WILMERHALE

Privilege Standing Committee Update

AUGUST 21, 2008

District Court Orders Law Firm to Disclose Interview Memoranda

In *Steptoe & Johnson v. UBS AG (In re HealthSouth Corp. Securities Litigation)*, No. 08-mc-116, 2008 U.S. Dist. LEXIS 34602 (D.D.C. April 29, 2008), the court explained how to determine whether an attorney interview memo constitutes opinion work product or fact work product. In this case, the court held that attorney notes of an interview of his client conducted by the FBI constituted fact, and not opinion, work product.

Investors in HealthSouth brought a securities class action against UBS and other defendants. The plaintiffs alleged that UBS helped HealthSouth commit accounting fraud and based their allegations largely on the sworn statements of Michael Martin, HealthSouth's former Chief Financial Officer. Some years earlier, the United States had investigated HealthSouth for accounting fraud; during that investigation, the government convinced Martin to cooperate and Martin attended two debriefing interviews conducted by the FBI in late 2003 and early 2004. At these interviews, Martin spoke about various aspects of HealthSouth's operations, including its relationship with UBS. Both the FBI and Martin's own counsel, Steptoe & Johnson ("Steptoe"), took notes and subsequently produced interview memoranda. Some of Martin's statements (as recorded in the FBI interview memos) seemed to conflict with his later statements in support of plaintiffs in the securities suit. When UBS asked Martin about these discrepancies during a deposition, Martin replied that the FBI memos were inaccurate, and that Steptoe's interview memos would more accurately reflect what he had said during the FBI interviews.

UBS issued a third-party subpoena to Steptoe, seeking production of the firm's interview memos from 2003 and 2004. Steptoe moved to quash on the ground that the interview memos represented

inviolate opinion work product.

The district court denied Steptoe's motion, holding that because the memos constituted "fact" work product and not – as Steptoe had argued – "opinion" work product, they warranted reduced protection from discovery. The court acknowledged that even without overt editorializing, interview notes or memoranda might reveal an attorney's "mental impressions, conclusions, opinions, or legal theories" in one of two ways: *first*, through the questions asked, and, *second*, through the way in which the memo winnowed the many answers given during the course of the interview. Neither concern was present on these facts. First, the FBI had set the agenda, selected the topics to cover, and conducted the interview, so there was no danger that the selection or ordering of questions would reveal Martin's lawyers' legal theories or thought processes. *Id.* at *14. Second, the memos merely related, in a question-and-answer format, everything that the FBI and Martin said; Steptoe "did not carefully weed the material in any manner that would reveal attorney mental processes." *Id.* at *15. Since neither danger was present, the Steptoe interview memos were merely fact work product. *Id.* And because UBS had shown a substantial need for the materials (Martin was the main witness against UBS), *Id.* at *19-20, the court ordered Steptoe to turn over the relevant portions of the memoranda, *Id.* at *21.

Limited-Liability Corporations Should Be Treated Like Corporations in Attorney-Client Privilege Litigation, District Court Holds

Montgomery v. eTreppid Technologies, LLC, No. 3:06-CV-00056, 2008 U.S. Dist. LEXIS 35561 (D. Nev. April 18, 2008), addressed whether a limited liability company (LLC) and its members are considered "joint clients" for purposes of the attorney-client privilege, so that the LLC's members may demand disclosure of otherwise-privileged documents.

Dennis Montgomery was one of the founders and managers of eTreppid, a software development company organized as an LLC under Nevada law. After falling out with his partners, Montgomery resigned his management position and brought a copyright suit against eTreppid, claiming it continued to sell a software program that he had invented and to which he held the copyright. *Id.* at *4. eTreppid asserted the attorney-client privilege in response to some of Montgomery's discovery requests. Montgomery responded that as a former member and manager of eTreppid, he and the company had been joint clients, and thus the LLC could not assert the privilege against him (at least as to those documents created during his tenure with the company). *Id.* at *4-5.

Magistrate Cooke concluded that under the federal common law, eTreppid could assert the attorney-client privilege against its former manager and member. Essentially, for purposes of the privilege, LLCs should be treated as courts typically treat corporations (i.e., the corporate entity alone is the client), rather than as courts typically general partnerships (i.e., all the partners are joint clients). In reaching this conclusion, the court made three legal observations and one factual one. First, it relied on two other cases that treated LLCs as corporations for privilege purposes (albeit under somewhat different circumstances): *Moore v. Commissioner of Internal Revenue*, T.C. Memo 2004-259 (2004), and *In re Tri-River Trading, LLC*, 329 B.R. 252 (8th Cir. B.A.P. 2005). *Id.* at *14. Second, the court observed that courts had analogized LLCs to corporations (rather than to partnerships) in a variety of legal settings (shareholder derivative actions, bankruptcy, attorney conflict-of-interest

rules, etc.). *Id.* at *14-17. Third, the court noted that federal common law treats limited partnerships as corporations for purposes of the attorney-client privilege. *Id.* at *17-18. Finally, eTreppid's Operating Agreement created the LLC with a corporation-like hierarchical management structure rather than a decentralized partnership model. Id. at *19-22. Each of these considerations weighed in favor of treating the LLC as a corporation for purposes of Montgomery's motion to compel production. *Id.* at *22.

