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NEWSLETTER

Interview of Policyholder under "Cooperation Clause" Does Not Require Disqualification of Interviewing Attorney in Rescission Litigation

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A federal district court in Texas, applying Texas law, has held that an attorney representing an insurance carrier who interviewed an insured director of a company, pursuant to the "cooperation clause" of the D&O policy issued to the company, was not disqualified from representing the carrier in subsequent litigation to rescind the policy. *Great Am. Ins. Co. v. Christopher*, 2003 WL 21414676 (N.D. Tex. June 13, 2003).

The insurer issued a D&O policy to a company. The policy contained a cooperation clause requiring the policyholder to "provide the Insurer with all information and particulars it may reasonably request in order to reach a decision as to its consent to incur costs of the defense."

After the company filed for bankruptcy and shareholder lawsuits followed, the company sought indemnification under the policy. The insurer's outside counsel told the directors that the carrier would not accept coverage until it had an opportunity to interview one of the directors. During the interview, the attorney told the director that the information discussed "would not be disseminated to third parties." After the interview, the insurer began to advance defense expenses pursuant to an agreement in which the carrier reserved all of its rights. Subsequently, the insurer determined that material misrepresentations had been made in the application for the policy, and it instituted litigation to rescind the policy. One of the directors moved to disqualify the insurer's counsel on the grounds that the same law firm had conducted the interview prior to agreeing to advance.

The district court denied the motion to disqualify. It first rejected the argument that a *de facto* attorney-client relationship existed between the insurer's counsel and the director as a result of the interview and the limited disclosure of confidential information. The court reasoned that disclosure of confidential information, while relevant to the creation of an attorney-client relationship, is not sufficient by itself. Instead, the court said inquiry must be made into "the facts and circumstances as a whole." Here, since separate counsel represented the director at all times, and the director's attorney even negotiated the contours of the interview, the court reasoned that there was no attorney-client relationship. The court suggested that the relationship was much more like an information exchange under a joint defense agreement.

The court also rejected the argument that, because the insurer's outside counsel received confidential information, it owed the company's director a fiduciary duty. The court first noted that the counsel was using the information on behalf of the same client he had been representing at all times—the insurer—and that the situation was therefore distinguishable from cases in which an attorney uses information on behalf of another client. The court also explained that "Texas law is clear that an assumed duty to preserve confidences does not preclude an attorney and client from acting in their own best interests, even to the point of using information disclosed by others in ways that conflicts with the others' interests." Finally, while the court noted that the promise by counsel not to disclose the information created a reasonable expectation that the information would not be used in subsequent representation of a third party, the director "could not expect loyalty" from the insurer's counsel at "the expense" of the insurer.

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