Discoverability of Reinsurance Information

Reinsurer Access to Privileged Documents

By Michael Steinlage

In coverage disputes between an insured and an insurer, it is not uncommon for the policyholder to pursue discovery of the insurer's communications with its reinsurers regarding the claim. Insurers have become increasingly cautious about sharing information with reinsurers out of a concern that a court will find the communications discoverable or find that certain privileges were waived,[1] leading to disputes between reinsurers and cedents over the reinsurer's right of access to privileged information. This article will explore the historical context, competing interests, and recent developments in this vexing area of the law and offer insight regarding potential pitfalls and best practices for communicating with reinsurers.

Reinsurance: The Basics

Reinsurance is a transaction whereby the reinsurer,

> in consideration of premium paid, agrees to indemnify [the ceding] insurer . . . against all or part of the loss which the latter may sustain under [the underlying] policy or . . . policies which it has issued.[2]

Reinsurance plays an important role in the economy because it (1) allows insurers to shift their risk of economic loss to a company willing to undertake that risk, (2) increases an insurance company's capacity to accept new risks and allows it to write risks that might otherwise be beyond its capacity, (3) spreads large risks throughout the global reinsurance market, (4) enables coverage for risks that are large and difficult to place, and (5) permits small insurers to compete on a level playing field with large competitors.

While some reinsurance contracts reinsure policies issued to a single insured or risk (commonly known as *facultative reinsurance*), most reinsurance contracts are not insured-specific but instead reinsure entire categories of business and are written and triggered on a different basis than the underlying insurance.

Reinsurance differs from insurance in many respects. One important difference is in the handling of claims. Except in certain fronting situations, reinsurers do not duplicate the claim-handling function of an insurer. Instead, reinsurers count on the insurer to conduct a thorough and reasonable investigation of the claim and communicate the results of the investigation to the reinsurer.

Communications with Reinsurers: Historical Context

Insurers' dealings with their reinsurers have traditionally been viewed through a different prism than other commercial transactions.

The doctrine of *uberrimae fidei*, or utmost good faith, has its origins in maritime insurance in which contracts were, out of necessity, "conceived in the uttermost good faith and incubated in a legal environment which transcends the sharper practices of the world of commerce."[3] Under the doctrine, parties to a marine insurance contract were expected to "accord each other the highest degree of good faith," which "requires the assured to disclose to the insurer all known circumstances that materially affect the risk being insured."[4]

The doctrine of utmost good faith has found similar acceptance in the context of reinsurance because of the special relationship that exists between the reinsured and the reinsurer.[5] The doctrine has been recognized as applying "particularly in the sharing of information."[6]

Because access to information in a reinsurance relationship is so one-sided, courts traditionally have enforced the duty of utmost good faith to require full disclosure of information[7] and even impose a duty on the reassured to volunteer information that might have a bearing on the scope of the risk assumed.[8] As one court has noted:

> Since the [reinsured] is in the best position to know of any circumstances material to the risk, [it] must reveal those facts to the underwriter, rather than wait for the underwriter to inquire.[9]

In California, the obligation has been codified as part of the Insurance Code.[10]

The obligation is particularly important in the context of treaty reinsurance, where the reinsurer agrees to automatically reinsure an entire book of business written by the insurer.[11] The cedent's duty of disclosure is so ingrained in its contractual relationship with its reinsurer that, in at least one instance, an arbitration panel was found to have properly rejected a cedent's reinsurance claim after it failed to provide information to support its claim, even though the reinsurance contract lacked a cooperation clause or access to records provision.[12]

These historical factors and business realities collectively contribute to an understanding that reinsurance communications are different from traditional arm's-length communications between parties to a transaction and are entitled to greater protection.[13]

Types of Information Disclosed to Reinsurers

Communications with reinsurers take many forms.

Preclaim communications. At the outset of the relationship, the information disclosed to a reinsurer consists primarily of program, premium, and pricing information and other information necessary to an understanding of the risk assumed.

The potential relevance of the information to future disputes depends on the nature of the reinsurance involved. In facultative reinsurance arrangements,

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Cedents and reinsurers need to approach communications thoughtfully and work cooperatively to ensure reinsurers have timely access to relevant information and records.

the information disclosed at the time of placement will be specific to the particular risk and therefore potentially more relevant in a future coverage dispute. In the case of treaty reinsurance, on the other hand, information exchanged between the insurer and reinsurer is more general in nature, consisting of summary information regarding the line of business or program to be reinsured (e.g., deductibles and limits, written premiums, historical loss experience), and less probative of issues relating to individual claims.[14] Relevance will also depend on whether the terms of reinsurance follow form to the underlying coverage or involve different insuring terms and conditions than the underlying coverage.

Postclaim communications. When a claim arises, there will be additional information disclosed to the reinsurer depending on the nature of the coverage and the notice and reporting requirements of the treaty.

Excess of loss reinsurance contracts may involve limited reporting of information at the outset of a claim, with any escalation of reporting tied to increases in reserves over the life of the claim. In some instances, the reinsured may be allowed to report claims via bordereaux (a list of claims), with little or no information regarding the nature of the claim or potential coverage issues.

In other instances, the requirements for providing notice to the reinsurer are more substantive and subjective, creating greater potential for disclosure of sensitive or privileged information. For example, in *Insurance Co. of Pennsylvania v. Associated International Insurance Co.*, the notice provision in the reinsurance contract was found to be tied to the insurer's subjective "estimate [of] the value of the injuries or damages sought" by the direct claimant.[15] Because reinsurers do not duplicate the claim-handling function,[16] they necessarily rely on the claim analysis of the insurer, creating the potential for disclosure of strategic information that an insurer normally would not share with the policyholder.

