Insurance & Reinsurance

CLARK HILL

www.clarkhill.com

BRIEFING

Spring 2014

Arizona

Delaware

Illinois

Michigan

New Jersey

Pennsylvania

Washington, DC

West Virginia

Insurance And Reinsurance Cyber Risk Issues

Virtually all companies have potential cyber risk exposure, whether limited to the costs of retrieving and recreating lost data or as massive as the multi-million dollar losses suffered by Target. From the Target data breach, to the indictment of Chinese military officers for cyber espionage, to the international raids on the developers and users of the Blackshades malware, threats of data breaches and cyber-attacks impacting both businesses and individuals are very real. The last 15 years have seen exponential growth in the use of computers, computer networks and "smart" devices that interact with computers and computer networks. Sensitive personal information is electronically transmitted through retail, banking, investment and other types of transactions, many of which are on-line. Much of the data is stored on companies' servers. The large majority of states have laws requiring notification to individuals when personal information is exposed in a cyber-attack. Data breaches and cyber-attacks have increased almost 50% in recent years. And it is not just large companies that are at risk. Almost three-quarters of incidents occur at companies with fewer than 100 employees.

The term "cyber risk" is used to describe all risks associated with computers, computer networks and smart devices. Forms of cyber risk include lost data, the loss of data to third parties, damage to cyber infrastructure, malware, viruses, hacking, and the use/misuse of social media and the internet. Employees and other insiders are particularly vexing sources of exposure. Their activities may range from "innocent" (if somewhat naive) clicking on suspect links, to carelessness with passwords, to "rogue" actions utilizing hacking and/or malware to obtain unauthorized access to systems and information.

It is little wonder that the insurance market has stepped in to offer an expanding line of insurance products to address these evolving risks. Available coverages for cyber risk include costs of notification and credit monitoring for privacy breaches; third-party liability (sometimes including regulatory enforcement and violation costs); restoring/replacing lost data; business interruption coverage; liability for libel, slander, copyright infringement and other similar claims related to websites or social media; and cyber extortion/terrorism. Generally, cyber risk policies are written on a claims made and reported basis. It has been estimated that over 30% of businesses, representing $1.3 billion in premium, had some form of cyber risk coverage in 2013. That premium figure is expected to rise significantly in the next two to three years. This in turn should trigger a rise in demand for reinsurance for cyber risk policies.

Given the evolving nature of cyber risks and the numerous risk factors at play, risk management and underwriting are particularly important to successfully writing cyber risk coverage. Cyber-attacks that result in the most harm often involve multiple causes such as hacking, malware, or actions by rogue employees. The level and type of risks also vary widely between industries and size of the business. Coverages and limits will vary widely as well. Policyholders should carefully consider how to tailor their cyber risk coverages to address the specific types of exposures their companies may face.

In the Target case, vendors were given remote access, not just to the limited portion of Target's systems necessary for them to perform tasks relevant to their work, but to much wider segments of Target's network. Notwithstanding this obvious security gap, Target had very proactive data security procedures in place and had invested in the latest technology

CONTINUED ON PAGE 2

Inside this Briefing

Insurance And Reinsurance Cyber Risk Issues

Claims Arising From Recording Customers' Calls May Not Be Covered Under CGL Policies

Sixth Circuit Reverses Injunction Entered By Michigan Trial Court That Had Enjoined Arbitration To Address Allegations Of Misconduct By Arbitrator, Umpire, and Counsel

Broker's Motion For Summary Judgment Against Client/Insured Denied Because Factual Issue Existed Regarding Whether Parties Had Special Relationship

Kansas Federal Court Grants Request That Non-Party Broker Be Compelled To Produce Documents In Coverage Dispute

Insurance And Reinsurance Cyber Risk Issues

CONTINUED FROM PAGE 1

designed to detect and block cyber-attacks. The technology apparently worked properly; alarms were sent in a timely manner that could have prevented data from leaving Target's systems. However, those alarms were apparently ignored by the personnel tasked with monitoring the systems. Information was stolen from about 110 million of Target's customers' debit and credit cards. The Target breach starkly demonstrates the potential for devastating losses as Target has reported spending $61 million as of February 1, 2014, less than two months after the breach was reported.

