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# A Threat To Cedent/Reinsurer Communications

*Law360, New York (May 07, 2010)* -- A recent United States District Court for the District of Oregon decision, which is currently under consideration for a writ of mandamus by the Ninth Circuit Court of Appeals, could have significant implications for the flow of information between ceding companies and reinsurers.

If the Ninth Circuit does not issue a writ of mandamus in The Regence Group, et al. v. TIG Specialty Insurance Company, Case No. 07-1337-HA (the Regence Litigation), ceding companies may be faced with a difficult choice of either risking a privilege waiver or facing no-pay arguments from reinsurers, and reinsurers may see a significant decrease in the amount of information disclosed to them. As a result, this decision bears watching.

**The Regence Litigation**

The Regence Litigation was initiated against TIG by a group of TIG's policyholders (Regence). Regence is comprised of the Regence Group, Regence Blueshield, Regence Bluecross Blueshield of Oregon, Regence Blueshield of Idaho, and Regence Bluecross Blueshield of Utah.

The case involves a Managed Care Organization Liability Insurance Policy (Policy) that TIG issued to the Regence entities. While the Policy was in effect, certain medical providers filed lawsuits against Regence, alleging various RICO violations (Underlying Lawsuits). Regence seeks a declaration in the Regence Litigation that TIG is obligated to pay settlement and defense costs arising out of the Underlying Lawsuits.

TIG also is a party to reinsurance treaties with Swiss Reinsurance American Corporation and Munich Reinsurance America (the Reinsurers), under which TIG potentially is reinsured for losses sustained under the Policy. As part of its normal business practice, TIG provided detailed information to the Reinsurers about claims arising under policies subject to the treaties, including the Underlying Lawsuits. In doing so, TIG disclosed some of its outside coverage counsel's opinions in the Underlying Lawsuits.

While the Regence Litigation was pending, TIG became involved in separate arbitrations with the Reinsurers (TIG Arbitrations) concerning, among other things, whether the Underlying Lawsuits fell within the coverage provided by the treaties. During these Arbitrations, the Reinsurers requested files relating to Regence and the Underlying Lawsuits that contained privileged documents — including coverage opinions, litigation reports and communications with TIG's coverage attorneys.

TIG resisted disclosure of its privileged information in the TIG Arbitrations, at least in part on the grounds that producing such information could constitute a waiver. TIG ultimately was ordered to produce its privileged documents. However, in ordering production, the arbitrators were careful to state that any production made by TIG did not constitute a waiver, and that TIG's productions were made subject to the Confidentiality Agreements governing the Arbitrations. TIG and the Reinsurers ultimately settled the TIG Arbitrations.

Subsequently, as part of discovery in the Regence Litigation, Regence sought the following categories of documents from TIG and the Reinsurers (Regence-requested Documents): (1) reinsurance contracts purchased by TIG covering the Policy; (2) documents exchanged between TIG and the Reinsurers concerning the Underlying Lawsuits; (3) documents exchanged between or among TIG, the Reinsurers and the arbitrators in the TIG Arbitrations, to the extent they related to coverage for the Underlying Lawsuits; and (4) documents concerning payments received by TIG from the Reinsurers for the settlement of claims relating to the Underlying Lawsuits. See Order at 3, The Regence Group (May 1, 2009) (May 1 Order).

In response to Regence's requests, TIG sought a Protective Order. TIG argued, among other things, that the Regence-requested Documents were protected by the attorney-client privilege, the work product doctrine, and the common interest doctrine. TIG Spec. Ins. Co's Memo in Support of its Motion for Protective Order at 5, The Regence Group (Dec. 18, 2008) (Protective Order Memo). According to TIG, the Reinsurers and TIG shared a common interest in ensuring that coverage was properly available under TIG's policies, and that TIG's communications with the Reinsurers were made with the expectation that they would not be disclosed to TIG's policyholder.

The court denied TIG's motion, and ordered production of the Regence-requested Documents. See May 1 Order at 3-5. The court relied primarily upon AIU Ins. Co. v. TIG Ins. Co, No. 7052, 2008 WL 5062030 (S.D.N.Y. Nov. 25, 2008), and found that TIG waived privilege by producing privileged documents to the Reinsurers "when the parties' interests are not aligned." Id. at 4. According to the court, TIG's and the Reinsurers' interests were not aligned, because they were opposing parties in the TIG Arbitrations. Id. at 4-5.

On May 15, 2009, TIG filed a Motion to Reconsider and Reclarify the May 1 Order. See Motion to Reconsider and Reclarify, Regence Group, (May 15, 2009). TIG asked the court to reconsider its reliance on AIU, and to clarify whether the Order also applied to documents TIG sent to the Reinsurers prior to entering into arbitration. See TIG's Memo in Support of Motion to Reconsider and Reclarify, Regence Group (May 15, 2009). Alternatively, TIG asked the court to certify an appeal of the May 1 Order. Id. at 9.

