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Uncertainty Continues Concerning **Selective Waiver**

One remedy is contained in pending legislation.

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THE "SELECTIVE WAIVER" doctrine has been a matter of significant controversy since it was first given life by the Eighth Circuit in *Diversified Industries Inc. v. Meredith*, in 1977.[1] Since that time, the doctrine, which permits the holder of attorney-client and work product protections to produce privileged material to government investigators but nevertheless to retain claims of privilege as to third parties, has been the subject of conflicting decisions in the federal courts of appeal, and uneven application in the district courts.

Recently, the debate on selective waiver has been fueled by policies and practices in place at the United States Department of Justice (DOJ), the Securities and Exchange Commission (SEC), and other federal and state regulators that permit government investigators to request that corporations waive the attorney-client and the attorney work product privileges. Under current guidelines, the DOJ and the SEC may deem a refusal to waive privilege as a failure fully to cooperate in the investigation, and are free to consider that failure in making charging and enforcement decisions.[2]

Two recent decisions in the Southern District of New York, one by Judge Robert P. Patterson in *In re Cardinal Health Inc. Securities Litigation* ("*Cardinal Health*"),[3] and one by Judge Shira A. Scheindlin in *In re Initial Public Offering Securities Litigation* ("*In re IPO*"),[4] show how these government practices raise difficult questions for courts called upon to address selective waiver claims in related civil litigation.

Cardinal Health, decided in January 2007, upheld a selective waiver claim in order to encourage open communication between corporations and government investigators, and sought to avoid penalizing the corporation for waiving by applying the selective waiver doctrine in a subsequent civil suit.

In contrast, *In re IPO*, decided in February 2008, rejected a selective waiver claim because the court was concerned that the doctrine would strip corporations of any legitimate basis for resisting government waiver requests. The court reasoned that widespread application of the doctrine would lead to even more government pressure on corporations to waive privilege.

These decisions reflect the continuing debate between those who believe the doctrine should be abandoned because it undermines the principal public policies underlying the attorney-client and work product privileges, namely to foster full and candid communications between attorney and client and to promote the proper functioning of the adversary system, and those who believe the doctrine should be readily applied to facilitate speedier and more efficient government investigations.

Cardinal Health and *In re IPO* confirm that the courts thus far have failed consistently to redress the coercive effects of government waiver requests in criminal or regulatory investigations. Indeed, continuing uncertainty as to the scope, rationale and vitality of the doctrine suggests that only legislation prohibiting government investigators from seeking waivers can provide effective relief to corporate clients faced with the difficult choice between complying with the government's standard for full cooperation and preserving the privileges.

Such legislation may soon be enacted. One such bill, the Attorney-Client Privilege Protection Act of 2007, is currently under review by the Senate Judiciary Committee.[5] A similar bill already has been approved by the House of Representatives.[6]

In an express effort to forestall this legislation, however, the DOJ has recently reported that it expects to amend its principles governing prosecutions of business organizations to make clear that "[c]ooperation will be measured by the extent to which a corporation discloses relevant facts and evidence, not its waiver of privileges."[7]

If enacted (over the DOJ's opposition), the legislative proposals before Congress promise to put an end to government requests for waivers and the role of waivers in charging or enforcement decisions, and may end the selective waiver debate once and for all.[8]

Split in Federal Appellate Law

The persistence of the debate on the selective waiver doctrine owes much to the absence of consistency among the federal circuit courts and lack of guidance from the Supreme Court.

While most federal appellate courts to have considered the doctrine have rejected it on the facts before them, several also have been reluctant to adopt per se rules against the doctrine in all contexts. The result is confusion and continuing uncertainty as to whether the doctrine will be applied in any particular case.

In the Second Circuit, the controlling authority is *In re Steinhardt Partners, L.P.*

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("*Steinhardt*").[9] In *Steinhardt*, SEC investigators requested that Steinhardt's attorneys prepare a memorandum addressing various legal issues relating to their investigation, and share their memorandum with the SEC. Steinhardt's attorneys complied with the request, and produced a memorandum to the government.