All indications are that cyber risk will continue to increase as technology evolves. Legislation and the courts are only just catching up to what has been happening for the last several years. The recent opinion from the New Jersey federal district court in *Federal Trade Commission v. Wyndham Worldwide Corp.*, No. 13-1887, 2014 U.S. Dist. LEXIS 47622 (D.N.J. April 7, 2014) concerned three data breaches at Wyndham hotels between April 2008 and January 2010 and illustrated how risk exposure is still evolving. The FTC brought charges of unfair and deceptive trade practices against Wyndham related to the company's data security. The FTC alleged Wyndham engaged in unfair acts or practices under the FTC Act by failing to employ reasonable and appropriate measures to protect personal information from unauthorized access. The FTC further alleged that this failure caused or was likely to cause substantial injury to consumers who were not able to avoid the injury on their own. Wyndham tried to have the case dismissed, arguing that the FTC's jurisdiction in the data security field was preempted and that, even if it was not preempted, the FTC was required to engage in rule making before bringing an enforcement action. The court overruled Wyndham's objections and allowed the case to proceed. It remains to be seen if the court's decision will stand and if liability will ultimately be found, but the case serves as a good example of how the legal landscape surrounding cyber risk is only beginning to emerge.

Many of the types of exposures and losses common to cyber-attacks and data breaches are not covered by standard CGL policies. All companies, regardless of size or nature of business, need to seriously evaluate their potential exposure to losses resulting from cyber-attacks and data breaches and to procure the type and level of cyber risk coverage necessary to protect their businesses.

Claims Arising From Recording Customers' Calls May Not Be Covered Under CGL Policies

SUMMARY: In *Defender Security Co. v. First Mercury Ins. Co.*, 2014 U.S. Dist. LEXIS 33318 (S.D. Ind., Mar. 14, 2014), a federal district court in Indiana held allegations that an insured unlawfully recorded its customers' telephone calls did not constitute "[o]ral or written publication of material that violates a person's right of privacy" under Coverage B of a commercial general liability ("CGL") policy. Thus, the CGL insurer was not required to provide a defense to the insured for a lawsuit based upon such allegations. The court held that merely recording and storing customer telephone calls did not constitute a "publication" by the insured, as required for Coverage B to be triggered. Further, the court reviewed and expressly rejected a recent decision by another federal district court, which had reached a contrary conclusion under similar facts.

The insured, Defender Security Company, sought coverage for a class action complaint filed against it in California. The plaintiff, Kami Brown, said she had made telephone calls to Defender regarding the purchase of home security services, during which she allegedly "shared personal information" with Defender, including her name, address, date of birth and social security number. Brown asserted that her conversations with Defender were recorded by Defender without her knowledge and consent, and that Defender systematically recorded and stored all of its telephone conversations with customers without obtaining consent as required by California law, which makes it a crime to record a telephone conversation unless all parties to the call consent.

Defender tendered the defense of the California lawsuit to its CGL insurer, First Mercury Insurance Company, but First Mercury denied coverage. Defender then filed a declaratory judgment action against First Mercury, claiming that coverage was available under Coverage B of its CGL policy, which provided coverage for "personal and advertising injury," defined to include "[o]ral or written publication of material that violates a person's right of privacy."

First Mercury filed a motion to dismiss the coverage lawsuit, arguing that Defender's recording and storing of customer telephone calls, without any allegation that the recordings had been disseminated to a third party, did not constitute a "publication" as required by Coverage B. Defender, however, argued that disclosure to just one person constituted a "publication" and that the allegation in the California lawsuit that Defender stored the telephone

call recordings "for various business purposes" implied that the recordings were disclosed to at least one person.

The court agreed with First Mercury, finding that no "publication" of the telephone call recordings was alleged in the California lawsuit and, thus, no coverage existed under Coverage B of the CGL policy. The court held that:

> [T]he allegation that Ms. Brown shared personal information with Defender during her call establishes at most only that *she* published information about *herself*, not that *Defender* published information about *her*. Assuming the truth of Ms. Brown's allegation that Defender utilized "Call Recording Technology" to store the recording of her telephone call likewise shows merely that Defender maintained a record of the call, not that it communicated the content of the recording to anyone.

