

Illinois Appellate Court Recognizes Common Interest Exception to Waiver of Privilege Rule



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On December 7, 2017, an Illinois appellate court held that co-defendants in a case who agree to share information pursuant to their common interest in defeating their litigation opponent do not waive either the attorney-client or work-product privilege when they do so.¹ The decision marks the first published guidance from any Illinois court on this issue, providing helpful clarity to litigants in Illinois state courts over what they may share with co-parties to litigation without waiving these privileges.

Typically, a client waives the attorney-client privilege if it discloses privileged information to a third party. The work-product privilege may be waived in much the same way. Without some protection recognized in the law, when parties on the same side of a lawsuit meet together – clients and lawyers alike – to strategize over prosecution or defense of the action, they risk waiving their attorney-client privilege for anything that is said in that meeting as well as the work-product privilege for any work product that is shared. In turn, most jurisdictions, including federal courts in Illinois (and now Illinois state courts), do recognize a “common interest” or “joint defense” privilege that shields these types of communications from third parties.

The Lawsuit

Between 2006 and 2009, State Farm Mutual Auto Insurance Company (State Farm) filed a series of subrogation lawsuits through its counsel, James M. O’Dea (O’Dea), including suits against the named plaintiffs in the case at hand. In October 2010, these plaintiffs filed a purported class action lawsuit against State Farm and O’Dea, claiming that the subrogation lawsuits were part of a scheme to obtain fraudulent default judgments by circumventing state service of process requirements. The question of the applicability of a common interest or joint defense privilege came to a head after State Farm objected to certain written discovery seeking information about communications it had with O’Dea after the filing of the class action lawsuit. In addition to relying on the attorney-client and work-product privileges, State Farm also asserted what it called a “joint defense privilege,” arguing that State Farm and O’Dea had executed a joint defense agreement, and anything the co-defendants and their respective lawyers said to one another after the filing of the lawsuit, about the lawsuit, was privileged as part of communications concerning a common or joint defense.

State Farm pointed to a decision from the Illinois Supreme Court in *Waste Management Inc. v. International Surplus Lines Ins. Co.*, 144 Ill. 2d 178, 193 (1991), asserting that the State had already recognized the doctrine. State Farm also directed the Court to numerous other federal and state jurisdictions that have recognized the common interest privilege in similar circumstances. Although the trial court disagreed that Waste Management adopted such a doctrine², it nevertheless decided that Illinois should follow the pattern of other jurisdictions and recognize the “joint legal defense” doctrine in this case. After reaching this conclusion, the trial court saw no need to dig further into the content or context of the State Farm communications at issue, finding it unnecessary to hold an in camera hearing or require a privilege log under Illinois Supreme Court Rule 201(n), and concluding that any communications identified by State Farm in its interrogatory response would be covered by the common interest exception to the waiver rule.

The Appeal

On appeal, in a lengthy and detailed decision, the Illinois appellate court affirmed the trial court’s decision to adopt the doctrine, noting (much to its own surprise) that the Illinois courts had yet to recognize it. The appellate panel described the doctrine, not as an entirely new privilege as some courts have, but rather as an exception to the waiver that normally invalidates the attorney-client or work-product privileges. The court’s decision gives insight into two main questions: (1) what constitutes a common interest sufficient to fall within the exception; and (2) what types of communications are protected by the exception.

What Constitutes a Common Interest?

The court explained that while the parties must share a common interest in the litigation, they need not be fully aligned on every issue. In State Farm and O’Dea’s case, their interests were sufficiently aligned to satisfy the standard. The court explained that because many of the theories of liability asserted against State Farm were vicarious in nature, and the actual acts of wrongdoing were undertaken by O’Dea (allegedly with State Farm’s blessing), if plaintiffs’ case against O’Dea failed for whatever reason, so would its case against State Farm. In turn, the co-

defendants had every reason to assist one another in defeating the class action lawsuit. And, even though these co-defendants could conceivably one day be adverse to one another, this did not alter the finding of a common interest.

What Types of Communications Are Protected?

The court spelled out what the common interest exception protects from disclosure to third parties as follows: those statements made to further the parties' common interest, pursuant to a common interest agreement, (1) by the attorney for one party to the other party's attorney; (2) by one party to the other party's attorney; (3) by one party to its own attorney, if in the presence of the other party's lawyer; and (4) from one party to another, with counsel present.

The decision did not decide the more difficult question of whether client-to-client communications, without the presence of counsel, are covered by the common interest exception. Moreover, it did not decide two other critical issues, thereby leaving the scope of the doctrine in flux. First, the court did not decide whether the doctrine extends beyond actual litigation to the threat of litigation. Second, nor did the appellate court decide whether a written or advance agreement between the co-defendants is required.

Lastly, the appellate court departed from the trial court's holding in one important respect – namely, it found that State Farm should be required to provide a privilege log of each communication it objected to on the basis of the common interest exception and that an in camera communication-by-communication analysis should be performed by the trial court to determine the applicability of the exception. Thus, it remanded for these further proceedings.

Conclusion

This Illinois appellate court decision provides much needed clarity to co-defendants in Illinois state court who are seeking to share information as a part of their joint defense but are concerned whether certain disclosures will waive the attorney-client or work-product privileges. While not every disclosure to a co-defendant will warrant protection, co-defendants can take comfort that strategic communications among co-defendant attorneys and clients (with counsel present) likely will not waive the privilege. While the scope of the exception remains in flux with several critical questions left unanswered by the decision, co-defendants would be wise to enter into written and advance joint defense or common interest agreements and take care to note that the Illinois decision does not expressly extend the doctrine to instances where litigation is merely threatened. In addition, in anticipation of a possible challenge or claim of waiver, care should be taken to make sure the communications covered by the privilege are carefully considered and properly documented.

1 The case is *Selby, et al. v. O'Dea, et al.*, 2017 IL App (1st) 151572 (Il. Ct. App. 2017).

2 The Illinois appeals court also disagreed with State Farm that the Supreme Court's *Waste Management* decision recognized the common interest exception. Rather, it found that *Waste Management* recognized a related doctrine in which the courts look at whether one party with the common

interest may shield its communications from the other party with the common interest in a later proceeding. See *Waste Management Inc.*, 144 Ill. 2d at 193. By contrast, the doctrine recognized by the Illinois appellate decision looks at whether the two parties to the common interest may shield their joint communications about that common interest from *third parties* – including their opponent in litigation.

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