

Insurance Brokers as Agents: Shielding Policyholder/Broker Communications from Discovery. Think Before You Send!

By John G. Nevius

Some courts have held that communications between policyholder and broker are not protected by the attorney-client privilege or work product doctrine and are therefore discoverable by an insurance company in coverage litigation. When the issue arises, it may be too late to properly address privilege.

The author of this article discusses the issue and provides practice points for policyholders and counsel who wish to share privileged communications with brokers.

Insurance brokers can be invaluable resources for policyholders involved in coverage disputes with their insurance companies. Often, the broker possesses specialized or unique information about the policyholder's claim and risk-management program or expertise in handling and presenting similar claims. For these reasons, policyholders faced with a coverage denial and the possibility of ensuing coverage litigation often look to the insurance broker for assistance in developing and implementing litigation or settlement strategies. Some risk managers even routinely copy brokers on all claim-related correspondence.



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Not surprisingly, most policyholders do not consider the fact that some courts have held that communications between policyholder and broker are not protected by the attorney-client privilege or work product doctrine and are therefore discoverable by an insurance company in coverage litigation.

When the issue arises, it may be too late to properly address privilege. However, much depends upon the circumstances and there are cases that have upheld the privilege. In these cases, courts have held that policyholder communications with a broker fall within the scope of the attorney-client privilege and work product doctrine, recognizing that policyholders commonly rely on brokers with

extensive claims experience to assist counsel and others in developing legal advice and settlement strategies. Whether a policyholder's communications with a broker are privileged is a fact-intensive question which typically hinges on whether the policyholder retained the broker, at least in part, as its agent to help with claim adjustment or the formulation of litigation or settlement strategy.

A recent decision of the New York Supreme Court in *TC Ravenswood, LLC v. National Union Fire Insurance*,¹ provides useful guidance for policyholders who rely on brokers in preparation for, or during the course of, coverage litigation. In *TC Ravenswood*, the court, interpreting New York law, held that the attorney-client privilege and work product doctrine protect communications between a policyholder and broker from disclosure where the broker is acting as the policyholder's agent.

Background

TC Ravenswood involved TransCanada Energy USA, Inc.'s claim for insurance coverage related to the breakdown of a steam turbine power generator in Queens, New York. Damage to the rotor component of the turbine was discovered after the turbine vibrated so violently that it could no longer function to generate power and had to be taken out of service for repair. As a result, TransCanada experienced significant business interruption losses, in addition to losses related to the property damage to the turbine. TransCanada subsequently filed a claim for repair costs and business interruption losses under its property insurance policies.

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Featured Article

After TransCanada's insurance companies denied coverage and initiated coverage litigation, TransCanada sought the advice of the insurance broker, which had considerable experience assisting energy providers in presenting claims, advocating for coverage, and assisting counsel in litigation. TransCanada and the broker previously had entered into a consulting agreement specifically providing that the broker would not only help TransCanada place its coverage, but would also assist TransCanada as its agent with respect to claim, litigation and settlement issues. Pursuant to the agreement, the broker communicated with both outside and in-house counsel for TransCanada, and TransCanada employees forwarded attorney-client communications and work product from counsel to the broker. At TransCanada's request, upon receipt of a subpoena, the broker withheld such communications and documents from production in the coverage litigation.

TransCanada's insurance companies moved to compel the documents arguing that by including the broker in communications with counsel or by forwarding otherwise privileged documents to the broker, TransCanada had waived any applicable privileges because the broker was a third party. In response, TransCanada argued that the communications were protected from disclosure because they constituted attorney-client communications or attorney work product, and because the broker was acting as TransCanada's agent, the broker's involvement did not result in any waiver under New York law.

The Decision

The *TC Ravenswood* court denied the insurance companies' motion to compel. Recognizing that communications between policyholder and broker with respect to legal advice are protected by the attorney-client privilege, the court held that "[the broker] was specifically hired by TransCanada and its counsel to explain the complex insurance policies at issue for TransCanada and its counsel. . . . [The broker] . . . performed the work requested and TransCanada had a reasonable expectation of privacy. Consequently, TransCanada's communications to [the broker] do not constitute a waiver of the privilege." The court's decision was based on established New York law that the attorney-client privilege is not waived upon disclosure to a third party if the third party is acting as an agent of the client or its attorney.

Accordingly, the court held that the following communications between TransCanada and the broker were protected by the attorney-client privilege: (1) communications between the broker and TransCanada's

counsel; (2) communications between TransCanada and its counsel that were forwarded to the broker, or where the broker was copied on the original communication; and (3) communications between non-attorney employees of the broker and/or TransCanada involving requests for information and advice from counsel.

