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Court Upholds Privilege for Discussion of Insurance Coverage Between Insured's Associate General Counsel and Its Board of Directors

June 6, 2013
Insurance Coverage Alert

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State vs. Lead Industries Association, Inc., Rhode Island Supreme Court, No. 2010-288-Appeal (May 10, 2013)

The state of Rhode Island sued several lead paint companies for property damage and other damages caused by the presence of lead paint in state-owned buildings. *State of Rhode Island vs. Lead Industries Association, Inc., et al*., 951 A 2d 428 (R.I. 2008). After defendants prevailed on appeal, they moved for an award of costs under the Rhode Island Rules of Civil Procedure. The state opposed the motion, in part, on the basis that one of the defendants, a paint manufacturer, had not actually incurred the defense costs because those were paid by insurance. In support of its opposition, the state attached three PowerPoint slides from a larger PowerPoint presentation made by the manufacturer's Associate General Counsel to its board of directors. The slides were entitled "Insurance and Lead Litigation," "Reimbursement of Lead Defense Costs," and "Potential Insurance Coverage for Lead Liabilities." The manufacturer had not disclosed the PowerPoint in the litigation or in any other public forum and immediately demanded to know how the state had received a copy of it. The state refused to provide an explanation. Unfortunately, the manufacturer had provided copies of the state's memorandum containing the PowerPoint slides to a blogger and to the Mealey's *Litigation Report: Lead* and immediately demanded that these sources not use the disputed slides.

The manufacturer moved for a protective order trying to seal the PowerPoint slides from further disclosure and to permit discovery into the question of how the state obtained them. The manufacturer submitted an affidavit from its in-house counsel stating that part of his responsibilities were advising the manufacturer's board of directors as to the available insurance coverage. He further stated that he intended the documents to be protected under the attorney-client privilege and the work product doctrine. The blogger had not disclosed any of the materials that were provided to her, and Mealey's agreed not to publish them.

The trial court denied the motion for protective order, but found that there was an attorney-client relationship between the Associate General Counsel and the manufacturer's board. The court found that the material did not qualify as legal

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advice as it was “merely a collection of numbers and statistics, lacking any legal opinions or conclusions” and there was a fact question requiring discovery as to whether the associate general counsel was actually acting in his capacity as a lawyer at the time of the PowerPoint presentation. After discovery, the court concluded that the Associate General Counsel was transmitting “factual and business information rather than serving as a lawyer when he prepared or caused to be prepared” the presentation. Although the Associate General Counsel may have provided legal advice based on the slides, the slides themselves did not contain this legal advice.

On appeal, the Supreme Court of Rhode Island began by stating that the trial court had not made a determination as to whether the lack of protection was pursuant to the work product doctrine or the attorney client privilege.
As to the work product doctrine, the Rhode Island Rule of Civil Procedure 26(b)(3) follows the federal and most state formulations of it. In other words, it is framed in the form of a rule permitting disclosure, unless a party seeking discovery can show that the material is incapable of being obtained from other sources without undue hardship and that all “mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party” are to be protected.

The Supreme Court declined to find that the documents at issue here were “opinion work product,” worthy of absolute immunity from discovery. The Court found that the material here was “factual work product“ (not including the thoughts or mental impressions of counsel), but that the state failed to show that it had substantial need for the materials in preparation of its case and was unable to obtain to the information by other means. The state was forced to admit that the manufacturer had already produced the policies in discovery. Moreover, the state did not have a “substantial need“ for the data because the trial court’s decision allocating the costs did not give a substantial weight to the PowerPoint slides, but rather held that the financial need of the prevailing party for reimbursement was to be balanced against the harm that would be inflicted on a “non-affluent, non-prevailing party,” as well as the good faith of the state in filing the action.

The Supreme Court also rejected the waiver argument made by the state based on the fact that the slides had been disclosed to a blogger and to Mealey’s and the PowerPoint slides had never been listed on a privilege log anywhere and that third parties were actually at the board of directors meeting when the slides were shown.

First, it found that the third parties in the meeting were all high-ranking officers or employees of the manufacturer and that this disclosure did not increase the likelihood the protected content would be revealed to an adverse party.

As to disclosing the material to the blogger and to Mealey’s, the manufacturer did not voluntarily disclose the slides to the state by means of the blogger or Mealey’s, but that the state had already disclosed these in its own pleadings. While the manufacturer’s counsel who provided the materials to the blogger and to Mealey’s should have done a better job of reviewing the material first, the Court found that this did not constitute much carelessness as to waive the privilege. Last, the Court stated that the manufacturer was not obligated to list the slides in a privilege log because the state had never requested documents that fell within that category and courts are, and should be, reluctant to find a waiver simply because a document was not included in a privilege log.

Practice Note

Internal discussions by a client, without outside counsel present, are often the subject of discovery requests by opposing parties. The best way to secure such information from disclosure is to make sure that outside counsel is involved in the discussion. Furthermore, taking appropriate steps to secure documents provided at meetings by collecting them at the end of meetings and making sure that they are only retained by those people who are required to review them will limit the risk of disclosure to an adverse party and claims of waiver. Additionally, before providing documents to media sources it is important to make sure that nothing contained in those documents is something that is arguably privileged. Finally, counsel should be careful that privilege logs are complete and that any document that is covered, or arguably so, by an opponent‘s document requests is listed in the privilege log. Courts do find waivers when counsel fails to designate a document on a log.

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