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THE COMMON INTEREST PRIVILEGE IN WEST VIRGINIA: VARIOUS APPLICATIONS AND RESULTS

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Can communications between a party to litigation, his current and former counsel, and his family members be protected by the common interest privilege? Are exchanges of work product and privileged information among counsel, for distinct defendants, in a civil action similarly protected? In the Fourth Circuit, yes, the common interest privilege is often applied to protect such communications.[1] In West Virginia . . . it is unclear.

The common interest privilege has been recognized in the United States since 1981.[2] As of 2005, some form of the doctrine had been favorably recognized or adopted in a handful of states and nearly all of the federal circuits: Arizona, California, Delaware, Florida, Georgia, Massachusetts, Missouri, Montana, New Jersey, New York, Texas, Tennessee and Virginia; and the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Federal, and District of Columbia Circuits.[3] Generally speaking, the common interest privilege, also referred to and/or conceptualized in alternate forms as the "community of interests doctrine" and the "joint defense privilege," is an extension of the attorney-client privilege that prevents waiver of the attorney-client privilege when otherwise privileged communications are disclosed in the presence of or to certain third parties with a "common interest" in a legal matter.[4] The clients' interests need not be aligned, though they often are. And, importantly, one party to the privilege usually has the right to intervene to protect the privilege that the other party is prepared to waive.[5]

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[1] *See, e.g., U.S. v. Aramony*, 88 F.3d 1369 (4th Cir. 1996); *In re Grand Jury Subpoenas*, 902 F.2d 244 (4th Cir. 1990).

[2] *See Chahoon v. Commonwealth*, 62 Va. 822, 1871 WL 4931 (1871).

[3] Katharine Traylor Schaffzin, *An Uncertain Privilege: Why the Common Interest Privilege Does Not Work and How Uniformity Can Fix It*, 15 B.U. PUB. INT. L.J. 49, 49 n.7 (2005),

[4] EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE VOL. I, at 274-324 (5th ed., American Bar Association 2007).

[5] *See, e.g., In re Grand Jury Proceedings*, 156 F.3d 1038 (10th Cir. 1998).

The doctrine is typically applied when the same attorney acts for two parties with a common interest, and each party communicates privileged information to that attorney or to each other.[6] Another situation, commonly known as the joint defense privilege to West Virginia attorneys and often affirmatively created by a "joint defense agreement," allows separate attorneys representing distinct clients with a common interest to communicate with one another without waving the attorney-client privilege.[7] Jurisdictions have accepted many different forms of the common interest privilege.[8] Some only apply the doctrine when litigation is pending or imminent, and jurisdictions vary on whether the doctrine applies in just criminal, or both criminal and civil cases.

West Virginia has yet to formally adopt a version of the common interest privilege. Yet, most attorneys assume that such protection exists, whether as part of the traditional attorney-client privilege and work-product doctrines or as a formal extension. Joint defense agreements are common practice in West Virginia, after all. This is not surprising, because in many situations, the doctrine just makes sense. Parties should be able to coordinate their efforts to obtain the best defense possible, and common interest protections can increase efficiency and reduce costs.

There is a split of authority in states and the circuits on whether the privilege even exists and, if so, how far and in what form it is recognized. The following three cases illustrate this uncertainty within the West Virginia court system as courts have encountered different factual scenarios.

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[6] Anne King, *The Common Interest Doctrine and Disclosures During Negotiations for Substantial Transactions*, 74 U. CHI. L. REV. *1411*, 1424 (2007).

[7] *See, e.g.*, *Slider v. State Farm Mut. Auto. Ins. Co.*, 210 W. Va. 476, 480, 557 S.E.2d 883, 887 (2001); *see also* SELAN EPSTEIN, *supra* note 4, at 286 (for a discussion on this form of the common interest privilege).

[8] *See* SELAN EPSTEIN, *supra* note 4, Element 3, Section X; Traylor Schaffzin, *supra* note 3, Part III, Section B.

