ADMINISTRATIVE INVESTIGATIONS AND THE POTENTIAL LOSS OF THE ATTORNEY-CLIENT PRIVILEGE

Douglas A. Mang, Esq.
Wendy Russell Wiener, Esq.
Connie Pecori Crews, Esq.
(850) 222-7710

An insurer's counsel may be called upon to participate in an investigation conducted by a state or federal agency. Participation in the investigation can destroy the privileged nature of some communications between an insurer and its attorneys, both in-house and outside. In order to avoid such destruction, counsel must proceed carefully when "cooperating" with an agency investigation.

An insurer cooperating with an agency investigation must consider the selective waiver doctrine which frees a client to cooperate with an agency investigation without risk of waiving the privilege protecting attorney-client communications. Several federal courts and a handful of state courts have considered a client's assertion of the privilege following the client's disclosure of the "privileged" communications to an agency conducting an investigation. Following the establishment of the doctrine, many courts turned away from the concept holding instead that the very purpose of the attorney-client privilege, to encourage full and open communication between lawyer and client, disagrees with a client's use of the privilege as a convenient shield. Reduced to essentials, those courts reasoned that communications are either confidential or they are not — confidentiality being the cornerstone of the privilege. More recently however, one Florida appellate court, considering an insurer's assertion of the privilege over communications previously disclosed to two state agencies, declined to rule that the insurer had waived its evidentiary privilege, which would make the communications admissible in the context of civil litigation.[1] In failing to pass upon the issue, the Florida court has signaled a reinvigoration of the selective waiver doctrine. This article provides some limited instruction to counsel advising insurers on securing the privilege when cooperation with the agency investigation is "compelled."

The Agency Investigation: To Cooperate or Not To Cooperate

With the threat of possible administrative action looming, an insurer may be compelled to "cooperate" with an administrative agency's conduct of an investigation. In so doing, the insurer may even be compelled by subpoena or "friendly request" to turn over information the insurer fully believes is protected from disclosure by the attorney-client and other privileges.

An insurer intent on resolving its differences with a government agency frequently finds itself in a precarious position. Often, the regulator "requests" that the insurer cooperate with a governmental investigation by disclosing information that otherwise would be protected by the attorney-client or work-product privileges. The insurer desires to cooperate with the regulator in its investigation, either to persuade the regulator of the party's innocence or to assist the government in pursuing other potentially culpable parties. While the disclosure might help the insurer to resolve its differences with the agency, it is important for the insurer to be aware that a court, considering the admissibility of such disclosures subsequently, may order the disclosure of this otherwise privileged information to third parties seeking to take advantage of the investigative work of the party and/or its legal counsel.

The Selective Waiver Doctrine

To accommodate both the government's interest in obtaining an insurer's cooperation and a client's need to maintain the confidentiality of its disclosure, some courts have applied the doctrine of limited or selective waiver. The doctrine of selective waiver provides that a party that discloses information protected by the attorney-client privilege or work-product doctrine in order to cooperate with a government agency waives its privileges only as against the government; it does not waive them completely. Thus, the information is not vulnerable to discovery by a third party in a subsequent proceeding.[2]

The United States Court of Appeals for the Eighth Circuit created the limited or selective waiver doctrine.[3] The Eighth

Circuit found that the voluntary disclosure of privileged materials pursuant to an agency subpoena resulted only in a limited waiver of the privilege. The court reasoned that "[t]o hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers.[4] Furthermore, *In re Grand Jury Subpoena*[5], the Court followed the controlling law of the Eighth Circuit established in *Diversified* in concluding that no waiver occurred where a party voluntarily turned over privileged documents to an agency.

Yet, since *Diversified*, the Second, Third, Fourth, and District of Columbia Circuits have addressed the doctrine of limited waiver but have refused to apply it. Essentially, the Courts have found the doctrine itself fundamentally inconsistent with the stated purposes of the attorney-client privilege and work-product doctrine, specifically to encourage clients to fully disclose all pertinent facts relative to the legal services sought. These several Courts all ruled that voluntary disclosure of privileged documents to an agency destroyed the attorney-client privilege.[6] The *Permian* court, cited by commentators as the ultimate rejection of *Diversified*, stated that the selective waiver concept had "little to do with" the privilege's purpose: protecting the confidentiality of attorney-client communications.[7]

More recently, a Florida appellate court was called upon to determine whether certain documents obtained by a state agency during the course of an investigation were public records subject to open public inspection pursuant to Florida's public records law, Chapter 119, Florida Statutes.[8] In *Hill*, an insurer sued the state's Attorney General and Department of Insurance to block production of records obtained during an investigation of the company which were sought by the estate of a policyholder for use in the estate's private civil litigation against the company charging unfair sales practices.

