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Privilege and the Tripartite Insurer-Insured-Counsel Relationship

By Matthew C. Luzadder and Cameron R. Argetsinger*

Not all of the communications amongst the three parties involved in the insurer-insured-counsel relationship may be covered by the attorney-client privilege. This article examines the relevant case law in Illinois and the protection of communications within the insurer-insured-counsel relationship.

The tripartite insurer-insured-counsel relationship requires the insurer, its insured, and the insured's counsel to communicate with each other in the defense of a claim. In general, all parties work together to come to a mutually beneficial resolution to the claim at issue. There may, however, be challenges to the assertion of the attorney-client privilege to prevent the disclosure of communications between counsel and the insurer. The rules that govern the tripartite relationship differ among jurisdictions and counsel should be aware of how courts address this issue.

There is the potential for conflicts of interests to arise in the course of the relationship between the parties. In addition, not all of the communications amongst the three parties involved in the relationship – the insurer, insured, and the counsel – may be covered by the attorney-client privilege. This article examines the relevant case law in Illinois and the protection of communications within the insurer-insured-counsel relationship.

INSURER-INSURED PRIVILEGE

The Illinois Supreme Court explicitly established the insurer-insured privilege in *People v. Ryan*.[1] 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, Emberton 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.

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[1] 30 Ill.2d 456 (1964).

Shortly thereafter, Ryan requested and received from the insurance company the claim file, including Emberton's statement. The State's Attorney subsequently served Ryan with a subpoena in connection with the criminal charges against Emberton, requesting the file, including Emberton's statement. When Ryan refused to produce the statement, he was found in contempt of court. Ryan appealed the contempt order.

The Illinois 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 Illinois Supreme Court. There, the state urged that any communications between an insured and an insurer are not privileged. The Illinois 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 communications given by Emberton to her insurance company's investigator were privileged.[2]

> 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.[3]

THE PRIVILEGE TEST

Following *Ryan*, Illinois appellate courts have refined the test the party asserting the insurer-insured privilege must meet. The Illinois Appellate Court, First District, concisely set forth the elements in *Chicago Trust Co. v. Cook County Hosp.*,[4] as follows:

(1) The identity of the insured;

(2) The identity of the insurance carrier;

(3) The duty to defend the lawsuit; and

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[2] *Ryan*, 30 Ill.2d at 460-62.

[3] *Id.* at 460-461.

[4] 298 Ill. App. 3d 396, 407 (First Dist., 1998).

(4) That a communication was made between the insured and an agent of the insurer.[5]

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."[6]

THE "DOMINATE PURPOSE" REQUIREMENT

This test was recently applied by the Illinois Appellate Court, First District, in *Ritter v. 2014 Health LLC*,[7] with a strong emphasis on the "dominate purpose" requirement. In that case, Ritter's family filed a wrongful death action against the Chicago Behavioral Hospital.[8]

During discovery, the hospital refused to produce the three documents at issue. These documents were titled the Sentinel Event Report, Investigation Summary, and Narrative of Investigatory Findings. As the names suggest, these documents relate to the factual circumstances of the death as issue. The hospital argued that the Sentinel Event Report and Investigation Summary were privileged under the Illinois Medical Studies Act, and the Narrative of Findings was privileged under the insurer-insured privilege.[9]

At trail, the court ruled that the hospital had failed to meet its burden of establishing the three documents were privileged.[10] The hospital appealed. The hospital argued that the Narrative of Findings was created for the purpose of obtaining insurance coverage and to protect the hospital's interests.[11]

The First District examined the documents and affirmed the trial court's finding that none the documents were privileged. In reaching its decision, the court noted that in cases where the privilege was found to apply, specific evidence had been submitted indicating the statements at issue were made in the context of a duty to defend the lawsuit.[12]

The court found that the hospital failed to put forth adequate facts to demonstrate a duty to defend the lawsuit. The court pointed to the fact that the hospital had not

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[5] *Id.*
[6] *Id.*
[7] No. 1-19-0370 (Ill. App. Ct. First Dist. Feb. 28, 2020).
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*

provided terms of its insurance policy. Also, the fact that it remained unknown whether the insurer was aware of a potential claim at the time the Narrative of Findings was submitted.[13]

Following the reasoning of *Ryan* and *Chicago Trust Co.,* the *Ritter* 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."[14]

CONCLUSION

The lesson gleaned from the *Ryan*, *Chicago Trust Co.*, *Ritter* 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. In order to protect documents shared with the insurer under the attorney-client privilege, the insured should establish facts supported the insurer's duty to defend.

The establishment of the tripartite attorney-client privilege, therefore, dovetails well with pursuing available insurance coverage early in a matter and asking the insurer to provide a coverage opinion, even with a reservations of rights, as soon as possible. Establishing the privilege can help foster the free flow of information between the parties in the coordinated resolution of a matter.

[13] *Id.*
[14] *Id.*