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Privileges and Cooperation

Insurers may be asked to set aside attorney-client and work-product privileges.

Insurance companies, like other businesses, face inquiries and investigations from government agencies and attorneys. They also rely on attorney-client and work-product privileges when gathering information and reaching conclusions necessary to respond in such situations. Companies under scrutiny often face pressure, however, to waive these privileges.

The government routinely considers companies' "cooperation" when deciding whether to bring or recommend charges. Full cooperation, however, often has required a waiver of privileges, when requested. For example, the Department of Justice's 2003 "Thompson Memorandum" specifically instructed prosecutors, when considering charges, to evaluate a corporation's willingness to waive the corporate attorney-client and work-product protection. The Securities and Exchange Commission's 2001 "Seaboard Report" has been similarly characterized.

This reality threatens the very purpose of the privilege: to promote a frank and complete discussion of facts between companies and their attorneys. Moreover, management often faces a conflict between its duty to secure as favorable an outcome to the investigation as possible and its duty to preserve the company's rights and protect the company from additional liability. Several courts have rejected the notion that companies may effect a "selective waiver" only to investigators. Thus, what a company discloses to regulators, even confidentially, may be used against it in subsequent proceedings.

The situation has generated considerable criticism and has improved somewhat. The DOJ recently issued the "McNulty Memorandum," superseding the Thompson Memorandum, and stating "waiver of attorney-client and work-product protections is not a prerequisite to a finding that a company has cooperated in the government's investigation." It also imposes procedural requirements on prosecutors' requests for waiver, including approval from presidential appointees. As for the SEC, Commissioner Atkins recently stated that "the Commission should not view a company's waiver of privilege as a factor that will afford cooperation credit," and that the SEC may amend the "offending" portions of the Seaboard Report.

Critics remain unsatisfied. The McNulty Memorandum, for instance, still allows prosecutors to consider waivers when judging cooperation. Sen. Arlen Specter recently introduced legislation that would prohibit federal officials from requesting privilege waivers or considering privilege assertions in their charging decisions. A proposed Federal Rule of Evidence would allow a "selective waiver" to government authorities, at least as an evidentiary matter. The outcome of these efforts remains unclear.

Thus, insurers, when faced with an actual or potential government investigation, must recognize that attorney-client and work-product privileges—while theoretically sacrosanct—remain vulnerable in practice. Specifically, companies must bear in mind that they may, even in the distant future, decide to waive those privileges, under government pressure.

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This is especially important to consider when conducting internal investigations, which typically generate new, privileged information. If asked to waive privileges, a company should verify that government officials have followed their internal requirements for making the request. And if a company decides to waive a privilege—after weighing short-term benefits versus long-term repercussions—it should negotiate as restrictive a confidentiality agreement as possible. While the pressure to cooperate remains, companies now enjoy increasing leverage in preserving their rights. BR

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