



▶ Cedant's Sharing of Privileged Documents with Reinsurers Waived Attorney-Client Privilege: Significant Oregon Federal District Court Decision



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An Oregon federal district court recently sounded a caution alarm for cedants regarding the consequences of a cedant's sharing of privileged documents with its reinsurers. On February 4, 2010, the United States District Court for the District of Oregon ("the Court") issued a decision in the case of *The Regence Group, et al. v. TIG Specialty Insurance Co.*, Civil No. 07-1337-HA, 2010 U.S. Dist. LEXIS 9840 (D.Or. February 4, 2010). In that case, the Court refused to reconsider its earlier denial of the motion for protective order filed by defendant TIG Specialty Insurance Company ("TIG" or "defendant" or "cedant") concerning the scope of subpoenas served by the plaintiffs on TIG's reinsurers, and ruled that TIG's sharing of privileged documents with its reinsurers waived the protections afforded by the attorney-client privilege and the work product doctrine, even where the interests of TIG and its reinsurers were not adverse at the time some of the privileged documents were shared. The prospect of waiver of those protections due to a cedant's sharing of privileged documents with its reinsurers, where the cedant is seeking coverage from its reinsurers for underlying claims, may provide cedants and their counsel with cause for concern regarding whether to share privileged communications with their reinsurers.

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...this decision provides important clarification for the reinsurance sector, and should allow claims which had stagnated for over a decade to be processed again.

In order to more accurately gauge that concern, it is helpful to take a closer look at the significant aspects of the decision.

Background to TIG's Motion for Reconsideration

Plaintiffs ("Regence") are five corporations headquartered in four different states. Regence brought this action against its insurer TIG alleging claims for breach of contract, declaratory relief, breach of the duty of good faith and fair dealing, fraud, and bad faith. The issues in dispute included TIG's alleged conduct and representations in selling RICO coverage to Regence, TIG's alleged conduct in denying coverage, and TIG's alleged contradictory positions regarding coverage. Regence sought a declaration that TIG was obligated to pay defense and indemnity costs related to three separate underlying lawsuits involving similar claims. During the course of a reinsurance dispute involving a large number of policies, TIG engaged in arbitration proceedings with its reinsurers during which it was compelled to produce privileged and confidential materials to its reinsurers regarding claims and policies involving Regence.

In a May 1, 2009 Order, the Court denied TIG's motion for a protective order by which TIG sought to shield from production documents relating to positions TIG took in communications with its reinsurers in the ordinary course of TIG's reinsurance claims submission (and during arbitration proceedings between TIG and its reinsurers) for the purpose of ensuring coverage from the reinsurers. The Court found that TIG failed to meet the burden of establishing that specific prejudice or harm would result if the documents were produced to Regence and, further, TIG failed to make a threshold

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showing of appropriate circumstances to warrant a protective order. TIG then filed a motion to reconsider and clarify the Court's May 1, 2009 Order.

The Parties' Positions

Citing authority from the Ninth Circuit Federal Court of Appeals (*Transamerica Computer Co., Inc. v. IBM*, 573 F.2d 646 (9th Cir. 1978), and *Gomez v. Vernon*, 255 F.3d 1118 (9th Cir. 2001)), TIG asserted that disclosure of privileged material constitutes a waiver of the attorney-client privilege only if the disclosure is voluntary and not compelled. In its briefing, TIG argued that there could be no waiver of the privilege because the arbitration panels specifically ordered TIG to produce the attorney-client communications to the reinsurers in the respective reinsurance arbitrations.

Additionally, TIG asserted in its briefing that confidentiality agreements in the arbitration proceedings with the reinsurers effectively prevented TIG's document production in the arbitration proceedings from constituting a waiver of the attorney-client privilege and work product doctrine. TIG took the position that the documents requested by, and provided to, the reinsurers with the expectation of confidentiality maintain their privilege protection because of the "common interest" between a reinsurer and its cedant. Relying upon *AIU Insurance Co. v. TIG Insurance Co.*, No. 07 Civ. 7052, 2008 U.S. Dist. Lexis 96693 (S.D.N.Y. November 25, 2008), TIG argued that the confidentiality agreements precluded waiver as to all parties, and that TIG's non-waiver as to its reinsurers amounts to non-waiver as to Regence and other third parties, even if disclosure of the documents has been made to a party's direct adversary.