In reaching this decision, the *Defender* court reviewed and rejected the holding of another federal trial court which involved similar facts. *Encore Receivable Management, Inc. v. ACE Property & Cas. Ins. Co.*, 2013 U.S. Dist. LEXIS 93513 (S.D. Ohio, July 3, 2013), concerned a call center that recorded customer telephone calls without the customers' knowledge and consent. Such calls were alleged to have been "distributed internally" within the insured's operations for training and quality control. The *Encore* court found that these allegations were sufficient to demonstrate that the recordings were "published" and, thus, to trigger Coverage B of the insured's CGL policy. According to the *Encore* court, "this Court need not find that the communications were actually disseminated to third parties, because the initial dissemination of the conversation constitutes a publication at the very moment that the conversation is disseminated or transmitted to the recording device." Despite the factual similarity between the two cases, the *Defender* court rejected *Encore* in reaching its decision because that case was decided by a different federal district court and because it considered "its analysis to be contrary to the manner in which we believe Indiana courts would decide this issue."

Both *Defender* and *Encore* have been appealed, *Defender* to the Seventh Circuit and *Encore* to the Sixth Circuit.

IMPORT OF DECISION: It is not uncommon for companies to record their customers' telephone calls for quality control, training, and other business purposes. Since the law on recording telephone conversations varies from state to state, companies that engage in this practice may find themselves on the receiving end of a lawsuit by aggrieved customers alleging that their rights were violated. However, whether a company faced with such a lawsuit will be provided a defense by their CGL insurer is unclear, as evidenced by the *Defender* and *Encore* decisions. Whether or not coverage will be afforded for such a claim will not only turn on the specific factual allegations of the underlying lawsuit for which a defense is sought by the insured, but also on whether the court hearing the coverage matter is inclined to follow the reasoning of *Defender* or *Encore* (or neither). Further, with two different federal appeals courts now considering essentially the same question, how the law will develop on this Coverage B issue is still very much up in the air.

Sixth Circuit Reverses Injunction Entered By Michigan Trial Court That Had Enjoined Arbitration To Address Allegations Of Misconduct By Arbitrator, Umpire, and Counsel

SUMMARY: In our Winter 2014 Newsletter, we commented on a Michigan federal district court case in which the court enjoined an ongoing arbitration to allow one of the parties to pursue allegations of impermissible conduct by the umpire, one of the arbitrators, and one of the attorneys involved in the arbitration. *Star Ins. Co. v. Nat'l Union Fire Ins. Co.*, 2013 U.S. Dist. LEXIS 130379 (E. D. Mich. Sept. 12, 2013). The case was appealed to the Sixth Circuit which has now reversed the trial court's decision and dissolved the injunction, holding that judicial review of the interim arbitral decision in this matter is not permissible. *Savers Property and Cas. Ins. Co. v. Nat'l Union Fire Ins. Co.*, 2014 U.S. App. LEXIS 6488 (6th Cir. Apr. 9, 2014).

Star Insurance Company, Savers Property & Casualty Insurance Company, Ameritrust Insurance Corporation, and Williamsburg National Insurance Company ("Cedents") and National Union Fire Insurance Company, the reinsurer, entered into a reinsurance treaty covering workers' compensation business that contained an arbitration provision under which disputes were to be submitted to a panel of two party-appointed arbitrators and an umpire who were not under the control of either party.

A dispute arose, and the Cedents commenced an arbitration against National Union. Party arbitrators and an umpire were appointed. The arbitrators issued a scheduling order that provided *ex parte* communications with panel members were to cease upon the filing of the parties' initial pre-hearing briefs. The order did not say when or if *ex parte* communications could resume. Following a hearing, the panel issued an "Interim Final Award" resolving liability but leaving open issues relating to damages. Thereafter, National Union's counsel and its arbitrator had *ex parte* communications, and the umpire and National Union's arbitrator issued two orders, allegedly without the knowledge or participation of the Cedents' arbitrator.

CONTINUED ON PAGE 4

Sixth Circuit Reverses Injunction Entered By Michigan Trial Court That Had Enjoined Arbitration To Address Allegations Of Misconduct By Arbitrator, Umpire, and Counsel

CONTINUED FROM PAGE 3

The Cedents then filed a lawsuit seeking to enjoin the arbitration and to obtain appropriate relief for alleged breaches of the treaty which they asserted included the *ex parte* communications, various relationships between National Union's arbitrator and its counsel and between that arbitrator and the umpire, and the issuance of panel orders without the participation of the Cedents' arbitrator.

