feature

Privilege, Waiver, and the Voluntary Disclosure of Privileged Documents to Reinsurers


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Ceding companies have grown more sensitive to the possibility that they might waive the protection afforded to privileged coverage and defense documents by disclosing those documents to their reinsurers. If the documents lose their protection as privileged communications, they are vulnerable to discovery by policyholders and others. Because such documents may reveal case weaknesses or strategy decisions that could be exploited by policyholders or claimants to the disadvantage of the ceding company (and its reinsurers), cedents are increasingly cautious in disseminating privileged documents to reinsurers.

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The Attorney-Client Privilege and Work Product Doctrine

There are two general categories of "privilege": the attorney client privilege and the work product doctrine. The parameters of the privileges may vary from jurisdiction to jurisdiction, but the general outlines of the privileges are relatively constant. A document is subject to the attorney client privilege if it is (1) a communication; (2) made between an attorney and a client; (3) in confidence; and (4) for purposes of seeking, obtaining, or providing legal advice. A document is protected pursuant to the work product doctrine if it is prepared (1) by or for a party or that party's representative (usually an attorney); (2) in anticipation of litigation or for trial. The requirement that a document be prepared "in anticipation of litigation" has both a temporal element (was there a likelihood of litigation at the time the document was prepared?) and a motivational element (was the document created because of the prospect of an adversarial proceeding?).

The work product protection is not absolute. The extent of the work production protection has been codified in Federal Rule of Civil Procedure 26(b)(3) (and in the Federal Rules of Criminal Procedure), which govern all cases tried in the federal courts. This is different than the attorney-client privilege, where federal courts will look to the forum state's law of privilege. Federal Rule of Civil Procedure 26(b)(3) provides that:

> a party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Fed. R. Civ. P. 26(b)(3). Rule 26(b) thus draws a distinction between "opinion" work product and "ordinary" work product. While ordinary work product is subject to discovery on a showing of need or hardship, opinion work product is more protected.

Waiver of Privileges

Even when a document meets the requirements necessary to establish the existence of the attorney-client privilege, the

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privilege will not be recognized if it has been waived. The client holds the privilege and it is the client's purview to decide whether to waive the privilege, although counsel acting on a client's behalf, a successor-in-interest, and a trustee in bankruptcy stand in the shoes of the client and thus can also waive the privilege. Most often the waiver will occur because of a disclosure - inadvertent[2] or deliberate - that vitiates the confidential nature of the communication. The purposeful disclosure of privileged documents to a third party is generally viewed as waiving the privilege as to all others - unless the disclosure is between privileged parties (e.g., between parties with a common interest or within the control group of a corporation).

While the attorney-client privilege is often treated as waived by any voluntary disclosure, only disclosures that are "inconsistent with the adversary system" are deemed to waive work product protection. This is because strategic disclosure of work product is consistent with the work product doctrine. Thus, voluntary disclosure to an adversary is almost invariably seen as total waiver. *See In re Steinhardt Partners, L.P.*, 9 F.3d 230, 234-35 (9th Cir. 1993) (voluntary disclosure of protected work product to SEC, with whom trader was in an adversary relationship, waived protection in subsequent litigation with private parties). A waiver can occur without actual disclosure to an adversary if a substantial risk of disclosure to an adversary has been created. A confidentiality agreement concerning disclosed work product may be sufficient to show an intent to protect the work product from actual or potential litigation adversaries. *Blanchard v. Edgemark Fin. Corp.*, 192 F.R.D. 233, 236 (N.D. Ill. 2000). When confidentiality is protected, disclosure of documents for legitimate business reasons is unlikely to waive the work product doctrine. Where parties have a common adversary in litigation and are conducting a joint defense, they may share work product without thereby waiving the protection of the doctrine. *In re Sunrise Sec. Litig.*, 130 F.R.D. 560, 583 (E.D. Pa. 1989) (no waiver when work product shared with one having interests in common under understanding of confidentiality and of pursuing a joint defense).

The Common Interest Doctrine - Generally

The common interest doctrine enables a party to share privileged documents with another party with whom it shares a "common interest" in litigation against a common adversary while still maintaining the ability to assert the privilege against third parties. *See Miron v. BDO Seidman, LLP*, No. Civ.A 04-968, 2004 WL 3741931, at *2 (E.D. Pa. October 21, 2004). However, courts are reluctant to expand the common interest doctrine to include cases where the parties merely share a common business interest rather than a common legal interest. For example, in *Aetna Casualty & Surety Co. v. Certain Underwriters at Lloyd's London*, 676 N.Y.S.2d 727 (Sup. Ct. N.Y. Cty. 1998), the court did not accept that communications among reinsurers were privileged where the reinsurers were engaged in strategic discussions of business issues, and the attorneys present at the meetings merely acted as scriveners rather than providing legal advice:

> any "common interest" privilege must be limited to communications between counsel and parties with respect to legal advice in pending or reasonably anticipated litigation in which the joint consulting parties have a common legal interest. . . [i]t may not be used to protect communications that are business oriented or are of a personal nature. . . This court does not find that the limited New York authority on the subject permits the carving out of a large class of communications between potential parties so as to immunize their communications between themselves and counsel for other parties.