A First-Party Insurance Case (*State* ex rel. *Brison v. Kaufman*)

In *State* ex rel. *Brison v. Kaufman*,[9] an automobile insurer, its former claims representative, and two former attorneys for the insurer petitioned for a writ of prohibition against discovery of a litigation file and redacted portions of a claim file in a bad faith action in the Circuit Court of Kanawha County. Cledith Lee Falls, Jr., had been killed in a car accident, while riding as a passenger, in a car driven by April D. Knight. Deborah K. Falls ("Falls"), Administratrix of the Estate of Cledith Falls, filed a wrongful death action against Knight and others, and sought underinsurance coverage from Nationwide Mutual Insurance Company ("Nationwide"). Nationwide paid Falls the policy limits, but Falls filed bad faith and unfair trade practice claims against Nationwide for Nationwide's alleged delay in paying the underinsurance benefits. Falls sought discovery of the litigation file and redacted portions of the claim file, which were created and maintained during the earlier wrongful death action, and Nationwide sought protection from this disclosure under the attorney-client privilege and the work-product doctrine.

After determining that Nationwide's former attorneys did in fact represent Nationwide in the wrongful death action, the Court applied the attorney-client privilege and the work-product doctrine to prohibit production and disclosure of the documents.

However, only Chief Justice Robin Jean Davis, in her concurring opinion, discussed the common interest privilege.[10] She explained that there are two contexts in which first-party bad faith actions against the insurer arise. In the first scenario, an insurer fails to use good faith in resolving a "loss claim" filed by the insured. In loss claim actions, the insurer and

[9] 213 W. Va. 624, 584 S.E.2d 480 (2003).
[10] *Id.* at 635 (R.J. Davis, concurring).

insured are generally in an adversarial relationship because the insured has filed a claim for a loss sustained and the insurer has denied coverage, delayed payment, or offered an amount the insured deems insufficient to cover the loss.[11] This is the basic fact pattern in *Kaufman*, and Chief Justice Davis concluded that it was properly resolved under traditional principles of attorney-client privilege and the work-product doctrine.[12]

The second scenario results from the insurer's failure to use good faith in settling a lawsuit brought by a third-party against the insured, resulting in an "excess judgment" against the insured.[13] This scenario is distinct for purposes of the common interest privilege, because when an insured is sued by a third-party and the insurance company provides representation, the insurer employs the attorney to represent the common interests of both the insured and the insurer (limiting tort liability).[14]

Thus, in this setting, the common interest privilege allows counsel to share with the insured privileged communications with the insurer, without losing the privilege. However, in a subsequent bad faith litigation between the insurer and the insured, the privilege will not apply to prevent disclosure of his or her claim file and the litigation file even though their interests are no longer aligned:

> The common interest privilege is usually cited as the reason for not allowing the attorney-client privilege and work product rule to apply in first-party bad faith litigation arising from a prior mutual interest litigation. "[U]nder the common interest privilege, when an attorney acts for two different parties who each have a common interest, communications by either party to the attorney are not necessarily privileged in a subsequent controversy between the two parties. . . ." [And] the interests of the insured and insurer in

[11] *Id.* (R.J. Davis, concurring).
[12] *Id.* (R.J. Davis, concurring).
[13] *Id.* (R.J. Davis, concurring).
[14] *Id.* (R.J. Davis, concurring).

> defeating the third-party claim against the insured are so close that 'no reasonable expectation of confidentiality is said to exist.[15]

Despite recognizing that *Kaufman* concerned a first-party bad faith "loss claim" action, Chief Justice Davis went out of her way to address the common interest privilege in the context of first-party "excess judgment" bad faith litigation. Thus, it is seems clear that Chief Justice Davis would be willing to apply the common interest privilege, if the right case arose.

This case raises another important point: though the Supreme Court has never explicitly adopted the "common interest privilege," the Court has accepted its existence. Under traditional principles of attorney-client privilege, the privilege is waived when communications are revealed to third-parties. When counsel for the insurer reveals communications with the insurer to the insured, the privilege is lost. However, that is not the case in West Virginia and, indeed, most states. Whether the term "common interest" is used or not, West Virginia has long held that those with common interests are entitled to special protections of confidential information, at least in the insurance context.

