SHARING A COMMON INTEREST? AN OVERVIEW OF CLAIMS OF PRIVILEGE AND THE CEDENT/REINSURER RELATIONSHIP

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# TABLE OF CONTENTS

I. INTRODUCTION .................................................................................................................. 3

II. THE COMMON EXAMPLE .................................................................................................. 3

III. BACKGROUND ON PRIVILEGE ......................................................................................... 4
    A. Attorney Client Privilege ................................................................................................. 4
    B. Work Product Privilege .................................................................................................. 4
    C. Summary ....................................................................................................................... 4

IV. THE COMMON INTEREST DOCTRINE AT ITS CORE ..................................................... 4
    A. Definition ....................................................................................................................... 4
    B. Roots ............................................................................................................................. 5
    C. Limitations ................................................................................................................... 5

V. APPLICATION ..................................................................................................................... 5
    A. Standard ......................................................................................................................... 5
    B. Evaluate the Interests ..................................................................................................... 5
    C. When is there an identical legal interest? .................................................................... 7
    D. When does the legal interest break down? ................................................................... 8
    E. Finding a common legal interest in the reinsurance context ...................................... 10

VI. WORK PRODUCT PRIVILEGE .......................................................................................... 12

VII. THE DOCTRINE AS A SHIELD AND A SWORD ............................................................. 13

VIII. OTHER THEORIES USED WHEN SEEKING PRIVILEGED DOCUMENTS .............. 14
    A. The At Issue Doctrine .................................................................................................... 14
    B. Cooperation/Inspection and Audit Clauses and the Right to Associate ..................... 15

IX. POSSIBLE SOLUTIONS .................................................................................................... 17
    A. Implementation of non-waiver agreements ................................................................. 17
    B. Request from cedent, not the attorney ....................................................................... 18
    C. Attach a written confidentiality clause to the documents ............................................ 19
    D. Exercise contractual rights ......................................................................................... 19

X. CONCLUSION – NO EASY ANSWERS ............................................................................ 19
    A. Plaintiffs’ lawyers are savvy and aggressive .............................................................. 19
    B. Higher Stakes .............................................................................................................. 19
    C. Class Actions on the rise ............................................................................................ 20
    D. Varying case law with no definite direction ............................................................... 20
    E. Keep the objective in mind ......................................................................................... 20
    F. Future developments .................................................................................................. 20
I. INTRODUCTION

This paper will examine the relationship between a reinsurer and its cedent in the course of resolving an underlying claim. The paper will focus on whether the reinsurer and cedent share a common legal interest in the outcome of the underlying litigation and whether communications between them are protected by privilege. Would disclosure of documents to a reinsurer by a cedent waive privilege as to third parties? As will be demonstrated in this paper, that depends on how each court applies the common interest doctrine to the reinsurer/cedent relationship.

II. THE COMMON EXAMPLE

When evaluating an underlying claim, it would appear that a reinsurer and cedent are aligned in their common goal of determining the merits of the claim as well as the potential exposure arising therefrom. In that context, it would seem that the parties share a common interest and would expect confidentiality in their communications with each other. However, often times the reinsurer may seek to avoid settling with the cedent and the initial common interest breaks down. Now, the analysis becomes more critical. The common interest doctrine will typically come into play when a cedent is seeking indemnity from its reinsurers and the reinsurers, in turn, seek documents from the underlying action. The documents may be necessary to establish the bases for positions taken by the ceding company in the underlying litigation or provide the basis for settlement. It is typical for an insurer to request substantive communications between underlying defense counsel and the ceding company. Yet, some of these documents may be protected from disclosure by the attorney client privilege or work product doctrines. Under some circumstances, the reinsurer can claim a legitimate interest in seeing the privileged communications from the underlying matter in order to gain an understanding of the underlying litigation and/or to make a coverage determination. Frequently, reinsurers may use a claims cooperation clause or an audit and inspection clause together with the common interest doctrine for support in acquiring these documents. The cedent, on the other hand, often refuses these requests for information by suggesting that the parties do not share a common legal interest and that production of the privileged materials under those circumstances can result in a waiver of privilege. A twist on the problem is when one jurisdiction recognizes the common interest and allows production without waiver as to third parties yet another jurisdiction finds a voluntary waiver as to the same documents.
III. BACKGROUND ON PRIVILEGE

The initial inquiry in evaluating whether documents should or will be disclosed is whether or not the documents or communications are protected by privilege. If the document at issue is not already shielded from disclosure by privilege, the common interest doctrine has no application. *Dexia Credit Local v. Rogan*, 231 F.R.D. 268, 274 (N.D. Ill. 2004).