Subsequently, when civil litigation in the same matter commenced, Steinhardt's adversaries requested all documents that had been divulged to the government; the company resisted disclosure on work product grounds, and the plaintiffs moved to compel. The district court granted the motion.

The Second Circuit affirmed the district court and rejected Steinhardt's selective waiver arguments. The court reasoned that "selective assertion of privilege should not be merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage,"[10] and was unsympathetic to the defendant's claim that selective waiver was necessary to alleviate the "Hobson's choice between waiving work product protection through cooperation with investigatory authorities, or not cooperating with the authorities."[11]

The court concluded that "[a]n allegation that a party facing a federal investigation and the prospect of a civil fraud suit must make difficult choices is insufficient justification for carving a substantial exception to the waiver doctrine."[12]

Though the Second Circuit rejected Steinhardt's claim of privilege, the court explicitly declined to adopt a per se rule that all voluntary disclosures to the government waived work product protections in subsequent civil litigations.

The court explained that "[e]stablishing a rigid rule would fail to anticipate situations in which the disclosing party and the government may share a common interest in developing legal theories and analyzing information, or situations in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials."[13] Since Steinhardt did not secure a confidentiality agreement with the SEC and was adverse to the government, the court ruled that the privilege was waived.

Like the Second Circuit, the Tenth Circuit has rejected selective waiver in the only case in which it considered the question, but left open the possibility that, under certain circumstances, a selective waiver may be deemed effective.

In *In re Qwest Communications International Inc.*,[14] the court found that a defendant's production of attorney-client privileged documents to the SEC and DOJ under a confidentiality agreement waived the privilege in subsequent civil litigation, because the confidentiality agreement "d[id] little to restrict the agencies' use of the materials they received."[15]

The court expressly distinguished the case from one in which "a confidentiality agreement…prohibits further disclosures without the express agreement of the privilege holder,"[16] thus leaving open the possibility that selective waiver would be available to other parties with more restrictive confidentiality agreements in the future.

In contrast, the Third, Sixth and D.C. Circuits have held that even confidentiality agreements that strictly limit the government's use of privileged documents will be ineffective to preserve subsequent claims of privilege.[17] All three courts rejected the selective waiver doctrine on the grounds that the core policies of the attorney-client and work product privileges, which seek to foster open attorney-client communications and promote the functioning of the adversary system, would not be served by allowing a party to "pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit."[18]

While most federal appellate courts to have considered the doctrine have rejected it on the facts before them, several have been reluctant to adopt per se rules against it in all contexts, resulting in confusion as to whether the doctrine will be applied in any particular case.

These courts saw no reason to deviate from the rule that "a voluntary disclosure to a third party waives the attorney-client privilege even if the third party agrees not to disclose the communications to anyone else."[19] The First and Fourth Circuits have similarly refused to recognize selective waiver on the grounds that the policies of the privileges are undermined by disclosure to third parties, suggesting that a promise of confidentiality would be ineffective in those circuits.[20]

The Eighth Circuit in *Diversified*, by contrast, concluded just the opposite, and determined that the selective waiver doctrine served the policy of encouraging frank and open attorney-client communications. The court explained that a finding of privilege waiver by disclosure of documents to the SEC in an investigation would potentially "thwart[] the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers."[21]

Overwhelmingly, the federal appellate courts have been unreceptive to arguments that selective waiver is necessary to foster cooperation with government investigators.

The Sixth Circuit refused to accept this argument, which was advocated by one dissenting judge on the panel, because it saw no reason to impair private litigants' access to information in favor of government investigators.[22] The First Circuit dismissed the concern for the government's access to information by noting that government agencies "usually have means to secure the information they need,"[23] and the Tenth Circuit rejected this argument because it lacked any evidentiary support.[24]

Conflicts in District Courts

Not surprisingly, the failure of the federal appellate courts to resolve the competing concerns implicated by the selective waiver issue has given rise to conflicting results in the district courts.

