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REPRESENTATIONS & WARRANTIES INSURANCE AND PRIVILEGE

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Syed S. Ahmad, Richard Warren, and Patrick M. McDermott

Representations and warranties ("R&W") insurance continues to cement itself as a viable alternative to traditional indemnification in many corporate mergers and acquisitions. As the use of R&W insurance continues to increase, R&W policyholders increasingly face insurance-related issues similar to those that all policyholders encounter.

As one example, policyholders often receive requests for information from insurance companies that encompass information protected by the attorney-client privilege. Whether to provide privileged information to an insurance company can be a difficult decision. On the one hand, while some courts have held that cooperation requirements do not necessarily require the disclosure of privileged information,[1] providing privileged information can foster a policyholder's relationship with its insurer, can increase the chances of getting claims paid, and can avoid potential coverage defenses. On the other hand, disclosing privileged information to a third party may result in loss of the privilege, which can potentially harm a policyholder in a dispute with a third party or in any future dispute with its insurer.

R&W insurance raises these same concerns. If a claim arises, an R&W insurer's requests may involve privileged information when counsel is involved in investigating, prosecuting, or defending the claim. After a review of some relevant law on disclosure of privileged information to insurance companies, this article examines the policyholder's options in the second circumstance.

Disclosing Privileged Information May Result in Waiver

As a general matter, whenever an entity discloses privileged information to a third party, courts may find waiver of the privilege. But, courts will not necessarily find waiver due to various doctrines such as the common-interest doctrine. Generally speaking, under that doctrine, disclosure of privileged information to a third party will not waive the privilege if the privilege holder and the third party share a common interest. Courts have applied the common-interest doctrine to find that disclosure of privileged information to an insurance company does not result in waiver. However, state law varies widely on this issue.

For example, in Texas, courts refer to the common-interest doctrine as the allied-litigant privilege because Texas law requires that the communications be in the context of a pending action. Under that rule, communications between an insured and its insurer's lawyer in a workers' compensation proceeding against the insurer were not protected because the insured was not a party to the lawsuit and because the communications were not with the insured's lawyer.[2]

As another example, New York's highest court recently held that the common-interest doctrine applied only to common legal interest in pending or anticipated litigation.[3] Thus, disclosures of privileged information to insurers may result in waiver if they are not made in connection with pending or anticipated litigation.

Even in states with a more traditional view of the common-interest doctrine, courts may not find a common interest between policyholder and insurer. Instead, they will examine the facts to decide whether a common interest in fact exists between the policyholder and the insurer and determine, based on those facts, whether disclosure to an insurer waives the privilege. Where the insurer acknowledges coverage or must provide coverage, courts are more likely to find that the common-interest doctrine would protect the privilege if the policyholder shares privileged information with its insurer.[4] Where the insurer denies coverage, courts are less likely to arrive at that conclusion.[5]

Because of the variations among the states, whether a court will find waiver of privilege due to a policyholder's disclosure of privileged information to an insurer usually is highly dependent on which law applies. And, choice-of-law principles that courts use to decide privilege issues often provide no clear answer as to which state's law will apply given that privileged communications frequently involve parties in different states and that those locations can differ from the state whose law applies to the insurance policy and the state in which any dispute is resolved.

Thus, policyholders likely cannot avoid the risk of waiver and therefore they should consider how to minimize that risk, both when negotiating coverage and after a claim arises.

Minimizing Risk of Waiver When Purchasing Coverage

Policyholders can attempt to minimize the risk of privilege waiver when purchasing R&W coverage. Many R&W insurers are amenable to reasonable provisions to deal with this issue.

To altogether avoid the dilemma of whether to disclose privileged information, a policyholder can seek an express provision stating that it is not required to disclose privileged information to the insurer. Such a provision would dispense with the need to balance the risk of the insurer denying coverage due to an alleged failure to cooperate with the risk of waiving privilege by disclosing such information to the insurer.

Alternatively, the policyholder can request a provision that disclosure is not required if it reasonably believes that disclosure of privileged information to the insurer would result in waiver or that disclosure is not required where maintaining the privilege cannot be reasonably assured. In most situations, such provisions should address a policyholder's privilege concerns because, without a reasonable belief that disclosure would result in waiver, the dilemma of whether to disclose privileged information would not exist.