In March 1995, the Florida Attorney General's Office (AG) and the Florida Department of Insurance (DOI) joined more than 35 other states in investigating allegations that appellee had been engaged in misleading insurance sales practices during the 1980's and 1990's. During the course of Florida's investigation, both the AG and DOI obtained, through voluntary compliance with investigative subpoenas, thousands of documents from the insurer and sworn testimony from both current and past employees of the insurer.

In February and March 1997, an administrative proceeding against the insurer to revoke its license to sell insurance and a class action lawsuit against the insurer by its policyholders in federal court in New Jersey were both resolved by mutually agreeable settlements among the parties and insurance regulators from all 50 states. Many of the thousands of policyholders that opted out of the federal class action continued to independently pursue litigation against the insurer. A personal representative of one of these policyholders, pursuant to Chapter 119, Florida Statutes, requested any and all documentation, including sworn statements, depositions and videotapes, assembled or used by both the AG and/or the DOI during their investigations into appellee's business practices.

In March 1997, the insurer filed suit against the AG and the DOI, seeking to prohibit production under Florida's public records law of what appellee characterized as "stolen" and "misappropriated" material obtained by the agencies during the course of their investigations. The insurer alleged in its Complaint and Motion for Temporary Injunction that these "stolen" and "misappropriated" documents were either attorney-client privileged, work-product privileged, or privileged under New Jersey's self-critical analysis doctrine, and that they had been disclosed to the Florida agencies without the insurer's knowledge or consent.[9]

In addition to seeking return of some of the disputed materials, the insurer also sought a judicial declaration regarding the confidentiality of the records and a permanent injunction prohibiting disclosure of any of the materials. In addition, the insurer sought temporary injunctive relief to prohibit both the AG and DOI from disclosing the disputed documents to anyone with currently outstanding public records requests that encompassed the disputed materials. In determining whether materials were subject to disclosure pursuant to the Florida public records law, the court performed a two-step analysis. It first determined whether the documents sought were, in fact, public records and whether the documents were exempt from public disclosure as a result of a constitutional or statutorily created exemption.

The relevant Florida law[10] defines in pertinent part the term "public records" to include, [A]ll documents . . . received pursuant to law or ordinance or in connection with the transaction of official business by any agency. Also, a portion of the Florida Insurance Code[11] indicates that Department of Insurance investigative records collected during investigation of probable violations of the state insurance code are public records subject to disclosure once the

investigation is closed.

Using the statutory framework provided in Florida's public records law, the court reversed the decision of the trial court to exempt from disclosure records *obtained lawfully by the government during the course of an investigation*, but specifically noted that the court would not rule on the ultimate admissibility of the records based on the attorney-client privilege in pending or subsequent litigation.[12]

Clearly, that Florida court was faced with an insurer who claimed a privilege over various documents that were either voluntarily disclosed or disclosed to an administrative agency by subpoena. While the court's central ruling regarded the public nature of the documents when the investigation ultimately closed, the recognition of the traditional waiver doctrine would clearly have led the court to the conclusion that a waiver had in fact taken place. Yet, instructively, the Florida court left unanswered the question of whether or not the documents will indeed be deemed admissible or privileged in the context of the civil case itself. Perhaps the *Hill* case signals a return, at least in Florida, to acceptance of the selective waiver doctrine.

Avoiding Inadvertent Waiver

To avoid ever having to employ the selective waiver doctrine, however, counsel is well served to instruct insurers to make certain that, when cooperation with an agency investigation is necessary, the appropriate steps are taken to ensure that the privilege is not waived. Indeed, at least one commentator instructs that the client wishing to avail itself of the privilege "must establish a factual record from the outset that provides compelling reasons for a court to apply the selective or limited waiver doctrine."[13]

While counsel must be mindful that no guarantee exists that a party's disclosure to a government agency will be privileged with respect to other civil litigants, several steps may be taken that might, if necessary, persuade a court to conclude that the client has not waived its attorney-client privilege. First, the client must endeavor to preserve the attorney-client privilege from the outset. The inside counsel must ensure that the communications with the insurer client are made to further counsel's provision of legal rather than business advice to the client. Second, the insurer should limit its disclosures to the government. As Ms. Burke writes:

