Does Passing Legal Documents Through Reinsurance

Intermediaries Waive Privilege?

By

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I. Introduction

Most reinsurance in the world is placed through reinsurance intermediaries (also called reinsurance brokers) and the reinsurance contracts they use typically call for all communications between cedents and reinsurers to pass through the intermediary. Given this fact, the recent case of *Certain Underwriters at Lloyds v. AMTRAK*, 2016 U.S. Dist. LEXIS 27041 (E.D. N.Y.) is jarring. In this case, the court ruled that passing documents from litigating counsel to London Market Insurers through brokers waived attorney-client privilege. The purpose of this article is to explore selected case law on point and to place the *AMTRAK* case in proper perspective.

II. Case Law Directly on Point

An excess insurer retained a coverage counsel to provide an opinion on a disputed claim in *U.S. Fire Ins. Co. v. General Re Corp.*, 1989 U.S. Dist. LEXIS 8280 (S. D.N.Y.). A claims examiner summarized the opinion and the summary was provided to the excess insurer's reinsurers through an intermediary. Another excess insurer sought the memo through discovery arguing that work product privilege had been waived by passing the summary through a third party *i.e.* the intermediary. The court ruled that the privilege had not been waived holding:

> Since the broker/intermediary is merely a conduit for the relay of correspondence to U.S. Fire's reinsurers, disclosure of relayed information to the broker/intermediary is consistent "with the purpose of maintaining the secrecy of [privileged] information from current or potential adversaries." As has been

> noted, "[t]he work product privilege should not be deemed waived unless the disclosure is inconsistent with maintaining secrecy from possible adversaries." There can be no doubt U.S. Fire's reinsurers and the broker/intermediary which served as a conduit between U.S. Fire and its reinsurers were and remain in a community of interest regarding the lawsuit. As such, shared communications among these entities retain their privileged status under the work product doctrine.[1]

Minnesota Sch. Bds. Ass'n Ins. Trust v. Employers Ins. Co., 183 F.R.D. 627 (N.D.Ill.) was a claim dispute between an insured and its excess insurer. The insured argued that the excess insurer had waived work product privilege on three letters by sending them to the excess insurer's reinsurers through an intermediary. Citing to *U.S. Fire Ins. Co. v. General Re Corp.*, the court ruled that the intermediary was merely a conduit for information being forwarded to the reinsurers and as such, did not waive the privilege.

The insured sought documents protected by attorney-client privilege on the basis they were forwarded by the cedent to reinsurers through a reinsurance intermediary in *Am. Safety Cas. Ins. Co. v. City of Waukegan*, 2011 U.S. Dist. Lexis 4854 (N.D.Ill.). The court rejected this argument:

> The Court also is not persuaded by the [insured's] argument that the common interest doctrine does not apply here because the communications were made to a broker rather than the reinsurers themselves. The affidavit of [the cedent's] claims representative . . . makes clear that [the intermediary] served as "[the cedent's] contact to its domestic reinsurers on the Dominquez claim." The Court finds that [the cedent did not waive the privilege by communicating with its reinsurers through [the intermediary].[2]

As excess insurer sought legal documents forwarded through a reinsurance intermediary to multiple reinsurers in the London marketplace in *Certain Underwriters at Lloyd's v. Fidelity & Cas. Co.*, 1997 U.S. Dist. Lexis 19670 (N.D. Ill.) *rev'd on other grounds* 4 F.3d 541 (6th Cir. 1997). The court ruled that the privilege had not been waived:

> Plaintiffs correctly point out that the communicating agent served to "facilitate, control and maintain" privileged communications with Chicago counsel. Plaintiffs are not a single entity but consist of a conglomerate of various insurance companies, and as such the broker agent formed the only effective way for

> Chicago Counsel to communicate with all of the plaintiff entities. Accordingly, we find that plaintiffs have not waived the attorney client privilege by communicating through the broker.[3]

III. A Closer Look at *Certain Underwriters at Lloyd's v. AMTRAK*

One point of distinction between the *AMTRAK* case and those above is that this case involves an insurance broker rather than a reinsurance broker. AMTRAK used London brokers to secure necessary capacity. The court noted that in accord with historical London procedure, U.S. counsel sent reports on litigation to London market brokers who would distribute the information among London market insurers. The court acknowledged that certain communication to third parties did not waive privilege when the third parties are "agents of the lawyer or client and their involvement 'improve[s] the comprehension of the communications between attorney and client' . . . ."[4] Without citing any of the above cases, the court rejected the "conduit" argument and ruled that the privilege was waived:

> Here, however, nothing in the record suggests that the London brokers served any analogous role. Rather, it appears that the London brokers acted as nothing more than an intermediary or clearing house for the Policies. . . .
> . . . .
> The thrust of [the London Market Insurers'] arguments with respect to attorney-client communications sent through the London brokers is that such a practice was "standard" and "necessary" given the London market's structure. [London Market Insurers'] position is unavailing for several reasons. First, the fact that a particular method of distributing and/or retaining documents is standard in an industry does not determine whether that method of distribution comports with the law governing attorney-client privilege. . . .
> . . . .
> Second, although [London Market Insurers] characterize[] the utilization of the London brokers as a necessity, there is nothing in the record to support a finding that this was the only method by which the U.S. lawyers could communicate with the relevant insurers . . . .
> . . . .
> Moreover, the record contains no evidence whatsoever regarding the confidential treatment of the Attorney Reports or other communications through the London brokers . . . .[5]

III. Commentary

It remains to be seen whether the *AMTRAK* case will prove to be an anomaly or a trend. The only material factual difference between the *AMTRAK* case and those cited above is that the *AMTRAK* case involved communications with insurers rather than reinsurers. However, this seems like a weak differentiation when all the cases involve brokers transmitting the same types of information between and among similarly situated parties.

On the anomaly side, it is evident that the *AMTRAK* case is very much at odds with prior case law. On the trend side, it is evident that in the age of the internet: (a) legal documents need not be run through reinsurance intermediaries or insurance brokers to get to insurers and reinsurers; and (b) that controlling the flow of information is more about controlling the business than legal necessity.

ENDNOTES

1 1989 U.S. Dist. LEXIS 8280 *7 (internal citations omitted).

2 2011 U.S. Dist. LEXIS 4854 fn. 1.

3 1997 U.S. Dist. LEXIS 19670 *6.

4 2016 U.S. Dist. LEXIS 27041 *3 (internal citations omitted).

5 *Id.* at *3 – 7.