A Property Case (*Hegyi v. Demar Revocable Trust*)

[15] *Id.* at 636 (R.J. Davis, concurring) (citation omitted).

Hegyi v. Demar Revocable Trust[16] involved a seemingly straightforward action to quiet title to a prescriptive easement, but it illustrates the essential need for the common interest privilege in the property context to encourage and protect cooperation among parties.

Plaintiff Hugh E. Hegyi, is Trustee for the beneficial holders of a certain Trust. For years, hundreds of emails were generated between the Trustee and several of the beneficiaries in anticipation of litigation concerning the use of a right-of-way that later became the subject of this case. Emails were also generated that contained communications between Plaintiff's prior counsel and counsel appearing in this case.

During discovery, Defendants sought production of "all written statements taken from any person who you believe is or may be a potential witness in this civil action."[17] This request was not mere puffery. Despite Plaintiff's efforts to obtain a more narrowly defined discovery request, Defendant's counsel insisted that all of Plaintiff Trustee's emails be produced.[18]

Thereafter, Plaintiff filed a Motion for Protective Order requesting that the Plaintiff not be required to produce, among other things:

> a. Emails from Hugh Hegyi and Bruce Hegyi to their former and current attorneys.
>
> b. Emails from Hugh Hegyi and Bruce Hegyi to and from their siblings (all of whom are the beneficiaries of the Trust), on the subject matter of whether or not to bring a law suit, their investigation in attempting to make the decision, the thoughts of the Trust beneficiaries in regard to same, who their witnesses should be, what their legal theories of recovery would be, the progress of the lawsuit and further action concerning the law suit.[19]

[16] C.A. No. 11-C-979 (Berkeley Cty filed Nov. 17, 2011).

[17] Plaintiff's Motion for Protective Order at 2, *Hegyi v. Demar Revocable Trust*, C.A. No. 11-C-979 (Berkeley Cty July 17, 2012).

[18] *Id.*

[19] *Id.* at 3.

In opposition to this request, the Plaintiffs argued that the common interest privilege protected the sharing of attorney-client privileged materials and work product between beneficiaries of the trust.

After a hearing on the Motion, a Court-appointed Discovery Commissioner in Berkeley County affirmed − and the Circuit Court Judge ratified − Plaintiff's reliance on the common interest privilege:

> The undersigned Discovery Commissioner is not aware of any decision by our Court which expands the work-product doctrine to cover documents that contain communications between parties or other persons concerning probable or ongoing litigation in which they share a common interest. However, "most commentators and courts view [the "common interest privilege"] as an extension of the attorney-client privilege or work-product doctrine." As stated by one court, "persons who share a common interest in litigation should be able to communicate with their respective attorneys *and with each other* to more effectively prosecute or defend their claims." Thus, the undersigned Discovery Commissioner believes that our Court would apply a common-interest privilege in civil discovery proceedings.[20]

The Discovery Commissioner continued to find the aforementioned documents privileged. Specifically, he recommended and the trial court granted Plaintiff's Motion for Protective Order as to emails between the Trustee and other beneficiaries of the Trust, and between the Trustee and his wife and children, regarding the easement and the subject litigation. "The emails between the beneficiaries of the Trust and their potential heirs, who clearly have a common interest with regard to the alleged easement, were prepared in anticipation of or for this litigation."[21]

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[20] Discovery Commissioner's Report and Recommended Decisions Re: Defendants' Motion to Quash Subpoena Duces Tecum and for a Protective Order, and Plaintiff's Motion for Protective Order at 6, *Hegyi v. Demar Revocable Trust*, C.A. No. 11-C-979 (Berkeley Cty Oct. 31, 2012) (citations omitted).

[21] *Id.* at 9.

