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Illinois Coverage Basics

Attorney-Client Privilege Is Not Available To Insureds Who Resist Insurers' Investigation And Requests For Information.

Under most liability insurance policies, the insurer is given broad rights to investigate claims and request information from its insured. Liability policies also generally impose a corresponding duty to cooperate upon the insured. Nonetheless, insureds are sometimes reluctant to freely share information with their insurers, particularly when litigation is expected on coverage issues. Illinois has a unique rule favoring disclosure under these circumstances.

Illinois law provides that when a coverage dispute exists, the insured may not assert attorney-client privilege as a basis for withholding information from its insurer. In contrast, the law is to the contrary in virtually every other jurisdiction that has considered the issue. Outside Illinois, courts commonly recognize the right of insureds to withhold information from their insurers based on assertions of attorney-client privilege. However, in Illinois the privilege will not support efforts of an insured to withhold production from its insurer.

Illinois' unique rule governing attorney-client privilege in the context of insurer-insured disputes finds its source in a 1991 Illinois Supreme Court opinion entitled *Waste Management, Inc. v. International Surplus Lines Insurance Company*, 144 Ill.2d 78, 579 N.E.2d 322. In *Waste Management*, insurers and insureds filed cross actions for declaratory judgment disputing coverage for environmental liabilities. During the course of discovery in the case, the insurers in *Waste Management* requested production of defense counsel's files in the underlying litigations, but the insureds refused to fully comply, citing the attorney-client privilege.

The Illinois Supreme Court ruled in favor of the insurers in *Waste Management*, holding that the attorney-client privilege does not permit an insured to withhold information requested by its insurer when coverage is questioned. The court's *Waste Management* opinion explained that the purpose of the attorney-client privilege is to promote frank and full consultation between client and attorney, but it is not absolute. As the privilege is merely an exception to the general rule requiring disclosure, the *Waste Management* court ruled that in coverage cases the privilege should be strictly confined to "its narrowest possible limits":

“[T]he attorney-client privilege is limited solely to those communications which the claimant either expressly made confidential or which he could reasonably believe under the circumstances would be understood by the attorney as such.”

The *Waste Management* court concluded that in litigation concerning insurance coverage, an insured cannot properly use the attorney-client privilege to escape its production obligations to an insurer. The Illinois Supreme Court identified two distinct reasons why the privilege should not be available to an insured in such a case.

First, the cooperation clause, which is a common feature of most liability policies, negates any reasonable expectation on the part of an insured that the contents of its defense counsel's file will be held in confidence. The *Waste Management* opinion observes that "the cooperation clause imposes a broad duty of cooperation and is without limitation or qualification." Having entered into an insurance agreement stating a duty to cooperate, the insured cannot thereafter legitimately expect that such materials would be protected from production. The *Waste Management* court said that, even where an insurance policy does not contain an express duty to cooperate, the duty should be implied and will negate any expectation of confidentiality on the part of the insured, just as if the policy had specifically provided for such a duty.

The second reason the *Waste Management* court found that the insureds could not assert the attorney-client privilege to avoid their duty of production is the applicability of the "common interest doctrine." The court explained that under the "common interest doctrine," when two parties represented by the same attorney share a common legal interest, their communications with the attorney will not be privileged in a later controversy between the two of them. The rationale is that when each knows that it is represented by the same attorney, it must expect that the attorney will share information with them both. The court found that even where a coverage dispute exists, the insurer and the insured have a common interest in defending the underlying claim. Consequently, the "common interest doctrine" applies and precludes the assertion of attorney-client privilege by an insured seeking to avoid an insurer's request for documents or information.

Importantly, the *Waste Management* decision does not prohibit an insurer from resisting production on grounds of attorney-client privilege. Although the one-sided nature of this ruling may initially seem somewhat surprising, it is clear that an insurer does not have a duty to cooperate under the terms of a liability insurance policy. Moreover, an insurer typically asserts attorney-client privilege to protect communications with the insurer's own coverage counsel, as to which there is no arguable "common interest" that would destroy the privilege.

Waste Management can be a very powerful discovery weapon for insurers in coverage litigation in Illinois. But it also applies to the investigation of claims before litigation. Under the *Waste Management* ruling, insureds are prohibited from refusing insurers' requests for information on grounds of attorney-client privilege, whether or not coverage litigation has been commenced.

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If you have questions or would like to discuss the subject of this article further, please feel free to contact James K. Horstman at Cray Huber Horstman Heil & VanAusdal LLC, 303 West Madison Street, Suite 2200, Chicago IL 60606; 312-332-8494; jkh@crayhuber.com.