Steinhardt, with its vague dicta suggesting the availability of selective waiver where a common interest is found or a confidentiality agreement is in place, has been particularly difficult to apply. Following that ruling, some courts adjudicating selective waiver claims have held that the existence of a confidentiality agreement is the determinative factor.[25] Others have viewed the existence of such an agreement to be a significant factor in the analysis, but not conclusive.[26]

The absence of a uniform approach is particularly striking in *Cardinal Health* and *In re IPO*, the two most recent Southern District decisions to consider the selective waiver doctrine, neither of which turned on the existence of a confidentiality agreement.

In the former case, Cardinal Health produced documents in an SEC investigation, and as a result became aware of potential accounting misconduct by its employees. Cardinal Health's audit committee then commenced its own internal investigation of possible wrongdoing and engaged outside counsel to conduct the investigation.

The SEC and the DOJ contacted the audit committee and requested that it share the results of the investigation. The committee produced attorney work product to the SEC pursuant to a confidentiality agreement, but

produced documents to the DOJ without any such agreement in place.

In a subsequent related civil case against Cardinal Health, plaintiffs subpoenaed the attorney work product from the audit committee's outside counsel, who moved to quash. Judge Patterson granted the motion, finding that the work product privilege had not been waived, and determining that under the circumstances of the case,

> it seems clear that the Audit Committee's purpose in authorizing the investigation in the face of almost certain litigation between Cardinal and the SEC or USAO—as well as in sharing the results with the SEC and USAO—was that Cardinal's financial and accounting practices be "clean as a hounds tooth," an interest in common with the SEC and USAO.[27]

Relying on *Steinhardt*'s dicta that "common interest" was a basis for upholding claims of selective waiver, the court concluded that the lack of a confidentiality agreement with the DOJ was not fatal to Cardinal Health's position. The court found support for its conclusion in the policy justification that "it is entirely appropriate…for courts to protect work product in these circumstances to encourage cooperation between the private and public sectors acting with a common interest."[28]

Cardinal Health unquestionably defined "common interest" more broadly than *Steinhardt*.

In *Steinhardt*, the court found that the government and the company were adverse and did not share a common interest based on the "determinative fact" that "Steinhardt knew that it was the subject of an SEC investigation [(even though an enforcement proceeding had not yet been commenced)], and that the [work product] was sought as part of this investigation."[29] These same facts were present in *Cardinal Health*, but the *Cardinal Health* court focused instead on the potential for selective waiver to encourage corporations to cooperate with government investigators.

In re IPO reached a very different result. In that case, Credit Suisse's general counsel commenced an internal investigation into IPO allocations, and retained outside counsel to assist in this effort. Credit Suisse thereafter produced attorney work product to both the DOJ and SEC agencies pursuant to letter agreements promising confidentiality.

In later civil litigation, plaintiffs moved to compel production of the work product. In granting the motion, Judge Scheindlin gave no apparent weight to the existence of the confidentiality agreements. She also rejected as "baseless" the company's argument that it shared a common interest with government investigators; the court reasoned that because the company knew it was the subject of a government investigation and that the government sought the work product as part of the investigation, the company and the government were adverse.[30]

The *In re IPO* court's rejection of the selective waiver doctrine was rooted in its view that the doctrine "is not in the long-term best interests of the government, the adversarial system, or litigants."[31] The court found that selective waiver would impair the adversary system because attorney-client communications would inevitably be made with an eye towards future selective disclosure to the government, and not for the purpose of frank communications between lawyers and their clients.

The court also believed that the government's interest in obtaining privileged information would be undermined if the materials were created with the expectation that they would be disclosed, and not by attorneys who believed their work product would never be turned over to third parties.

Finally, and most forcefully, the court expressed concern that the selective waiver doctrine would make it more difficult for corporations to assert claims of privilege in the face of government investigations. The court explained that

> [r]educing the risk of waiver may concomitantly reduce the ability of defendants to resist demands for disclosure, particularly from government agencies. The result would be a significant increase in the extent to which attorney work product is disclosed to government agencies.[32]

For those reasons the court concluded that "there is a strong presumption against a finding of selective waiver, and it should not be permitted absent special circumstances."[33]

Conclusion

The law of selective waiver remains very much unsettled, as the recent conflicting opinions in *Cardinal Health* and *In re IPO* demonstrate.

