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# Illinois Court Requires Policyholder to Produce Privileged Documents Concerning Pre-Policy Knowledge of Potential Claim

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An Illinois intermediate appellate court, applying Illinois law, has held that a policyholder company must produce documents relating to lawsuits filed before a professional liability policy incepted, including attorney analyses, holding that the company waived the privilege based on the prior knowledge exclusion and cooperation clause. *Sharp v. Trans Union, LLC*, 2006 WL 488477 (Ill. App. Mar. 1, 2006).

The company provided consumer credit reporting services internationally and sold its consumer lists to credit grantors. Years before the company's professional liability policy incepted, a Federal Trade Commission (FTC) administrative law judge found that the company had violated the Fair Credit Reporting Act by selling consumer lists for "improper purposes." An individual then filed a similar lawsuit against the company in federal court.

Subsequently, the company procured professional liability insurance that was negotiated through a broker for several months. In its application, the company disclosed that "various consumer claims pending against it have been brought for alleged violations of federal and state consumer reporting laws," but it did not disclose the FTC or individual lawsuits.

Based on the application, the parties negotiated the policy language to exclude coverage for "[a]ny Claim arising out of acts, errors, violations or omissions that took place prior to the effective date of this Insurance, if the General Counsel of the Named Assured on the effective date knew that such acts, errors, violations or omissions might be expected to be the basis of a Claim." The policy provided that "[a]ll Claims arising out of the same, continuing or related Professional Services shall be considered a single Claim and deemed to have been made at the time of the first of the related Claims is reported to the Underwriters and shall be subject to one Limit of Liability." The policy's cooperation clause required cooperation "in all investigations, including investigations regarding the application and coverage under this Policy."

After the policy was issued, the company disclosed the FTC and individual suits. The insurer then filed suit, arguing that there was no coverage based on, *inter alia*, the prior knowledge exclusion. During discovery, the insurer sought documents relating to the suits filed before the policy incepted, including conversations

between the company's corporate and external counsel and underlying defense counsel.

Applying *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 579 N.E.2d 322 (Ill. 1991), the intermediate appellate court held that "the parties' manuscripted insurance policy was negotiated and written to require disclosure of [the company's] general counsel's knowledge, work product, and communications regarding the pre-policy litigation" based on the prior knowledge exclusion and the cooperation clause.

The court explained that the unambiguous language of the exclusion "thus protects the [insurers] from insuring a known loss . . . [and] defines known losses in terms of the general counsel's knowledge by excluding errors and omissions that [the company's] general counsel knew might be the basis of a future claim." The court also explained that Illinois public policy encourages the duty to disclose "to prevent the insured from committing fraud upon the insurer." As such, the court found that the company waived the attorney-client privilege and held "the parties to their bargain."

The court rejected the argument that disclosing the documents would impede the company's defense of the underlying suits, explaining that a confidentiality agreement with the insurer or protective order would protect the company.