A. Attorney Client Privilege

The attorney client privilege is designed to facilitate openness between client and counsel. This doctrine is intended to prevent communications between attorney and client which take place during the provision of legal services from being disclosed to third parties. *Upjohn Co. v. United States*, 449 U.S. 383 (1981); Fed. R. Civ. P. 26.

B. Work Product Privilege

The work product privilege is designed to protect material “prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative.” Fed. R. Civ. P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495 (1947). This privilege protects mental impressions, conclusions, opinions or legal theories of counsel. *Taylor*, 329 U.S. at 510-11.

C. Parties will assert one or both of these doctrines to prevent disclosure of documents to third parties. A reinsurer, in seeking documents from a cedent that asserts one of these privileges, must either convince a court that privilege does not attach to the documents or assert that a common interest exists between the reinsurer and cedent.

IV. THE COMMON INTEREST DOCTRINE AT ITS CORE

A. Defined

A communication is not confidential if it is disclosed to disinterested third parties. *In re Horowitz*, 482 F.2d 72, 81 (2d Cir. 1973), *cert. denied*, 414 U.S. 867 (1973). There is an exception when a “community of interests exists among different persons or separate corporations where they have an identical legal interest with respect to the subject matter of a communication between an
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attorney and a client concerning legal advice.” *DuPlan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172 (D.S.C. 1975). This doctrine is known as the “common interest doctrine.” It is also known as the “community of interest doctrine” or the “joint defense privilege” (hereinafter “the doctrine”).

B. *Roots*

The doctrine was originally applied in the criminal context when co-defendants were represented by the same counsel. *U.S. v. Schwimmer*, 892 F.2d 237 (2d Cir. 1989). The doctrine has become fully applied in the civil context. *In re Bairnco Corp. Securities Litigation*, 148 F.R.D. 91 (S.D.N.Y. 1993).

C. *Limitations*

The doctrine is limited to communications between parties and counsel with respect to legal advice in pending litigation or anticipated litigation. The doctrine does not protect communications which are personal in nature or business oriented. An insurer would not be able to rely on the attorney-client privilege doctrine with regard to the evaluation of a claim for coverage which would occur in the normal course of business in the insurance industry. Communications made for business purposes, such as providing the insurer with notice of a claim, are not made for purposes of obtaining legal advice, and therefore, are not privileged. *Calabro v. Stone*, 225 F.R.D. 96, 98 (E.D.N.Y. 2004).

V. *APPLICATION*

A. *Standard*

While the standard utilized in applying the doctrine varies among jurisdictions, the pivotal question is generally the same – have the parties cooperated toward a common legal goal? It is typically not enough that the parties are pursuing a common commercial goal.

B. *Evaluate the interests*

1. “The relationship between a reinsurer and a reinsured is one of utmost good faith, requiring the reinsured to disclose to the reinsurer all facts that materially affect the risk of which it is aware and of which the
reinsurer itself has no reason to be aware.” Christiania General Insurance Corp. of New York v. Great American Insurance Co., 979 F.2d 268, 278 (2d Cir. 1992). Accepting this principle as true, it would seem that courts should easily find that communications between a reinsurer and its cedent are privileged. However, case law indicates that the evaluation is not that simple.

2. Some courts have held that joint representation is the outer limit of the common interest doctrine. International Insurance Co. v. Newmont Mining Corp., 800 F. Supp. 1195 (S.D.N.Y. 1992). One court has commented that “the common interest doctrine is completely unleashed from its moorings in traditional privilege law when it is held broadly to apply in contexts other than when there is joint representation.” North River Insurance Co. v. Philadelphia Reinsurance Corp., 797 F. Supp. 363, 367 (D.N.J. 1992).

3. “The doctrine does extend at least to situations where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel. That is, the doctrine applies where parties are represented by separate counsel that engage in a common legal enterprise.” North River Insurance Co. v. Columbia Casualty Co., 1995 WL 5792 at *1, *3 (S.D.N.Y. Jan. 5, 1995). It would then be unnecessary for litigation to be in progress for the doctrine to be applied. “More troublesome is the question of whether the doctrine can be stretched to apply to communications between entities that have parallel interests but are not actively pursuing a common legal strategy.” Id.

