

INSURANCE REGULATORY INVESTIGATIONS: PRIVILEGES, CONFIDENTIALITY AND CURRENT LEGAL AND ETHICAL ISSUES

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Recent high-profile investigations of insurance companies, agents and brokers have resulted in penalties and restitution of hundreds of millions of dollars. The fact investigations which preceded these settlements have been done within the legal authority of state insurance regulators and state attorneys' general. Those investigations entail unique discovery, confidentiality and privilege issues which are not usually present in ordinary business litigation.

In this article we will examine current legal and ethical developments affecting insurance regulatory investigations. In many cases the conclusions that can be drawn are applicable to other types of state and federal regulatory investigations as well. The preeminence of state authority over the insurance industry, as well as the state's role in licensing and regulating attorneys, mean that rules and lessons to be learned will vary from state to state. However, there are some common issues and trends which are noteworthy and deserving of further examination.

Attorney-client Privilege

Erosion of the attorney-client privilege seems to be spreading in a number of investigatory environments.¹ This erosion extends to work product privilege as well as attorney-client privilege. Concern over this development has been so great that American Bar Association President Robert Grey formed a Presidential Task Force on Attorney-Client Privilege in October, 2004. The purpose of the Task Force is to examine the privilege, its purposes and controversies surrounding it.²

In an insurance regulatory setting, an insurer's counsel could well have extraordinarily detailed knowledge of the facts and legal issues surrounding any insurance regulatory matter. When business corporations, including insurers and their agents, become aware of questionable conduct and regulatory interest in that conduct, a common response is to retain outside counsel to conduct an investigation for the company. Such was the case in the New York Attorney General's investigation of Marsh & McLennan Companies and AIG, Inc. The results of those special investigations by outside counsel subsequently can provide a road map for a regulatory investigation. As a regulator becomes aware of those investigations by outside counsel, the pressure on the regulated entity to turn over the results of the investigation are intense.

Even in the context of an insurer's ordinary day to day communications with its inside and outside counsel, there can be pressure on an insurer to waive any privilege with its counsel. As a state licensed business, insurers are always concerned about maintaining good working relationships with their regulators. Understandably, insurers will take very seriously a request by a regulator, whether in the context of a market conduct examination or other enforcement proceeding, to waive attorney-client privilege.

The attorney-client privilege has a long common law history dating back to English common law.³ In the United States, the attorney-client privilege has found its way into both the Rules of Evidence and the Rules of Professional Conduct. The Rules of Evidence often prevent the introduction of privileged information into legal proceedings.⁴ The Model Rules of Professional Conduct prevent attorneys from disclosing confidential information obtained from a client.⁵ The highest courts of the land have not been reluctant to support the attorney-client privilege. In *Swidler & Berlin v United States*,⁶ the United States Supreme Court noted that the attorney-client privilege "is one of the oldest recognized privileges for confidential communications" and held that the privilege even survives the death of the client.

For business corporations, a seminal case on attorney-client privilege is *Upjohn Company v United States*.⁷ In that case, the Supreme Court held that a corporate entity can possess the right to assert an attorney-client privilege. For an insurer, the question to be addressed is what types of communications between corporate lawyers and the corporate employees are covered by the privilege.

In general, ordinary business communications will not be subject to the attorney-client privilege. On the other hand, a lawyer rendering advice that is predominately of a legal character would be subject to the privilege.⁸ Obviously,

in-house counsel can offer both business and legal advice and the distinctions between the two may sometimes be hard to define.

Waiver Of The Privilege

As mentioned previously, even assuming communications requested by regulators are subject to the attorney-client privilege, the regulated party may consider waiver of that privilege and production of the requested communications. However, there are consequences from disclosure of privileged information to regulators that exists beyond the context of the particular governmental investigation. For example, if an insurer waives the attorney-client privilege and discloses confidential information to regulators, the privilege could be deemed waived as to third parties as well. Several federal courts have held that organizations disclosing privileged information to a government investigator without an agreement to keep the information confidential lose the privilege as to the information disclosed.⁹ Although a contrary position was taken by the Eighth Circuit,¹⁰ more recent courts have rejected the notion of a selective waiver.

Public Record Laws

Another source of possible protection for information given to insurance regulators could be state public records laws. State laws commonly provide that documents produced to regulatory agencies are confidential during the period of an investigation.¹¹ In an attempt to extend data protection beyond the period of the investigation, insurers may attempt to negotiate confidentiality agreements preventing subsequent disclosure of communications produced to the regulator.

