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Attorney-Client Privilege in Insurance Disputes: Preserving Confidentiality, Meeting Legal Ethics Standards

Waiver and Exceptions to the Privilege, the Tripartite Relationship, and the Role of Counsel in Claims Handling and Litigation

WEDNESDAY, JANUARY 22, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Adam Gajadharsingh, Attorney, **Barnes & Thornburg**, Atlanta

Travis S. Hunter, Director, **Richards Layton & Finger**, Wilmington, Del.

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SQUIRE PATTON BOGGS

New York Keeps Common Interest Doctrine Litigation Related

June 2016

The Common Interest Doctrine is used often in insurance and reinsurance-related disputes. As policyholder and claimant lawyers continue to aggressively pursue communications between insurers and reinsurers about their claims, those seeking to preclude disclosure often turn to the common interest doctrine to assert this as an exception to waiver of the attorney-client privilege. Many courts have extended the common interest doctrine to include any common legal advice and strategy and not just legal advice and strategy on current or anticipated litigation. New York has just chosen not to do so.

In *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, No. 80, 2016 N.Y. LEXIS 1649 (NY Jun. 9, 2016), the New York Court of Appeals (New York's highest court) reversed a decision of the Appellate Division, First Department, and held that under the common interest doctrine, an attorney-client communication that is disclosed to a third party remains privileged if the third party shares a common legal interest with the client who made the communication, the communication is made in furtherance of that common legal interest, and any such communication relates to litigation, either pending or anticipated. It is the latter litigation requirement that the court, by majority decision, kept in place, even in the face of commentators and other courts expanding the common interest doctrine exception beyond litigation.

The decision is a necessary read for anyone interested in attorney-client privilege and anyone having to address the need to share attorney-client privileged communications with third parties in the context of a common legal interest. The majority ultimately concluded that the benefits of expanding the common interest doctrine beyond litigation were outweighed by the substantial loss of relevant evidence was well as the potential for abuse. The majority invited the New York Legislature to consider the alternative arguments made by the dissent if it wished to expand the doctrine beyond litigation.

The dissent concluded that the attorney-client privilege exception to discovery served individual and societal goals of furthering the proper administration of justice by encouraging the free flow of information essential to legal representation. Because it has never been limited to client communications involving pending or anticipated litigation, it made little sense to limit the common interest doctrine exception just to litigation.

The dissent would extend the attorney-client privilege (through the common interest doctrine) to communications related to confidential communications made for purposes of seeking legal and regulatory advice to complete a merger.

The ramifications under New York law to insurance and reinsurance disputes are many. The Court of Appeals has now made it crystal clear that the exception to waiver of the attorney-client privilege through the common interest doctrine will not apply unless the privileged communication shared is in furtherance of a shared common legal interest and relates to pending or anticipated litigation. Where discovery is sought concerning communications between cedents and reinsurers about underlying losses and there is no litigation pending or anticipated, those communications, under New York law, will not be shielded from discovery. On the flip side, in commercial litigation involving failed mergers or other corporate transactions, including insurance and reinsurance transactions, attorney-client privileged communications shared with third parties will not be shielded from disclosure unless those communications relate to pending or anticipated litigation. What this means is that under New York law, before any attorney-client communication is shared with a third party, consideration must be given to whether that communication will be discoverable in the future.

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The Struggle to Maintain the Attorney-Client Privilege for In-House Insurance Counsel

March 2017

When an in-house attorney at an insurance company is asked to analyze complex insurance coverage scenarios and their reinsurance implications by a senior business executive, is the written memorandum prepared by in-house counsel protected from disclosure by any applicable privilege or doctrine? That was the question before a federal magistrate judge in ruling on whether an insurer's withholding of the in-house counsel's memo from production was justified.

Where outside counsel is retained to provide legal advice on an insurance coverage issue, it is somewhat easier to assert the applicable privileges. When in-house counsel is asked to prepare an analysis on coverage scenarios that might apply to certain types of claims, the issue is closer because of the claims responsibilities of the insurance company. What makes it even more complicated is when the issue arises various times in various cases and courts refer to the analysis in court opinions. Has the privilege been waived or so diluted that a subsequent request for the document is no longer a risk of breaching the privilege?

In *ITT Corp. v. Travelers Cas. & Sur. Co.*, No. 3:12 CV 38 (JAM), 2017 U.S. Dist. LEXIS 26807 (D. CT. Feb. 27, 2017), a memo prepared by in-house counsel for the insurer on the reinsurance implications of different coverage scenarios for breast implant claims submitted under a certain policy form had been requested by a senior vice president of the insurer's specialty liability group. Given the numerous coverage disputes that have arisen over breast implant claims, this memo was a sought-after commodity by policyholders and claimants.

Although the insurance carrier has sought to protect the memo from disclosure under the attorney-client privilege and the work product doctrine in every case where this issue has arisen, some courts have directed the insurer to produce the memo. According to the court, the Third Circuit discussed the contents of the memo extensively in its opinion in Travelers Cas. & Sur. Co. v. Ins. Co. of N.A., 609 F.3d 143 (3rd Cir. 2010). Additionally, the memo was summarized in witness testimony after having been admitted in evidence. Given the forced (judicial) production of the memo and the publicly available quotes and summaries of the content of portions of the memo, was the insurer's efforts to keep the memo confidential successful? The answer is, in part, yes and no, but mostly no.

The court had already determined in an earlier decision that the insurance company had failed to establish the basis for a privilege claim. Nevertheless, the court agreed to an *in camera* review before ordering production. As a result of the review, the court agreed that under usual circumstances, the memo would be found to be privileged. The court recognized the general rule that a party does not waive the attorney-client privilege for documents which it is compelled to produce.

Here, however, the court found that because of the public disclosure of the memo's contents, it was impossible to consider the memo as privileged. The court held that under these "extremely unusual circumstances," the insurer must produce a copy of the sections of the memo addressed in the Third Circuit's opinion. But the court agreed that certain items could be redacted, including the name of its insured and the dollar figures and percentages in the memo. The court also ordered that the production was for attorney's eyes only unless otherwise ordered by the court.

This is not the only memo found in an insurance company's files that has become a sought-after piece of evidence in coverage disputes by policyholders and claimants. The lesson here is that insurance companies need to be vigilant to maintain confidentiality and privilege for documents they consider falling within the attorney-client privilege or attorney work product doctrine. While the courts, by compelling production, may weaken, if not eviscerate, the privilege, insurers should still insist on as limited a production as possible for attorney's eyes only.

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