

U.S. Court In Kansas Finds Insurer Waived Attorney-Client Privilege By Disclosing Legal Advice In Contract Negotiations With Hospital Network

A managed care insurer waived its attorney-client privilege by disclosing its attorney's legal concerns about certain exclusivity provisions during contract negotiations with a hospital network, a federal trial court in Kansas ruled February 6.

The issue arose in connection with an antitrust lawsuit brought by Heartland Surgical Specialty Hospital LLC (Heartland) against CIGNA HealthCare of Ohio, Inc. (CIGNA).

Heartland contended that CIGNA had waived the attorney-client privilege as to certain legal advice it received from its in-house counsel regarding contractual exclusivity provisions in its negotiations with Midwest Division, Inc., d/b/a HCA Midwest Division (HCA).

HCA, in response to document discovery requests, produced to Heartland a memorandum it received from CIGNA about its attorneys' legal advice regarding the exclusivity provisions in the HCA/CIGNA contract negotiations.

According to Heartland, by disclosing this specific legal advice to HCA, and otherwise placing such advice at issue in the litigation, CIGNA waived any privilege that may have attached to the material.

The U.S. District Court for the District of Kansas concluded that CIGNA waived the attorney-client privilege as to the specific communications made in the memorandum, as well as to all other attorney communications on this issue.

CIGNA argued that its disclosure to HCA did not result in waiver of the attorney-client privilege because it amounted to a party's position on a legal matter during business negotiations.

But the court noted that Tenth Circuit case law recognized no such special category of protected disclosures and that in any event "CIGNA did much more here than generically take a position on a legal issue."

Rather, the statements in the memorandum "reveal the precise advice of CIGNA's attorney to CIGNA with regard to the contractual exclusivity language at issue."

In addition, the appeals court found CIGNA's waiver included all documents involving the subject of the exclusivity provisions as discussed in the memo to HCA.

Finally, the court ruled Heartland was not entitled to attorney's fees because CIGNA's refusal to produce the documents at issue was not done in bad faith and was substantially justified pending a ruling of the court.

Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc., No. 05-2164-MLB-DWB (D. Kan. Feb. 6, 2007)