The court held that the LLC itself was the sole holder of the privilege, current management controlled the privilege, and once Montgomery left eTreppid, he no longer had any right of access to privileged documents. *Id.* at *34-36. Assuming the current managers of eTreppid asserted attorney-client privilege, Montgomery could not demand disclosure of those documents. (The court left open the possibility that a different result might obtain had Montgomery been suing on behalf of eTreppid or in his capacity as a former officer. *Id.* at *35.)

District Court Finds Disclosure of Privileged Special Litigation Committee Report in One Litigation Does Not Waive Privilege as to Second, Related Litigation

In *Ross v. Abercrombie & Fitch Co.*, No. 2:05-CV-0819, 2008 U.S. Dist. LEXIS 33018 (S.D. Ohio April 22, 2008), held that a Special Litigation Committee Report retained the attorney-client privilege and work product protection even though defendant Abercrombie had relied on the report in support of its efforts to dismiss a separate shareholder derivative suit.

Abercrombie had faced two distinct but related lawsuits: one involving shareholder derivative claims and one involving private securities claims. Abercrombie moved to dismiss the derivative on the ground that its board had investigated and concluded that the suit was not in the best interest of shareholders. The key evidence in support of its motion was a report by the Board's Special Litigation Committee. The Report—which was itself work product and which contained several privileged attorney-client communications—was filed with the court under seal and was served on counsel for plaintiffs in the derivative suit. In the separate private securities suit, plaintiffs moved to compel production of the Report (and the underlying privileged documents upon which its authors had relied) on the ground that its use in the derivative action waived any privilege.

The court denied the securities plaintiffs' motion, holding that filing of the Report under seal in the derivative action did not waive the applicable privileges because "the disclosure of the report under those unique circumstances is essentially involuntary[.]" *Id.* at *12. While circuit precedent clearly compelled this result (see *In re Perrigo*, 128 F.3d 430 (6th Cir. 1997)), the district court noted that sister circuits had approved findings of waiver on similar facts (compare *Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984); *Joy v. North*, 692 F.2d 880 (2d Cir. 1982)). 2008 U.S. Dist. LEXIS 33018 at *14-15.

Nonetheless, Abercrombie did not win a clear victory: the court, in managing the related derivative action, would hold a hearing to determine whether to make public the contents of the Special Litigation Committee Report. The court indicated that, in making that determination (at some future date), it would balance Abercrombie's privacy interests against the public's right to know the basis of the court's decision to dismiss the derivative suit. *Id.* at *16. Obviously, if made public, the Report

would lose any claim to privilege or work product protection.

Second Circuit Affirms Order that Subject of Grand Jury Investigation Must Produce Fact Work Product to Government

In *In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d 180 (2d Cir. 2007), cert. denied sub nom. *Doe v. United States*, 2008 U.S. LEXIS 4839 (June 9, 2008), the Second Circuit held that although tape recordings sought by the government from the subject of a grand jury investigation were "fact work product," the government was entitled to the recordings.

In January 2005, a federal prosecutor informed counsel for the appellant, a mortgage broker ("Appellant"), that Appellant was a subject of a grand jury investigation. Appellant and his attorney met with the prosecutors on January 12, 2005, and again on May 15, 2005. At the second meeting, Appellant informed the government that some time after their previous meeting, Appellant had surreptitiously recorded conversations with a colleague ("Broker"), who was also the subject of an ongoing grand jury investigation. Appellant explained that his counsel had advised him to make these recordings in order to protect himself. The FBI subsequently served Appellant with a grand jury subpoena seeking the recordings, but Appellant's counsel refused to produce them, protesting that the subpoena was barred by the Fifth Amendment and by the attorney-client privilege. The district court rejected Appellant's claims, but ordered supplemental briefing regarding the possible applicability of the work-product doctrine. The government argued that the recordings should be disclosed because the prosecutors had a substantial need for recordings that could illustrate Broker's role in the scheme under investigation and had exhausted all other means of obtaining the information on the recordings. The district court agreed, holding that the recordings were fact work product that would not reveal his counsel's legal strategies or mental impressions, and ordered Appellant to comply with the subpoena.

The Second Circuit (Wesley, J.) affirmed the district court's ruling. The court accepted the government's position that a showing of "substantial need" for the recordings was sufficient, notwithstanding Appellant's contention that compliance with the subpoena should be ordered only if the government could show that "the recordings were 'necessary' for the grand jury to fulfill its purpose." *Id.* at 186. The court also found that the government had demonstrated a "substantial need" for the recordings, because the recordings constituted data that the grand jury "need[ed] to decide whether it should return an indictment." *Id*. Finally, the court held that the government had exhausted all other means of obtaining the information on the recordings, although it had asked neither Appellant nor Broker to describe their contents, as "the recordings are a unique memorialization of the conversations between Appellant and Broker that is not subject to 'fading memories or contradiction.'" *Id*. The court therefore ordered Appellant to comply with the district court's order commanding compliance with the subpoena.