PLUNKETT COONEY

Attorney-Client Privilege, Related Acts Coverage Update

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The e-POST

Attorney-Client Privilege – Texas

In re: City of Dickinson
--- S.W.3d ---, 2019 WL 638555 (Tex. Feb. 15, 2019)

The Texas Supreme Court ruled that emails exchanged between an insurer's corporate representative and its counsel in advance of the filing of an affidavit by the corporate representative were subject to the attorney-client privilege. The supreme court rejected the City of Dickinson's (City) argument that the privilege did not apply when the corporate representative also served as the insurer's expert witness.

The City purchased a commercial windstorm policy from Texas Windstorm Insurance Association (TWIA). Following Hurricane Ike in 2008, the City sought coverage from TWIA, and later brought a proceeding to recover amounts the City alleged had not been paid out from TWIA. The City filed a motion for summary judgment and, in responding to the motion, TWIA filed an affidavit of its corporate representative, which contained both fact and expert testimony. The City moved to compel discovery of emails exchanged between the corporate representative and TWIA's counsel.

On appeal to the Texas Supreme Court, the City argued that it was entitled to discovery of the emails because the state's discovery rules allowed for production of documents relied on by a party's expert, even if the expert is an employee of a party in the case. The supreme court disagreed, saying that "[w]e will not create a new exception to the [attorney-client] privilege here," because "the City concede[d] that the email communications between [the witness and TWIA]'s attorney would be privileged had [TWIA] not designated [the witness] as a testifying expert." The supreme court held that "our discovery rules do not operate to waive the attorney-client privilege whenever a client or its representative offers expert testimony." The Supreme Court reasoned that allowing discovery of emails relating to the corporate representative's testimony or affidavit may have a chilling effect on attorney-client communications relating to such testimony.

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Related Acts – Ninth Circuit (California Law)

Attorneys Ins. Mut. Risk Retention Grp., Inc. v. Liberty Surplus Ins. Corp.
--- Fed. Appx. ---, 2019 WL 643442 (9th Cir. Feb. 15, 2019

The U.S. Court of Appeals for the Ninth Circuit held that an insurer must contribute to the defense of an attorney who was accused of malpractice twice in two successive policy years. The underlying accusations arose out of attorney J. Wayne Allen's involvement in an estate matter.

Third parties filed malpractice suits against Allen, first on Feb. 1, 2010 (the 2009-2010 policy period) in probate court and again on Sept. 24, 2010 (during the 2010-2011 policy period) in a related civil action. Liberty Surplus Insurance Corp. (Liberty) issued the 2009-2010 policy and Attorney's Insurance Mutual Risk Retention Group Inc. (AIMRRG) issued the 2010-2011 policy. After Liberty declined coverage for Allen in the civil action, AIMRRG, which had been defending Allen, sued Liberty for defense cost contribution. The trial court entered summary judgment in favor of AIMRRG and Liberty appealed.

On appeal, Liberty argued that a provision limiting its liability for multiple related claims applied to preclude coverage. Specifically, Liberty argued that its policy "limits coverage so that if multiple claims regarding the same set of facts are made against an insured in multiple policy periods, the claims are all considered initially made during the policy period in which the first claim is made." Liberty further argued that because claims must be reported during the policy period in which they are made, it had no obligation to defend Allen against the civil action because he failed to report the related claim during the 2009–2010 policy period. The appellate court stated that although Liberty's interpretation "may create an ambiguity in the meaning of the multiple related claims provision as a whole, the district court did not err because ambiguities in an insurance policy are resolved against the insurer." Therefore, the appellate court ultimately affirmed the trial court's grant of summary judgment in favor of AIMRRG.

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