The court agreed with the Cedents and entered an order enjoining the arbitration to allow the Cedents an opportunity to investigate their allegations of misconduct. National Union appealed. The Sixth Circuit first addressed the choice of law issue. The parties disagreed whether the Federal Arbitration Act ("FAA") or the Michigan Arbitration Act ("MAA") controlled the dispute. In resolving this issue, the court noted the treaty stated that any arbitration would be subject to the laws of the State of Michigan. Thus, the court found that the MAA applied. However, it further observed that the FAA and the MAA were identical in all relevant respects, and therefore it employed FAA-based precedent to help in its analysis.

The Sixth Circuit next considered whether the district court's review of the Interim Final Award was improper. The court analyzed the history and purpose behind the FAA and MAA and held that the laws contemplated "only two stages at which courts may become involved in arbitration proceedings." First, at the outset of any dispute, courts are authorized to decide certain "gateway matters" of arbitrability. Second, at the conclusion of an arbitration proceeding, courts are authorized "to enter an order confirming, vacating, or modifying the award." Between those two stages, however, the court said "the laws are largely silent with respect to judicial review." The Sixth Circuit and several other circuits have previously interpreted that silence "to preclude the interlocutory review of arbitration proceedings and decisions." The court noted there were sound policy reasons for withholding judicial review until the conclusion of an arbitration proceeding. The court further observed that the Cedents and National Union expressly agreed to be bound by Michigan law and thereby "agreed to defer judicial review until after conclusion of the [a]rbitration." Finally, the court noted that the Interim Final Award only addressed liability and that the panel had retained jurisdiction to compute damages. Thus, the court said, the arbitration was not complete because there was no "final" award. Accordingly, the court held that the Cedents' "request that the district court intervene to halt this ongoing arbitration proceeding was plainly improper."

The Sixth Circuit then considered the district court's employment of 9 U.S.C. § 2 to intervene in the arbitration, noting first that it was not required to review this aspect of the district court's decision because the Cedents never raised the issue before the district court. Section 2 provides that an arbitration clause in a contract is valid and enforceable except "upon such grounds as exist at law or in equity for the revocation of any contract." The court nevertheless proceeded to analyze 9 U.S.C. § 2, noting first that it "pertains only to the revocability of an arbitration agreement under traditional contract defenses." The court held that "[c]hallenging the fairness of an arbitration proceeding or the partiality of an arbitrator is different in kind than challenging the underlying contract that contained the agreement to arbitrate" and that the district court erred in relying on 9 U.S.C. § 2 to entertain the Cedents' "premature challenge to the fairness of the proceedings and the partiality of the arbitrators."

The Sixth Circuit addressed the Cedents' reliance on certain cases involving arbitration agreements that permitted interlocutory review and concluded that those cases were not persuasive because the treaty did not include such language:

> Absent express or implied consent in the underlying agreement to arbitrate, federal courts may not graft a provision for interlocutory judicial review onto the otherwise straight-forward regime contemplated by the FAA and the Michigan Arbitration Act. Both laws generally call for judicial review only at the beginning of an arbitration, to decide certain gateway matters of arbitrability, or at the end of an arbitration, to confirm, vacate, or modify a final arbitration award. Where the parties agree to arbitrate a matter under either the FAA or the Michigan Arbitration Act *alone*, as [the parties] did here, we must enforce their contract according to its terms.

The Sixth Circuit ended its opinion by noting that the Cedents were not without a remedy. The court said the Cedents will be entitled to challenge the fairness of the arbitration proceeding and the partiality of the arbitrators after the panel has "concluded its work and issued a final award."

IMPORT OF DECISION: The Sixth Circuit's decision upholds the strong public policy favoring arbitration, but disfavoring judicial intervention in the arbitration process prior to the issuance of a final arbitral award. While there is a public interest in the integrity of the arbitration system and valid arbitration provisions in contracts, interlocutory challenges made while an arbitration proceeding is ongoing are permitted in only limited circumstances not present in *Savers*.

Broker's Motion For Summary Judgment Against Client/Insured Denied Because Factual Issue Existed Regarding Whether Parties Had Special Relationship

SUMMARY: In *Voss v. Netherlands Insurance Company*, 2014 N.Y. LEXIS 384 (N.Y. Ct. App. Feb. 25, 2014), an insurance broker's motion for summary judgment on a negligence claim brought by its client was denied because issues of material fact existed regarding whether there was a special relationship between the parties.

