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## Civil Practice and Procedure

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# Restricting and Redefining Professional Privilege and Duties in Illinois

March 19, 2015 was an interesting and important day for professionals across the state of Illinois as the Illinois Supreme Court demonstrated its willingness to take the path less traveled when it comes to privilege and professional issues. In three separate opinions, the court tackled the accountant-client privilege, the self-critical analysis privilege, and the duties of captive insurance agents. This article examines each of these decisions and analyzes their impact on the practice of professional liability defense.

### *Brunton v. Kruger*

*Brunton v. Kruger* is a prime example of the court strictly following statutory language and departing from what other states have done when it comes to the interpretation of privilege, in particular the accountant-client privilege. Illinois has long been in the minority in holding to the control group test in relation to the scope of the attorney-client privilege, and has taken a similar minority position, this time guided by the statute, in construing the accountant-client privilege. The accountant-client privilege is created in Illinois by Section 27 of the Illinois Public Accounting Act (Act), which provides that "a licensed or registered certified public accountant shall not be required by any court to divulge information or evidence which has been obtained by him in his confidential capacity as a licensed or registered certified public accountant." 225 ILCS 450/27. At issue in *Brunton* was the basic question of to whom the privilege belongs.

In *Brunton v. Kruger*, the daughter of Helen and Gordon Kruger (Krugers), June Brunton, initiated a will contest against her brother Robert Kruger and other family members. *Brunton v. Kruger*, 2015 IL 117663, ¶ 4. June, who was not named in the trusts of her parents, alleged undue influence on behalf of certain family members who were named as beneficiaries of the trusts, including Robert. *Brunton*, 2015 IL 117663, ¶ 4. Prior to their death the Krugers consulted with the accounting firm of Striegel, Knobloch & Co, LLC (Striegel) during the process of planning their estate. *Id*. ¶ 5. Striegel provided information to assist the attorneys for the Krugers in preparing trust documents and "pour over" wills. *Id*. Brunton claimed that undue influence on the Krugers took place during the estate planning process and sought to obtain information and evidence relating to discussions and information provided by the Krugers and any of the trusts beneficiaries to Striegel during the preparation of the trust documents. *Id*. ¶¶ 5-6. Brunton issued a discovery subpoena which was later followed by the Estate issuing an identical subpoena for the same information. *Id*.

One of Striegel's CPAs complied with the Estate's subpoena, turning over all of the documents in its possession that related to the Krugers' estate planning. *Id*. ¶ 7. The CPA did not comply with Brunton's subpoena and Brunton filed a motion to compel compliance. In a motion to quash the subpoena, Striegel invoked Section 27 of the Act, claiming that the documents were protected from disclosure. *Id*.

The circuit court found that the documents were protected under Section 27, but also found that Striegel waived the privilege when it provided the documents to the Estate. *Id*. ¶ 9. Striegel's attorney, Matthew Tibble, refused to comply with the discovery order and requested that he be found in contempt and fined for his refusal so as to allow the matter be reviewed by the appellate court. *Id*. The circuit court found him in contempt.

On appeal, the appellate court vacated the contempt order against Tibble and affirmed the circuit court. *Id*. ¶ 11. The appellate court concluded that estate planning is a form of "accounting activities" as provided in the statute under Section 8.05, and thus subject to Section 27. *Id*. The appellate court further concluded that the client, not the CPA, is the holder of the privilege. *Id*. As the holder, the client had the power to waive the privilege, which the court held occurred because the Estate filed a brief with the court in support of the circuit court's decision. *Id*.

While the supreme court affirmed the lower court's judgments, it reversed their decisions as to the privilege holder. *Id*. ¶ 90. The court rejected the appellate court's reasoning that the client, not the accountant, is the holder of the privilege in Section 27. *Id*. ¶¶ 33-34. In doing so, the court distinguished the privilege in Section 27 from the number of other evidentiary privileges in the Illinois Code of Civil Procedure on the grounds that the accountant privilege is codified in the Public Accounting Act, which is not part of the legislatively created body of evidentiary privilege, but expressly tied to the legislative scheme enacted to regulate the public accounting profession in Illinois. *Id*. ¶ 35. The court explained that the separate treatment of privileges in the context of the accountant-client relationship combined with the plain language of Section 27 reveals the legislative intent to confer the privilege in Section 27 on the accountant who provides the services, not the client who receives them. *Id*. ¶ 46.

