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# The Gavel

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## Co-Client Relationship Between Insurer and Insured Not Automatic

By [Ian S. Clement](#), *Litigation News* Contributing Editor

Where an insurer funds the defense of its insured, the insurer may be, but is not always, a co-client of the insured. In reaching that conclusion, the United States Court for the Eastern District of Pennsylvania also held that the court will determine whether the insurer is a co-client based upon a showing of positive facts from the insurer demonstrating an active role in the defense of the insured. *CAMICO Mutual Insurance Co v. Heffler Radetich & Saitta*

### Background

A class member sued defendant Heffler, Radetich & Saitta, L.L.P., which administers class action settlement funds, alleging that one of the defendant's employees misappropriated class funds. The firm independently retained an attorney to defend against the action. CAMICO Mutual Insurance Company, who insured the firm in the misappropriation action, sought a declaratory judgment stating that its coverage obligation was limited to \$100,000, and moved to compel production of documents regarding the misappropriation action. The firm refused to turn over certain documents to CAMICO, citing the attorney-client privilege. CAMICO did not dispute that the documents were privileged, but asserted the common or community-of-interest exception, which allows separate attorneys representing different clients in the same action with at least substantially similar legal interests to share information without having to disclose it to others.

Applying Pennsylvania law, the court found that the community-of-interest exception was inapplicable here because CAMICO and the firm did not retain separate counsel in the misappropriation action. Further, following the Restatement (Third) of the Law Governing Lawyers §§ 128-131 and *In re Teleglobe Communications Corp* [PDF], a widely followed Third Circuit opinion, the court also found that CAMICO was not a co-client of the firm.

Consequently, CAMICO could not pierce the firm's attorney-client privilege, and the court accordingly denied CAMICO's motion to compel.

### **When Are Insured and Insurer Co-Clients, and to Whom Does Counsel Owe a Duty?**

The co-client privilege applies when multiple clients hire the same counsel to represent them on matters of legal common interest. The circuits differ on the degree of commonality required to satisfy a showing of legal common interest. The Second, Fourth, Fifth, Sixth, and Seventh Circuits require that the parties' legal interest be identical. The Ninth, Tenth and Eleventh Circuits find some middle ground requiring the interests to be substantially identical, while the Third, Eighth, and D.C. Circuits merely require that the parties' legal interests be substantially similar.

"The Pennsylvania courts are unsettled on the question of whether they will view an insurance carrier and its insured as a single client of an attorney appointed by the insurer to defend the insured," says [Thomas G. Wilkinson](#), Philadelphia, cochair of the Conflicts of Interest Subcommittee of the ABA Section of Litigation's [Ethics and Professionalism Committee](#). In fact, Pennsylvania courts had not addressed the absolute rule, which states that an insurer always shares a common interest with its insured whenever the insurer funds the defense of the insured. Therefore, here the district court was required to predict how the Pennsylvania Supreme Court would rule on the issue.

The court suggested that a dichotomy of Pennsylvania cases diverge on the question of whether the insurer or its insured retained counsel. In the former, the insured has no expectation of privilege whereas in the latter, the insured is the attorney's client and privilege applies. The court further stated that the Restatement also rejects an absolute rule, noting that whether an attorney-client relationship exists between counsel and the insurer depends upon the insurer satisfying the traditional test for an attorney-client relationship under §14 of the Restatement. The court predicted that the Pennsylvania Supreme Court would reject the absolute rule and find that a co-client relationship exists where the interests of the parties are substantially similar and the insurer shows, through positive evidence, active participation in the defense of the insured.

Emphasizing the facts that (1) the firm independently retained counsel for the misappropriation action; (2) an affidavit from the firm's counsel stated that the firm never represented CAMICO; and (3) a retention letter to CAMICO at the outset did not implicate a joint representation, the court found that the firm's counsel represented only the firm in the misappropriation action. Therefore, the firm was entitled to assert attorney-client privilege against CAMICO.

"The court took a good nuanced approach and conceptualized a situation where the insured and the carrier could both be clients under a proper set of circumstances, but not in this particular case," says [Lawrence J. Fox](#), Philadelphia, a former member of the ABA Section of Litigation's Attorney-Client Privilege Task Force. "These cases present a natural tension between the insured and insurer; insurance companies want to control the cost of litigation, while the insured wants the best defense imaginable," says Fox. "Overlaying the defense of the insured and the interests of the insurer on the rules of professional conduct can be tricky because the interests of the parties are often not aligned," Fox continues.

### **Implications of the CAMICO Decision**

"While counsel must share some information with the insurer who is funding the defense, she has to be mindful not to share information that would be harmful to the insured," says Fox. Counsel should remember that the insured is the primary client, and that counsel's primary duty is to the insured, cautions Fox. If, for example, the attorney learns information from the insured that would compromise its coverage, the Rules of Professional Conduct prevent

the attorney from sharing that information with the carrier, he says. "This is true even in jurisdictions that consistently hold that the insured and carrier are always co-clients," says Fox.

"If the insurer and insured are deemed to be co-clients, however, counsel should advise the insured that its communications with counsel may not be privileged vis-à-vis the insurer," says Wilkinson. "Following CAMICO, counsel for an insured should be aware that if it or the insured voluntarily shares information with the insurer, and a co-client relationship is not found to exist, there is a significant risk that privilege may be waived, not just to the insurer, but potentially to third parties."

**Keywords:** attorney-client privilege, co-client, common interest, community-of-interest, insured, insurer

#### Related Resources

- » *CAMICO Mutual Insurance Co v. Heffler Radetich & Saitta*, C.A. No. 11-4753 (E. D. Pa. Jan. 28, 2013).
- » *In re Teleglobe Communications Corp*, 493 F.3d 345 (3d. Cir. 2007).
- » *Waste Management, Inc. v. Int'l Surplus Lines Ins. Co.*, 144 Ill. 2d 178, 579 N.E.2d 322 (1991).
- » The Restatement (Third) of the Law Governing Lawyers §§ 128–131.
- » Tiffany M. Williams, "Protecting the Common Interest from Imputed Disqualification," *Litigation News*, Nov. 25, 2009.

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