Deborah Voss owned several companies. She purchased property, professional liability, and business interruption insurance through CH Insurance Brokerage Services Co., Inc. ("CHI") for herself and her companies. When Voss initially discussed business interruption insurance with CHI, the broker asked her for sales figures and other pertinent information to enable it to calculate an appropriate level of business interruption coverage. Voss claimed that CHI said it would reassess her coverage needs as her businesses grew.

Based on the information Voss provided, the broker proposed business interruption coverage of $75,000 per incident. When Voss questioned whether the $75,000 limit was adequate, the broker allegedly assured her that it would suffice. According to Voss, the broker also said he calculated the amount of coverage at a threshold level, emphasizing that CHI would "take it up" each year as the businesses evolved. Voss accepted the broker's recommendations and purchased a policy with The Netherlands Insurance Company with $75,000 of business interruption coverage.

When Voss moved one of her companies to new premises and opened two more businesses at the same location, she discussed these developments with CHI. The Netherlands policy was renewed with the same $75,000 business interruption limit. Voss then incurred a loss caused by multiple leaks in the roof. The roof was replaced, but a month later, the new roof failed, resulting in more extensive water damage. Voss was forced to close all three of her businesses for various periods of time.

Voss filed claims with Netherlands which treated the two roof leaks as separate occurrences under the business interruption policy. Voss contended the carrier delayed making payments. While dealing with the roof repairs, Voss met with another individual at CHI to discuss renewal of the policy. When she received a proposal indicating that the business interruption coverage would be reduced from $75,000 to $30,000, she questioned the broker about the reduction. According to Voss, the broker responded that she "would take a look at it." Voss did not follow up because, she said, she was preoccupied with the building's extensive damage. When the policy was renewed, it contained a $30,000 per occurrence limit for business interruption coverage.

A short while later, the roof failed a third time, causing significant damage to the premises and further disrupting Voss's businesses. While her claims stemming from the third loss were pending, Voss commenced an action against CHI, Netherlands, and the roofing contractor.

With respect to her claim against the broker, Voss alleged that a special relationship existed with CHI and that CHI had negligently secured inadequate levels of business interruption insurance for all three losses. Following discovery, CHI moved for summary judgment, asserting that no special relationship was created and that in the absence of a specific request by the insured for coverage that went unfulfilled, CHI could not be held liable for failing to recommend or obtain higher limits. In addition, CHI argued that it could not be held liable for negligence because Voss had admitted she was fully aware of the initial $75,000 business interruption limits and the subsequent reduced limits of $30,000. Finally, CHI claimed that even if a special relationship existed, any breach of duty was not the proximate cause of Voss's damages which CHI alleged resulted from Netherlands' failure to pay the policy limits to Voss.

The Supreme Court of New York agreed with all three of CHI's arguments and granted the broker's motion for summary judgment, dismissing the complaint. The Appellate Division, with one justice dissenting, affirmed. The majority upheld the dismissal, but disagreed with the Supreme Court with regard to the special relationship issue, finding that CHI had failed to meet its burden of demonstrating the absence of a special relationship. The majority agreed with the trial court, however, on the other two arguments. The dissent agreed with the majority on the special relationship issue, but said that, assuming a special relationship existed, it was irrelevant to whether Voss was aware of the policy limits and that the proximate cause issue could not be decided as a matter of law. The Court of Appeals granted leave to appeal.

CHI contended that the Court of Appeals did not need to address the other two issues, but could resolve the case (favorably to CHI) by finding the record did not support the existence of a special relationship between CHI and Voss. The broker asserted the evidence showed that the parties only had an ordinary broker-client relationship.

The Court of Appeals held that CHI failed to demonstrate the absence of any material issues of fact regarding the existence of a special relationship between the parties. The

CONTINUED ON PAGE 6

Broker's Motion For Summary Judgment Against Client/Insured Denied Because Factual Issue Existed Regarding Whether Parties Had Special Relationship

CONTINUED FROM PAGE 5

court said that as a general rule insurance brokers have a common law duty to obtain coverage requested by their clients or to inform them of their inability to do so. Brokers, however, have no continuing duty to advise clients to obtain additional coverage. In an ordinary broker-client case, the client may prevail in a negligence claim only where it can establish that it made a particular request to the broker and the requested coverage was not procured.