In situations where the reinsurance contract provides coverage for extracontractual claims (e.g., bad faith and failure to settle with limits), the information disclosed to the reinsurer may be even more detailed and sensitive. This is particularly true where the reinsurance contract requires the reinsurer to "counsel and concur" in the decision for the reinsurance coverage to apply.

Under most reinsurance contracts, the reinsurer also has the right to access records and files maintained by the insurer relating to the subject of the reinsurance, through which a reinsurer may be provided access to internal claim documentation, including the results of investigations, coverage analysis, requests for settlement authority, and coverage notes. The files may also contain communications with outside coverage counsel and privileged work-product materials, including consulting expert information and jury research.

In the past, parties to reinsurance contracts generally accepted that a reinsurer was entitled to see such communications and work product of attorneys contained in the insurer's files. This perspective was based on the assumption that the reinsurer shares a common interest with its reinsured in the underlying litigation, and, thus, such access was within the scope of the privilege attaching to such documents. As attempts to exploit such communications by policyholders and claimants have increased, however, insurers have become more circumspect in providing access to such documents.

Communications via brokers. Finally, where there is a broker involved in placing the reinsurance, the contract often will contain an intermediary clause directing that all communications with a reinsurer shall flow through the broker. Courts have traditionally recognized the broker/intermediary as someone with whom an insurer may share privileged information without fear of waiving the privilege.[17] Nevertheless, this added layer in the chain of communication brings with it not only potential benefits but also potential risks.

Discoverability of Reinsurance Information in Coverage Disputes

No clear consensus exists regarding the discoverability of reinsurance information in disputes between insurers and their original insureds. More often than not, discovery requests for reinsurance information in underlying disputes are recognized as an improper intrusion on confidential or privileged communications[18] or denied as irrelevant.[19] However, discoverability of reinsurance information may be relevant to claims of bad faith, to the existence and terms of lost or disputed policies, or to rebut claims of late notice. Reinsurance agreements themselves also may be discoverable under the Federal Rules of Civil Procedure requiring disclosure of insurance agreements,[20] particularly

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where concerns regarding the insurer's solvency or ability to pay are raised.[21] In each case, discoverability turns on the particular facts in an underlying dispute, as the following recent decisions addressing the issue demonstrate.

Discovery of reinsurance information generally. In *ContraVest Inc. v. Mt. Hawley Insurance Co.*, the court upheld a magistrate's report and recommendation allowing discovery into reinsurance communications, finding that the information was relevant to the insured's bad faith claims against the insurer.[22] The court distinguished South Carolina law from the handful of jurisdictions that finds the mere allegation of bad faith in a complaint sufficient to abrogate the application of privilege with respect to reinsurance communications.

The court observed the predicament that these cases presented to an insurer: any defendant insurer that opposes a bad faith claim is inevitably forced to assert its own good faith, "mak[ing] it rather difficult for a defendant to avoid waiver." To "constrain this effect" and prevent automatic waiver whenever a plaintiff brings a bad faith claim, the court adopted a prima facie requirement, which holds that a plaintiff must make "[a] substantial showing of merit to [its bad faith] case . . . before a court should apply the exception to the privilege."[23] The court went on to discuss the scope and level of evidence required to establish a prima facie case of bad faith, including whether evidence of a defendant's bad faith intent was sufficient or whether the analysis must address every element of the plaintiff's bad faith claim (including resolution of the underlying coverage dispute).[24]

The court ultimately found that the insurer's argument for a broader proof requirement had not been presented to the magistrate and was therefore waived.[25] Focusing on the factual arguments that were presented to the magistrate, the court accepted the magistrate's findings "that sufficient evidence has been introduced to warrant submission to the jury of the issue to which the evidence is directed."[26]

In *Baxter International, Inc. v. AXA Versicherung*, the insured sought discovery of two types of postlitigation communications with reinsurers: (1) notices of the underlying multidistrict litigation (MDL) and reinsurers' responses to the notices and (2) any correspondence in which AXA describes the coverage available to Baxter under the AXA policy or any agreement or understanding between the insured and AXA concerning coverage available for these types of claims.[27]

With respect to the notices to reinsurers, the insured argued that they were relevant because they might contain admissions by AXA about the scope of coverage under the policy and its obligations to Baxter. The court found this sufficient and granted the insured's motion to compel as to the first type of documents.[28]

As to the more substantive communications with reinsurers, regarding the existence of coverage for Baxter under the policy, the court rejected AXA's categorical objection to such discovery on work-product grounds but reserved ruling on the motion to allow AXA to make a more fully supported argument in favor of its work-product objections. In previewing the issue, however, the court noted the challenge that the insurer faced in rebutting the insured's characterization of its communications with reinsurers as routine reporting made in the ordinary course of business, and proving instead that the communications were created in anticipation of or in preparation for litigation.

Discoverability of reinsurance information may be relevant to claims of bad faith, to the existence and terms of lost or disputed policies, or to rebut claims of late notice.