The court observed that the accountant's privilege is, for practical purposes, a limited one. *Id*. ¶ 47. It made clear that if the client is still living, the privilege does not bar the client from voluntarily producing the information, or prevent a client from disclosing information in his possession under court order. *Id*. Rather, the court observed that the accountant's full power over the information or evidence involves situations such as the one in this case where the client is deceased. *Id*.

Next, in deciding that the CPA holds the privilege, the Illinois Supreme Court found that the issue of waiver "simple" to resolve. *Id*. ¶ 85. The court explained that whenever a privilege holder voluntarily discloses or consents to disclosure of privilege information to a third-party, the privilege is waived. *Id*. ¶¶ 86-87. In this case, the court held that the accountant, as the privilege holder, disclosed the information and evidence to the Estate in the subpoena seeking the same information and evidence as Brunton, the privilege was waived and Brunton was entitled to compliance of her subpoena. *Id*. ¶ 88.

Illinois stands in stark contrast with the law of other states regarding the holder of the privilege. The language of most states' statutes requires the client's consent in order to disclose information of conversations by the accountant with the client. Several states, including Colorado (COLO. REV. STAT. § 13-90-107), Florida (FLA. STAT. § 90.5055), Georgia (GA. CODE ANN. § 43-3-29), Idaho (IDAHO CODE ANN. § 9-203A), Kentucky (KY. REV. STAT. ANN. § 325.44), Kansas (KAN. STAT. ANN. § 1-401), Louisiana (LA. CODE EVID. ANN. art. 515), Maryland (MD. CODE ANN., CTS. & JUD. PROC. § 9-110), Michigan (MICH, COMP. LAWS § 339.732), Missouri (MO. REV. STAT. § 326.22), Nevada (NEV. REV. STAT. ANN. § 49.195), Oklahoma (OKLA. STAT. tit. 12, § 2502.1) and Pennsylvania (63 PA. STAT. ANN. § 9.11a) all acknowledge that the privilege belongs to the client, not the accountant. In the wake of this decision, accountants and those that represent them should take a second look at the accountant-client privilege as the court has made clear that the privilege belongs to the accountant, not the client, and that the accountant controls disclosure regardless of the client's approval or disapproval.

## *Harris v. One Hope United*

In *One Hope United*, the Illinois Supreme Court refused to recognize the self-critical analysis privilege, applied in federal courts around the country, and designed to protect documents containing candid and self-critical statements. Instead, it held that the legislative intent behind the Acts which the defendants urged were analogous in application did not allow for the extension of the privilege, and the court therefore deferred to the legislature on the issue of creation of the privilege.

The *One Hope United* case arose out of the death of seven-month-old Marshana Philpot. The child's death occurred while in her mother's care and while her family was enrolled in One Hope's "Intact Family Services" program, an extension of the Illinois Department of Child and Family Services (DCFS). *Harris v. One Hope United, Inc.*, 2015 IL 117200, ¶ 3. The Cook County Public Guardian, serving as the administrator of Marshana's estate, filed suit against Marshana's mother and One Hope. *One Hope United, Inc.*, 2015 IL 117200, ¶ 3. In the complaint, the Public Guardian alleged that following a DCFS investigation, Marshana was removed from the care of her mother and hospitalized for failure to thrive. *Id.* ¶ 4. Following her discharge from the hospital, she was ordered to live with her aunt, but was eventually returned to the care of her mother. *Id.* Marshana subsequently drowned while in her mother's care after she was left unattended while bathing. *Id.* As a result, the Public Guardian alleged that One Hope failed to protect Marshana and should not have allowed her to return to her mother's care due to her history of neglect and failure to complete parenting classes. *Id.*