Voss did not contend she specifically requested higher business interruption limits. Rather, she claimed the existence of a special relationship with CHI. Under New York law, where a special relationship develops, a broker may be liable, even in the absence of a specific request for coverage, for failing to advise the client to obtain additional coverage. Voss maintained that CHI failed to advise her to obtain additional business interruption coverage.

New York courts have identified three situations that may give rise to a special relationship thereby creating an additional duty of advisement: (1) the broker received compensation for consultation apart from payment by the client of premium; (2) there was some interaction regarding a question of coverage such that the insured relied on the expertise of the broker; or (3) there was a course of dealing over an extended period of time which would have put an objectively reasonable insurance broker on notice that its advice was being sought and specifically relied on.

The Court of Appeals held that the proof submitted by CHI in support of its summary judgment motion—Voss's deposition testimony—did not satisfy its burden of establishing the absence of a material issue of fact as to the existence of a special relationship. To the contrary, the court said the evidence suggested there was some interaction regarding the question of business interruption coverage, with the insured relying on the expertise of the broker in agreeing to the amount of coverage the broker recommended. Voss also testified that the broker repeatedly pledged that CHI would review coverage annually and recommend adjustments as Voss's businesses grew. Therefore, the court concluded that sufficient factual issues existed to preclude granting summary judgment on the question of whether a special relationship arose between the parties.

The Court of Appeals also rejected CHI's other two arguments. The court held that Voss's awareness of the business interruption limits was wholly irrelevant to her claim that CHI was negligent in failing to recommend higher limits. The court also rejected CHI's argument that any negligence on its part was not the proximate cause of Voss's damages, holding that questions of proximate cause and foreseeability should generally be resolved by the factfinder.

IMPORT OF DECISION: When an insurance policy does not cover an occurrence or when the amount of coverage is insufficient to make an insured whole, the insured sometimes tries to blame its insurance broker for the lack of coverage. Under the common law, an insurance broker has a duty to obtain the coverage its client requests or to inform the client of its inability to procure the coverage. An insurance broker, as a rule, does not have an affirmative and continuing duty to advise, guide or direct a client to obtain additional coverage. If a special relationship develops between the broker and the client, however, a broker may be liable—even in the absence of a specific request—for failing to advise a client to obtain additional coverage.

Kansas Federal Court Grants Request That Non-Party Broker Be Compelled To Produce Documents In Coverage Dispute

SUMMARY: In *Black & Veatch Corp. v. Aspen Ins.* (UK) Ltd., 2014 U.S. Dist. LEXIS 25896 (D. Kan. Feb. 28, 2014), the court ruled that a non-party broker must produce documents subpoenaed by insurance carriers in a coverage dispute with their insured, holding that the insured had failed to establish the documents were covered by the attorney-client privilege or work-product doctrine.

Black & Veatch Corporation ("B&V") entered into a series of contracts to construct several gas desulfurization systems for American Electric Power Service Corporation. Prior to construction, B&V obtained commercial general liability coverage from several insurers. B&V contended that AON co-brokered an umbrella policy for B&V with Aspen Insurance (UK) Ltd., Catlin Lloyd's Syndicate 2003, and Liberty Mutual Insurance Europe (UK) Ltd. (the "Liability Insurers"). The Liability Insurers asserted AON was not the broker for the umbrella policy.

After the desulfurization systems were built, American Electric alleged they had significant defects, which B&V repaired for several million dollars. B&V then submitted claims to the Liability Insurers and followed up with a declaratory judgment action seeking damages under the various policies.

The Liability Insurers served a subpoena on AON seeking the production of certain documents. AON produced some but not all of the subpoenaed documents. B&V prepared a privilege log for the withheld documents and objected to their production on the grounds that the documents were covered by the work-product doctrine and the attorney-client privilege. B&V asserted that AON was a representative of B&V's when the documents were created, was acting as its broker, and was a member of its advisory team. B&V said AON participated in strategy discussions with B&V and its legal counsel and took action in furtherance of such strategies in attempting to recover monies from the Liability Insurers. An AON executive vice president and chief broking officer submitted a declaration in support of B&V's position, stating that he had acted as B&V's representative.

