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Illinois Supreme Court: Subject Matter Waiver Does Not Apply to Extra-Judicial Disclosures

In a matter of first impression, the Illinois Supreme Court has held that the subject matter waiver applies only to disclosures made during litigation to gain a tactical advantage. The subject matter waiver doctrine creates an exception to the attorney-client privilege where a party selectively discloses some, but not all, of its attorney-client communications. In such cases, courts have ordered the disclosing parties to turn over all privileged communications on the same subject matter, to avoid the unfair situation where the party discloses only favorable information, but continues to assert the privilege as to less favorable communications. Courts sometimes refer to this tactic as "using the privilege as both a sword and a shield" (when, in fact, what they mean is that the party is using the privileged information as a sword, while using the privilege itself as a shield to hide damaging information).

In the Illinois case, *Center Partners, Ltd. v. Growth Head GP, LLC* (Nov. 29, 2012), the Defendants had shared privileged information with each other during the negotiations over an underlying transaction. In the subsequent litigation, Plaintiffs argued that the disclosures made during the transaction triggered a waiver as to all privileged communications on the same subject matter. Both the trial court and the intermediate appellate court agreed and ordered the Defendants to disclose all of their communications with their lawyers on the subject matter.

In a lengthy opinion, the Illinois Supreme Court reversed, holding that the subject matter waiver doctrine does not apply to disclosures made during business transactions or other extra-judicial settings. Rather, the waiver applies only where disclosures are made during the litigation for the purpose of gaining a strategic advantage. According to the Court, limiting the waiver comports more closely with the purpose of the doctrine, which is to ensure that parties in litigation are not using privileged information unfairly. In addition, the Court reasoned that extending the doctrine to the transactional setting would create "perverse" incentives for parties to exclude attorneys from negotiations for fear of a subject matter waiver.

The opinion offers a useful survey of the current law on subject matter waiver in a variety of jurisdictions and ultimately adopts the rule articulated by the Second Circuit in the *Von Bulow*

decision (828 F.2d 94), which held that the inclusion of certain privileged information in Alan Dershowitz's book *Reversal of Fortune* did not effect a broader privilege waiver in a subsequent lawsuit against Von Bulow.

For those of us who have grown concerned about the gradual erosion of the attorney-client privilege, this decision comes as welcome news. It is also heartening that the Court articulated a fairly bright-line rule, rather than relying on a "facts and circumstances" driven analysis. Decisions like this provide useful guidance to attorneys who take their ethical obligations seriously and are looking for clarity on how to protect their communications with their clients.

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