New York Commercial Division Round-Up
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Posted at 8:34 AM on June 25, 2010 by Sheppard Mullin

Providing Your Adversary With Information "For Settlement Purposes Only" Does Not Necessarily Make It So

By Daniel L. Brown and David A. Schrager

In *Hudson Ins. Co. v. M.J. Oppenheim*, 604411/05 (Sup Ct, NY County, May 25, 2010) ("*Hudson*"), Justice Bransten held that statements made in an expert consultant's report prepared in connection with settlement negotiations were not entitled to the usual protections afforded settlement communications and, therefore, were admissible at trial. The lesson to be learned is that attorneys and clients must be careful when disclosing information during settlement discussions, because otherwise admissible evidence is not rendered inadmissible merely because it was provided during settlement negotiations.

Section 4547 of New York's Civil Practice Law and Rules, entitled "Compromise and offers to compromise," generally provides that confidential settlement negotiations are inadmissible as evidence and thus cannot be used by or against your adversary at trial if negotiations break down. The Practice Commentaries to CPLR § 4547 state that the rule "is an adoption, in substantially identical language, of the original version of Rule 408 of the Federal Rules of Evidence." Vincent C. Alexander, Practice Commentaries, CPLR 4547 (McKinney's 2007).

In *Hudson*, plaintiffs sought to use at trial certain statements contained in the defendant's expert's report that was provided to plaintiffs as part of settlement discussions. Defendant objected, arguing that because the expert's report was provided for purposes of settlement negotiations only, it was inadmissible as evidence pursuant to CPLR §4547. Specifically, defendant pointed to the language in CPLR §4547 which provides that "[e]vidence of any conduct or statement made during compromise negotiations shall [] be inadmissible." CPLR §4547.

In response, plaintiffs made two arguments. First, plaintiffs argued that the expert's report did not fall within the protection afforded by CPLR §4547, because the settlement negotiations did not ultimately result in a settlement offer or conclude in a settlement. Second, plaintiffs argued that the statements and materials contained in the expert's report were the product of an investigation to determine whether to accept or reject insurance coverage, prepared in the insurance

organization's ordinary course of business. The court rejected the plaintiffs' first argument, because protection under CPLR §4547 is not contingent on the outcome of settlement negotiations. However, the court agreed with the plaintiffs that the statements and materials contained in the expert's report were prepared in the insurance organization's ordinary course of business. Therefore, because CPLR §4547 also provides that "the provisions of this section shall not require the exclusion of any evidence, which is otherwise discoverable, solely because such evidence was presented during the course of compromise negotiations," the court held that the statements and materials contained in the expert's report was not subject to the protection afforded by CPLR §4547 merely because they were produced during settlement negotiations.

As demonstrated by the *Hudson* decision, attorneys involved in commercial disputes governed by New York law would be advised to tread carefully during settlement negotiations, as statements and materials provided therein are not automatically protected under CPLR §4547, and may be used against your client if a settlement before trial is not achieved.

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