Regulators and attorneys' general typically are hostile to attempts to create and enforce confidentiality agreements viewing their responsibility so as to require more rather than less disclosure. As one court noted, "there is a presumption in favor of a common law right of access to civil court records."¹²

However, even if successfully negotiated, a confidentiality agreement may not provide the protection that it appears to provide. For example, in a Sixth Circuit decision, the court held that a corporation could not continue to assert the attorney-client privilege in regard to non-governmental entities after the corporation selectively waived the privilege by releasing confidential information to government investigators.¹³ Even though the company had entered into a confidentiality agreement with the government specifically stating that the disclosure of the information did not constitute a waiver of privilege, the privilege was lost.

In a recent Minnesota Court of Appeals case, the court considered whether the state Attorney General, who had obtained certain documents in an antitrust investigation, would be allowed to disclose those records in subsequent litigation, notwithstanding the fact that the documents had been designated confidential pursuant to a confidentiality agreement with the Attorney General. The trial court had found that both the confidentiality agreement and a court order contained a commitment by the state to protect as confidential all information produced. However, the Court of Appeals found that the State could challenge the confidentiality of the documents and use them in subsequent litigation.¹⁴

The Court of Appeals also addressed a question presented by the appellant as to whether or not the First Amendment protected the documents from disclosure. The Court had little difficulty finding that the proposed disclosure of the documents would not interfere with the freedom of association rights of the petitioner, notwithstanding that some of the communications were produced in concert with other pharmaceutical companies and their trade association.

Regulatory Consequences of Waiver

As was stated at the outset, even if privilege could be asserted as to production of certain documents, there may be an incentive for the regulated entity to produce the documents. In particular, it may be perceived that production of the documents will engender good will with the regulator or the regulator's counsel. That good will could manifest itself in a decision not to take regulatory enforcement action, or, subsequently, in a reduced or diminished settlement or penalty.

While the incentives at the state level for waiver may be somewhat amorphous, federal regulators have made an effort to quantify the benefits of waiver of privilege. In 2004, the United States Sentencing Guidelines Commission amended its commentary on the sentencing guidelines to reward organizations that “provide timely and thorough disclosure of all pertinent information known to the organization.”¹⁵ For a company faced with a federal criminal prosecution, this guideline might provide ample incentive to waive privilege.

In addition, several federal regulatory agencies have adopted policies intended to reward disclosure of privileged information. In particular, the United States Department of Justice in the “Thompson Memorandum” focused on the consequences of cooperation with regulators as reflected in plea agreements.¹⁶ That memorandum comments on an organization’s “timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents” as a legitimate factor to consider in structuring a plea agreement. Certainly, waiver of privilege by a corporation could be considered “cooperation” with the investigators.

Conclusion

Clearly, multiple factors must be considered in determining, first of all, whether or not a privilege exists as to certain information, whether it can be protected by means of confidentiality agreements or otherwise, and the consequences of disclosure of that protected information. A balancing of both legal considerations and business concerns will be required in the context of an insurance regulatory investigation. As a part of that balance, companies will no doubt be required to consider both the increasing erosion of privileges such as the attorney-client and work product privileges and the regulatory and enforcement pressures that can be brought to reward disclosure of privileged or confidential information.

¹ “The Squeezing of Lawyer-Client Privilege,” *New York Times*, September 7, 2005.

² See Report of the American Bar Association’s Task Force on the Attorney-Client Privilege, *The Business Lawyer*, Vol. 60, May 2005.

³ See Paul R. Rice, *Attorney-Client Privilege in the United States* Sections 1:1-1.3 at 6-7 (1999).

⁴ See e.g. Minn. Stat. § 595.02 (2004).

⁵ See Model Rules of Professional Conduct, R. 1.6 (2000).

⁶ *Swidler & Berlin v United States*, 524 US 399, 403 (1998).

⁷ *Upjohn Company v United States*, 449 US 383, 395 (1981).

⁸ *Spectrum System International Corporation v Chemical Bank*, 78 NY 2d, 371, 378; 575 NYS §§ 809, 814 (1991).

⁹ See *United States v. Massachusetts Institute of Technology*, 129 F. 3rd, 681, 685 (2d. Cir. 1997).

¹⁰ See *Diversified Industries, Inc. v Meredith*, 572 F. 2d 596, 611 (8th Cir. 1978).

¹¹ See e.g. Minn. Stat. § 13.39, Subd 2 (2004).

¹² See *State ex rel. Humphrey v. Philip Morris, Inc.*, 606 NW 2d 676, 686 (Minn. Apr. 2000) review denied (Minn. Apr. 25, 2000)

¹³ *See In Re Columbia/HCA Health Care Corp. Billing Practices Litigation*, 293 F. 3rd, 289, 304 (6th Cir. 2002).

¹⁴ *Id.*, at 7.

¹⁵ US Sentencing Guidelines, Commentary § 8C2.5.

¹⁶ *See* Memorandum from Larry D. Thompson, Deputy Attorney General, US Department of Justice (Jan 20, 2003).