To protect against rare instances where insurers may insist that privileged information must be disclosed even if there is a reasonable likelihood that disclosure will waive privilege, R&W policies should at least require that the insurer make good faith effort to preserve the policyholder's privilege, as is the minimum standard in many R&W policies. Policyholders may then rely on such a provision to avoid waiver since an insurer's good faith efforts to preserve privilege should include not requiring the policyholder to provide privileged information if there is a reasonable risk of waiver.

Minimizing Risk of Waiver After a Claim Arises

Attempts to curtail potential waiver of privilege should continue after a claim arises. One option is to enter into a common-interest agreement with the insurer. Policyholders should remain wary of such agreements as a talisman to avoid waiver. Courts may find that the common-interest doctrine does not protect a privilege if the doctrines requirements are not met, even if the parties entered into a common-interest agreement.[6]

Policyholders should also consider an agreement with the insurer that the disclosure of some privileged information will not operate as a waiver as to other privileged information that was not disclosed to the insurer and that the insurer will not make any arguments for non-disclosed privileged information based on any such waiver. This type of non-waiver agreement could minimize the scope of any waiver relative to the insurer in any future dispute with an insurer.

Of course, the best way to minimize the risk of waiver resulting from disclosure is to not disclose the privileged information in the first place. As noted above, this choice is not without peril since insurers may try to use a policyholder's refusal to provide privileged information as a basis to assert a breach of any cooperation requirement.

One way to minimize that peril is for policyholders to work with insurers to find ways to mitigate the risk that privilege is waived. In circumstances where there is a reasonable likelihood that disclosure of the requested information would result in a waiver, insureds can agree to provide the insurer with comparable documents or information while still preserving the privileged status of (or applicability of work product doctrine to) any documents or information that is not provided.

Key Takeaways

In sum, disclosure of privileged information to an R&W insurer during the claims process may result in waiver of that privilege. Thus, policyholders should explore ways to protect against that possibility. The first opportunity arises during insurance contract negotiations, during which policyholders can seek provisions to maximize their ability to maintain the provision. The second opportunity comes after a policyholder provides notice of a claim. At that time, policyholders can seek additional agreements from insurers to help protect the privilege or, if necessary, may ultimately decide to not provide privileged information.

Notes

[1] *Metropolitan Life Ins. Co. v. Aetna Cas. and Sur. Co.*, 730 A.2d 51 (Conn. 1999) (finding that refusal to provide privileged information did not breach cooperation clause); *Eastern Air Lines, Inc. v. U.S. Aviation Underwriters, Inc.*, 716 So. 2d 340 (Fla. Ct. App. 1998) (same). *But see Waste Management, Inc. v. International Surplus Lines Ins. Co.*, 579 N.E.2d 322 (Ill. 1991) (finding that privilege did not bar insurer's discovery of communications between insured and insured's defense counsel due to cooperation clause and common-interest doctrine).

[2] *In re XL Specialty Ins. Co.*, 373 S.W. 3d 46, 51–52 (Tex. 2012).

[3] *See Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616 (N.Y. 2016).

[4] *See Independent Petrochemical Corp. v. Aetna Cas. and Sur. Co.*, 654 F. Supp. 1334, 1365 (D.D.C. 1986) (finding that insurer that was obligated to defend underlying action was entitled to privileged information concerning underlying liability action).

[5] *See Pittston Co. v. Allianz Ins. Co.*, 143 F.R.D. 66, 71 (D.N.J. 1992) (finding that insurer that had denied coverage was not entitled to privileged information concerning underlying liability action).

[6] *59 South 4th LLC v. A-Top Ins. Brokerage, Inc.*, 2017 WL 106648 (N.Y. Sup. Ct. Jan. 10, 2017) (finding that common-interest doctrine did not protect privilege despite common-interest agreement between parties).

About the Authors

Syed S. Ahmad and **Richard Warren** are partners and **Patrick M. McDermott** is an associate at **Hunton & Williams LLP**. Mr. Warren advises clients in connection with mergers and acquisitions, corporate finance, corporate governance, and general commercial matters. Mr. Ahmad and Mr. McDermott represent clients in connection with insurance coverage, reinsurance matters, and other business litigation. The authors may be reached at sahmad@hunton.com, rwarren@hunton.com, and pmcdermott@hunton.com, respectively.

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