4. “A community of interest exists among different persons or separate corporations where they have an identical legal interest with respect to the subject matter of a communication between an attorney and a client concerning legal advice…the key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial. The fact that there may be an overlap of a commercial and a legal interest for a third party does not negate the effect of the legal interest in establishing a community of interest.” DuPlan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1172 (D.S.C. 1975).

5. In one of the earlier cases addressing the doctrine, the Southern District of New York took a broad approach in applying the interest
standard. In *Durham Industries, Inc. v. North River Ins. Co.*, 1980 WL 112701 at *1 (S.D.N.Y. Nov. 21, 1980), the issue was whether Durham could obtain correspondence between North River and its former law firm, which were contained in the reinsurer’s files. North River had refused to pay Durham under the terms of a surety bond. Durham argued that disclosure of documents to the reinsurer waived privilege. North River and its reinsurer argued that since they shared the risk on the surety bond, they share a common interest. The court held “where the reinsurers bear a percentage of liability on the bond, their interest is clearly identical to that of [the cedent].” *Id.* at *3.

6. In sum, it is necessary to demonstrate to a court that the reinsurer and cedent share a common legal interest in the outcome of the underlying litigation. Proving the existence of a common legal interest may be a challenge.

C. *When is there an identical legal interest?*

1. **The legal duty to defend**
   a. Many courts have held that when the insurer retains counsel to defend an insured, there is a common legal interest between the insurer and the insured. In *Waste Management, Inc. v. International Surplus Lines Ins. Co.*, 579 N.E.2d 322 (Ill. 1991), the court held that a common interest exists when the attorney acts for the mutual benefit of the insured and insurer. The common interest is succeeding in the underlying litigation because the insurers are ultimately liable for payments. Denying access to discovery would offend public policy which encourages full disclosure to the insurer.
   
   b. Other courts have rejected the theory that the interests of the insurer and insured are sufficiently aligned to maintain privilege simply because the insurer has a contractual obligation to pay litigation expenses. *Go Med. Ind. Pty. Ltd. v. C.R. Bard, Inc.*, 1998 WL 1632525, at *4 (D. Conn. August 14, 1998), rev’d in part on other grounds, 250 F.3d 763 (Fed. Cir. 2000).
   
   c. In *Home Indemnity Co. v. Lane Powell Moss and Miller*, 43 F.3d 1322 (9th Cir. 1995), the court held that where there is no reservation of rights, there is no conflict between the insurer and the insured. The attorney retained to defend the insured is representing the interests of both the insurer and the insured in
minimizing damages. Thus, an attorney-client relationship exists between the insurer and the attorney representing the insured. *Id.* at 1330-31.

d. In *Independent Petrochemical Corp. v. Aetna Casualty and Surety Co.*, 654 F. Supp. 1334 (D.D.C. 1986), the court recognized the inherent difficulty in applying the common interest doctrine when there is a common interest in minimizing exposure in underlying claims, but also a dispute between insurers and insureds regarding coverage. The court relied on the facts in holding that the common interest trumped claims of privilege. There, the insurer was obligated to defend the underlying case, and to do so, access to documents prepared in anticipation of that litigation was necessary. *Id.* at 1365.

e. Generally, courts will recognize that a common legal interest exists between an insurer and insured when the insurer is defending the underlying suit.

D. *When does the legal interest break down?*

1. The insurer does not appoint counsel/assume defense of the claim

   a. If the insurer does not appoint counsel for the insured, the common interest does not exist. *Bituminous Casualty Corp. v. Tonka Corp.*, 140 F.R.D. 381 (D. Minn. 1992). This court rejected the notion that the attorney-client privilege is unavailable to an insured even if the insurer never appointed counsel. The common interest doctrine does not apply if the attorney never represented the party seeking the communications. *Id.* at 387.