During the course of discovery, the executive director of One Hope revealed the existence of a "Priority Review" regarding Marshana's case. *Id.* ¶ 5. Per the executive director, One Hope employs a "continuous quality review department" to investigate cases, evaluate the services provided, identify areas of improvement, and assess whether the outcome was successful or unsuccessful. *Id.* One Hope refused to produce the report, asserting it was protected from discovery by the self-critical analysis privilege. *Id.* Ruling on the Public Guardian's motion to compel, the circuit court held that the privilege did not apply and ordered production of the report. *Id.* ¶ 6. One Hope refused to do so and was held in "friendly contempt" and imposed a fine of $1 per day. *Id.*

In determining whether Illinois should recognize the self-critical analysis privilege, the supreme court first examined the privilege's origins, which stem from a federal medical malpractice case, *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249 (D.D.C. 1970). *One Hope United*, 2015 IL 117200, ¶ 8. There, the court held that the administrator of an estate could not obtain minutes of a hospital's staff review meeting on the basis that the confidentiality of the staff's evaluation of potential improvements was so essential to the self-review process that allowing disclosure would chill the candor required for such a process. *Id.* The *Bredice* court recognized that the potential benefits of improved healthcare outweighed the needs of the party seeking discovery, and accordingly held that such documents should not be turned over without a showing of good cause. *Id.*

The court next turned to application of the privilege in Illinois. It observed that in the two other cases in which the self-critical analysis privilege had been claimed, both appellate courts had declined to recognize the privilege. *Id.* ¶ 15. In *People v. Campobello*, 348 Ill. App. 3d 619 (2d Dist. 2004), the second district was asked to recognize the privilege in the context of a case involving alleged molestation case of a young girl by a priest. *One Hope United*, 2015 IL 117200, ¶ 15. The Roman Catholic Diocese of Rockford argued that the records of its misconduct officer and intervention committee were the product of a function analogous to internal quality control processes undertaken by hospitals and

which are protected under the Medical Studies Act (735 ILCS 5/8-2101). *Id.* ¶ 20. The appellate court rejected this argument, stating that the privilege implicated competing public policy considerations and was therefore best left to the legislature. *Id.*

In *Rockford Police Benevolent & Protective Ass'n v. Morrissey*, 398 Ill. App. 3d 145 (2d Dist. 2010), the Illinois Appellate Court, First District, considered the self-critical analysis privilege in the context of a Freedom of Information Act (FOIA) request for production of a survey conducted by Rockford College at the request of the Rockford Police Department. *One Hope United*, 2015 IL 117200, ¶ 17. The first district refused to recognize the privilege, observing that the self-critical analysis privilege was not in the enumerated exemptions listed in the FOIA. *Id.* ¶ 18. Similar to the Illinois Appellate Court Second District in *Campobello*, the first district rejected the analogy to the privilege provided by the Medical Studies Act, observing that the legislature could have codified the privilege in the FOIA, but declined to do so, while it expressly chose to codify it in the Medical Studies Act. *Id.* Therefore, the First District refused to recognize the self-critical analysis privilege.

Finally, the court considered the appellate court's examination of the privilege in the current case. There, One Hope argued that shielding self-critical documents would further the purpose behind the Child Death Review Team Act (20 ILCS 515/1 *et seq.*) and that the rationale behind the Medical Studies Act should be extended analogously. *Id.* ¶ 21. The appellate court rejected these arguments. *Id.* ¶ 22. Its review of the Child Death Review Team Act revealed that the Act encouraged, as opposed to discouraged, the disclosure of the information sought by the Public Guardian. The court further ruled that by the Medical Studies Act's own terms, it does not apply to institutions such as One Hope. *Id.* ¶ 23.

Turning to the case before it, the court considered its own decision in *People ex rel. Birkett v. City of Chicago*, 184 Ill. 2d 521 (1998), where it stated that creation of a new privilege is presumptively a legislative task, but acknowledged that creation of an evidentiary privilege was possible in rare circumstances where the following conditions have been met: (1) the communications originated in a confidence that they would not be disclosed; (2) the element of confidentiality was essential to the relation between the parties; (3) the relationship was one which the community believes ought to be sedulously fostered; and (4) the injury that would result to the relationship through disclosure would be greater than the benefit gained. *One Hope United*, 2015 IL 117200, ¶ 27.

