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IMPACT

An Overview of Current Legal Events of Concern and Interest

From the Attorneys of Strauss & Troy, Cincinnati, Ohio, and Northern Kentucky *Winter/Spring 1999*

Does the Attorney-Client Privilege Die with You?

By R. Guy Taft

Independent counsel Kenneth Starr's investigation has made front-page news out of several legal issues that would normally be of interest to few, but lawyers. One of the more interesting issues is whether an attorney may be required to disclose the content of confidential conversations with a client who has died.

The Supreme Court recently ruled on that issue, holding that the attorney-client privilege almost always prevents attorneys from revealing attorney-client communications after the client's death. Let's take a look at the court's decision.

The Facts

In 1993, Vincent Foster was President Clinton's Deputy White House Counsel. After several White House Travel Office employees were dismissed, Foster went to a lawyer, James Hamilton, to seek legal representation in relation to possible obstruction of justice allegations. They met only once, nine days before Foster committed suicide. Hamilton took three pages of notes during the two-hour meeting.

When Starr subpoenaed Hamilton's notes, Hamilton refused to turn them over, citing the attorney-client privilege. Starr argued that the attorney-client privilege did not apply when the client is dead and the privileged information is relevant to a criminal investigation.

The Attorney-Client Privilege

In order to promote open and honest communication between attorneys and their clients, the attorney-client privilege prevents attorneys from disclosing the content of confidential attorney-client communications. As the court noted, the privilege is "one of the oldest recognized privileges for confidential communications."

The general rule is that all relevant evidence may be used at trial unless it is privileged or meets one of a number of other exceptions to admissibility. Furthermore, prosecutors are not limited to gathering only evidence that would be admissible at trial. They may obtain evidence that is not admissible itself, or may not be directly relevant to the investigation, if it reasonably could lead to discovery of evidence that is admissible. For example, evidence of a criminal defendant's other crimes may be obtained by the prosecutor even though that evidence would not normally be admissible at trial.

So generally, prosecutors have very broad subpoena powers. About the only reason they would be unable to obtain evidence - as opposed to actually using it at trial - is if it's privileged.

The Supreme Court's Decision

Starr's main contention to the Supreme Court was that it should force Hamilton to turn over his notes because the public's interest in determining whether a crime has been committed outweighs any interest in maintaining a dead man's confidentiality.

The court rejected Starr's arguments, pointing out that most clients would have no way of predicting whether the information they disclose to an attorney might later become relevant to a criminal matter. As a result, all clients would have to be more cautious in deciding what information to disclose to their attorneys, which would inevitably erode the privilege.

Our Comments

The vast majority of attorneys and their clients don't need to be concerned that their attorney-client communications might be relevant to future criminal investigations. But any doubt about confidentiality could give even the most chaste client cause to hold back information. The Supreme Court's decision rightly preserves your ability to communicate openly and honestly with your attorneys. Caution, however, that in a civil lawsuit, there are several ways in which an attorney-client privilege can be waived or otherwise lost. Attorneys and their clients always must be careful to proceed in strict conformity with the legal rules for maintaining confidentiality of written and verbal communications.

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Supreme Court Allows "Double" Coverage Under COBRA

By Larry A. Neuman

Employers with 20 or more employees are required to offer COBRA continuation coverage to terminated employees who already have other insurance through a group health plan offered by a spouse's employer, according to a recent U.S. Supreme Court ruling.

The Facts

The parties in the case were Moore Medical Corporation and James Geissal, a former employee of Moore. Moore fired Geissal in 1993, for reasons that apparently were not stated in documents before the Court. Geissal suffered from cancer when he was fired. In addition to having health insurance through his Moore's plan, he had coverage through his wife's employer (TWA) when he was fired.

When Moore fired Geissal, it gave him an election form advising him of his rights under COBRA. Geissal elected to continue receiving coverage under Moore's group health plan in addition to keeping the coverage he already had under TWA's plan. Geissal paid premiums for insurance under Moore's plan for six months, at which time Moore informed him that he was ineligible for COBRA benefits because he already had coverage under the group health policy provided by his wife's employer. Moore offered to reimburse Geissal for the premiums he had already paid and returned all medical bills that had been submitted for payment under Moore's group health plan after Geissal's termination.

Geissal sued Moore, its group health plan, and the plan administrator, asserting that they illegally denied COBRA continuation coverage to him.

The Law

Generally, COBRA provides that terminated employees are allowed to continue their health insurance under their former employers' health plans for a certain period of time - usually 18 months. But COBRA also says that an employer may *cancel* a former employee's continuation coverage when "the [employee] first becomes, after the date of the election [to continue coverage], covered under any other group health plan which does not contain any exclusion or limitation with respect to any pre-existing condition of beneficiary. . . ."

