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Complying With the Cooperation Clause Without Compromising Privilege

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Insurance companies often invoke a policy's cooperation clause to compel a policyholder to share privileged defense information even after the insurance company has reserved the right to deny coverage at a later date. At one extreme, the policyholder might withhold all defense information and risk prompting the insurance company to issue a disclaimer of coverage for failure to cooperate. At the other end of the spectrum, a policyholder might lose the protection of litigation privileges by giving the insurance company unfettered access to defense information, potentially rendering the material discoverable by the policyholder's adversary in the underlying action. Policyholders can avoid these outcomes by taking proactive steps to preserve the privileged nature of defense materials shared with their primary or excess insurance companies.

Policyholders are familiar with insurance companies' practice of reserving rights to disclaim coverage early in the policyholder's defense of the underlying action. Despite their reservations of rights, insurance companies nevertheless often demand privileged defense materials from their policyholders and ground the demand in the policy's cooperation clause — a clause (common to commercial general liability policies) that purports to impose an undefined "duty to cooperate" on the policyholder. While the stated purpose is to gather information relevant to the defense of the underlying action, insurance companies frequently mine this material for information that could support a disclaimer of coverage and thus reduce or eliminate the insurance company's exposure to loss.

Enter the Excess Insurance Company

The situation is further complicated when a policyholder has both primary insurance and excess insurance that "follows form" to the primary insurance. Often, the primary insurance company bears the duty to defend and is closely involved in the defense of the underlying action from the start of the litigation. Excess insurance companies, meanwhile, may not enter the fray for months, often years, after the policyholder and primary insurance company have established a working relationship, be it amicable or contentious. Excess insurance companies that have seemingly been uninterested in the details of the underlying action may suddenly seek to become involved; and may even seek to appoint their own selection of co-counsel to appear in the case on the eve of trial. There is strong support for the proposition that insurance companies cannot intervene in the defense of an action late in the case. *See, e.g., Bassett Seamless Guttering,*

> "Disclosure of **privileged defense information** to insurance companies presents a **risk of waiver** of the privilege."

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Inc. v. GutterGuard, LLC, No. 05 Civ. 184, 2007 U.S. Dist. LEXIS 51002 (M.D.N.C. July 13, 2007) (two months before trial); *McWhorter v. Elsea, Inc.*, No. 00 Civ. 473, 2006 U.S. Dist. LEXIS 88273 (S.D. Ohio Dec. 6, 2006) (five months before trial).

The Risk of Forfeiting Privilege

The tension between the policyholder's desire to comply with the cooperation clause and fear of arming its insurance company is compounded by the risk that privilege could be lost in the process and the plaintiff in the underlying action might thereby gain access to the information. Generally, disclosure of privileged information to parties outside the attorney-client relationship results in a waiver of that privilege. The risks are high: the disclosure of unfavorable defense materials not only may provide the insurance company with a basis to deny coverage, it also may arm the plaintiff with information that will hurt the policyholder at trial.

Some states seek to mitigate this risk through a doctrine called the "common interest privilege" (also called the "joint defense privilege" or "community of interest privilege"). Whether your state recognizes this doctrine always should play a role in deciding what information to disclose to your insurance company. The common interest privilege preserves the privileged nature of documents and information that are shared with those outside the confidential relationship, so long as the disclosure is made to further a common interest and in a manner that demonstrates an intent to maintain confidentiality. Depending on the applicable state law, privileged defense material shared with a policyholder's insurance company to further a common interest — namely, minimizing the policyholder's liability — may be done without waiving the privilege or rendering the material subject to discovery by the plaintiff in the underlying action. Some states, however, have declined to recognize the common interest privilege as between a policyholder and its insurance company if the insurance company has disclaimed coverage. *See, e.g., NL Industries, Inc. v. Commercial Union Insurance Co.*, 144 F.R.D. 225, 231 n. 10 (D.N.J. 1992) (applying New Jersey law). This renders the common interest privilege inapplicable in precisely those cases in which the insurance company probably will seek to use privileged information against the policyholder to avoid or reduce its coverage obligations.

Protect Yourself in Advance with a Confidentiality Agreement

A carefully drafted agreement between the policyholder and the insurance company can address these risks and not only preserve privilege, but also limit the scope of what will be shared with the insurance company. A "common interest and confidentiality agreement" can both demonstrate that the policyholder seeks to satisfy its duty to cooperate and protect the policyholder from having to divulge harmful defense materials to the plaintiff in the underlying action.

> "...[M]ake clear that the policyholder has **no obligation to share any information that could further the insurance company's adverse interest** — that is not a 'common' interest."