Once again, One Hope argued that protection of the documents was consistent with the intent of the Child Death Review Team Act and the Medical Studies Act. *Id.* ¶ 34. The court disagreed. Following the appellate court, it noted that by its own terms, the Medical Studies Act does not apply to institutions such as One Hope. *Id.* ¶ 35. According to the court, this demonstrated the legislature's intent to limit, rather than expand, the scope of the privilege. *Id.* ¶ 36. Reviewing the Child Death Review Team Act, the court found that the Act's own policy underscored the need for a determination of the cause of death and the development of policies to prevent similar deaths in the future. *Id.* ¶ 37. Therefore, it concluded, the legislature determined that access of such information is necessary to achieve these measures. *Id.* As a result, the court concluded that there was "clear evidence that legislature did not intend to expand any existing quality control privilege." *Id.* ¶ 38. On this basis, it declined to recognize the self-critical analysis privilege, deferring to the legislature to create privileges where deemed necessary. This ruling is in keeping with the Illinois Supreme Court's reticence to expand privileges and the policy to encourage open discovery.

## *Skaperdas v. Country Casualty Insurance Company*

Finally, the court delivered another blow to professionals in Illinois in its decision in *Skaperdas v. Country Casualty Insurance Company*, expanding the definition of "insurance producer" and holding that a captive insurance agent owes a duty of care to a client to obtain requested coverage under the Illinois Code of Civil Procedure (Code), 735 ILCS 5/2-2201.

In that case, Country Casualty, via its agent Tom Lessaris, issued an automobile insurance policy to the one of the plaintiffs, Steven Skaperdas. *Skaperdas v. Country Cas. Ins. Co.*, 2015 IL 117021, ¶ 4. Following an accident in which Skaperdas's fiancé, Valerie Day, was injured while driving one of her fiancé's vehicles, Country Casualty required Skaperdas to amend his policy to include Day as an additional driver. *Skaperdas*, 2015 IL 117021, ¶ 4. Skaperdas met with Lessaris to change the policy. *Id.* Lessaris prepared the policy, but only identified Skaperdas as the named insured, and identified the driver as a "female, 30-64." *Id.* Subsequently, Day's minor son was struck by a vehicle while riding his bicycle. *Id.* ¶ 5. The driver's policy limit was insufficient to cover the minor's injuries, so Skaperdas and Day made a claim for underinsured motorist benefits under the policy. *Id.* Country Casualty denied the claim on the basis that neither Day nor her son was listed as a named insured. *Id.*

Skaperdas and Day filed a complaint alleging, *inter alia*, that Lessaris was negligent in failing to obtain the insurance as requested by Skaperdas. *Id.* ¶ 6. Specifically, they alleged that Lessaris breached his duty to exercise ordinary care in renewing, procuring, binding and placing the requested insurance coverage as provided by Section 2-2201 of the Code. *Id.* Lessaris moved to dismiss the negligence claim pursuant to Section 2-619 of the Code, claiming he did not owe the plaintiffs a duty of care in procuring coverage. *Id.* ¶ 7.

The circuit court agreed and granted the motion to dismiss the negligence count. *Id.* ¶ 8. The appellate court reversed, holding that a plain reading of Section 2-2201 along with the definition of "insurance producer" set forth in Section 500-10 of the Illinois Insurance Code established that "any person required to be licensed to sell, solicit, or negotiate insurance has a duty to exercise ordinary care in procuring insurance." *Id.* ¶ 9 (internal citations omitted).