TIG offered two arguments in favor of reconsideration. First, TIG distinguished AIU by pointing out that, unlike the insurer in AIU, TIG produced documents to the Reinsurers under the protection of a Confidentiality Agreement, and never produced privileged documents directly to Regence. Id. at 4. Second, TIG relied on two Ninth Circuit precedents to argue that privilege is not waived when a party is compelled to produce documents, as TIG was in the TIG Arbitrations. Id. at 5. (citing Transamerica Computer Co. Inc. v. IBM, 573 F.2d 646 (9th Cir. 1978) and Gomez v. Vernon, 255 F.3d 1118 (9th Cir. 2001)).

The court denied TIG's motion to reconsider, clarified that there were no temporal limitations on the scope of discovery, and refused to certify an appeal. See Regence Group, et al. v. TIG Specialty Ins. Co., 2010 WL 476646 (D.Or. Feb. 4, 2010). The court declined to consider the Ninth Circuit precedents because, according to the court, these precedents were neither newly discovered nor factually similar to the case before it. Id. at *2. The court also was not persuaded by TIG's attempt to distinguish AIU, and reiterated that an insured waives any privilege by producing documents to its reinsurer "when the parties interests are not aligned." Id. (quoting AIU). As a result, the court reaffirmed its May 1 Order.

On Feb. 22, 2010, TIG filed a Petition for Writ of Mandamus with the Ninth Circuit. See Petition for Writ Of Mandamus, In Re TIG Specialty Ins. Co., v. United States District Court of Oregon, Case No. 10-70530 (9th Cir. Feb. 22, 2010) (Mandamus Petition). To date, there has been no action taken by the Ninth Circuit.

**Implications for Cedents and Reinsurers**

Although Regence is only one case from one district court – in a jurisdiction that typically does not see many reinsurance disputes – parties likely will be disinclined to ignore its holding, considering: (a) the significant risk of

doing so (i.e., waiving attorney-client privilege and providing ammunition to policyholders and claimants alike); (b) the paucity of contrary, on-point authority; (c) the recent vintage of the decision; and (d) the absence of ironclad safeguards that can be erected to prevent a finding of waiver. Accordingly, the district court's decision has implications for cedents and reinsurers, both inside and outside the arbitration context.

Within the arbitration context, a cedent concerned with waiving privilege may have to consider resisting providing discovery, even if ordered to do so by an arbitration panel. As the facts in the TIG Arbitrations make clear, there are no foolproof protections that an arbitration panel, or the parties, can adopt which will definitively prevent a waiver.

However, the decision to resist a discovery order of an arbitration panel potentially could result in a variety of negative implications for a cedent, including: (a) adverse inferences being drawn against the cedent by the Panel; (b) angering the panel; and (c) triggering a separate claim by reinsurers that the cedent breached an applicable access to records clause.

As a result, if faced with a motion to compel privileged information in an arbitration, a cedent may want to rely heavily on the implications of the Regence v.TIG decision as a means to resist producing privileged documents. A panel would have to think carefully about ordering the production of privileged documents knowing that such an order could result in a broad privilege waiver.

A second concern for cedents arises outside of the arbitration context. Specifically, reinsurers often seek access to privileged communications as part of their standard claims evaluation process, and assert that failure to provide such information constitutes a breach of an access to records clause. While there is some legal support for withholding privileged communications, doing so will often result in a reinsurer declining to pay, which may leave the cedent in a difficult situation.

If it fails to provide privileged communications, it may be precluded from obtaining payment from its reinsurers (and face a breach of contract claim as well, depending on the breadth of the governing access to records clause). If, instead, the cedent elects to initiate arbitration, it risks disclosure of its privileged communications in discovery.

Accordingly, cedents will have to weigh, on a case-by-case basis, the risks of waiver against the implications of refusing to disclose privileged documents. At a minimum, a cedent should resist, where possible, instituting arbitration against its reinsurers until the underlying litigation triggering such arbitration is complete. This will diminish the possibility of third parties seeking arbitration information, and limit the impact of any potential waiver.

However, the negative implications of the Regence v. TIG decision are not limited to cedents – reinsurers are placed in a similarly difficult situation by the Oregon federal court's holding. By the very nature of reinsurance, reinsurers generally are at an informational disadvantage in seeking to evaluate a complex claim.

Often, the advice and analysis obtained from cedent's coverage counsel is among the best sources of information explaining the cedent's position. Yet, cedents faced with the Regence v. TIG decision may determine that the risk of providing privileged or confidential information is too great, which will affect a reinsurer's ability to comprehensively and cost effectively evaluate complex claims.

Also, reinsurers may have a more difficult time convincing arbitration panels to order cedents to disclose privileged communications, in light of the potential waiver concerns. Finally, a finding of waiver that allows sensitive (and potentially damaging) privileged communications to be produced to policyholders or claimants could substantially increase the value of claims ultimately presented to reinsurers for payment, thereby increasing their own liability.

**Conclusion**

In short, the Regence v. TIG decision has the potential to significantly alter cedent/reinsurer communications. If the Ninth Circuit does not issue the writ of mandamus requested by TIG, cedents and reinsurers should look for opportunities to obtain more favorable rulings on this issue from other courts. Unless and until such rulings are obtained, cedents will have to be very careful in evaluating the circumstances under which privileged communications can be disclosed to reinsurers, and reinsurers and cedents should work together, where possible, to limit or avoid the possibility of waiver.

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