Contract interpretation is another area where courts appear to be of two minds when it comes to the relevance of reinsurance information. Courts generally are reluctant to allow discovery of communications between cedents and their reinsurers for the purpose of establishing the proper interpretation of an unambiguous insurance policy.[29] On the other hand, courts have held that reinsurance documents may be discoverable where the original insurance policy contains ambiguous terms and the reinsurance documents provide an indication as to the cedent's intent when issuing the original policy.[30]

Discovery of privileged information disclosed to reinsurers. Decisions addressing the issue of whether a cedent waives privilege over documents by sharing them with its reinsurer generally focus on the common interest doctrine. The common interest doctrine serves as an exception to waiver of privilege when a third party who receives a privileged communication shares a common interest in the litigation.[31] In order to protect against discovery of privileged documents by an underlying insured, an insurer typically will take the position that the insurer and its reinsurers share a common interest in defending against the underlying insurance coverage litigation.

Many courts have recognized this exception, concluding that disclosure of privileged communications and documents to reinsurers does not constitute a waiver of the privilege.[32] For instance, in *OOIDA Risk Retention Group, Inc. v. Bordeaux*,[33] the federal district court in Nevada, applying California law, found that emails sent to a reinsurer discussing the underlying lawsuit, coverage issues, reserves, and the budget from outside counsel were prepared in anticipation of litigation and properly withheld on the basis of privilege, rejecting the claimant's argument that the communications with the reinsurer were not for the purpose of obtaining or providing legal advice.[34] The court found explicit support for its ruling in California precedent and provisions of the California Insurance Code mandating full disclosure of information to reinsurers.[35]

Other courts have adopted a narrower view of the common interest doctrine. In *Aetna Casualty & Surety Co. v. Certain Underwriters at Lloyd's London*, the court held:

> [A]ny "common interest" privilege must be limited to communications between counsel and parties with respect to legal advice in pending or reasonably anticipated litigation in which the joint consulting parties have a common legal interest. . . . It may not be used to protect communications that are business oriented or are of a personal nature.[36]

The court thus concluded that the reinsurance relationship alone could not establish the existence of a legal privilege. Similarly, in *Regence Group v. TIG Specialty Insurance Co.*, the district court held that "an insurance company can be construed as waiving any privilege if it has shared its counsel's documents with a reinsurer when the parties' interests are not aligned."[37] However, decisions finding that disclosure of privileged information to a reinsurer constitutes a waiver of the privilege are still in the minority.

Another significant discovery ruling with potential implications for cedents and reinsurers is *U.S. Securities & Exchange Commission v. Herrera*.[38] In *Herrera*, the District Court for the Southern District of Florida was asked to decide whether "oral downloads" of otherwise-protected attorney work-product information provided to regulators and auditors for a company under a U.S. Securities and Exchange Commission (SEC) investigation constituted a waiver of the privilege. The materials in question consisted of detailed notes of witness interviews conducted by outside counsel as part of the company's investigation into the accounting issues at the heart of the SEC investigation. The defendants in a subsequent SEC enforcement action sought to subpoena the interview notes and memoranda prepared by the law firm, claiming that any privilege attaching to them had been waived when the information was communicated orally to the SEC.[39] While the case does not deal with reinsurance information directly, the manner in which the information was communicated, i.e., through oral downloads, is a method often used by insurers for communicating to reinsurers sensitive information relating to ongoing underlying litigation.

In ruling on the issue, the court focused not on whether privileged information was disclosed but rather to whom the disclosure was made.[40] According to the court,

> work product protection is waived when protected materials are "disclosed in a manner which is either inconsistent with maintaining secrecy against **opponents** or substantially increases the opportunity for a potential **adversary** to obtain the protected information."[41]

The law firm, for its part, did not dispute that the disclosure to the SEC was one made to an adversary.[42] It contended, instead, that there was a meaningful distinction between the actual production of a witness interview note or memo and providing the same or similar information orally, and that the latter did not amount to waiver.[43] The court rejected this distinction, finding that the oral downloads were not "detail-free conclusions or general impressions" of the interviews but detailed descriptions of the substance of 12 witness interviews that were the "functional equivalent" of the actual witness notes and memoranda, and ordered them produced.[44]

When it came to disclosure of the same materials to the outside auditor, however, the *Herrera* court took a different view. The court recognized that an independent or outside auditor typically shares a common interest with the corporation (and its law firm) for purposes of the work-product and waiver doctrines, such that documents shared with Deloitte were protected from disclosure.[45] Notably, the court came to this conclusion despite efforts by the defendants to portray Deloitte as a "potential adversary" based on Deloitte subsequently entering into a tolling agreement with the SEC regarding its own conduct. In rejecting the *adversary* designation for Deloitte, the court observed that the request for a tolling agreement occurred 10 months after the law firm shared the results of the interviews with Deloitte, suggesting that it is the party's status at the time of the disclosure that is dispositive.[46] Equally important to the reinsurance context, the court noted that even if Deloitte was a potential adversary with the company on one issue, it had a common interest for other purposes, and thus the common interest exception to waiver still applied.[47]

Reinsurers' Right to Access Insurers' Privileged Communications

As discovery disputes with policyholders have become more common, some cedents have responded by limiting the amount of privileged information that they share with reinsurers. In response, reinsurers have invoked the common interest rule offensively to argue that otherwise-privileged communications are not privileged as to the reinsurers based on their common interest in the underlying litigation against the insured and, thus, should be produced.

Common interest does not waive privilege. While no consensus has developed around this issue, some courts and arbitration panels have recognized that the existence of a common interest and general right of access to records, standing alone, does not entitle a reinsurer to overcome a privilege that would otherwise apply; and they have prohibited reinsurers' access to cedents' privileged communications with counsel on that basis.