> The party to whom the disclosure is made often affects the scope of waiver, with courts affording greater protection when the disclosure is made to a governmental entity rather than a private civil litigant. Although a significant number of courts have found waiver even though the parties entered into an express agreement, the distinguishing feature is with whom the agreement is made. For public policy reasons alone, courts elevate an agreement with the government above agreements between private parties.[14]

Third, counsel must urge the insurer to negotiate a written agreement with the agency. Although at least one court has ruled that even if the disclosing party requires, as a condition of disclosure, that the recipient maintain the materials in confidence, this agreement does not prevent the disclosure from constituting a waiver of the privilege; it merely obligates the recipient to comply with the terms of any confidentiality agreement."[15] However, other courts have suggested that an express confidentiality agreement with the governmental agency may act to preserve the privilege.[16] The courts' rulings in this area teach that in order for such an agreement to stand up to scrutiny, the agreement itself should establish the client's *reasonable* expectation that the agency will keep the privileged documents confidential.[17] Although there is not yet a judicial laundry list of necessary components for an effective confidentiality agreement, the following terms should be included in any confidential nondisclosure agreement:

> First, write the agreement in clear and unambiguous terms. Second, limit the privileged disclosure to a specific governmental entity. Third, the governmental entity must agree not to disclose the documents to third parties, including other government entities. Fourth, the agreement must affirmatively state that the government entity recognizes that any submission of privileged documents is confidential and privileged. Fifth, the government entity must agree not to assert that disclosure waived the privilege. Sixth, obtain the government's assistance in taking affirmative steps to enforce the agreement in any subsequent litigation. Seventh, if applicable, note the harm to the government

> if disclosure occurs. Eighth, have the agreement governed by the law of the Eighth Circuit. Ninth, do not permit access to the privileged documents, much less produce them, until the disclosing party has obtained and memorialized an unambiguous and comprehensive confidentiality agreement with the government.[18]

Fourth, counsel should build a factual record that the insurer and the agency to whom disclosure will be made are not adversaries. Of course, since the courts have been less than instructive regarding what constitutes a non-adversarial relationship, the disclosing party must provide the court with as much evidence as possible, either through words, conduct, or other evidence.[19]

Fifth and finally, given the holding in *Hill*, it is advisable to secure from the agency an agreement that once the investigation is complete, the memorializations of communications or documents over which a privilege is claimed will be returned to the insurer. Otherwise, although the communications arguable do not forfeit their privileged nature, the *Hill* court considers such memorializations and documents public records.

Conclusion

An insurer's counsel must proceed with extreme caution when "cooperating" with an agency investigation on behalf of the insurer else risk waiver of the attorney-client privilege protecting the communications between that counsel and its client, the insurer.

Endnotes

1. *Hill v. Prudential Insurance Company of America*, 701 So.2d 1218 (Fla. 1st DCA 1998).

2. *See*, generally, N. Burke, "The Price of Cooperating With the Government: Possible Waiver of Attorney-Client and Work-Product Privileges," Baylor Law Review, Winter 1997.

3. *Diversified Industries v. Meredith*, 572 F.2d 596 (8th Cir. 1978).

4. *Id*. at 611.

5. *In re Grand Jury subpoena*, dated July 13, 1979, 478 F. Supp. 368 (D. Wis. 1979).

6. *See*, *United States v. Massachusetts Institute of Technology*, 129 F.3d 681 (1st Cir. 1997); *In re Steinhardt Partners, L.P.*, 9 F.3d 230 (2d Cir. 1993); *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3rd Cir. 1991); *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988); *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981).

7. *Permian*, 665 F.2d at 1220.

8. *Hill*, 701 So.2d 1218.

9. *Id*.

10. Section 119.011(1), Florida Statutes (1995).

11. Section 624.319(3), Florida Statutes.

12. *Id*. at 1220.

13. N. Burke, "The Price of Cooperating With the Government: Possible Waiver of Attorney-Client and Work-Product Privileges," Baylor Law Review, Winter 1997 at 60.

14. *Id*.

15. *Bowne of New York City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 481 (S.D.N.Y. 1993).

16. *See*, e.g. *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993) (rejecting application of the selective waiver doctrine, but noting that disclosing party failed to obtain an express confidentiality agreement to preserve its privilege and that, had it obtained such an agreement the case may have been decided differently).

17. *See*, e.g., *Permian*, 665 F.2d 1214.

18. N. Burke, "The Price of Cooperating With the Government: Possible Waiver of Attorney-Client and Work-Product Privileges," Baylor Law Review, Winter 1997 at 63.

19. *Id*. at 68.