   b. Numerous courts reject the notion that there is a commonality of interests because the parties share the desire to lower the amount of damage in the underlying case. One court held that “even assuming this to be true, the parties did not then and do not now share an interest in characterizing how that damage occurred, what type of damage has occurred, or how the insured responded to the damage.” *Remington Arms Co. v. Liberty Mutual Insurance Co.*, 142 F.R.D. 408, 418 (D. Del. 1992). With regard to questions of coverage, the interests may conflict significantly. *NL Industries, Inc. v. Commercial Union Insurance Co.*, 144 F.R.D. 225, 231-32 (D.N.J. 1992).
2. Reservation of rights
   a. Can a community of interests actually exist if the insurer denied coverage or reserved its rights to deny coverage at a later time?
      i. The court in *Home Indemnity Co. v. Lane Powell Moss and Miller*, 43 F.3d 1322 (9th Cir. 1995), suggested that when the insurer reserves its right to dispute coverage, there may be numerous conflicts which would indicate an attorney-client relationship does not exist between the insurer and the counsel it retains for the insured. These conflicts may include “the possibility that the insurer might offer a token defense knowing that it could later assert non-coverage, that the insurer might steer the result to judgment under an uninsured theory of recovery, or that the insurer might gain access to confidential or privileged information which it could use later to its advantage.” *Id.* at 1330.
      ii. In *First Pac. Networks, Inc. v. Atlantic Mutual Ins. Co.*, 163 F.R.D. 574, 579 (N.D. Cal. 1995), the court held that when the insurer reserved its rights any confidential relationship that existed between the insured and the insurer was eliminated. *See Owens-Corning Fiberglas Corp. v. Allstate Ins. Co.*, 660 N.E.2d 765, 769 (Ohio Ct. Com. Pl. 1993)(holding that where there is a dispute over coverage, the parties are at odds, and applying the common interest doctrine is “somewhat laughable”).
      iii. However, other courts have recognized that privilege may exist between an insurer and counsel for the insured even if an insurer reserved its rights. An insured that communicates with the insurer concerning underlying claims has a reasonable expectation that these communications will be confidential and would not be disclosed to third parties, especially the plaintiff. *See Lectrolarm Custom Systems, Inc. v. Pelco Sales, Inc.*, 212 F.R.D. 567 (E.D. Cal. 2002); *LaSalle National Trust, N.A. v. Schaffner*, 1993 WL 105422 at *1 (N.D. Ill. April 6, 1993).
   b. Would the analysis be different in the reinsurance context? While no case law has been found specifically addressing the doctrine when a reinsurer reserves its rights, it would seem that the analysis would be very similar to the analysis in the insurer/insured context. In both situations the parties, at first, are aligned toward a common legal goal, yet there is a possibility that the interests will diverge as the
litigation progresses. Some courts reject the application of the doctrine entirely in the coverage context if there was no joint representation. Other courts will look to the facts of each case to determine if a common legal goal existed.

E. Finding a “common legal interest” in the reinsurance context.

1. Arguing that a common legal interest exists will always be difficult because, generally, courts are reluctant to recognize a common interest based on the reinsurer/cedent relationship alone. The interests of the cedent and the reinsurer may be compatible at times yet antagonistic at other times. Therefore, a common interest cannot be assumed simply on the status of the parties. North River (Columbia), 1995 WL at *4.

2. In Reliance Insurance Company v. American Lintex Corp., 2001 WL 604080 (S.D.N.Y. Jun. 1, 2001), the insured sought discovery of information shared between its insurer, Reliance, and the reinsurer. The court held that Reliance failed to establish a common legal interest with its reinsurer. The court explained that “while their commercial interests coincide, to some extent, no evidence has been proffered that establishes that Reliance and its reinsurer share the same counsel or coordinate legal strategy in any way.” Reliance Insurance Co., 2001 WL at *4. Reliance’s only argument in support of application of the doctrine was the reinsurer/cedent relationship which the court held was not enough. Id.

3. The California Court of Appeals in Lipton v. Superior Court, 56 Cal. Rptr. 2d 341 (Cal. Ct. App. 1996), suggested that documents shared between insurer and reinsurer may contain privileged materials and would be entitled to the same protection as similar communications between insured and insurer. While not applying the common interest doctrine universally to the reinsurer/cedent relationship, the court did recognize that privileged materials may exist between reinsurer and cedent warranting the application of the doctrine. See Great Am. Surplus Lines, Inc. v. Ace Oil Co., 120 F.R.D. 533 (E.D. Cal. 1988)(holding that disclosure of documents to the reinsurer did not waive privilege because the reinsurer had a financial interest in the outcome of the underlying litigation); Hartford Steam Boiler
Inspection and Ins. Co. v. Stauffer Chemical Co., 5 Conn. L. Rptr. 236 (Conn. Super. Ct. 1991)(interests of cedent and reinsurer were “inextricably linked by the reinsurance treaty” warranting application of the common interest doctrine because the reinsurer had a financial stake in the litigation).