Not much case law has developed regarding the right of a plaintiff to obtain access to privileged information that a defendant has shared with its insurance company under a confidentiality agreement. As other commentators have suggested, the key to a successful confidentiality agreement is to identify the parties' common interest and their adverse interests. *See*, e.g., John Buchanan and Wendy Feng, *Protecting Privilege While Preserving Coverage*, available at http://bit.ly/1mt8az9 (Mar. 8, 2012). In appropriate circumstances, that which is common may be shared.

The interest common to both the insurance company and the policyholder is the reduction of the policyholder's ultimate liability to the plaintiff. The confidentiality agreement should clearly and unequivocally confirm that the only purpose of the agreement is for the policyholder to share privileged defense information with the insurance company in order to further the parties' common interest. Meanwhile, there are a host of adverse interests stemming from the

policyholder's desire to maintain coverage and the insurance company's goal of avoiding or limiting coverage. A confidentiality agreement should identify those adverse interests and make clear that the policyholder has no obligation to share any information that could further the insurance company's adverse interest — that is not a "common" interest. Finally, a confidentiality agreement should specify that by sharing information within the bounds of the agreement, the policyholder is in compliance with the policy's cooperation clause.

Disclosure of privileged defense information to insurance companies presents a risk of waiver of the privilege such that the plaintiff in the underlying action might also be able to obtain that information. Meanwhile, absolute nondisclosure risks a loss of insurance coverage due to violation of the policy's cooperation clause. The "common interest privilege" may not be available in all states and circumstances. Even when it is available to provide general protection to a policyholder, a written agreement that details the understanding of the parties will provide enhanced protection to the policyholder and will be available to refute assertions of failing to cooperate. A carefully drafted common interest and confidentiality agreement can protect the policyholder from loss of coverage and from greater liability in the underlying action.

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10 Tips to Maximize Cyber Insurance Recovery

By Joshua Gold

Businesses face two enormous challenges when seeking to contain cyber risks and maximize cyber insurance recovery. First, the risks are by their very nature ever-evolving and thus difficult to stay abreast of, let alone contain. Second, the insurance marketplace is in flux and fragmented.

Below are 10 tips for maximizing cyber insurance recovery.

1. Make sure your insurance matches the way you conduct online business and process data. For example, there are insurance coverage implications if you use cloud computing or other vendors for hosting and processing data. Many cyber-risk insurance policies available today can be tailored to reflect the fact that the policyholder may delegate to third-party data management and hosting.

2. Do not rule out coverage for a claim under traditional business policies. If a cyber loss occurs, consider D&O, E&O, crime and general liability insurance coverage depending on the claim against your company or the form of loss. We have had success in winning coverage for our clients for cyber-related losses under traditional coverage.

3. Avoid cyber insurance policy terms that condition coverage on the policyholder having employed "reasonable" data security measures. These clauses are so vague and subjective that they are bound to lead to coverage fights. Further, given the lightning speed of technological innovation and amorphous nature of cyber risks, a cyber security practice that was reasonable just months ago may look reckless with the benefit of hindsight.

4. If you possess or process consumer or business credit card information, make sure that you have coverage for fraudulent card charges and credit card brand assessments and fines — these can be large exposures when there is a significant data breach.

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5. If you do business with individual consumers and obtain their personal identifying information, make sure you have coverage (including attorneys' fee coverage) for the inevitable expenses of responding to informal inquiries and formal proceedings that ensue from state attorneys general, the Federal Trade Commission and others when a breach occurs (often implicating residents of several states).

6. Make sure that your insurance covers breaches arising from mobile devices that may or may not be connected to the company's computer network. More and more employees can access systems through tablets, smartphones, and PCs. The ever-growing size of hard drives and the ubiquity of portable drives mean that some employees may create security risks, even when the device is not logged onto the company servers.

7. Complete insurance applications carefully, including D&O applications. Underwriters will be focusing more and more on computer risk areas, and insurance application responses often are used against policyholders to contest insurance claims.

8. Avoid cyber insurance policies with contractual liability exclusions. Contractual liability claims often are made in conjunction with statutory claims, negligence claims and other forms of relief, and policyholders are best off not enduring a huge allocation fight over what portion of the claim is covered.

9. If you are buying or renewing specialty cyber insurance policies, make sure you work with a very good and experienced broker. There is not presently uniformity of product in the cyber insurance marketplace, and lots of terms are open for negotiation. A good broker can help get you the best coverage.

10. Provide notice to your insurance companies quickly after a breach. The cost meter starts immediately. When you have a breach situation, every second counts, and you undoubtedly will incur costs quickly for computer forensics, attorneys and other consultants. Providing proper notices and advising of these costs promptly can increase the odds of recovering these costs from your insurance companies.

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