Courts Apply Privilege Choice of Law Principles: Part II

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In his November 12, 2014 “Privilege Points” release, Tom Spahn discusses choice of law principles in diversity cases considering privilege claims.

Last week's Privilege Point explained that federal common law privilege principles govern federal question cases, and that analyzing choice of law issues in bankruptcy matters can be more subtle.

Federal courts sitting in diversity should rely on their host jurisdiction's choice of law rules in selecting the proper privilege law. However, most federal courts inexplicably short-circuit this process — automatically applying the host jurisdiction's privilege law rather than its choice of law principles. See, e.g., Camico Mut. Ins. Co. v. Heffler, Radetich & Saitta, LLP, Civ. A. No. 11-4753, 2013 U.S. Dist. LEXIS 10832 (E.D. Pa. Jan. 28, 2013). Courts undertaking the proper analysis sometimes reach surprising results. In Skepnek v. Roper & Twardowsky, LLC, the court handling a diversity case properly looked to Kansas choice of law rules — almost apologetically explaining that Kansas follows the "older, minority approach" of the Restatement (First) of Conflict of Laws (1934). Case No. 11-CV-4102-DDC-JPO, 2014 U.S. Dist. LEXIS 122918, at *10 (D. Kan. Sept. 4, 2014). That approach "provides that '[t]he law of the forum determines the admissibility of a particular piece of evidence."' Id. at *11 (quoting Restatement § 597). The court therefore applied Kansas privilege law principles to emails among "New Jersey clients communicating with their New Jersey law firm about a New Jersey lawsuit." Id. at *11-12. Not surprisingly, the court acknowledged that those New Jersey clients "may find it unusual that Kansas state law determines whether their e-mails are privileged." Id. at *12.

This type of counterintuituitive result usually makes little difference, but in some cases Illinois state courts have relied on this analysis to apply that state's narrow "control group" privilege standard to communications that deserved privilege protection under the more corporate-friendly Upjohn standard of when and where the communications took place.