4. In North River (Columbia), the court was asked to apply the doctrine to documents used in preparation of an arbitration proceeding between the insured and the insurer. The reinsurer sought production of those documents arguing that it shared a common interest with the insurer. In determining that the reinsurer and the insurer did not share a common interest, the court noted that: 1) the parties did not use the same counsel to represent them; 2) the reinsurer did not contribute to the reinsured’s legal expenses; 3) the reinsurer did not exercise any control over the proceedings; and 4) the parties did not coordinate their litigation strategy. North River (Columbia), at *5.

5. One Illinois court examined the doctrine in the reinsurer/cedent context and found that there was no common interest. The court first determined that the documents in issue did not fall under the attorney client privilege or work product privilege and then decided to analyze the common interest doctrine anyway. The court found that privilege had been waived by disclosure to reinsurers. Because a contract of reinsurance is not one of insurance but rather one of indemnity, the relationship between a reinsurer and cedent is very different than the relationship between an insurer and insured. Allendale Mutual Ins. Co. v. Bull Data Systems, 152 F.R.D. 132 (N.D. Ill. 1993). The court explained that the common interest is merely commercial, not legal in nature, and thus disclosure of communications would waive privilege. Because there was no consultation among attorneys in preparation of a joint defense, there was no expectation of confidentiality. The court did note, however, that federal courts have held that a common interest may exist in a number of circumstances, including that of a reinsurer and cedent.

6. In a more recent Illinois case, the court distinguished Allendale in that the documents were prepared by attorneys or agents of attorneys. In Minnesota School Boards Association Ins. Trust v. Employers Ins. Co. of Wausau, 183 F.R.D. 627 (N.D. Ill. 1999), the court held that the cedent and reinsurer expected their communications to remain
confidential and protected from common adversaries and accordingly, the parties shared a common interest.

7. It is clear that courts are reluctant to recognize a common interest based on the reinsurer/cedent relationship alone. Many courts will not recognize a common interest because, while their commercial interests may be aligned, their legal analysis and legal goals may differ significantly. Other courts recognize that reinsurers and cedents expect confidentiality in their communications with each other. One thing is certain - finding a common interest is fact sensitive and varies significantly among jurisdictions.

VI. WORK PRODUCT PRIVILEGE

A. It is logical to assume that if the common interest doctrine protects the cedent’s documents under an assertion of attorney client privilege, the cedent should also be able to protect communications under an assertion of work product privilege. The work product doctrine is meant to protect material prepared in anticipation of litigation or for trial by or for another party or that party’s representative. Fed. R. Civ. P. 26(b)(3). A party seeking another’s work product must show a substantial need for them and that it cannot obtain these documents without substantial hardship.

B. In Remington Arms, the court distinguished attorney client privilege from work product privilege in that the contemporary work product doctrine is broader than that the attorney client privilege. The right to assert the work product privilege belongs mostly to the attorney. The common interest doctrine does not apply to work product because it is reasonable to expect that an attorney would seek a zone of privacy as to his work for his client. Id. at 419-20; See also Dedham-Westwood Water District v. National Union Fire Insurance Co. of Pitt., 2000 WL 33593142 (Mass. Sup. Ct. Feb. 4, 2000) at *1, in which the court held that the insurers could not establish that they had a substantial need for the material and that they were unable to obtain the materials by other means without substantial hardship.

