



Alerts

Pennsylvania Supreme Court Splits on Rationale for Subject Matter Waiver; Avoids Decision on Scope of Privilege for In-House Counsel-to-Client Communication

March 23, 2010

Lawyers for the Profession® Alert

Nationwide Mutual Ins. Co., et al v. Fleming et al, No. 32 WAP 2007 (Supreme Court of Pennsylvania, Western District, January 29, 2010)

Brief Summary

A split decision by Pennsylvania's Supreme Court informs, but was unable to finally decide, the important principal issue on appeal: whether and under what circumstances the attorney-client privilege applies to communications by in-house counsel relating to litigation and reflecting confidential information from the client as well as legal advice to the client. The court instead decided the case by finding subject matter waiver, while disagreeing on the application of that rule here as well.

Complete Summary

The Pennsylvania Supreme Court affirmed a lower court's result by virtue of an even split among the four sitting justices. The discovery dispute arose out of an insurance company's ("Company") suit against its former insurance agents ("Agents"). During the discovery process, Company produced two documents but withheld a third on the basis of attorney-client privilege.

The first produced document was a memo drafted by an in-house lawyer outlining reasons why Company had severed ties with former Agents. It had been sent to a group of employees, including other in-house lawyers. The second pertained to the Company's policy for dealing with Agents' defections. It was drafted by a Company administrator and had been sent to a group of officers and employees.

The third document, which was not produced, contained litigation strategy about the departures. It was drafted by Company's in-house general counsel and sent to Company executives and members of Company's legal team. Among other things, the document contained litigation strategy. It stated that the Company cannot reasonably expect the lawsuits to succeed and that the primary purpose of the litigation was to send a message to current employees.

The trial court reviewed the withheld document *in camera* and found that

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Company waived its attorney-client privilege for the withheld document when it produced the two other documents. The trial court relied materially on its conclusion that the Company had selectively produced two favorable documents on the same subject matter, but withheld the allegedly privileged document, which was less than favorable.

On initial appeal to the Superior Court, the court held that the withheld document was not privileged. It held that the attorney-client privilege protects client-to-attorney communication, but that communications from attorney to client are privileged only to the extent they contain and would reveal confidential communications from the client, thus not including the attorney's legal advice.

The Pennsylvania Supreme Court accepted review to consider the question of the scope of the attorney-client privilege in Pennsylvania law, specifically whether and under what circumstances the attorney-client privilege applies to communications by in-house counsel relating to litigation and reflecting both confidential information from the client as well as legal advice to the client. The Pennsylvania Supreme Court was split 2-2 (with two other justices not participating) on the ultimate question of whether the document was protected from discovery. The consequence of the split was to affirm the result below (requiring disclosure of the document) but without majority approval for the reasoning of either of the lower courts on the questions of privilege or waiver.

Two justices voted to affirm the lower courts' result, discussing privilege law generally but ultimately treating the withheld document as privileged *arguendo* and thus not deciding that issue. Rather, these two justices concluded, as did the trial court, that the Company waived any privilege to the withheld document when it produced the two other documents, particularly because of the Company's apparent attempt to use the privilege as both a sword (with the produced documents) and a shield (with the withheld document). The court found persuasive state and federal case law for recognizing and applying the principle of subject matter waiver.

The two remaining justices voted to reverse the lower courts' result, finding first that the document was privileged, adhering to a 109-year-old precedent that would categorically protect all attorney-to-client communications. These justices relied heavily on the briefs of *amici curiae*, including the Association of Corporate Counsel, recognizing the significant interests at stake in protecting the ability of in-house counsel to communicate candidly with the companies they advise. These justices also would recognize the doctrine of subject matter waiver that is set forth in federal case law and which was applied by the two affirming justices. However, they disagreed with the conclusion of the other two justices. Rather, they would conclude that no waiver occurred here because, although the produced documents were similar to the withheld document, there was not a sufficient subject-matter nexus to merit waiver of the privilege.

The decision can be found at one of the following three sites:

<http://www.courts.state.pa.us/OpPosting/Supreme/out/J-27-2008pco.pdf>

<http://www.courts.state.pa.us/OpPosting/Supreme/out/J-27-2008oisa.pdf>

<http://www.courts.state.pa.us/OpPosting/Supreme/out/J-27-2008oisr.pdf>

Significance of Opinion

This much-awaited decision (the case was argued in March 2008) reflects a significant fissure in the Pennsylvania Supreme Court on how to define the scope of privilege for attorney-to-client communications, not only in the context of in-house counsel communications but also more generally.

The two justices who did venture an opinion on the issue supported categorical protection, even if it means overprotection, of communications from a lawyer to a client.

Note that the parties here did not raise, and thus the court did not consider, the application of the attorney work product doctrine.



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