Regence, on the other hand, argued in its briefing that the *Transamerica* and *Gomez* decisions were inapposite because both of those cases dealt with the inadvertent disclosure of privileged documents, and not with a cedant's voluntary disclosure to its reinsurers during the ordinary course of business and during arbitration proceedings. Moreover, Regence further argued that to the extent that any documents were previously privileged and protected, such privilege or protection was waived when TIG shared the documents with its reinsurers.

Finally, Regence argued that the *AIU* decision provided no basis for reconsidering the Court's Order because the *AIU* court made clear that a cedant can waive the privilege by sharing documents with its reinsurers. In

this case, the cedant and its reinsurers were involved in an adversarial proceeding and, therefore, there was no common legal interest and, accordingly, any shared information was not privileged. In other words, a waiver as to one adversary constitutes a waiver as to all adversaries.

The Court's Ruling

In its February 4, 2010 decision, the Court denied both TIG's motion for reconsideration of the May 1, 2009 Order, and TIG's alternative request for certification to appeal the May 1, 2009 Order. The Court granted TIG's motion only insofar as it sought clarification of the May 1, 2009 Order.

In denying the motion for reconsideration, the Court found that TIG's reliance upon *Transamerica* and *Gomez* as grounds for reconsideration fell well short of the type of "newly discovered evidence" or reflection of an "intervening change in controlling law" required to grant reconsideration. The Court further found that those decisions did not support TIG's sought-after conclusion – that if a party is compelled to produce documents in another matter, there is no waiver of privilege so long as reasonable steps had been taken to protect confidentiality in that other matter. Instead, the Court reiterated its prior ruling – that even if the reinsurance documents at issue were at some point privileged, TIG expressly or impliedly waived that privilege by its production to its reinsurers during the arbitration.

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In its May 1, 2009 Order, the Court acknowledged the *AIU* court's conclusion "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' interest are not aligned." The Court reaffirmed that conclusion in this decision and reiterated that the scope of Regence's requested discovery was reasonable and proper. Because the interests of Regence and TIG were indeed adverse, the Court stood behind its refusal to invoke the common interest doctrine as a basis for a protective order.

continued on page 28



Significant Oregon Court Decision *continued from page 27*

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The Court went on to clarify that its earlier Order compelled – without reservation – production of Regence's requested discovery, including:

1. The reinsurance policies purchased by TIG covering the Regence policy at issue or underlying litigation that is at issue;
2. Documents exchanged between TIG and its reinsurers about the underlying litigation;
3. Documents relating to coverage for the underlying litigation "exchanged with an opposing party or the arbitrators as part of the [arbitration proceedings]..."; and
4. Documents relating to the payments received by TIG from its reinsurers in connection with settlement of claims for coverage for the underlying litigation.

The Court further noted that the scope of this discovery was not restricted to temporal limitations regarding when the disputes arose between TIG and its reinsurers or when those disputes were resolved. The scope of discovery

the Court allowed included all documents related to the policy at issue and TIG's reinsurance claims for the Regence matters. In its May 1, 2009 Order, the Court expressly noted that Regence was not seeking reinsurance information regarding claims of other policyholders or TIG's privileged materials from the arbitrations that were not previously shared with the arbitrators or the reinsurers in those arbitration proceedings.

Potential Effect of the Court's Ruling on a Cedant's Sharing of Information With Its Reinsurers

The Court appeared to rely heavily on the fact that even though the interests of TIG and its reinsurers may have been aligned at one time, their interests did not remain aligned and, therefore, the common interest doctrine did not apply under these circumstances. It is anyone's guess as to whether the Court would have compelled production of the privileged documents if TIG had not been engaged in arbitration with its reinsurers and, further, if TIG had not been compelled to produce privileged documents during the course of the reinsurance arbitration proceedings. Nevertheless, caution should be exercised by cedants when deciding whether to share privileged communications with the cedant's reinsurers in the ordinary course of the cedant's claim submission. In the event a dispute should later arise between a cedant and its reinsurer, the cedant may be later compelled to produce the privileged communication in related litigation. ■

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