C. The Northern District of Illinois held differently. In Minnesota School Boards Assoc. Ins. Trust v. Employers Ins. Co. of Wausau, the court held that the insurer’s disclosure of work product to the reinsurer did not waive the privilege. The cedent and reinsurer shared a common interest in evaluating and
minimizing the exposure from the underlying litigation. The court held that “waiver only occurs...if the disclosure to a third party ‘is inconsistent with the maintenance of secrecy from the disclosing party’s adversary.” Id. at 631, quoting United States v. American Tel. & Tel., 642 F.2d 1285, 1299 (D.C. Cir. 1980). This court first recognized that a common interest existed between the cedent and reinsurer and that the work product privilege would protect communications between them. The court in Metro Wastewater Reclamation District v. Continental Cas. Co., 142 F.R.D. 471, 478 (D. Col. 1992) held that the common interest doctrine “applies with equal force to claims of work product.” See Independent Petrochemical Corp. v. Aetna Cas. & Sur., 654 F.Supp. 1334 (D.D.C. 1986); EDO Corp. v. Newark Insurance Co., 145 F.R.D. 18 (D. Conn. 1992).

D. In sum, once again the analysis is fact sensitive and varies among jurisdictions. Some courts hold that the common interest doctrine will not apply to work product and a party must make the requisite showing of substantial need before any communications protected by that doctrine would be produced. On the other hand, some courts have held that both work product and attorney client communications may be disclosed pursuant to the common interest doctrine. In those situations, a court must first find that a common interest exists between the reinsurer and cedent.

VII. THE DOCTRINE AS A SHIELD AND A SWORD

A. Courts are consistent in holding that the doctrine cannot be used as a shield and a sword. A party cannot assert attorney client privilege or work product privilege to prevent disclosure in one context yet produce the communications when it is beneficial or strategic. For example, in North River (Columbia), the defendant (cedent) refused to disclose documents from the ADR proceeding to one of its reinsurers. The defendant argued to the court that it did not share a common interest with that reinsurer. The defendant did, however, disclose other documents to another reinsurer and subsequently argued that the doctrine applied because they shared a common interest in evaluating the reinsurance bills. The court held that by waiving the privilege as to one party, the privilege was waived as to all others. The court would not allow the cedent to use the doctrine both as a shield and a sword. See also Allendale Mutual Insurance Co. v. Bull Data Systems, 152 F.R.D. 132 (N.D. Ill. 1993).
VIII. OTHER THEORIES USED WHEN SEEKING PRIVILEGED DOCUMENTS

A. At Issue Doctrine

1. Courts may find that an insured waived attorney client privilege when it has put the subject of the privileged materials “at issue” or “in issue” in the coverage litigation. When privileged information is put “in issue” there is an implied waiver of privilege. An implied waiver occurs when: “1) the party asserts the privilege as a result of some affirmative act, such as filing suit; 2) through this affirmative act, the asserting party puts the privileged information at issue; and 3) allowing the privilege would deny the opposing party access to information vital to its defense.” Home Indemnity Co., 43 F.3d at 1326, citing Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D. Wash. 1975).

2. Broad view: Courts that employ a broad view of this doctrine find an implied waiver of privilege even if the insured did not use the privileged materials.
   a. If an insured certifies that it has fully complied with policy terms, privilege is waived as to those materials which would prove that assertion. Hoechst Celanese Corp. v. National Union Fire Insurance Co. of Pittsburgh, PA, 623 A.2d 1118 (Del. Super. Ct. 1992).
   b. Another example is where the insured sought defense costs from the underlying case, privilege as to the documents from the underlying case was waived. Safeway Stores, Inc. v. National Union Fire Ins. Co., 1992 WL 486801 at *1 (N.D. Cal. Dec. 8, 1992).

3. Narrow view: Other courts employ a narrow view requiring production when a party intends to use privileged materials to prove a claim or defense.
   a. In Guaranty Corp. v. National Union Fire Ins. Co. of Pittsburgh, 1992 WL 365330, at *1 (E.D. La. Nov. 23, 1992), the question was whether the party committed itself “to a course of action that will require the disclosure of a
privileged communication.” *Id.* at *5, quoting *Smith v. Kavanaugh, Pierson & Talley*, 513 So.2d 1138, 1146 (La. 1987).

b. In *Colonial Gas Co. v. Aetna Cas. & Sur. Co.*, 144 F.R.D. 600 (D. Mass. 1992), the issue was whether the insured would rely on counsel’s advice in proving its claim. The court held that there is no waiver if the insured does not plan to rely upon counsel’s advice in supporting its claims. *Id.* at 604. However, in *Bolton v. Weil Gotsahl & Manges LLP*, 2004 WL 2239545, at *4 (Sup. Ct. N.Y. Co. 2004), the court held that waiver may occur even if the client does not expressly rely on the advice of counsel. The court provided that “the truth of the parties’ position can only be assessed by examination of a privileged communication.”

c. “The way in which courts have dealt with this type of waiver has become inconsistent and unnecessarily complicated. If the information is actually required for a truthful resolution of the issue on which the party has raised by injecting the issue, the party must either waive the attorney-client privilege as to that information or it should be prevented from using the privileged information to establish the elements of the case.” *Remington Arms*, 142 F.R.D., at 415.

