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Maintaining Privilege When Communicating with Professionals

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When a loan begins to deteriorate, or actually defaults, lenders routinely need to communicate with counsel, outside vendors, investors and other professionals to determine the best course of action. Many of those communications involve sensitive information, including workout strategies, that lenders may sometimes want to keep private.

What steps can lenders take to maximize the possibility that these types of communications are not discoverable in the event of litigation?

Communications with Counsel

In the United States, the attorney-client privilege is sacred. The privilege is intended to promote "full and frank communications between attorneys and their clients."[1] An attorney's effective representation of his or her client is dependent on knowing everything that relates to the matter at issue.[2]When the attorney's client is a corporation, the privilege extends to communications between the attorney and employees of corporations.[3]

For lenders communicating with counsel, the key to keeping communications privileged is ensuring that the attorney client communications are not divulged to third parties.[4] Today, with electronic communication being so prevalent, email poses a significant risk to the attorney-client privilege. Lenders should take great care when forwarding emails to individuals outside the client organization and when selecting recipients on emails that include counsel.[5]

When communicating with in-house counsel, lenders should bear in mind that only legal advice, not business advice, is privileged.[6] In-house counsel often serve dual roles and sometimes have multiple titles that reflect those roles. Where the primary purpose of a communication with in-house counsel is to provide legal advice, it is privileged, but where the primary purpose is business advice, the privilege does not protect the communication.[7]

The privilege also generally applies to loan servicers working on behalf of CMBS trusts and similarly structured investment vehicles, as the servicers are acting as the lender's agent.[8] But lawyers and servicers should be careful to examine the content of such communications before coming to the conclusion that they will be privileged: if the communication is clearly one that is made for the benefit of the trust itself, the privilege should apply. However, if the communication is made with regard to the servicer's interests (rather than the Trust's interests), the extent of the privilege may be limited. The communication may be privileged to the extent the lawyer was acting as counsel to the servicer; it may not be privileged as to the trust itself.

Communications with Vendors

When enforcing a defaulted loan, it often is necessary to engage other professionals such as appraisers, accountants, and inspectors to assist with evaluation of the loan, the obligors, the collateral, or other matters affecting enforcement or workout. For those professionals to do their jobs effectively, the ability to freely communicate and share information may be paramount. The law generally does not protect communications between the lender and the lender's third party vendors; privileges (like the attorney-client privilege) are less regularly found in the law to protect such communications. However, the law generally protects the lawyer's communications with such professionals when the involvement of those professionals is to help the lawyer render legal advice.[9] The key consideration is whether the communication with the third-party vendor, or the agent's involvement, was necessary for the attorney in providing legal advice. [10]

The work-product doctrine is relevant to this issue. Under the workproduct doctrine, a lawyer's mental impressions, as she strategizes in anticipation of litigation on behalf of her client, are generally protected and are not discoverable by the client's adversaries. By extension, if the lawyer (as opposed to the client) engages a third-party vendor to assist her in strategizing in anticipation of litigation, her communications with that vendor should be protected by the doctrine. An important exception applies to the doctrine, however; when the attorney and client conclude that the third-party vendor's work will actually be used in the litigation (or if they conclude to actually call the third-party vendor as a witness), then the vendor's work is discoverable.

Thus, generally, the best way to ensure that communications with, and documents prepared by, professionals like appraisers, accountants and inspectors are protected is to have them engaged by and work through the lender's attorney(s).[11] If the lender (or one of its nonattorney agents) communicates directly with the retained professional, there is a risk that the court may find that such communications, and any reports prepared by such professional, are discoverable.[12]

Communications with Investors

In certain situations, such as those involving CMBS trusts, various stakeholders have consent rights or must be consulted in connection with any enforcement decisions by the lender or its servicer. Because of the stakeholder's rights, it may be necessary to share privileged information with them or to involve them in communications with counsel. Protection of such shared information relies on the common interest exception to waiver with the primary justification for the preservation of the privilege in this scenario being that the parties share a commonality of interest and the privileged communication furthers that interest.13 Thus, for the common interest exception to waiver to apply to protect confidential, privileged material that is disclosed to a third party, a two-part showing is required: (1) the party who asserts the doctrine must share a common legal interest with the party with whom the information was shared; and (2) the statements for which protection is sought must have been designed to further that interest.