The court held that, while the work-product doctrine may cover documents created by an attorney's investigator or other agents, it only protects documents prepared in the ordinary course of business if they were created as a result of the imminent threat of litigation. The court said B&V failed to provide sufficient details regarding the creation of the documents to establish that the requirements for work-product protection had been met. Among other deficiencies, B&V did not provide job titles or identifying information for the majority of the individuals listed on B&V's privilege log. Also, information was not provided to show AON was acting as B&V's representative as opposed to simply working as a broker in the ordinary course of its business.

The court also held B&V failed to show the documents were prepared in anticipation of litigation rather than in the ordinary course of AON's business. Many of the documents were handwritten notes as to which there was no showing they pertained to litigation. Others were routine broker communications relating to B&V's coverage claims. Also, B&V did not prove the notes were ever provided to B&V or its counsel, which the court said demonstrated they were unlikely prepared for litigation. The court said the fact that many of the notes were undated prevented it from determining if they were created after litigation was anticipated.

B&V countered that the withheld documents were prepared in anticipation of litigation because they were created after the Liability Insurers sent B&V a reservation of rights letter and B&V hired counsel. The court said, however, that it could not tell whether the undated documents had been prepared after those two events. Also, the court said, documents created after an insurer declines coverage are not automatically deemed to have been prepared in anticipation of litigation. Rather, documents must be examined individually on a case-by-case basis. The court held that in an insurance investigation setting, whether documents are created in anticipation of litigation depends on whether there has been "a definite shift made by the insurer or adjuster from acting in its ordinary course of business to acting in anticipation of litigation." Concluding that the same principle applied to documents created by a broker, the court found that B&V did prove there was a definitive shift from AON's acting as a broker to its acting as B&V's representative in the litigation.

B&V also objected to the production of three documents on attorney-client privilege grounds. Initially, the court rejected the Liability Insurers' argument that the privilege did not apply since the documents did not involve an attorney. Rather, the court held, the lack of attorney involvement does not necessarily preclude a party from demonstrating the privilege's applicability. Nonetheless, the court held B&V failed to provide sufficient information for it to determine whether each element of the attorney-client privilege had been satisfied. B&V did not prove the documents were made in confidence for the primary purpose of obtaining legal advice from a lawyer. In addition, B&V failed to show the documents were sent by B&V to counsel seeking legal advice or by counsel to the client containing such advice.

IMPORT OF DECISION: It is not uncommon for brokers to have documents relevant to disputes between insureds and insurers or reinsureds and reinsurers. Such documents may relate to contract formation and shed light on what the parties intended certain terms to mean. Brokers may have documents concerning the calculation and payment of premium. Also, brokers may have claims-related documents. Generally, broker documents will not be privileged or covered by the work-product doctrine. It is possible, however, that specific documents could be protected if the applicable requirements are met. In this case, the court strictly applied the rules relating to the work-product doctrine and attorney-client privilege and concluded the requirements had not been satisfied. It is possible this court might have ruled some of the documents were exempt from production if the insured had been able to make a more particularized showing that the elements of the work-product doctrine or attorney-client privilege had been met.

CLARK HILL'S Insurance and Reinsurance Practice Group has an established reputation for its work in the global insurance and reinsurance industry. The firm represents major United States, London Market, European, and Bermuda insurers and reinsurers in commercial litigation, coverage disputes, and major business transactions. Our practice encompasses all types of insurance, and every kind of underlying risk. We have the capacity to efficiently handle any (re)insurance matter, from individual to class action claims, and each assignment undertaken by the firm is afforded the same personal attention of partners having expertise with respect to the issues.

Philadelphia

Joseph M. Donley
Insurance & Reinsurance Practice Group Leader

Christopher M. Brubaker
Douglas M. Chapman
William E. Cox
Christopher J. Day
Peter B. Kupelian
Carol G. Schley
Robert W. Tomilson
Karolien M. Vandenberghe

For more information, please contact Joseph M. Donley at jdonley@clarkhill.com, or call 215.640.8500.

To subscribe to *Insurance & Reinsurance Briefing*, please contact Connie Lojewski at 215.640.8543 or clojewski@clarkhill.com.

Note: The foregoing publication is intended solely for the education and information of the recipient. It is not intended to be legal advice or a legal opinion and should not be regarded as either legal advice or a legal opinion.