In *Gulf Insurance Co. v. Transatlantic Reinsurance Co.*, the New York Appellate Division concluded that the

> [a]ccess to records provisions in standard reinsurance agreements, no matter how broadly phrased, are not intended to act as a per se waiver of the attorney-client or attorney work product privileges.[48]

The court reasoned that regardless of whether the parties had a common interest in the outcome of an underlying litigation, the common interest does not automatically waive the attorney-client privilege because "to hold otherwise would render these privileges meaningless."[49]

Similarly, in *North River Insurance Co. v. Philadelphia Reinsurance Corp.*, the reinsurer argued that the reinsured waived its attorney-client privilege as to certain documents relating to the underlying coverage action by operation of the access to records clause in the reinsurance certificate, which provided that the insurer would provide to the reinsurer "any of its records relating to this reinsurance or claims in connection therewith."[50] The reinsurer analogized this clause to the cooperation clause at issue in *Waste Management, Inc. v. International Surplus Lines Insurance Co.*,[51] which was found to have effectively waived the insured's right to assert the attorney-client privilege even after the parties had become adverse.[52]

The *North River* court rejected the reinsurer's argument, holding that a standard access to records clause, without more, does not constitute a waiver of the attorney-client privilege, and that the reinsured could withhold legal advice that may have been obtained "with a reasonable expectation of confidentiality."[53] As long as the

> reinsured has been forthright in making available to its reinsurer all factual knowledge or documentation in its possession relevant to the underlying claim or the handling of that claim, it has satisfied its obligations under the [access to records] clause.[54]

Limits of case rulings. Reinsurance disputes are usually arbitrated before persons experienced and knowledgeable in the industry. Thus, reported decisions do not always reflect how an arbitration panel may view the issue. In addition, many reported cases do not squarely address the potential for a right of access or waiver to exist through a course of dealing or custom and practice between the parties.[55] Nor do they rule out application of the "at issue" exception to the attorney-client privilege, which can apply in certain circumstances and is highly dependent on the facts of the particular case.[56] Also, different considerations may apply to reporting to reinsurers in the course of an underlying coverage dispute versus a reinsurer's right to discovery in the context of a subsequent claim for reinsurance after the underlying coverage dispute is fully resolved. Finally, none of the cases appears to involve circumstances in which it may be necessary for the insurer to disclose certain privileged information to establish a right to payment under the reinsurance contract.[57]

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Choice of Law Considerations

Court decisions addressing the discoverability of reinsurance information often turn on whether the parties had a reasonable expectation of confidentiality.[58] While industry custom and practice may have some role to play in understanding the parties' reasonable expectations, court perceptions are dictated more often by the parties' statements and actions measured against the applicable law governing privilege and confidentiality. Where the parties' positions and expectations do not match up with the strict legal requirements for establishing and maintaining privilege, parties may find themselves exposed to discovery of communications

that they presumed were confidential. For this reason, it is imperative that parties understand the rules for determining what law applies to their communications with reinsurers and, where possible, designate a law that provides the strongest protection against disclosure and unintended waiver.

Governing law: Forum state or another state? Determining what law will govern issues of privilege is not as clean and easy as it seems.

Where state law governs, the court must decide whether to look to the law of the forum state or the law of another state with a relationship to the privileged communications.

Rule 501 of the Federal Rules of Evidence provides that, "in civil cases, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision."[59] Thus, in a diversity action, where claims of coverage and contribution between insurers are governed by state law, state law would govern application of the attorney-client privilege. (This is in contrast to the work-product doctrine, which is governed in all instances by a uniform federal standard embodied in Federal Rule of Civil Procedure 26(b)(3).)[60]

Where state law governs, the court must decide whether to look to the law of the forum state or the law of another state with a relationship to the privileged communications. Section 139 of the *Restatement (Second) of Conflict of Laws* (*Restatement*) addressing choice of law for privileged communications states in pertinent part:

> (2) Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.[61]

The rationale for this rule is described as follows:

> The state of the forum will wish to reach correct results in domestic litigation. It will therefore have a strong policy favoring disclosure of all relevant facts that are not privileged under its own local law. On the other hand, the state which has the most significant relationship with the communication has a substantial interest in determining whether evidence of the communication should be privileged. It is also the state to whose local law a person might be expected to look for guidance in determining whether to make a certain statement or to make certain information available.[62]

It is also important to recognize that choice of law is not a one-size-fits-all issue. "Courts are not bound to decide all issues under the local law of a single state."[63] The process of applying the rules of different states to determine different issues—commonly referred to as *depecage*—has been recognized and adopted by courts in many states.[64] In such jurisdictions, "[a] conflicts analysis must be undertaken on an issue by issue basis . . . when an actual conflict of law arises."[65] This approach favors the particularized evaluation of privilege as it relates to reinsurance.

Reasonable expectations. Among the factors that the forum will consider in determining whether or not to admit the evidence are (1) the number and nature of the contacts that the state of the forum has with the parties and with the transaction involved, (2) the relative materiality of the evidence that is sought to be excluded, (3) the kind of privilege involved, and (4) fairness to the parties.[66]

The last factor encompasses reasonable expectations of the parties. As the comments to *Restatement* section 139 note,

> [t]he forum will be more inclined to give effect to a privilege if it was probably relied upon by the parties. Such reliance may be found if at the time of the communication the parties were aware of the existence of the privilege in the local law of the state of most significant relationship. Such reliance may also be found if the parties, although unaware of the existence of the privilege, made the communication in reliance on the fact that communications of the sort involved are treated in strict confidence in the state of most significant relationship. In this latter situation, the fact that the communication was of a sort treated in strict confidence in the state of most significant relationship was presumably a result of the existence of the privilege. Hence, in a real sense the parties could be said to have relied upon the privilege although ignorant of it.[67]

Expectations denied: Default to law of forum state. Unfortunately, even when parties do attempt to document their reasonable expectations, their expectations may still be thwarted if the issue is decided

in a forum different from the one that they assumed would control. As noted above, *Restatement* section 139 provides that a court may still apply the law of the forum state "unless there is some special reason why the forum policy favoring admission should not be given effect." In some cases, courts will default to the law of the forum state without any analysis of the *Restatement* factors. Even those courts that do consider choice of law often find (based on cursory analysis) that there is no actual conflict of laws or that application of the differing rules would not lead to varying results.