How to interpret this confusing language has been a popular issue for litigation in the federal courts. Some federal courts of appeals concluded that the legislative intent of COBRA was to grant displaced employees the opportunity to *maintain the same level of health insurance* after their employment ended as they had while employed. As such, they found that employees in Mr. Geissal's situation were entitled to continuation coverage. But other courts held that such employees were not entitled to COBRA continuation coverage because Congress' intent was only to *provide interim insurance coverage* for employees who, as a result of some disruption in their employment, were left without any health insurance.

Although it ultimately dismissed Geissal's case, the federal court of appeals that considered his claim conceded that there were strong arguments on both sides of the issue. This fact made it a perfect case for Supreme Court review.

The Court's Decision

The Supreme Court held that Geissal's continuation coverage could not be cancelled. It rejected Moore's arguments that an employee who already has coverage under a spouse's group plan "first becomes covered under the spouse's plan the moment after he or she elects continuation coverage. Rather, the Supreme Court explained that COBRA allows plans to terminate continuation coverage upon the occurrence of the *event* of becoming covered by another group health plan. "This event is significant only if it occurs, and 'first' occurs, at a time 'after the date of the election.'" Because Geissal was a beneficiary of the TWA plan before he elected COBRA coverage, he did not "first become" covered under the TWA plan after the date of election. Hence, Moore could not cut off Geissal's COBRA coverage.

The Supreme Court also rejected the approach of several lower courts which required that the employer offer continuation coverage only if there was a "significant gap" between the coverage offered by the employer's group health plan and that offered by the employee's other group health plan. Citing the "sheer absence of any statutory support" for this approach, the Supreme Court said it would not - absent a clear mandate from Congress - adopt any approach that would require federal courts to make policy judgments about the adequacy of the coverage provided by the employee's other group health plan.

What Does It Mean to You?

The *Geissal* decision has several potential ramifications that might not be apparent at first glance. For example. it appears that the Court's opinion would also require any employer to offer COBRA continuation coverage when the beneficiary has or obtains Medicare coverage before electing COBRA continuation coverage.

In addition, the IRS has taken the position in Final Regulations released on February 3, 1999, that employers are required to provide continuation coverage even if the terminated employee already has coverage through a spouse's group health plan or through Medicare. While the Final Regulations are not effective until January 1, 2000, the regulations require that employers make a good faith effort to follow the *Geissal* decision prior to January 1, 2000.

Now that the Supreme Court has ruled and the Final Regulations are released, the IRS is free to assess excise taxes against plans that do not allow employees to elect continuation coverage in these circumstances. Although it is doubtful that the IRS would attempt to assess excise taxes against plans for violations that occurred before the issuance of the *Geissal* opinion, that does not prevent individuals from suing employers and plans for failure to offer continuation coverage or for cutting off coverage under these circumstances.

Finally, the Supreme Court specifically acknowledged that its ruling means employees will be able to elect continuation coverage even if they have obtained entirely new group coverage in the period between the qualifying event and the date that they elect COBRA continuation coverage. So for example, an employee who quits or has been terminated can:

1) enroll in the group health plan offered by his or her spouse's employer and then subsequently elect COBRA continuation coverage from his former employer; or

2) get a new job, enroll in his or her new employer's group health plan, and then elect COBRA continuation coverage from his former employer.

The first scenario may be less likely to occur because the employee would be responsible for paying premiums both to his or her former

employer and to the spouse's employer. The Supreme Court acknowledged this when it explained that its ruling will not result in a windfall to beneficiaries because "they are required to pay for COBRA coverage, and there is no reason to think that employees will elect coverage they do not need."

So when are employees likely to take advantage of the ruling? Primarily when there is a real benefit to double coverage - such as when the employee has a serious illness or a pre-existing condition that would not be covered under the new plan, or the new plan provides significantly lesser benefits than the existing plan.

The Tax Treatment of Environmental Liabilities

By: Thomas C. Rink

The tax treatment of environmental liabilities has long been a subject of confusion among businesses responsible for cleaning up contamination. Although the subject is still a bit confusing and some questions remain unanswered, the IRS has made substantial efforts in the last five years to expand and clarify the circumstances in which environmental liabilities may be deducted. This article will summarize the most important concepts regarding when a business may take deductions or receive other favorable tax treatment for costs incurred in connection with environmental liabilities.

Deductibility of Environmental Remediation Expenses

A pivotal question underlying the tax treatment of most environmental liabilities is whether remediation expenses may be deducted when incurred or whether they must be capitalized. Traditionally, the IRS treated remediation as an improvement to property - meaning that it was considered an activity undertaken to increase the value of the property. Such improvements are not deductible in the year made, but must be treated as a capital expenditure - meaning that the deduction must be taken in the form of depreciation over the anticipated useful life of the improvement.

