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INVESTIGATIONS AND PRIVILEGE

Rethinking Selective Waiver

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Companies being investigated by the government often decide to disclose attorney-client privileged or work product material to investigators, in the hope of winning cooperation credit from the government. While the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ) have issued new policies prohibiting demands for privileged material under certain circumstances,[1] the decision whether to waive and the scope of any such waiver exists in every investigation.[2] Circuit courts and commentators have held widely different views on whether disclosure to the government in these circumstances waives privilege or work product protection in related civil litigation. As a result of these divergent approaches, uncertainty reigns, and a recent effort in Congress to pass a statute providing a uniform rule has failed.[3]

In this environment, companies seeking to share protected information with the government without having to provide it to civil plaintiffs should consider other approaches This article raises a potential approach that remains relatively unexplored and that may be available to certain highly regulated companies.

These companies may be able to argue that the initial disclosure to the government was not a waiver at all, relying on two aspects of waiver law. First, the law traditionally deems only "voluntary" disclosure to be a waiver. For highly regulated companies, however, disclosure to the government may not be truly voluntary. Were these companies to resist production, the government could choose to file charges, which could harm or even destroy the business by putting essential licenses at risk or driving away customers. Companies in this position may be effectively subject to a "death sentence" before having had a fair opportunity to dispute the allegations, arguably rendering their production involuntary.

Second, with respect to work-product immunity (though not the attorney-client privilege), the law deems a waiver to have occurred only if disclosure is made to an "adversary." While the government is in some sense an adversary of a company it is investigating, one may argue that it is not the sort of litigation adversary contemplated by work-product waiver doctrine because the company likely could not survive long enough to contest any charges filed.

The Pressure to Produce

The context in which these arguments arise is illustrated by the destruction of Arthur Andersen upon being criminally charged in connection with Enron's collapse. As is well-known, the government charged Arthur Andersen with obstruction of justice.[4] After it was charged, Arthur Andersen was no longer able to function as an independent public company auditor, effectively ending its ability to function as a going concern.[5] This death sentence occurred well before the government's allegations could be tested at trial, a result made more tragic by the Supreme Court's ultimate rejection of the government's obstruction theory on appeal.[6]

> The company's relationship with the government is thus as a supplicant to an almost irresistible force, not a litigation adversary. In these circumstances, the adversarial process that the doctrine exists to promote simply does not exist.

Other companies can face similar risks from government investigations. For example, mortgage lenders may be disqualified from federal loan programs solely upon being indicted.[7] Contractors may be barred from bidding on government contracts if they have been indicted.[8] The SEC may suspend certain regulatory exemptions upon certain indictments.[9] And insurers may lose their state licenses if the company has "demonstrated untrustworthiness" or is "not carrying out its contracts in good faith."[10] Other examples no doubt exist, and are not necessarily limited to the criminal-indictment context.

These general pressures may be exacerbated by demands made by the particular government agency with which corporate counsel is dealing. The facts of *United States v. Stein*, although arising in a different context, are illustrative. In *Stein*, the district court found after an extensive evidentiary hearing that prosecutors had improperly pressured accounting firm KPMG to decline to pay counsel fees for individual partners being investigated for tax evasion. The court found that KPMG, which had also been the subject of investigation, had been put in an impossible position: "KPMG was faced with the fatal prospect of indictment" and that "it could be expected to do all it could, assisted by sophisticated counsel, to placate and appease the government," given that "its survival depended on its role in a joint project with the government to advance government prosecutions."[11]

These same pressures may prompt disclosure of material protected by the attorney-client privilege and work-product immunity. Indeed, facts like these have led some to observe that "the reality is that there is no such thing as a truly voluntary waiver of privilege in today's highly charged prosecutorial environment."[12]

How Voluntary Is Waiver?

Given these realities, it is a bit surprising that companies have not resisted private plaintiffs' demands for privileged or work-product materials provided to the government on the ground that the prior production was not a voluntary waiver. For instance, when government agents enter a place of business and demand disclosure of protected documents, the resulting "waiver" is not deemed to have been voluntary.[13] Similarly, when regulations give the government a legal right of access, such as when a regulator exercises statutory examination powers, the production of protected documents is not deemed a voluntary waiver.[14]

Those sorts of cases would support the argument that production to prevent a charge that could destroy the company should not be deemed "voluntary." To better advance this argument, the company should build the necessary record, including by having a clear, documented understanding of the potential consequences of a government charge; a written

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record of communications with the government objecting to the production as involuntary; and a detailed record of statements or actions by investigators that expressly or impliedly suggest that production of protected materials could help the company's cause. Such a record may be especially important if disclosure is made to the DOJ or SEC, which now have policies that at least facially suggest that disclosure should not be compelled by the government (see infra n. 1.)