Analysis upholding reasonable expectations. *3Com Corp. v. Diamond II Holdings, Inc.* is an example of a case in which a court did conduct a choice of law analysis in resolving issues of privilege.[68] The case involved an alleged breach of contract and application of the termination provision in a merger agreement. In a motion to compel, Diamond challenged 3Com's decision to withhold merger communications between 3Com and its attorneys that also involved its investment banker, Goldman Sachs. In previewing the issue, the court noted thus:

> This particular challenge raises a choice-of-law dispute over whether Delaware or Massachusetts law should apply. 3Com would apply the law of Delaware, which extends a wider privilege for communications made between a client and its attorney in the presence of an investment banker than that recognized by Massachusetts.[69]

In its analysis of the issue, the court sought to determine which state had the more significant relationship to the challenged communications.[70] The court recognized that the commentary to *Restatement* section 139 favored Diamond's position that Massachusetts law would apply. The court accepted that the relationship between 3Com, its counsel, and its investment bankers was centered in Massachusetts, noting that the communications between 3Com, its attorneys, and Goldman Sachs personnel took place largely in Massachusetts; that 3Com was headquartered in Massachusetts; and that key provisions of the merger agreement were negotiated, and the merger agreement itself was finalized, in Boston. The court nevertheless found that Diamond's arguments focused on the location of the communications was unpersuasive where the parties had selected Delaware law to govern and interpret the merger agreement and had consented to Delaware as the exclusive jurisdiction for disputes arising out of the merger agreement.

The reasoning behind the court's holding is instructive of the role that the parties' reasonable expectations should play in determining privilege and waiver issues:

> Delaware has a considerable interest in ensuring that corporate entities seeking a business combination under its laws may expect consistent and predictable treatment when appearing before its Courts. Most mergers and other important corporate transactions necessarily entail the involvement of business people, attorneys, and financial advisors located throughout the country, if not the world. [Diamond's] focus on the communications' location, if followed, could foster inconsistency in a context where predictability is at a premium. Indeed, while the record shows that many of the challenged communications originated or were received in Massachusetts, several others both originated or were received outside of that jurisdiction. Applying Delaware law in this context would avoid the uncertainty generated by the varying loci of communications involved both in this case and others like it. This, in turn, would foster predictability for parties to major corporate transactions that have availed themselves of Delaware law.
>
> *In sum, Delaware is the state with the most significant relationship to the challenged communications because it has considerable interest in vindicating the reasonable expectations of those parties that engage in a merger under Delaware law; it further has an interest in defining the scope of those reasonable expectations*. Because Delaware is also the forum state, its laws will apply.[71]

The *3Com* court noted that the decision to apply Delaware law was also consistent with the general choice of law policy objectives set forth in *Restatement* section 6, which "directs the Court to consider, among other factors, the protection of justified expectations, certainty, predictability and uniformity of result, and ease in determining the law to be applied."[72]

A court applying these same considerations to communications with reinsurers would first look to the reinsurance agreement itself and any governing law designation included therein. The court would also consider the parties' designation of a forum for the resolution of disputes as evidence of the parties' reasonable expectations that such forum's laws would apply. Only in the absence of such clear indicators would one look to other factors, such as the location of the cedent's operations, to determine the state with the most significant relationship to the communications with reinsurers.

Strategies for Protecting Reasonable Expectations

Despite the unpredictability surrounding how requests for reinsurance information often are resolved by courts, there are steps that insurers and reinsurers can take

to improve the likelihood that their communications receive the maximum protection possible.

As a starting point, parties should be proactive in understanding which state laws could potentially apply to an insurer's communications with reinsurers, and determining which of the potentially applicable laws is most beneficial to protecting against discovery based on disclosure to reinsurers. This may be easier said than done, particularly in jurisdictions where the law of privilege and waiver has not been resolved, or even tested. Nonetheless, parties should be aware of and account for any material variations in how different states view the scope of the common interest doctrine and waiver based on disclosure to third parties. In making these assessments, parties should keep in mind the comments to *Restatement* section 139:

> [T]he forum will be more inclined to give effect to a foreign privilege that is well established and recognized in many states than to a privilege that is relatively novel and recognized in only a few states. The forum will also be more inclined to give effect to a privilege which, although different, is generally similar to one or more privileges found in its local law than to a privilege which is entirely different from any found in the state of the forum.[73]

Second, once it is determined which of the potentially applicable laws is most favorable to the existence and preservation of a privilege, insurers should take steps to ensure that their reinsurance operations and communications are structured to take full advantage of these laws.[74] An insurer might consider entering into mutually acceptable nondisclosure agreements with its reinsurers that document the parties' understanding and expectations: (1) that the documents disclosed are and should remain confidential; (2) that the disclosures are made pursuant to and in furtherance of a common interest; and (3) which state law will govern privilege issues, recognizing that most courts will honor such provisions in contracts as long as they do not conflict with public policy.[75] In some circumstances, the reinsurer may even consider invoking the right to associate in the underlying defense—a right afforded in most casualty reinsurance contracts—to reinforce the understanding that the parties' interests are aligned.