In general, businesses rarely prefer capitalizing an expense to deducting it in full in the year of the expenditure. As a result, businesses faced with environmental liabilities have argued that remediation is not an improvement to property because the purpose of remediation is not to increase the value of the property but to restore it to its original, pre-contamination condition.

Several years ago, the IRS finally accepted this argument and started classifying some remediation costs as deductible business expenses rather than capital improvements. In addition, the Internal Revenue Code was amended to allow businesses to treat certain "qualified environmental remediation expenses" as deductible business expenses in the tax year in which they were paid or incurred. To claim this deduction, the following requirements must be met:

- The property must generally be held by the taxpayer for a business use.
- There must have been a past disposal, release, or threatened release of a hazardous substance on the property.
- The costs must be paid or incurred after Aug. 5, 1997, and before Jan. 1, 2001, to abate or control a hazardous substance.
- The property must be located in an area that has been identified by the EPA or state environmental agency as needing special incentives for cleanup (such as a brownfields site).
- The property must not be listed on the National Priorities List. In other words, the deduction cannot be claimed for costs incurred in remediating a Superfund site. But such costs may be deductible if contributed to a Qualified Settlement Fund.

Qualified and Non-qualified Settlement

Unfortunately, because it can only be claimed by the property owner, the qualified environmental remediation expense deduction does not help most businesses that have environmental liabilities. For example, under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the parties responsible for remediating Superfund sites include those who generated the hazardous substances or transported them to the site.

Because there are usually hundreds of potentially responsible parties (PRPs) at each Superfund site, payment of remediation costs typically involves an environmental settlement fund. PRPs contribute their "allocable share" to the fund, which in turn pays the costs of remediation.

In the past, the IRS said that businesses were not allowed to deduct their contributions to an environmental settlement fund until the fund actually paid out remediation costs. But the IRS has recognized an exception for "Qualified Settlement Funds" (QSFs), providing that businesses may deduct their contributions to QSFs in the year they are made.

To be a QSF, a settlement fund must:

- ➢ Be classified as a trust under applicable state law - or its assets must otherwise be segregated from the PRPs' general assets.
- ➢ Be established to resolve claims under CERCLA - liabilities under other environmental laws (such as state law) simply don't qualify.
- ➢ Clean up past releases of hazardous substances rather than pay for potential liabilities.
- ➢ Be created by order of a court of the United States, a state, political subdivision, or possession of the United States, or any agency or instrumentality of the foregoing. Alternatively, certain arbitrated settlements may qualify.

The IRS has also recognized the existence of nonqualifying environmental settlement funds (also known as "environmental remediation trusts"). A trust qualifies if:

(1) The trust's primary purpose is to collect and disburse amounts for environmental remediation of an existing waste site to resolve, mitigate, or prevent the liabilities imposed by federal, state, or local environmental laws; and

(2) Contributors are potentially liable or have a reasonable expectation of liability under such laws.

As with a QSF, each contributor may be allowed to deduct its contributions immediately rather than when remediation costs are eventually paid out by the fund. Favorable tax treatment is available to businesses that contribute amounts to the fund in exchange for a release from future liability by the other contributors.

Non-deductible Expenses

Some environmental liabilities - such as penalties imposed for violations of environmental laws - are never deductible. In addition, the general rule is that environmental activities that go beyond restoring the property to its

original condition are not deductible. For example, the cost of removing underground storage tanks (USTs) is deductible, but the cost of a replacement UST is not.

The tax treatment of environmental liabilities is a complex subject that cannot be fully addressed in an article of this length. If you have any questions on particular tax issues, please feel free to contact Thomas C. Rink at Strauss & Troy.

Perhaps you have heard . . .
STRAUSS & TROY IS MOVING

Strauss & Troy is pleased to announce the relocation of our Cincinnati office this spring. We will be moving on May 17, 1999, to our exciting new home in The Federal Reserve Building just across Main Street from our current office. The Federal Reserve Building provides us with a much-needed increase in offices, conference rooms, and work areas. The building also offers a number of amenities, technological upgrades, and improvements over our existing space, all of which will enable us to function more efficiently and serve our clients even better.

During our move, please bear with us as our phone service will be briefly disconnected over the weekend of our move, Friday, May 14 through Sunday, May 16, 1999. We have been planning the logistics of the move for several months, and it is our goal to make the move as seamless as possible so that we may continue to serve the needs of our clients with minimal interruption or inconvenience.

Our Kentucky office will continue to serve you from RiverCenter in Covington, Kentucky. Only our Cincinnati address will change - our telephone and fax numbers will remain the same:

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All of the attorneys and staff at Strauss & Troy are eager to continue our commitment to provide the very best of legal services to our clients. We look forward to seeing you and welcoming you to our new quarters.