Id. at 732-33. Thus, a "common interest," standing alone, is insufficient to establish the existence of a legal privilege.

Access to Records Clauses

The typical access to records clause, on its face, seemingly entitles the reinsurer to broad access to the cedent's records, including privileged documents.

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> Sample A: The Reinsurer or its designated representatives shall have free access at any reasonable time to all records of the Company which pertain in any way to this reinsurance.[3]
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> Sample B: The Reinsurer or its designated representatives shall have access to the books and records of the company on matters relating to this reinsurance at all reasonable times for the purpose of obtaining information concerning this Contract or the subject matter hereof.

Some cedents are sufficiently concerned about the potential for third parties to gain access to privileged documentation as a result of disclosure to reinsurers that they add language to the Access to Records clause explicitly removing access to both attorney-client privileged documents and attorney work product documents. Reinsurers may object to such carve-outs, contending that the result is to deny the reinsurers access to relevant information about claims they have been asked to pay.

Despite these concerns by cedents, however, courts have not been so quick to find that such clauses waive legal privileges held by the ceding company. For example, in *Gulf Insurance Co. v. Transatlantic Insurance Co.*, 13 A.D.3d 278 (N.Y. App. Div. 2004), the appellate court overruled the lower court's decision finding that the access to records clause waived legal privileges that would have been otherwise applicable to documents held by a cedent:

> Access to records provisions in standard reinsurance agreements, no matter how broadly phrased, are not intended to act as a per se waiver of the attorney-client or attorney work product privileges. To hold otherwise would render these privileges meaningless.

Id. at 279. Thus, the access to records clause did not constitute a blanket waiver of privilege and thereby entitle the reinsurer to access to the cedent's privileged documents. *Id.* at 280. Similarly, the court in *North River Insurance Co. v. Philadelphia Reinsurance Corp.*, 797 F. Supp. 363 (D.N.J. 1992), interpreted a cooperation clause, which provided that the insurer would provide to the reinsurer "any of its records relating to this reinsurance or claims in connection therewith," so as not to result in an automatic waiver of the attorney-client privilege. Id. at 368-69. In that case, the reinsurer moved for production of documents that the insurer, on the basis of the attorney client-privilege, refused to produce. The court held that the reinsurer was "not entitled under a cooperation clause to learn of any and all legal advice" that had been obtained "with a reasonable expectation of confidentiality." *Id.* at 369 (citation omitted). Rather, "more explicit language" was necessary to show that the cedent had "wholesale" given up its rights to preserve the confidentiality of privileged information. *Id.*

The Existence or Absence of a Common Interest between a Cedent and Its Reinsurers

At least in instances in which a cedent and its reinsurer are not engaged in a reinsurance coverage dispute, some courts have held that cedents and their reinsurers enjoy a common interest such that the cedent can share privileged information with its reinsurer without waiving the privilege as to other third parties. *See, e.g., Durham Indus. Inc. v. North River Ins. Co.*, No. 79 Civ. 1705 (RWS),1980 WL 112701, at *3 (S.D.N.Y. Nov. 21, 1980) (surety bondholder's motion to compel production of cedent's privileged communications denied even though communications were disclosed to reinsurer because "where the reinsurers bear a percentage of liability on the bond, their interest is clearly identical to that of defendant [cedent]" and no waiver of the privilege occurred as a result of the disclosure); *Minn. School Bds. Assoc. Ins. Trust v. Empl. Ins. Co. of Wausau*, 183 F.R.D. 627, 631-32 (N.D. Ill. 1999) (finding that because of common interest between cedent and reinsurer, cedent did not waive work product privilege by providing privileged documents to reinsurer, and thus quashing subpoena issued by insured to reinsurer to obtain privileged documents); *Hartford Steam Boiler Inspection & Ins. Co. v. Stauffer Chem. Co.,* Nos. 701223, 701224, 1991 WL 230742, at *2 (Super. Ct. Conn. Nov. 4, 1991) (finding that cedent did not waive privilege by disclosing privileged documents to reinsurer because cedent and reinsurer shared legal and economic common interest, and thus denying insureds' motion to compel production of those privileged documents); *Lipton v. Superior Court of Los Angeles County*, 48 Cal. App. 4th 1599, 1618 (Cal. App. Ct. 1996) (Communications to a reinsurer may contain advice from counsel for the ceding insurer relating to coverage, exposure and other liability issues. These would, in all probability, be protected by the attorney-client privilege.") (citing Cal. Ins. Code § 622).