Third, parties should be thoughtful in their designation of information as confidential, recognizing that courts are less likely to find a reasonable expectation of confidentiality where the parties take an overly inclusive approach to designating documents as confidential and make no attempt to differentiate between information that does not warrant or require protection and information that is genuinely confidential.

Last, avoid conduct that could waive or undermine the perception that a document is confidential or that a particular state law will apply. At the heart of many decisions finding a privilege to have been waived is a casual approach to protecting the document from disclosure to outside parties. Recognize also that where a party acquiesces to the application of a certain state's law in briefings and at trial, such acquiescence is an implied stipulation that that state's law should apply and constitutes a waiver of that party's right to argue otherwise.[76] Finally, parties may take positions that place privileged communications squarely at issue, increasing the likelihood that a court or arbitration panel will require disclosure of the communications in the interest of "an equitable, complete and truthful resolution of the issues raised."[77] ■

Notes

1. *See, e.g.*, Regence Grp. v. TIG Specialty Ins. Co., 2010 WL 476646, at *2 (D. Or. 2010) (recognizing that "an insurance company can be construed as waiving any privilege if it has shared its counsel's documents with a reinsurer when the parties' interests are not aligned"); Reliance Ins. Co. v. Am. Lintex Corp., 2001 WL 604080, at *4 (S.D.N.Y. 2001) (rejecting an assertion of privilege under common interest because even though there are some common interests, "no evidence has been proffered that establishes that [the insurer] and its reinsurer share the same counsel or coordinate legal strategy in any way").

2. *Glossary of Reinsurance Terms*, Reinsurance Association of America (2018), www.reinsurance.org/Glossary_of_Reinsurance_Terms/#r.

3. Reliance Ins. Co. v. Certain Member Cos., 886 F. Supp. 1147, 1153 (S.D.N.Y. 1995).

4. Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 13 (2d Cir. 1986).

5. *Reliance*, 886 F. Supp. at 1152; Allendale Mut. Ins. Co. v. Excess Ins. Co., 992 F. Supp. 278, 282 (S.D.N.Y. 1998).

6. Unigard Sec. Ins. Co. v. N. River Ins. Co., 4 F.3d 1049, 1054 (2d Cir. 1992).

7. A/S Ivarans Rederei v. P.R. Ports Auth., 617 F.2d 903, 905 (1st Cir. 1980) (noting that "there is a duty on the reinsured to disclose [all material] facts").

8. Contractors Realty Co. v. Ins. Co. of N. Am., 469 F. Supp. 1287, 1294 (S.D.N.Y. 1979); see also *Ivarans Rederei*, 617 F.2d at 905:

> As between the reinsured and the reinsurer, there is no principle of imputed knowledge of facts material to the risk that the reinsurer is asked to assume; to the contrary, there is a duty on the reinsured to disclose such facts.

9. *Knight*, 804 F.2d at 13; *see also* Reliance Ins. Co. v. Certain Member Cos., 886 F. Supp. 1147, 1153 (S.D.N.Y. 1995), *aff'd*, 99 F.3d 402, 1995 WL 764460 (2d Cir. 1995); *Unigard*, 4 F.3d at 1066.

10. Cal. Ins. Code § 622 (West 2018) (requiring insurer with reinsurance to "communicate all representations

of the original insured, and also all the knowledge and information he possesses, whether previously or subsequently acquired, which are material to the risk").

11. *In re* Liquidation of Union Indem. Ins. Co., 89 N.Y.2d 94, 106, 651 N.Y.S.2d 383, 674 N.E.2d 313 (1996).

12. Mich. Mut. Ins. Co. v. Unigard Sec. Ins. Co., 44 F.3d 826, 832 (9th Cir. 1995).

13. First Horizon Nat'l Corp. v. Houston Cas. Co., 2016 WL 5869580, at *13 (W.D. Tenn. Oct. 5, 2016) (adopting view that reinsurance-related communications "reflect the insurers' business decisions to spread risk" and represent "exclusively 'proprietary or business decisions'" (emphasis in original)).

14. *Id.*

15. Ins. Co. of Pa. v. Associated Int'l Ins. Co., 922 F. 2d 516, 521 (1990).

16. Unigard Sec. Ins. Co. v. N. River Ins. Co., 4 F.3d 1049, 1054 (2d Cir. 1992) ("[R]einsurers do not examine risks, receive notice of the loss from the original insured, or investigate claims."); 14 APPLEMAN ON INSURANCE: LAW OF REINSURANCE § 105.7, at 384 (2d ed. 2000):

> [A]lthough reinsurance contracts commonly reserve the reinsurer's right to associate with the ceding insurer in the defense or control of claims involving the reinsurance, reinsurers rarely involve themselves in the defense or investigation of claims.

17. U.S. Fire Ins. Co. v. Gen. Reins. Corp., No. 88 CIV 6457 (JFK), 1989 WL 82415 (S.D.N.Y. July 20, 1989).

18. *See, e.g.*, Emp'r Reins. Corp. v. Laurier Indem. Co., 2006 WL 532113, at **2–3 (M.D. Fla. 2006) (holding that "[the reinsurer] and [the insurer] share[d] a common interest" and that communications between them thus remained privileged); Minn. Sch. Bds. Ass'n Ins. Trust v. Emp'rs Ins. Co. of Wausau, 183 F.R.D. 627, 632, 43 Fed. R. Serv. 3d 342 (N.D. Ill. 1999). *Compare* Aetna Cas. & Sur. Co. v. Certain Underwriters at Lloyd's London, 176 Misc. 2d 605, 676 N.Y.S.2d 727, 732–33 (N.Y. 1998), *aff'd*, 263 A.D.2d 367, 692 N.Y.S.2d 384 (1st Dep't 1999) (*see infra* note 36 and accompanying text).