B. Cooperation and Inspection and Audit Clauses and the Right to Associate

1. The Claims Cooperation Clause

a. Another topic which is relevant to the common interest analysis is the claims cooperation clause. A typical claims cooperation clause obligates the parties to cooperate with each other in defending the underlying claims. It becomes relevant to the common interest analysis when deciding whether an insured can
reasonably claim privilege when the insurer or reinsurer is seeking documents.

b. **Broad view:** These clauses “impose a broad duty of cooperation and [are] without limitation or qualification.” Insured has no reasonable expectation of privilege. *Waste Management*, 579 N.E.2d, at 328.

c. **Narrow view:** Other courts hold that the clause is inapplicable because the insurer is not seeking the documents to cooperate with the litigation but rather to advance its own interests in the coverage dispute. *Remington Arms Co. v. Liberty Mut. Ins. Co.*, 142 F.R.D. 408 (D. Del. 1992); *Bituminous Cas. Corp. v. Tonka Corp.*, 140 F.R.D. 381 (D. Minn. 1992).

d. Courts have also held that “access to records” provisions or “cooperation clauses” contained in reinsurance agreements do not *per se* prove that a common interest exists and that the reinsurer is entitled to privileged materials. *Gulf Insurance Co. v. Transatlantic Reinsurance Co.*, 788 N.Y.S.2d 44 (N.Y. App. Div. 2004). A cedent may assert privilege even if one of the clauses exist in the contract. The reinsurer will still have to overcome the hurdle of convincing a court that there is a common interest.

2. **The Right to Associate in the underlying litigation**

a. A typical “right to associate” clause in a reinsurance contract requires the cedent to give prompt notice to the reinsurer and provides the opportunity for the reinsurer to participate in the defense and control of any underlying claim that would affect the reinsurance limits. *Christiana General Insurance Corp. of N.Y. v. Great American Insurance Co.*, 979 F.2d 268 (2d Cir. 1992); *British Ins. Co. of Cayman v. Safety Nat. Cas.*, 335 F.3d 205 (3d Cir. 2003); *Unigard Sec. Ins. Co., Inc. v. North River Ins. Co.*, 4 F.3d 1049 (2d Cir. 1993).
b. If reinsurers utilized their right to associate, would their interests be aligned with the cedents enough to tip the scales in favor of finding a common interest? It would seem that when reinsurers are involved in the claim and work with the cedents in evaluating the claim, they are working toward a common legal goal.

3. In sum, the cooperation and audit and inspection clauses and the right to associate arise out of the reinsurance contract. However, privilege may still be waived as to third parties. While it may be harder to argue waiver when a clause exists, a stronger argument would be that a common interest exists.

IX. POSSIBLE SOLUTIONS

A. Implementation of Non-waiver Agreements

1. One possible way to avoid waiver of privilege when documents are produced by the cedent to the reinsurer is to implement a non-waiver agreement. For example, the cedent will agree to produce certain communications to the reinsurer, who, in turn, will promise to not disclose the documents to third parties, with the understanding that the privilege will remain as to those communications if a third party seeks production. However, courts have rejected the view that privilege can be waived only as to insurers but preserved as to third parties. In *The Navajo Nation v. Peabody Holding Company, Inc.*, 209 F. Supp. 2d 269 (D.D.C. 2002), the court reasoned that a pervasive policy consideration is that parties should not be allowed to disclose communications for tactical purposes in some circumstances and then claim privilege in others. The court went on to hold that even though a protective order and court order approving the protective order was in place, a voluntary disclosure to a third party waives privilege. *Id.* at 285-86; *In re
Subpoenas Duces Tecum to Fulbright & Jaworski, 738 F.2d 1367 (D.C. Cir. 1984).