An Employment Case (*Baker v. PPG*)

In September 2013, Judge David W. Hummel, Circuit Court of Marshall County, took a contrary view and rejected an application of the common interest privilege in *Baker v. PPG Industries, Inc.*[22] In *Baker*, Plaintiff filed suit against co-employee David Wayne Wade and her employer, PPG Industries, Inc., alleging sexual harassment. During discovery, the Plaintiff sought the production of documents exchanged by the co-defendants, including agreements between them. PPG filed a Motion for Protective Order pursuant to West Virginia Rules of Civil Procedure Rule 26(c), requesting that the court prohibit production of the requested documents on the basis that they were protected from disclosure by the common interest privilege. The Defendants acknowledged that West Virginia has not yet formally adopted the common interest privilege, but cited two West Virginia cases "that support[] the proposition that such privileges would be recognized as a logical extension of the attorney-client privilege and work product doctrines.[23] Defendants also discussed at length the Fourth Circuit's support for the doctrine.

Despite the Fourth Circuit's support and West Virginia's, shall we say, acknowledgement, of the doctrine, Judge Hummel roundly rejected the common interest privilege for its uneven application in jurisdictions that have affirmatively adopted it: "An uncertain privilege, or one which purports to be certain but results in widely varying applications

[22] C.A. No. 12-C-229 (Marshall Cty January 2, 2014).

[23] Joint Alternative Motions of Defendants PPG Industries Inc. and David Wayne Wade for Reconsideration, for Certification of Question, for Findings of Fact and Conclusions of Law and for Stay of Execution of Order at 3, *Baker v. PPG Industries, Inc.*, C.A. No. 12-C-229 (Marshall Cty Sept. 18, 2013) (citing *State ex rel. Medical Assurance of W. Va., Inc. v. Recht*, 213 W. Va. 457, 465, 583 S.E.2d 80, 88 (2003) and *Kirchner v. Smith*, 61 W. Va. 434, 58 S.E. 614, 620 (1907)).

by the courts, is little better than no privilege at all."[24] Finally, Judge Hummel recognized, not wrongly-so, that if the doctrine were to be adopted, "a hot-mess of details need to be ironed out":

> 1. Is an express agreement necessary or will the courts be able to presume that communications are intended to be in furtherance of a joint defense based upon the parties' actions?
>
> 2. Would the doctrine or privilege apply where litigation is not threatened or anticipated or will the "palpable threat of litigation" at the time of the communications be required?
>
> 3. Will the doctrine or privilege be limited to where the parties have common shared legal interests rather than only a common shared economic, financial or commercial interests?
>
> 4. What would constitute "waiver" and who could be found to have "waived the application of the doctrine or privilege as well as how and to what extent?[25]

Judge Hummel's ruling illustrates the lack of agreement on the common interest privilege among the circuit courts and begs the Supreme Court of Appeals to provide some guidance. Chief Justice Davis might be up for the task.

Conclusion

Some criticize the common interest privilege for its expanded restrictions on evidence available to the court.[26] And Judge Hummel is right, some questions would need to be answered. However, the doctrine also encourages better case preparation and reduces time and expense.[27] Moreover, as the *Kaufman* and *Baker* cases show, the doctrine already exists in West

[24] Order at 2, *Baker v. PPG Industries, Inc.*, C.A. No. 12-C-229 (Marshall Cty Sept. 4, 2013) (quoting *Upjohn v. United States*, 449 U.S. 383, 393 (1981)).

[25] *Id.* at 3.

[26] 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5493 (1986 Supp. 2003).

[27] *See* 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 188 (2d ed.).

Virginia, if not by name. Judge Hummel is also correct that the doctrine has been applied unevenly. Therefore, when the issue presents itself, it is time for the Court to give a name to its practices and answer the questions raised by Judge Hummel, because this is needed in West Virginia. If the Supreme Court of Appeals rejects the doctrine, it will be yet another deterrent to businesses and individuals who need to be able to cooperate with one another regarding legal matters in which they have a common interest and to have those communications protected from disclosure..