Technology Designed
with You in Mind

Strauss & Troy is committed to utilizing the best available technology to serve the needs of our clients. From computer-assisted legal research to the most up-to-date word processing system to our in-house computerized billing system, we are among the leaders in Cincinnati firms in putting technology to work for our clients. This enables us to do the best work for you at a reasonable cost and without delay.

In keeping with our progressive technological tradition, Strauss & Troy and each attorney now have private e-mail addresses, and the firm has a home page/web site on the internet. Our web site represents an on-line brochure, providing a variety of valuable information about the firm, our areas of practice, and some of the many articles written by our attorneys on a variety of legal subjects. We welcome you to visit our web site at:

www.strauss-troy.com

To contact the firm, you may e-mail us at: info@strauss-troy.com. The e-mail addresses of individual attorneys are available through the web site, or you may call for additional information at (513) 621-2120. Our sophisticated e-mail software gives us the capability to transmit documents electronically, saving both time and money. Many of our clients communicate with us in this manner and have expressed a preference for taking advantage of the available technology. If you have questions about how our new technology may be of benefit to you, please contact the attorney with whom you usually work, or contact Bill Woods, our business manager, at (513) 629-9423 or wlwoods@strauss-troy.com.

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News of the Firm

ATTORNEYS ON THE MOVE

On May 19, 1999, **Paul Calico** will speak at a one-day seminar entitled Ohio Construction Lien Law. The seminar is structured for contractors, owners, developers, subcontractors, materialmen, architects, engineers, lenders, and other construction professionals. The topics include private liens on commercial projects, residential construction and purchase contracts, public projects, bonds, AIA documents, key construction contract clauses, lien foreclosure and enforcement, and alternative dispute resolution. Paul, a member of the Litigation Department, regularly handles matters relating to mechanics liens and construction projects.

Paul B. Calico

Joseph Braun has been appointed by the Clermont County Board of Commissioners to a six year term on the Clermont County Mental Health Recovery Board.

Joseph Braun

Michael A. Ruh, Jr. has been reelected to the Board of Trustees for the University of Cincinnati College of Law Alumni Association. Mr. Ruh has also been elected to the Board of Trustees of the Covington-Kenton County Junior Chamber of Commerce.

Michael A. Ruh, Jr.

The Labor Crystal Owl Award of the American Arbitration Association was presented to **Mitchell Goldberg** at the Alternative Dispute Resolution Day luncheon on December 8, 1998.

Mitchell Goldberg

Charles Melville has a front-page featured article entitled “Left at the Altar” in the December, 1998 Agency Sales magazine - the national marketing magazine for manufacturers’ agencies and their principals. In his article, Mr. Melville recounts a true story of a case involving an alleged agreement between a manufacturers’ representative and a sales agency, a story which leads one to the clear conclusion that reps must be “proactive” in their use of legal counsel, consulting a qualified attorney well before a problem gets into litigation.

Charles Melville

James Heldman as co-chair of the Hebrew Union College-Jewish Institute of Religion (“HUC-JIR”) 16th annual tribute dinner on October 31, 1998, was recognized for his part in helping raise $712,000 for the HUC-JIR.

James Heldman

Steven Stuhlbarg has once again appeared in an amateur theater production at the Jewish Community Center, this time the musical “Is There Life After High School?”, in which Steve had a solo number.

Steven Stuhlbarg

Gordon Hood and **Paul Theissen** were honored by the Northern Kentucky Bar Association at its Senior Member Reception Dinner on October 20, 1998. The Bar Association was honoring attorneys 70 years of age and over and/or those who have practiced law for 45 years.

Gordon H. Hood

Paul J. Theissen

Client Spotlight

Bell Furniture Industries

Bell Furniture Industries, based in Loveland, Ohio, is one of Greater Cincinnati’s top 50 companies. With over 1 million square feet of warehousing and assembly facilities, Bell Furniture is recognized as one of the nation’s leading suppliers of home furnishings. Strategically located distribution centers in Ohio, California, Texas, Pennsylvania and Florida enable Bell to service furniture dealers around the world. The company was founded by Philip M. Bell in 1972.

Bell manufactures upholstery in factories in Tennessee and Mississippi, and is the third largest importer of furniture in the United States. An international sales force sells Bell’s products to over 7,000 dealers in the United States, Canada, Mexico, South America, Asia, and Europe. Over 40 of the top 100 furniture dealers in the United States buy furniture from Bell Furniture Industries.

Under the leadership of Tom Holmes, President of Bell Furniture Industries, the company has set a goal of becoming the best home furnishings supplier in the country. Learn more about Bell Furniture on the Internet at **www.bellfurniture.com.**