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Preserving the Attorney-Client Privilege in Third-Party Liability Claims: What Captive Groups Need to Know

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In the context of third-party liability claims, a familiar arrangement arises when an insurer retains defense counsel for its insured: the tripartite relationship among the insured, the insurer, and defense counsel. While common in automobile, general liability, and malpractice litigation, this arrangement raises recurring questions about the attorney-client privilege. Who holds the privilege? What is protected? When is the privilege waived? Additional complications arise when a captive group is involved in the claim, turning the tripartite relationship into a quadripartite one. The captive's participation in claims strategy discussions creates a serious risk that the privilege typically protecting such internal communications could be destroyed.

Without knowing the answers to these questions, communications containing internal legal strategies, as well as trial and settlement valuations could be discovered by opposing counsel. Though a captive group is rarely named as a party in these claims, it often has a business and financial stake in the outcome of the claim and an understandable desire to participate in strategy discussions. To that end, how does a captive group, and by extension, all of the parties in the quadripartite relationship, ensure that these communications remain privileged? The solution is the Common Interest Doctrine (the Doctrine).

What is the Common Interest Doctrine?

The Doctrine is a legal theory that works to preserve the attorney-client privilege when communicating with another where the parties are separately represented and have a common legal interest. Simply put, the Doctrine "allows attorneys representing different clients with similar legal interests to share information without having to disclose it to others." The Doctrine itself is not a privilege; it is a framework that has been created to preserve and extend already existing attorney-client privileges.

How Does the Common Interest Doctrine Work?

The attorney-client privilege – the foundation of the Doctrine – is the evidentiary rule that prevents the disclosure of communications between counsel and their client, whether an individual or company, made for the purpose of obtaining or providing legal advice.

Due to the differing natures of the relationships between the parties to the quadripartite relationship, courts are divided on whether the insured is defense counsel's client or whether both the insurer and the insured are counsel's clients. While there are no reported cases discussing whether a captive group is also defense counsel's client, this is unlikely to be the case in most circumstances. Understanding this distinction is essential because the only communications strictly protected by the attorney-client privilege are those between defense counsel and their client. The privilege does not protect communications directly between defense counsel and a captive group. Likewise, communications between the insured and a captive group are not protected.

How Can Captives Preserve the Privilege and Participate in Litigation Strategy?

To preserve the attorney-client privilege under the Doctrine, many jurisdictions require that a captive group is also represented by counsel. Though the circumstances in which the Doctrine applies vary widely from jurisdiction to jurisdiction, there are some core commonalities. The most significant, albeit nebulous, of these

commonalities is a shared legal interest, also referred to as a common interest, between the parties. Courts across the country differ in their definition of a "shared legal interest." Yet, there is a growing consensus that a shared legal interest is more than purely a commercial or business interest. Because of the dual business and legal aspects of the insurance industry, which are often characterized as two sides of the same coin, courts have recognized that the line between law-related communications and business communications is blurry.

The other elements of the Doctrine drastically change depending on the jurisdiction. Some courts broadly apply the Doctrine to protect client-to-client communications. Other jurisdictions may require a formalized written agreement. Still, some courts only apply the Doctrine when there is actual or threatened litigation, while others have applied the Doctrine regardless of whether litigation is threatened.

As the Supreme Court has recognized, an "uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."¹ Ultimately, it remains to be seen whether a uniform rule will emerge. Until then, the contours of the Doctrine are being actively litigated, and sometimes result in inconsistent outcomes. For the time being, a captive group's best protection against waiving privileged communications is to retain counsel and allow counsel to communicate on the captive's behalf in accordance with the governing jurisdiction's rules.

Baker Donelson attorney [Myles Sonnier](#) is available to assist with any questions regarding third-party liability litigation, risk mitigation for captives, or the "Common Interest Doctrine."

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¹ *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).