Counsel need to be sensitive to the potential consequences that making this argument will have on the company's relationship with the government. In cases where the disclosure is arguably involuntary, the government faces serious risks in accepting and relying upon the protected materials. If the company establishes that the initial production was not voluntary, then the government itself cannot use the materials at trial, because they remain protected (so long as the company acts to preserve the privilege and prevent their later use). The government could be compelled to return the documents reflecting the protected information.[15] Indeed, any evidence directly obtained from or derived from the disclosure could be suppressed under the "fruit-of-the-poisonous tree" theory.[16]

Setting aside the potential implications for the company's relationship with the government and the government's case, the involuntary disclosure argument remains a potentially valuable tool in defense counsel's arsenal in "bet the company" cases where the prospect of subsequent demands by private plaintiffs looms large.

Government as 'Adversary'?

The extreme power vested in some government agencies may give rise to another argument against finding a waiver of work-product immunity. Work-product immunity is deemed waived only when it is provided to an "adversary."[17] Such production is thought to be inconsistent with the work-product doctrine itself, which exists to provide a zone of confidentiality in which counsel can plan a client's case in anticipation of an adversarial proceeding.[18]

While the government may be an adversary in many cases[19]—and thus production to the government would be a waiver absent a common interest[20]—in the case of a highly regulated entity, the government may not be an adversary as that term is used for this purpose. There is no realistic prospect that a highly regulated company will ever survive long enough to participate in an adversarial proceeding. The company's relationship with the government is thus as a supplicant to an almost irresistible force, not a litigation adversary. In these circumstances, the adversarial process that the doctrine exists to promote simply does not exist.

Even though companies in this position cannot realistically litigate against the government, they can still maintain that they acted in "reasonable anticipation of litigation," as required to invoke work-product immunity.[21] The threat of related civil litigation—to which this argument is fundamentally addressed—in most cases should create a sufficient expectation of litigation to support work product protection. In addition, the threat of litigation may arise against individuals working for the company. Work product protection accordingly may still exist in this context, yet not be waived upon production to the government.

Counsel considering this argument should be aware of its limitations. It has the same or similar limitations as outlined above with respect to the voluntariness argument against privilege waiver—it is only available to certain companies, the record may be challenging to build, and government investigators may object to it. Moreover, when proceeding under either theory, it would be advisable to enter into a confidentiality agreement with the government, because the failure to take measures to prevent further disclosures to potential adversaries might be deemed a waiver.[22]

But unlike the argument that the waiver is involuntary, the government agency receiving this material can use it to develop facts and identify witnesses.[23] And the development of this second argument poses far less risk that the company will antagonize the government agency than the development of the first argument. This second theory of non-waiver seems less dependent upon establishing the fact of a government demand, whether explicit or implicit, for material that is work-product immune. It may be that all that need be demonstrated is the vast power vested in the government over the company and the company's exposure to charges that would threaten its very existence.

Conclusion

In sum, uncertainties in the selective waiver doctrine mean that company counsel should consider alternative arguments when deciding whether to produce privileged or work product materials to the government, and when defending against demands for those materials in related civil litigation. While selective waiver arguments can still be advanced, supplementing them with arguments such as those above will strengthen the company's ability to simultaneously cooperate with government investigators without damaging the company's civil litigation position.

Developing the arguments about the lack of voluntariness of any waiver and the lack of true adversity accords with the realities of defending highly regulated companies. In that context, the prospect of true adversarial litigation against the government may be non-existent, and the company's decisions about what information to disclose can only be properly understood in light of that reality. What becomes material in developing these arguments are the collateral consequences of getting charged and corporate counsel's interactions with the government—considerations that should not vary by circuit, but should provide greater defensibility to the company's position in related civil litigation.

1. United States Attorneys' Manual, Tit. 9 Ch. 9-28.720 ("Eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection"); Sec. & Exch. Comm'n Div. of Enforcement, Enforcement Manual §4.3 (2008) ("The staff should not ask a party to waive the attorney-client or work product privileges and is directed not to do so").

2. The Decline of the Attorney-Client Privilege in the Corporate Context, Survey Results Presented to the United States Congress and the United States Sentencing Commission at 11 (March 2005) (noting that corporate counsel responded to government officials' "stated expectations that waiver would be required for the company to be treated as cooperative" as well as their "unstated but perceived expectations that the company would not be treated as cooperative if waiver were withheld"); John A. Nathanson & K. Mallory Tosch, "Walking the Privilege Line," New York Law Journal, July 13, 2009 ("Given the extraordinary pressure to avoid an adverse disposition in a criminal investigation, counsel will likely continue to advise their clients to make all facts available to the government, including those facts gathered during internal investigations, regardless of waiver"). Moreover, changes in federal policy with respect to demands for privileged materials do nothing to staunch such requests from state enforcement authorities.