On appeal to the Illinois Supreme Court, Lessaris argued that Section 2-2201 does not impose a duty of ordinary care on a "captive insurance agent" with regard to procuring insurance for a client. *Id.* ¶ 12. Rather, he argued, a captive insurance agent is one who owes a duty to the company who employs him, not the insured; only insurance brokers, because they are employed by the insured, owe a fiduciary duty to the insured. *Id.* Section 2-2201 was intended to limit the liability of insurance brokers in a fiduciary relationship, and as an insurance agent he did not owe a duty to the plaintiffs. *Id.*

Considering Lessaris' arguments, the court turned to the statute. Section 2-2201 provides in relevant part that "[a]n insurance producer, registered firm, and limited insurance representative shall exercise ordinary care and skill in renewing, procuring, binding, or placing the coverage requested by the insured or proposed insured." *Id.* ¶ 17 (citing 735 ILCS 5/2-2201(a)). The court noted that the term "insurance producer" was not defined in Section 2-2201. *Skaperdas*, 2015 IL 117021, ¶ 18. It further noted while that insurance law distinguishes between insurance agents and brokers, it does not address whether insurance agents, brokers, or both could be classified as an "insurance producer." *Id.* ¶ 19. The court further observed that Black's Law Dictionary included the term "producer" in both the definition of an "insurance agent" and an "insurance broker." *Id.* ¶ 20. Thus, finding the statute to be ambiguous as to the term "insurance producer," the court turned to extrinsic aids of construction. *Id.* ¶¶ 27-28.

The court began by examining the definition of "insurance producer" in Section 500-10 of the Insurance Code which defines an insurance producer as "a person required to be licensed under the law of the State to sell, solicit, or negotiate insurance." *Id.* ¶ 29 (citing 215 ILCS 5/500-10). Although the defendants argued that the Insurance Code was inapplicable because it was not part of the Code of Civil Procedure, the court observed that Section 2-2201 expressly refers to the Insurance Code, recognizing a connection between the two provisions. It also acknowledged that the legislature was aware of Section 2-2201 when it enacted the definition of "insurance producer" when the Insurance Code became effective in 2002. *Skaperdas*, 2015 IL 117021, ¶ 30. The court further examined the legislative history of Section 2-2201 and found that the term "insurance agent" was consistently used with no distinction between agents and brokers. *Id.* ¶¶ .33-31

Finally, the court also observed that Illinois courts have previously recognized that a captive agent *may* owe a duty to an insured in certain situations. *Id.* ¶ 35. For example, the Illinois Appellate Court, Third District, held that an agent has a duty of care such he may be liable for unreasonably delaying an application for life insurance. *Id.* (citing *Talbot v. Country Life Ins. Co.*, 8 Ill. App. 3d 1062, 1065 (3d Dist. 1973)). More recently, the Illinois Appellate Court, First District, affirmed that a captive insurance agent may owe a proposed insured a duty of ordinary care in some circumstances, though it declined to find such circumstances existed based on the facts at hand. *Skaperdas*, 2015 IL 117021, ¶ 36 (citing *Bovan v. American Family Life Ins Co.*, 386 Ill. App. 3d 933, 940-41 (1st Dist. 2008)).

On these grounds the court concluded that "the best evidence of the legislature's intent in using the term 'insurance producer' [was] the statutory definition in Section 500-10 of the Insurance Code." *Skaperdas*, 2015 IL 117021, ¶ 43. In light of that definition, Section 2-2201 mandates that a person who is required to be licensed to sell insurance has a duty to exercise ordinary care and skill in the renewing, procuring, binding, or placing of coverage as requested by the client. *Id.* As a result, the court concluded that Section 2-2201 imposed a duty of ordinary care on Lessaris as a captive insurance agent to procure the coverage requested by Skaperdas and Day. *Id.* ¶ 45.

For those who practice professional liability, an understanding of this case will be critical going forward, as both agents and brokers now have a statutory duty to act with ordinary care when procuring coverage for their clients.

## Conclusion

As the first two cases make clear, the Illinois Supreme Court construes privilege narrowly and defers to the General Assembly on the issue of privilege. Professionals should take note. With regard to the accountant-client privilege, accountants and those representing them must be aware that in Illinois it is the accountant, not the client, who holds (and therefore may waive) the account-client privilege. Likewise, in *One Hope*, the court made clear that its adoption of common law privilege is a rare exception and must be based on clear statutory intent. Finally, for those representing insurance agents and brokers, under *Skaperdas*, the court has effectively written away, when it comes to duty of care, the distinction between insurance agents and brokers.

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