2. The court in *Permian Corp. v. United States*, 665 F.2d 1214, 1219 (D.C. Cir. 1980), held that “[a]ny voluntary disclosure by the holder of such a privilege is inconsistent with the confidential relationship and thus waives the privilege.” The court rejected a limited waiver doctrine when stating “[t]he client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit…the attorney client privilege is not designed for such tactical employment.” *Id.* at 1221.

3. Even if production was made pursuant to a subpoena or order to compel, privilege may still be waived. *Tompkins v. R.J. Reynolds Tobacco Co.*, 92 F. Supp. 2d 70 (N.D.N.Y. 2000).

4. Also, while production of documents to a court under seal may seem safe, there is always a chance that the court will rely on them in making a ruling. If a court relies on the documents in the course of decision making, the documents may become part of the public record. Many times the right of public access will outweigh a litigant’s assertion of privilege. *See U.S. v. Amodeo*, 44 F.3d 141, 145-46 (2d Cir. 1995).

B. Request from cedent, not the attorney

i. Another way in which critical information may be passed on to the reinsurer without a waiver of privilege could be to seek the information from the cedent, rather than the cedent’s attorney. There may be a way for the client to express how it valued the underlying matter and evaluated settling the claim in order to aid the reinsurer in determining coverage. In this context, no privileged documents would be
produced. The cedent would keep the privileged documents or work product confidential because no communications between the cedent and its attorney have been produced to a third party.

C. Attach a written confidentiality clause to the documents
   1. Another way to bolster chances of a court finding that a common interest exists could be to forward communications or documents with language indicating that the documents were sent in confidence. The transmission should read that the documents were sent under contract or pursuant to a cooperation clause in furtherance of a shared common legal interest in the dispute. Although not iron clad, such a transmission would suggest to a court that the parties expected confidentiality in their communications.

D. Exercise contractual rights
   1. Also, as suggested earlier, taking full advantage of the right to associate in the underlying litigation may help to convince a court that the interests of the reinsurers and cedents are aligned.

X. CONCLUSION – NO EASY ANSWERS

A. Plaintiffs’ lawyers are savvy and aggressive

B. Higher Stakes – there may have been a time when reinsurers and cedents had little difficulty agreeing on settlements. However, big money settlements have created an atmosphere in which reinsurers have become increasingly more skeptical as to the ceding companies’ decisions and as such, created a more adversarial field. This creates problems when an insurer or a reinsurer seeks to assert privilege or protect privilege as to documents or communications between them. Courts are less likely to find a common interest when it is apparent that the reinsurers are not going to simply take the cedent’s word that the settlement in the underlying case was reasonable.
C. *Class Actions on the Rise* - With the number of large class action suits rising, the problem with disclosure to plaintiffs who have opted out of the class action will remain. An insurer will look to the reinsurer to pay for the settlement and in turn, the reinsurer will seek discovery of documents pertaining to the underlying action. If the reinsurer and insurer cannot assert the common interest privilege, any documents disclosed to the reinsurer would then potentially be available to third parties who opted out of the settlement. With the courts reluctant to find a common interest between the reinsurer and insurer, this will cause problems in getting the reinsurer and cedent to agree on coverage.

D. *Varying case law with no definite direction* - Appropriate care must be taken when a reinsurer contemplates disclosing documents to a cedent or an insurer to an insured. Courts vary significantly on the analysis when determining whether a common interest applies. One thing is certain – very few, if any, courts will hold generally that a common interest exists between reinsurers and cedents. One must always look to local law in determining how the doctrine is applied and how it will likely be applied to the situation at hand. Take caution that one jurisdiction may recognize the common interest exception to waiver of privilege yet another jurisdiction may find waiver for the same documents in the same case. This suggests that the hurdles become more difficult for reinsurers when multiple jurisdictions are involved.

E. *Keep the objective in mind.* In what contexts will the reinsurer be affirmatively seeking documents that other parties will assert privilege? In what contexts will the reinsurers be on the defensive seeking to prevent disclosure? Keep the issue in mind early on with all communications and take appropriate steps to maintain confidentiality.

F. *Future developments* - This issue has become more pervasive and there is a possibility that the Federal Rules of Evidence may be amended to address when production may be made pursuant to an assertion of a common interest. Proposed amendments to attorney client privilege rules may also play a role in how courts will construe the common interest doctrine in the future.