Reasonable minds may disagree, as did the courts in those two cases, as to whether our criminal justice and regulatory systems are better served if courts preserve privilege claims in civil litigations following disclosure to the government, or if courts refuse to recognize or apply the selective waiver doctrine. As *In re IPO* observed, the doctrine has the potential to increase the pressure on corporations to waive the privilege because it eliminates an important basis for refusing to waive.

These decisions also show that, in the current environment, no corporation can be assured that courts will apply the selective waiver doctrine to remedy the coercive effect of government waiver requests and the potential adverse consequences in related civil litigation. The only certain remedy may be a legislative one.

1. 572 F.2d 596 (8th Cir. 1977).
2. See Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Att'ys (Dec. 12, 2006) (DOJ guidelines); Report of Investigation and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44,696 (Oct. 23, 2001) (SEC guidelines).
3. No. C2 04-575 ALM, 2007 WL 495150 (S.D.N.Y. Jan. 26, 2007).
4. __F.R.D.__, No. 21 MC 92(SAS), 2008 WL 400933 (S.D.N.Y. Feb. 14, 2008).
5. Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (2007).
6. Attorney-Client Privilege Protection Act of 2007, H.R. 3013, 110th Cong. (2007).
7. Letter from Deputy Attorney General Mark Filip to Patrick J. Leahy and Arlen Specter, Senate Committee on the Judiciary, dated July 9, 2008.
8. One potential drawback to the end of the selective waiver doctrine is that corporations may be unable under any circumstances to share privileged information with government regulators without waiving the privilege in related civil litigation, even in situations where there exists a genuine common interest between the corporation and the government in ensuring that prosecutorial or regulatory judgments are made on a full and accurate record.
9. 9 F.3d 230 (2d Cir. 1993).
10. Id. at 235.
11. Id. at 236.
12. Id.
13. Id.
14. 450 F.3d 1179 (10th Cir. 2006).
15. Id. at 1194.
16. Id. at 1182.
17. *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289 (6th Cir. 2002); *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981).
18. *Westinghouse*, 951 F.2d at 1425 (quoting *Permian*, 665 F.2d at 1221).
19. Id. at 1427; *In re Columbia/HCA*, 293 F.3d at 302-03 .
20. *United States v. M.I.T.*, 129 F.3d 681 (1st Cir. 1997); *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988). It should be noted, however, that the First Circuit in *M.I.T.* expressly declined to decide whether pure opinion work product, which is afforded special protection under Fed. R. Civ. P. 23(b)(3), could be a proper subject of selective waiver. 129 F.3d at 688.
21. 572 F.2d at 611.
22. *In re Columbia/HCA*, 293 F.3d at 303.
23. *M.I.T.*, 129 F.3d at 685.
24. *In re Qwest*, 450 F.3d at 1193.
25. See, e.g., *Maruzen Co., Ltd. v. HSBC USA Inc.*, Nos. 00 Civ. 1079(RO), 00 Civ. 1512(RO), 2002 WL 1628782, at *2 (S.D.N.Y. July 23, 2002); *In re Leslie Fay Cos. Sec. Litig.*, 161 F.R.D. 274 (S.D.N.Y 1995); *Lawrence E. Jaffe Pension Plan v. Household Int'l Inc.*, 244 F.R.D. 412 (N.D. Ill. 2006); *In re McKesson HBOC Inc. Sec. Litig.*, No. 99 Civ. 20743, 2005 WL 934331 (N.D. Cal. Mar. 31, 2005).
26. *United States v. Wilson*, 493 F. Supp. 2d 348 (E.D.N.Y. 2006); *In re Natural Gas Commodity Litig.*, No. 03 Civ. 6186(VM)(AJP), 2005 WL 1457666 (S.D.N.Y. June 21, 2005).
27. 2007 WL 495150, at *9.
28. Id. at *9 n.8.
29. 9 F.3d at 234.
30. 2007 WL 400933, at *7.
31. Id. at *6.
32. Id. at *5.
33. Id. at *6.