Conclusion

The attorney-client privilege is a fundamental cornerstone of American jurisprudence. However, the privilege only applies when legal advice is sought, not business advice. As a general rule, the privilege may be inadvertently waived when confidential information is divulged to third parties. However, confidential communications with third parties will not waive the privilege when the third party is an agent of the attorney and its involvement is indispensable in enabling the lawyer to provide legal advice. Further, such confidential communications with third parties may not waive the privilege when the third party is one that shares a common legal interest and the subject communication furthers that common interest. This framework provides protection to lenders in communicating with counsel, vendors, and investors.

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1 Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 682, 66 L. Ed. 2d 584 (1981).

2 Id

3 Id., at 396-97.

? United States v. Ryans, 903 F.2d 731, 741 (10th Cir. 1990).

? United States v. ChevronTexaco Corp., 241 F. Supp. 2d 1065, 1075 (N.D. Cal. 2002).

? See Pennsylvania Transp. Auth. v. Caremarkpcs Health, L.P., 254 F.R.D. 253, 260 (E.D. Pa. 2008).

? Id.

? Stopka v. Am. Family Mut. Ins. Co., 816 F. Supp. 2d 516, 529 (N.D. Ill. 2011); Zimmerman v. Superior Court, 220 Cal. App. 4th 389, 403, 163 Cal. Rptr. 3d 135, 145 (2013); Bowne of N.Y. City, Inc. v. AmBase Corp., 150 F.R.D. 465, 490 (S.D.N.Y. 1993); Memory Bowl v. N. Pointe Ins. Co., 280

F.R.D. 181, 185 (D.N.J. 2012).

9 Lawrence E. Jaffe Pension Plan v. Household Intern., Inc., 244 F.R.D. 412 (N.D. Ill. 2006) (The complexities of modern existence prevent attorneys from effectively handling clients' affairs without the help of others, and the attorney-client privilege must include all the persons who act as the

attorney's agents); Cavallaro v. U.S., 284 F.3d 236 (1st Cir. 2002) (Generally, disclosing attorney-client communications to a third party undermines the

privilege, but an exception to this general rule exists for third parties employed to assist a lawyer in rendering legal advice).

10 In re Lindsey, 158 F.3d 1263 (D.C. Cir. 1998) (In considering whether a client's communication with his or her lawyer through an agent is privileged under the intermediary doctrine, the critical factor is that the communication be made in confidence for the purpose of obtaining legal advice from the

lawyer); Cavallaro v. U.S., 284 F.3d 236 (1st Cir. 2002) (That an accountant was "useful" to a lawyer in providing legal assistance is not all that is

required under the Kovel exception to rule that disclosure to third party destroys attorney-client privilege; rather, the involvement of the accountant must

be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications).

11 “What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer.” U.S. v. Richey, 632 F.3d 559, 566 (9th Cir. 2011) (citing United States v. Gurtner, 474 F.2d 297, 299 (9th Cir.1973) (emphasis in original) (quoting United States v. Kovel, 296 F.2d 918, 922 (2d Cir.1961)).

12 U.S. v. Kovel, 296 F.2d 918 (2d Cir. 1961) (Attorney-client privilege requires that communication be made in confidence for purpose of obtaining legal advice from lawyer, and if what is sought is only accounting service, or accountant’s advice rather than lawyer’s, no privilege exists); In re Lindsey, 158 F.3d 1263, 1280 (D.C. Cir. 1998) (“When an agent changes a message in a way not intended simply to ensure complete understanding (as in the case of a translator), the agent is not acting consistently with [the sole purpose of obtaining legal advice from a lawyer]; by changing the message, the agent injects himself or herself into the chain of communication, rather than effectuating the client’s purpose of receiving advice from his or her lawyer.”).

13 HSH Nordbank AG New York Branch v. Swerdlow, 259 F.R.D. 64 (S.D.N.Y. 2009) (Common interest doctrine prevented waiver of the attorney-client privilege as to communications between counsel retained by administrative agent for five lenders who participated in syndication of $192 million loan for a residential condominium development, and the lenders, relating to timing and conduct of litigation to collect on loan guaranties, though lenders were not parties to the litigation and counsel communicated directly with lenders because lenders were not represented by their own counsel; administrative agent, who was also a lender, shared a common interest in enforcing the guaranties, loan agreement identified administrative

agent as the only party capable of enforcing or exercising any of the rights or remedies under any of the loan documents, and loan agreement contemplated that administrative agent's counsel would effectively represent the interests of the various lenders, which interests the agreement presumed to be identical).

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