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## Privilege and the tripartite insurer-insured counsel relationship

Following the publication of my last column on the common interest doctrine, I received inquiries as to the applicability of this doctrine in the setting of the tripartite insurer-insured-counsel relationship.

In Illinois, you don't have to go as far as the common interest doctrine to find protection for these tripartite communications. Although federal common law and many states do not recognize an insurer-insured privilege, the Illinois Supreme Court explicitly established this privilege in *People v. Ryan*, 30 Ill.2d 456 (1964).

The *Ryan* case arose out of a tragic set of circumstances in which the insured, Della Emberton, was involved in an automobile accident in which two people were killed. Following the accident, she gave a written statement to her insurance company's investigator in which she admitted to consuming several beers at two taverns before the accident. When Emberton was criminally charged in connection with the accident, she hired an attorney, Willis Ryan, who had been previously employed by her insurance company in automobile collision cases.

Shortly thereafter, he requested and received from the insurance company the claim file, including Emberton's statement. When Ryan refused to produce the statement pursuant to a subpoena served by the state's attorney, he was found in contempt of court.

On appeal of the contempt order, the appellate court held that Emberton's statement was not privileged on the grounds that Ryan was not directly retained by the insurance company at the time the statement came into his possession and, therefore, the statement was not between a client and an attorney.

Ryan then appealed to the high court. There, the state urged that any communications between an insured and an insurer are not privileged. The Supreme Court noted that eight sister states, the U.S. District Court for the District of Columbia and even the King's Bench Division of the High Court of Justice in London recognized

the insurer-insured privilege.

The court ultimately held that the communication given by Emberton to her insurance company's investigator was privileged. *Ryan*, 30 Ill.2d at 460-62.

"We concede that such communications are normally made by the insured to a layman and in many cases no lawyer will actually be retained for the purpose of defending the insured. Nevertheless, by the terms of the common liability insurance contract, the insured effectively delegates to the insurer the selection of an attorney and the conduct of the defense of any civil litigation.

"The insured is ordinarily not represented by counsel of his own choosing either at the time of making the communication or during the course of litigation. Under such circumstances we believe that the insured may properly assume that the communication is made to the insurer as an agent for the dominant purpose of transmitting it to an attorney for the protection of the interests of the insured." Id. at 460-461.

Following *Ryan*, Illinois appellate courts have refined the test the party asserting the insurer-insured privilege must meet. The 1st District concisely set forth the elements in *Chicago Trust Co. v. Cook County Hosp.*, 298 Ill. App. 3d 396, 407 (First Dist., 1998) as follows: 1) the identity of the insured; 2) the identity of the insurance carrier; 3) the duty to defend the lawsuit; and 4) that a communication was made between the insured and an agent of the insurer. Id.

At first blush, this may seem like an easy test to meet, however, the court in *Chicago Trust Co.* went on to elaborate on the *Ryan* holding and emphasized that the insurer-insured privilege, as an offshoot of the attorney-client privilege, applies only when "the insured may properly assume that the communication is made to the insurer for the dominant purpose of transmitting it to an attorney for the protection of the interests of the insured." Id.

This test was recently applied by the 5th District in *Holland v.*

### NEXT CHAPTER



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*Schwan's Home Service Inc.*, No. 5-11-0560, 2013 WL 2367892, (May 30, 2013, Ill. App. Ct., Fifth Dist.) with a strong emphasis on the "dominate purpose" requirement. In that case, Schwan's Home Service appealed a \$4,260,400 in compensatory and punitive damages verdict in favor of a former employee on a retaliatory discharge claim related to the plaintiff's filing of workers'

compensation claims.

At trial, the claim file and other documents of Schwan's workers' compensation insurance carrier, Hartford Insurance Co., were admitted into evidence. The documents contained some damaging communications that could have led the jury to conclude, among other things, that Schwan's did not reasonably accommodate the plaintiff's medical restrictions. Schwan's argued on appeal that the claim file was not admissible under the insurer-insured privilege.

The 5th District examined the statements contained in the claims file and concluded that they "were not made for the purpose of seeking legal advice but pertained to Holland's medical treatments, work restrictions and conditions of ill-being." Id. at \*38.

The court focused on the fact that when the statements were made, both Schwan's and Hartford did not dispute that the plaintiff's claim was covered under the Workers' Compensation Act. This removed the main legal question and indicated that the "purpose of the statements contained within the claim file was to help Schwan's and Hartford administer [plaintiff's] workers' compensation claim, rather than to enable Schwan's to obtain legal counsel."

Following the reasoning of *Ryan* and *Chicago Trust Co.*, the court concluded that "the statements are not in the nature of attorney-client communications and do not fall within the limited attorney-client privilege that has been extended to insurer-insured relationships." Id.

The lesson gleaned from the *Ryan* line of cases is that the insured should not view all of the communications within the claim file as protected by the insurer-insured privilege.

The insured should be circumspect about what notes, e-mails and other documents are provided to the insurer, knowing that unless the dominant purpose of the communication is to obtain legal advice, a court is likely to find that the communications are not protected.

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