Privilege Points: Courts Examine Two Elements of the Joint Defense/ Common Interest Doctrine: Part 1

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In his August 15, 2012 “Privilege Points” release, Tom Spahn discusses how courts have interpreted the “common interest” requirement in cases where privilege has been claimed for communications involving different parties:

Under the joint defense/common interest doctrine, separately represented clients can avoid what otherwise would be a waiver when they and their lawyers share privileged communications in pursuing a common legal strategy. Among other things, courts examine (1) the commonality of the participants' interest, and (2) whether they sufficiently anticipated litigation to invoke this non-waiver doctrine.

In McLane Foodservice, Inc. v. Ready Pac Produce, Inc., Civ. No. 10-6076 (RMB/JS), 2012 U.S. Dist. LEXIS 76343 (D.N.J. June 1, 2012), the court held that the common interest doctrine protected communications between two co-defendants (one of which supplied allegedly contaminated lettuce to the other company, which then processed it for Taco Bell restaurants). Plaintiffs argued that the common interest doctrine could not apply, because the processor had already sued the supplier in three other cases. However, the court found that the companies "have a common interest in establishing and arguing that lettuce did not cause the outbreak." Id. at *19. In contrast, a few weeks later the Western District of Virginia held that defendant company could not rely on the common interest doctrine to withhold some of its communications with the Commonwealth of Virginia, despite the latter's intervention in the case. Adair v. EQT Prod. Co., Case No. 1:10cv00037, 2012 U.S. Dist. LEXIS 89403 (W.D. Va. June 28, 2012). The court noted that "the Commonwealth's only 'common interest' with [the corporate defendant] in this litigation is to defend [a challenged state law] against constitutional attack." Id. at *11. The court held that the common interest doctrine did not cover communications dealing with issues other than constitutionality.

Lawyers considering reliance on the common interest doctrine must carefully examine the commonality of the interest and the exact communications they wish to protect. Next week's Privilege Point will deal with another issue – the required level of anticipated litigation that must underlie the common interest doctrine.