3. Peter K. Vigeland, Robert W. Trenchard, Daniel C. Richenthal & Michelle E. Kanter, "Selective Waiver," New York Law Journal (Dec. 1, 2008)

4. Greg Farrell, "Indictment Could Shred Andersen," USA Today (March 15, 2002) ("Andersen now finds itself in more jeopardy than it has ever seen in its history").

5. Ken Brown, Mitchell Pacelle, Cassell Bryan-Low, Jonathan Weil, Robert Frank, and Susanne Craig. "Andersen Indictment in Shredding Case Puts Its Future in Doubt as Clients Bolt," The Wall Street Journal (March 15, 2002); "Paul Volcker Says His Bid to Reform Andersen Is Over," The Wall Street Journal (May 6, 2002).

6. *Arthur Andersen, LLP v. United States*, 544 U.S. 696 (2005).

7. 24 C.F.R. §25.6(m).

8. 48 C.F.R. §9.407-2(b), (c).

9. 17 C.F.R. §230.258(a)(5).

10. See, e.g., N.Y. Ins. Law §2110(4); Cal. Ins. Code §704.

11. *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008).

12. Association of Corporate Counsel, Comments of the Association of Corporate Counsel on Proposed FRE 502, Judicial Conference of the United States, Standing Committee on Rules of Practice and Procedure, at 5 (Jan. 9, 2007).

13. See, e.g., *In re Parmalat Securities Litigation,* 2006 WL 3592936 (SDNY Dec. 1, 2006) (seizure of documents by Italian authorities was coerced, involuntary waiver); *Duttle v. Bandler & Kass*, 127 F.R.D. 46 (SDNY 1989) ("Although the privileged documents were seized at one time by West German authorities, that seizure did not effect a waiver of the attorney-client privilege").

14. *Securities and Exchange Commission v. Lavin*, 111 F.3d 921 (D.C. Cir. 1997) ("Bankers Trust's production of the Lavins' tapes…to the Federal Reserve Bank of New York also did not constitute waiver by the Lavins. Bankers Trust produced the tapes for the Federal Reserve, not pursuant to a subpoena, but in response to the Federal Reserve's exercise of its examination powers").

15. *United States v. Hatfield*, No. 06-CR-0550, 2010 WL 183522, at *10 (EDNY Jan. 8, 2010) ("Suppression by itself would be inadequate, as it would fail to sanction the Government for its failure to promptly return documents that were obviously protected by the work product immunity (as evidenced by their contents and the Mintz Levin letterhead), and enable the Government to retain, without penalty, whatever procedural 'benefit' it received from not having to summarize the SEC testimony itself").

16. See, e.g., *United States v. Edgar*, 82 F.3d 499 (1st Cir. 1996) ("[A] court may quash an indictment based upon evidence directly obtained from or derived from breach of the attorney-client privilege (citing cases)).

17. See, e.g., *United States v. MIT*, 129 F.3d 681, 687 (1st Cir. 1997) ("The prevailing rule is that disclosure to an adversary, real or potential, forfeits work product protection"). By contrast, disclosures to non-adversaries, such as family members, do not waive any work product immunity. See *United States v. Stewart*, 287 F.Supp.2d 461, 469 (SDNY 2003). Even disclosures to public accountants do not waive any work product protections, notwithstanding the fact that a public accountant, much like the government, serves a "public watchdog" function. See, e.g., *In re Pfizer Inc. Sec. Litig.*, No. 90 Civ. 1260, 1993 WL 561125, at *6 (SDNY Dec. 23, 1993).

18. See *United States v. Aldman*, 134 F.3d 1194, 1197 (2d Cir. 1998) (noting that the work product doctrine "is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy with an eye toward litigation, free from unnecessary intrusion by his adversaries").

19. See, e.g., *In re Initial Public Offering Securities Litig.*, 249 F.R.D. 457, 463 (SDNY 2008).

20. See, e.g., *United States v. Hatfield*, No. 06-CR-0550, 2010 WL 183522 (EDNY Jan. 8, 2010) (recognizing that a "common interest" exists between the audit committee and enforcement officials).

21. See, e.g., *Upjohn Co. v. United States*, 449 383, 386-87, 397-402 (1981) (applying work product protections even though no proceedings against the company were threatened when the documents were prepared).

22. *Spanierman Gallery, Profit Sharing Plan v. Merritt*, No. 00 Civ. 5712, 2003 WL 22909160 at *3 (SDNY Dec. 9, 2003); *In re Leslie Fay Cos. Sec. Litig.*, 152 F.R.D. 42, 44 (SDNY 1993).

23. This article does not explore what happens when the government attempts to use this work-product material at any trial of company employees that are subsequently charged.