19. *See* Barry R. Ostrager, *Discovery Disputes Relating to Reinsurance*, 7 BUS. & COM. LITIG. IN FED. COURTS § 80:31 (3d ed. 2011); Certain Underwriters at Lloyd's v. AMTRAK, 2016 U.S. Dist. LEXIS 64088 (E.D.N.Y. May 16, 2016) (allowing discovery of reinsurance agreement but denying discovery into communications with reinsurer); Indianapolis Airport Auth. v. Travelers Prop. Cas. Co. of Am., No. 1:13-CV-01316-JMS, 2015 WL 1539601, at *4 (S.D. Ind. Apr. 7, 2015), *on reconsideration in part*, No. 1:13-CV-01316-JMS, 2015 WL 4066635 (S.D. Ind. July 2, 2015).

20. FED. R. CIV. P. 26(a)(1)(A)(iv);

First Horizon Nat'l Corp. v. Houston Cas. Co., 2016 WL 5869580, at *12 (W.D. Tenn. Oct. 5, 2016).

21. *AMTRAK*, 2016 U.S. Dist. LEXIS 64088; Golon, Inc. v. Selective Ins. Co. of the Se., 2017 WL 6059680 (W.D. Pa. Dec. 7, 2017) (permitting discovery of the existence and content of an insurance agreement "to equalize the knowledge of both parties and give the plaintiff 'assurance that there can be recovery in the event of a favorable verdict'"). *Compare Indianapolis Airport Auth.*, 2015 WL 1539601, at *4 (finding that "[i]nformation concerning Travelers' contractual relationship with its reinsurers is not relevant to IAA's coverage claim and includes sensitive business matters," and, therefore, "the burden of producing these documents outweighs any benefit"); Broadrock Gas Servs., LLC v. AIG Specialty Ins. Co., No. 14 CV 3927 AJN MHD, 2015 WL 916464, at *2 (S.D.N.Y. Mar. 2, 2015) (executive summaries containing reinsurance calculations and treaty participation percentages are not relevant).

22. 273 F. Supp. 3d 607 (2017).

23. *Id.* at 615.

24. *Id.* at 619–20.

25. *Id.* at 620.

26. *Id.* at 621–22.

27. 320 F.R.D. 158 (2017).

28. The court declined to address the more controversial theory of relevance advanced by the insured, i.e., that the communications with reinsurers were relevant to AXA's motive for denying coverage, to the extent that they reveal AXA's belief or fear that it may not have reinsurance to help spread the risk if the insured prevails.

29. Leski v. Fed. Ins. Co., 129 F.R.D. 99, 106 (D.N.J. 1989); PCS Phosphate Co. v. Am. Home Assurance Co., 2015 WL 8490976 (E.D.N.C. Dec. 10, 2015); Indianapolis Airport Auth. v. Travelers Prop. Cas. Co. of Am., No. 1:13-CV-01316-JMS, 2015 WL 1548959, at *1 (S.D. Ind. Apr. 7, 2015) (finding documents at issue did not address the cedent's intent in the original policy or clarify any ambiguous term); Heights at Issaquah Ridge Owners Ass'n v. Steadfast Ins. Co., No. C07-1045RSM, 2007 WL 4410260, at *4 (W.D. Wash. Dec. 13, 2007).

30. Progressive Cas. Ins. Co. v. F.D.I.C., 302 F.R.D. 497, 504 (N.D. Iowa 2014); Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Stauffer Chem. Co., 558 A.2d 1091, 1096 (Del. Super. Ct. 1989).

31. Minn. Sch. Bds. Ass'n Ins. Trust v. Emp'rs Ins. Co. of Wausau, 183 F.R.D. 627, 632, 43 Fed. R. Serv. 3d 342 (N.D. Ill. 1999).

32. *See, e.g.*, Emp'r Reins. Corp. v. Laurier Indem. Co., 2006 WL 532113, at **2–3 (M.D. Fla. 2006) (holding that "[the reinsurer] and [the insurer] share[d] a common interest" and that communications between them thus remained privileged); Ooida Risk Retention Grp., Inc. v. Bordeaux, No. 3:15-cv-00081-MMD-VPC, 2016 U.S. Dist. LEXIS 12851 (D. Nev. Feb. 3, 2016); *Minn. Sch. Bds.*, 183 F.R.D. at 631–32 (recognizing that reinsurers had a common interest with the insurer in evaluating and minimizing the exposure arising from the suit, and finding "no waiver . . . , since [the insurer] . . . always intended and expected that their communications [with the reinsurer] would remain confidential and protected from common adversaries").

33. 2016 WL 427066 (D. Nev. Feb. 3, 2016).

34. *Id.* at **9–10.

35. *Id.* at *9.

36. 176 Misc. 2d 605, 676 N.Y.S.2d 727, 732–33 (N.Y. 1998), *aff'd*, 263 A.D.2d 367, 692 N.Y.S.2d 384 (1st Dep't 1999).

