Employees Only

Communications between a Corporation's Non-Employee Consultants and its Counsel Create Complex Privilege Issues in States Governed by the "Control Group" Doctrine

David Winters
Vincente A. Tennerelli

COMPANIES USE CONSULTANTS TO facilitate a number of objectives in today's business environment, from streamlining operations to improving public relations. Although they are often employees of independent consulting firms, consultants can take on many characteristics of their clients' own employees — working out of their clients' offices for extended periods of time, interacting regularly with their clients' personnel, and involving themselves in the intimate details of their clients' day-to-day operations. As a result, complex privilege issues may arise when consultants communicate with clients' counsel.

The Control Group doctrine, as set forth originally in *Philadelphia v. Westinghouse Electric Corp.*, 210 F.Supp.483, 485 (E.D. Pa. 1962), provides that a corporation may only claim attorney-client privilege regarding a given communication between an employee and counsel if "the employee making the communication . . . is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of his attorney, or . . . is an authorized member of a body or group which has that authority."

Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250 (Ill. 1982), is a landmark Control Group doctrine case that provides an extensive analysis of the doctrine under Illinois law. In *Consolidation Coal*, the Illinois Supreme Court considered whether an engineer-employee's metallurgical report, later transferred to the corporation's legal department to aid in pending litigation, was privileged. The Court reaffirmed that the Control Group doctrine governed in Illinois and clarified that the test would extend to communications between counsel and "an employee whose advisory role to top management in a particular area is such that a decision would not normally be made without his advice or opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority." *Id.* at 258.

The U.S. Supreme Court has expressly rejected the Control Group doctrine as overly restrictive, adopting the broader "Subject Matter" doctrine for determining privilege under federal common law. *Upjohn Co. v. United States*, 449 US 383, 392 (1981). A number of state courts have followed the lead of Upjohn, holding that the Control Group test is not the standard for determining privilege under their respective state laws. *See, e.g.*, TEX. R. EVID. 503(a)(2)(B) (1998); *Keefe v. Bernard*, 774 N.W.2d 663, 672 (Iowa 2009). Nonetheless, at least seven states continue to apply the Control Group doctrine. See, e.g., ALASKA R. EVID. 503; HAW. R. EVID. 503; ME. R. EVID. 502; N.H. R. EVID. 502; S.D. CODIFIED LAWS § 19-13-2; VT. STAT. ANN. tit. 12, § 1613; *Hayes v. Burlington N. & Santa Fe Ry. Co.*, 752 N.E.2d 470, 473 (Ill. App. Ct. 2001).

The Eighth Circuit Court of Appeals, citing *Upjohn*, has held that communications between consultants and counsel may be privileged under federal common law where the consultant is the "functional equivalent" of an employee. *In re Bieter Co.*, 16 F.3d 929, 939 (8th Cir. 1994). Federal courts in a number of other jurisdictions have, when interpreting federal common law, adopted the Eighth Circuit's holding in Bieter. *See, e.g., U.S. v. Graf,* 610 F.3d 1148, 1159 (9th Cir. 2010); *Hope for Families & Community Service, Inc. v. Warren*, No. 3:06-CV-1113, 2009 WL 1066525, at *10 (M.D. Ala. Apr. 21, 2009); In re Copper Market Antitrust Litig., 200 F.R.D. 213, 218 (S.D.N.Y. 2001).

However, because that Eighth Circuit decided *Bieter* under *Upjohn*, which created a broader zone of privilege than does the Control Group doctrine, Bieter and its progeny provide little guidance for assessing privilege in Control Group states.

There are very few cases analyzing the circumstances in which a consultant may belong to a corporation's "control group" for purposes of assessing the attorney-client privilege under the Control Group doctrine. In *Barrett Industrial Trucks, Inc. v. Old Republic Insurance Co*., 129 F.R.D. 515 (N.D. Ill. 1990), a diversity case applying Illinois law (and, hence, the Control Group doctrine), the plaintiff retained a former employee and potential witness in pending litigation as a litigation consultant. The defendant sought communications between the former employee and the plaintiff's counsel made during the former employee's tenure as a consultant. The plaintiff asserted privilege as to such communications. Without analyzing the nature of the consulting services at issue, the district court held that, under *Consolidated Coal*, only actual *employees* of a corporation could be members of the corporation's control group. Accordingly, while the Court did hold that certain of the subject communications, specifically those not conveying facts, were protected from disclosure under the work product doctrine, the Court held that the communications were not subject to attorney-client privilege.

In the absence of a contradictory Illinois state court decision on the subject, *Barrett* could be read as persuasive authority that the attorney-client privilege does not extend to non-employee consultants under the Control Group doctrine under Illinois law. However, in *Caremark, Inc. v. Affiliated Computer Services, Inc.*, 192 F.R.D. 263 (N.D. Ill. 2000), another diversity case applying Illinois law, the district court for the Northern District of Illinois stated that *Barrett* should *not* be read as adopting this blanket rule. In *Caremark* the plaintiff had engaged KPMG to analyze computer outsourcing services performed for the plaintiff. The plaintiff also retained external counsel to analyze a specific contract for such computer outsourcing services. In subsequent litigation between the plaintiff and the counterparty to this contract, the counterparty sought to discover communications between KPMG and the plaintiff's external counsel. Holding that such communications were protected by the attorney-client privilege, the district court rejected the defendant's argument that, under *Barrett*, non-employee consultants could not be members of a corporation's control group. Reading the *Barrett* holding narrowly, the district court held:

> While the *Consolidation Coal* court framed the control-group test in terms of the corporate client and its employee, the underlying relationship is one of principal and agent. Therefore, the analysis accommodates a principal/agent relationship which involves a non-employee agent working within the scope of his authority.

192 F.R.D. at 267. Accordingly, *Caremark* supports the proposition that a consultant may be a member of a corporation's control group where acting as the corporation's agent. The district court in *Caremark*, however, was careful to clarify that its holding applied only to the "narrow situation where the corporation gives express authority to a non-employee agent to communicate with attorneys on behalf of the corporate principal for the purpose of receiving legal advice." *Id*

The *Barrett* and *Caremark* holdings demonstrate that the degree to which the Control Group doctrine extends to non-employee consultants remains murky. Application of the doctrine will likely depend on the nature of the particular relationship between the consultant, counsel, and the client, as well as the specific circumstance surrounding the communication.

Counsel should be mindful that the test for attorney-client privilege applicable in a given jurisdiction, be it the Control Group test, the *Upjohn* test, or another standard, can have a profound effect on the protection afforded to communications between consultants and counsel. Because communications between counsel and consultants may be discoverable, those communications should be conducted with the appropriate level of caution.

David Winters is a partner and Vincente A. Tennerelli is an associate with Butler Rubin Saltarelli & Boyd LLP, a national litigation boutique based in Chicago. They focus their practices on the arbitration and litigation of commercial disputes. The views expressed herein are personal to the authors. www.butlerrubin.com