However, in certain circumstances, courts have held that, regardless of the interests a reinsurer may share with its cedent, such interests alone are not sufficient to protect the voluntary production of privileged documents from effecting a waiver of that privilege. For example, in *Reliance Insurance Co. v. American Lintex Corp.*, No. 00 CIV 5568 WHP KNF, 2001 WL 604080 (S.D.N.Y. June 1, 2001), on a motion by Reliance's policyholder, the court compelled Reliance to produce to the policyholder a privileged letter that Reliance had sent to its reinsurer. Reliance argued that the attorney-client privilege had not been waived "because primary insurers and reinsurers share a 'unity of interest.'" However, the court held that Reliance

> failed to establish that Reliance and its reinsurance underwriter share a common legal interest that warrants the extension of the attorney-client privilege to the document in question. While their commercial interests coincide, to some extent, no evidence has been proffered

> that establishes that Reliance and its reinsurer share the same counsel or coordinate legal strategy in any way.

Id. at *4.

Unlike the *Reliance* case, most cases that have failed to find a common interest between the cedent and its reinsurer have done so in the context of a reinsurer asking a court to compel its cedent to produce privileged materials, and thus, by definition, after a dispute has arisen between cedent and reinsurer. *See, e.g., North River Ins. Co. v. Columbia Cas. Co.*, No. 90 Civ. 2518 (MJL), 1995 WL 5792, at *4-*5 (S.D.N.Y. Jan. 5, 1995). The court in *Columbia Casualty* rejected the reinsurer's motion to compel the cedent to produce privileged documents from an underlying coverage dispute, holding that no common interest existed between North River (the cedent) and Columbia Casualty (the reinsurer) because (1) they were not represented by the same attorney in the proceeding in which the privileged documents were generated; (2) the reinsurer did not contribute to the cedent's legal expenses; (3) the reinsurer did not exercise any control over the cedent's conduct of the underlying proceedings; (4) the parties did not coordinate litigation strategies; and (5) the parties' legal interests diverged. *Id*. at *5. The court further stated that "Columbia Casualty's only argument for finding a common interest is that the two parties stand in the relation of reinsurer to ceding insurer, and that is insufficient." *Id*. at *5.

However, Columbia Casualty also sought the production of two privileged documents that North River had previously provided to another reinsurer, CIGNA. North River objected to the disclosure, arguing that it was entitled to use the common interest doctrine as "a shield" to resist disclosure even though it had asserted that Continental Casualty was not entitled to use the common interest doctrine as "a sword" to compel disclosure. *Id*. at *7. The court was not persuaded, and concluded that there had been no common legal interest between North River and CIGNA at the time of the disclosure, and that North River had waived the attorney-client privilege with respect to those documents:

> In the process of seeking payment from CIGNA under their reinsurance contract, North River provided the . . . Memos, apparently hoping that CIGNA would be persuaded to pay. It was not and litigation ensued. At no point did North River and CIGNA engage in a common legal enterprise and the common interest doctrine therefore does not apply.

Id. at *8. Having waived the privilege with respect to CIGNA, North River could not reassert the privilege to preclude Columbia Casualty from obtaining the documents at issue.

In evaluating the rationale underlying the common interest doctrine, the court also pointed out that "[w]hat is important is not whether the parties theoretically share similar interests but rather whether they demonstrate actual cooperation toward a common legal goal." *Id*. at *4. Thus, in the *Columbia Casualty* case, the court focused on a functional analysis of the common interest doctrine rather than relying on the status of the parties. A cedent and its reinsurer cannot be said to be cooperating "toward a common legal goal" once one party has contemplated suing or has actually sued the other over reinsurance coverage. *See also, e.g., North River Ins. Co. v. Phila. Reinsurance Corp.*, 797 F. Supp. at 366-67 (because relationship between cedent and insurer "does not fall within the confines of the classic common interest doctrine", court denied reinsurer's motion to compel production of cedent's privileged documents).

Conclusion

The critical conclusion that necessarily follows from these decisions is that voluntary production of privileged materials - even in situations where the interests of the cedent and the reinsurer are aligned - could effect a waiver of privilege. Moreover, once a dispute between a cedent and its reinsurer ripens, any "common interest" arguably ceases to apply, rendering the cedent even more vulnerable to an argument that voluntary production to its reinsurer of privileged materials (such as those relating to the cedent's coverage analysis or to the defense of the underlying claims against its policyholders) waives any applicable privileges. Although more is required to waive the work product protection than the attorney-client privilege, disclosure to a reinsurer with which the cedent is in an adversarial relationship creates the very real prospect of such a waiver. ▼

2 Courts take a number of different approaches to whether inadvertent disclosure waives the privilege. This paper does not examine the varying approaches because the issue addressed herein is the potential impact on privilege of a cedent's *deliberate* disclosure of privileged documents to its reinsurer.

3 These sample clauses (with emphasis added) have been obtained from the Brokers & Reinsurance Markets Association Contract Wording Reference Book.

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