37. Regence Grp. v. TIG Specialty Ins. Co., 2010 WL 476646, at **2–3 (D. Or. 2010) (quotation omitted); *see also* Reliance Ins. Co. v. Am. Lintex Corp., 2001 WL 604080, at *4 (S.D.N.Y. 2001) (rejecting an assertion of privilege under common interest because even though there are some common interests, "no evidence has been proffered that establishes that [the insurer] and its reinsurer share the same counsel or coordinate legal strategy in any way").

38. 324 F.R.D. 258 (S.D. Fla. 2017).

39. *Id.* at 261–62.

40. *Id.* at 262.

41. *Id.* at 263 (emphasis in original) (citations omitted).

42. *Id.*

43. *Id.* at 264.

44. *Id.*

45. *Id.* at 265.

46. *Id.* at 266.

47. *Id.*

48. 13 A.D.3d 278, 279, 788 N.Y.S.2d 44 (1st Dep't 2004).

49. *Id.*

50. 797 F. Supp. 363, 368 (D.N.J. 1992).

51. 579 N.E.2d 322 (Ill. 1991).

52. The cooperation clause in *Waste Management* gave the insurer the right to control the defense of any claim against the insured and required that the insured "shall give all such information and assistance as the insurers may reasonably require." *Id.* at 327–28. The court found that the clause "imposed a broad duty of cooperation and [was] without limitation or qualification." *Id.* at 328.

53. *North River*, 797 F. Supp. at 369 (quoting Carey-Can., Inc. v. Aetna Cas. & Sur. Co., 118 F.R.D. 250, 251 (D.D.C. 1987)).

54. *Id.* (following the holdings of *Remington Arms Co. v. Liberty Mutual Insurance Co.*, 142 F.R.D. 408 (D. Del. 1992), and *Bituminous Casualty Corp. v. Tonka Corp.*, 149 F.R.D. 381 (D. Minn. 1992) (rejecting *Waste Management*, 579 N.E.2d 322)).

55. *See* Robert J. Bates Jr., Discovery Issues in Reinsurance Disputes 6 (ARIAS-U.S. Fall Conference Nov. 2, 2006) ("Case law illustrates that reinsurers routinely obtain access to documents that are privileged as to the policy holder.").

56. The "at issue" exception to the attorney-client privilege applies when the party holding the privilege waives the privilege by injecting an issue into the litigation, the truthful resolution of which requires an examination of the confidential communications. Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co., 623 A.2d 1118, 1125 (Del. Super. Ct. 1992). The exception is based on the principles of waiver and fairness and exists to ensure "that the party holding the privilege cannot use it as a sword as well as a shield." *Id.*; *see also* Chevron Corp. v. Pennzoil Co., 974 F.2d 1156 (9th Cir. 1992) ("Pennzoil cannot invoke the

attorney-client privilege to deny Chevron access to the very information Chevron must refute in order to demonstrate [its claims].").

57. *See, e.g.*, UnitedHealth Grp., Inc. v. Columbia Cas. Co., 47 F. Supp. 3d 863, 889–90 (D. Minn. 2014) (noting that insured that refused to offer evidence of how the insured and its attorneys evaluated the claims at the time of settlement to meet its burden to prove what portion of a multiclaim settlement should be allocated to a particular claim was "entitled to make that choice" but must live with the result).

58. *See, e.g.*, Travelers Cas. & Sur. Co. v. Century Indem. Co., 2011 WL 5570784 (D. Conn. Nov. 16, 2011) (reinsured received advice of counsel with a "reasonable expectation of confidentiality").

59. Fed. R. Evid. 501.

60. See, e.g., Milinazzo v. State Farm Ins. Co., 247 F.R.D. 691, 699–700 (S.D. Fla. 2007).

61. Restatement (Second) of Conflict of Laws § 139 (1988).

62. *Id.* § 139 cmt. d, subsec. (2).

63. Monsanto Co. v. Aetna Cas. & Sur. Co., No. 88C-JA-118, 1994 WL 317557, at *9 (Del. Super. Ct. Mar. 15, 1994).

64. *See* W. Reese, *Depecage: A Common Phenomenon in Choice of Law*, 73 Colum. L. Rev. 58 (1973).

65. Travelers Indem. Co. v. Lake, 594 A.2d 38, 47 (Del. 1991).

66. Restatement (Second) of Conflict of Laws § 139.

67. *Id.* § 139 cmt. d.

68. 2010 WL 2280734 (Del. Ch. May 31, 2010).

69. *Id.* at *1.

70. *Id.* at *5.

71. *Id.* at **5–6 (emphasis added).

72. *Id.* at *5 n.30.

73. Restatement (Second) of Conflict of Laws § 139 cmt. d (1988).

74. *See, e.g.*, Sally Agel, *Guarding Privileged Documents Poses Challenge to "Utmost Good Faith" Doctrine*, Nat'l Underwriter Prop. & Casualty 2 (Apr. 28, 2003):

> [A] cedent that wishes to claim a privilege should document early signs of legal disputes and follow regimented procedures evidencing that documents were prepared in anticipation of litigation, as opposed to having the documents prepared by claims adjusters in the normal course of business.

75. *See* Restatement (Second) of Conflict of Laws § 187 (1988).

76. *See, e.g.*, Leininger v. Realistar Life Ins. Co., 2007 WL 2875283, at **7–8 (E.D. Mich. Sept. 28, 2007) (determining that parties had implicitly stipulated that Michigan law applied by arguing solely in terms of Michigan law).

77. Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co., 623 A.2d 1118, 1125 (Del. Super. Ct. 1992).