The court also held that, under New York law, work product protections are only waived upon disclosure to a third party "when there is a likelihood that the material will be revealed to an adversary, under conditions that are inconsistent with a desire to maintain confidentiality." Because the broker was acting as TransCanada's agent, the court held that the broker properly was expected to maintain the documents as confidential.

Practice Points

While *TC Ravenswood* is positive for policyholders, it is important to remember that not all courts have held that communications shared between policyholder and broker fall within the attorney-client privilege or the work product protection. However, a review of the *TC Ravenswood* decision provides some useful practice points for policyholders and counsel who wish to share privileged communications with brokers, at least where New York law applies.

Under *TC Ravenswood*, the attorney-client privilege is not waived upon disclosure to a broker to the extent the broker is acting as an agent of the policyholder or the policyholder's attorney. Similarly, the work product protection is not waived if the policyholder and broker understand that the broker is expected to maintain the confidentiality of the communications. Accordingly, the policyholder and broker should consider entering into a formal consulting agreement before sharing communications. Such agreement should expressly provide that the broker's retention includes assisting the policyholder and the policyholder's counsel in formulating legal strategy and providing legal advice or services (assistance with claims and settlement should also be covered).

The consulting agreement also should confirm that both the policyholder and broker understand that the broker's communications both made and received in its consulting capacity are confidential and protected by the privileges. While the policyholder likely will still need to demonstrate that the communications at issue are actually privileged, having a consulting agreement in place that clearly states that the broker is acting as the policyholder's agent for specific purposes will help foreclose any argument that the presence of a broker during attorney-client communications results in a waiver. It must

also be kept in mind, however, that brokers wear many hats, rely on commissions and may be the agent of the insurance company under certain circumstances, including especially in the London Market and/or under state statutes.

It is also helpful when asserting privileges if the policyholder has retained the broker for its expertise in a particular area, as the courts have been more receptive to the policyholder's claim of privilege where the broker's particular expertise proved valuable or necessary. For example, in *ECDC Environmental v. New York General Insurance Co.*,² the Southern District of New York, applying New York law, found that the broker was the policyholder's agent within the scope of the attorney-client privilege where the policyholder did not have experience with maritime insurance and the broker was retained, in part, on account of its expertise in this area.

In addition, in most jurisdictions, the policyholder has the burden of establishing that its broker communications are privileged. If the policyholder finds itself defending its privilege in litigation, the policyholder should submit evidentiary support for its privilege claim, which, at a minimum, should include affidavits from the broker and the policyholder attesting, among the other things discussed above, that the broker was retained to assist counsel and that both parties understood that the broker's communications in that capacity were confidential. At least two courts that have rejected the argument that broker communications are privileged did so, in part, because the policyholders failed to present the court with broker affidavits.³

Moreover, it is important to remember that the communications must be made to facilitate the

rendition of legal services *for the policyholder*. Where the communications are commercial in nature or fail to assist the policyholder in its coverage case, a court is more likely to deny application of a privilege. For example, in *SR International Business Insurance Co. v. World Trade Center Properties, LLC*,⁴ the court held that communications between a policyholder's attorneys and the broker that were made in preparation for the broker's deposition did not fall within the attorney-client privilege or work product doctrine.

Adhering to these practice points will not guarantee that a court will find that the attorney-client privilege or the work product protection applies to all broker communications. However, based on the precedent set by *TC Ravenswood* and other decisions, implementing some of the simple steps described above should greatly enhance a policyholder's chance of protecting its communications with a broker. Moreover, everyone, including policyholders, should be aware of the impact a communication may have if read in court and act accordingly. In this day and age it is very easy to communicate electronically, but almost impossible to wipe out the existence of such communications. Think before you send!

(Endnotes)

1. No. 400759/11, 2013 WL 3199817 (N.Y. Sup. Ct. N.Y. County June 20, 2013).
2. No. 96-CV-6033, 1998 WL 614478, at *9 (S.D.N.Y. June 4, 1998).
3. See *Sony Comp. Entm't Am. v. Great Am. Ins. Co.*, 229 F.R.D. 632 (N.D. Cal. 2005); *Mt. McKinley Ins. Co.*, No. 602454/2002, 2009 WL 6978591 (N.Y. Sup. Ct. N.Y. County Dec. 4, 2009).
4. No. 01-CV-9291, 2002 WL 1334821 (S.D.N.Y. June 19, 2002).