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NEWSLETTER

No Common Interest Exception to Attorney-Client Privilege for Insurer Paying Defense Costs

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The United States District Court for the Eastern District of Pennsylvania, predicting how the Pennsylvania Supreme Court would rule on an issue of first impression, has denied an insurer's motion to compel production of communications between an insured and its attorneys in the underlying action, holding that the insurer did not qualify for the co-client or common interest exception to attorney-client privilege. *CAMICO Mut. Ins. Co. v. Heffler, Radetich & Saitta, LLP*, 2013 WL 315716 (E.D. Pa. Jan. 28, 2013).

In the underlying action, a class member sued an insured class action settlement administrator for misappropriation of class action settlement proceeds. The insured administrator sought coverage from its insurer, and the insurer began paying for the insured's defense expenses. The insurer sought a declaratory judgment that its coverage obligation was limited to $100,000 and moved to compel production of communications between the insured and its attorneys in connection with the underlying action. The insurer asserted that these communications were subject to the co-client or common interest exception to the attorney-client privilege because the insurer shared a common interest with its insured regarding the defense of the underlying action.

The court held that where an insurer funds the defense of its insured, the insurer may be, but is not always, a co-client of the insured's attorney. The court looked to the facts and circumstances surrounding the representation to determine whether the law firm in question represented only the insured or also represented the insurer.

The court ultimately held that the law firm did not conduct a joint representation. First, the court found it persuasive that the insured had previously and independently retained the same law firm in connection with unrelated litigation. Second, the court noted that the law firm sent a letter to the insurer following commencement of the underlying claim stating that it represented the insured and was writing to notify the insurer of a potential claim against the insured that may implicate coverage in the insurance policy written by the insurer. Third, the insurer wrote a letter to the insured stating: "It is our understanding that you have already selected counsel of your choice through the engagement of [the law firm]. We will provide [the law firm] with our litigation guidelines to assist [the law firm] in providing [us] with information regarding the

defense of the Claim." The letter referenced the law firm as "independent counsel" three times, distinguishing such "independent counsel" from attorneys that had been retained by the insurer in the past. The court found all of these circumstances relevant to its conclusion that the law firm did not represent both the insurer and the insured.

Despite the fact that the insurer and insured may have had a shared interest in the outcome of the underlying action, the court held that a shared interest, absent more, does not automatically create a co-client relationship. Accordingly, the court held that the communications sought by the insurer were protected from disclosure by the attorney-client privilege.