New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 250—NO. 36
TUESDAY, AUGUST 20, 2013

SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Limiting the Scope of Waiver Under Federal Rule of Evidence 502(a)

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In a recent decision resolving a dispute over the extent to which a party had waived the attorney-client privilege by producing and then permitting witnesses to testify at deposition about two email chains containing legal advice, Southern District Magistrate Judge Frank Maas noted that neither party had mentioned Federal Rule of Evidence 502, despite its clear applicability.[1] He went on to observe that that omission should perhaps come as no surprise "since remarkably few lawyers seem to be aware of the Rule's existence despite its enactment nearly five years ago,"[2] a circumstance he found "unfortunate" inasmuch as Rule 502 was designed to "avoid vexatious and time-consuming privilege disputes" such as the one before him.[3] To the extent practitioners would benefit from a short refresher on Rule 502—particularly as it pertains to intentional disclosure of material covered by the attorney-client privilege and work product doctrine, we discuss below Rule 502(a), and Maas's decision in *Swift Spindrift v. Alvada Insurance*, applying that section of the rule.

Intentional Waiver

The *Swift Spindrift* litigation involved an insurance coverage dispute arising out of the protracted detention of the plaintiff's cargo ship by Libyan authorities after a Libyan importer obtained the vessel's arrest claiming it had delivered a defective cargo of corn. After posting a bond it thought (incorrectly) would secure the release of the ship, and engaging in extensive and unsuccessful litigation to obtain its release, the plaintiff sold the ship on an "as-is where-is" basis and sought recovery from its insurers for the difference between the fair market price of the ship and its sales price. The lawsuit before Maas concerned whether the loss was covered by the plaintiff's "war risk" policies.

During the course of discovery, plaintiff disclosed two email chains containing communications from its in-house counsel. One chain contained advice to plaintiff's sole director that the circumstances in Libya would not give rise to a valid claim under the war risk policies. The second chain involved communications between the same in-house lawyer and local counsel in London and Libya discussing the status of the case and the fact that the Libyan court had assessed the potential damages at an amount substantially higher than the amount of the bond plaintiff had posted. Plaintiff's in-house lawyer expressed "alarm" in the email, noting that a judgment in that amount might render the vessel a constructive total loss.

At deposition, plaintiff's director testified specifically about the advice he had received in the second email chain and plaintiff's decision not to increase the bond it posted to the full amount sought by the Libyan importer. One of the vessel's ultimate owners also testified about having received and discussed legal advice regarding the Libyan situation, but could not recall the specifics of those conversations and did not testify about any specific legal advice he had received.

Plaintiff produced in discovery approximately 8,000 documents (including the two email chains discussed above) and a 163-page privilege log listing emails on a variety of subjects including the need to obtain legal advice in Tripoli; plaintiff's obligations under the ship's charter agreement; unloading the ship's cargo; potential legal claims against plaintiff; and various aspects of the litigation and efforts to secure the ship's release.

The defendant insurer moved to compel production of all the emails listed in the privilege log arguing, in part, that by intentionally disclosing the two email chains and permitting its witnesses to testify about the legal advice they had received, plaintiff had broadly waived its attorney-client privilege as to "communications concerning the proceedings in Libya and the precipitating events." Plaintiff opposed waiver arguing (1) that it had only produced the two emails in question after determining that they were, at best "questionably privileged," and (2) that any waiver should be limited to the communications already disclosed because defendants had not been prejudiced by the partial disclosure.

Rule 502(a)

After noting that "fairness is the principal consideration in determining whether a party has waived the attorney-client privilege,"[4] Maas went on to remark on both parties' failure to discuss Rule 502 despite its obvious application. Citing the advisory committee's note, he observed that "Rule 502 was intended to 'resolve some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege' and 'respond[] to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information."[5]

As Maas instructed, Rule 502 makes a distinction between intentional and unintentional, or inadvertent disclosure. Rule 502(b), addressing inadvertent disclosure, codifies longstanding precedent in this circuit that when privileged material is disclosed inadvertently in a federal proceeding or to a federal office or agency, no waiver will result so long

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as the holder of the privilege (1) took reasonable steps to prevent disclosure, and (2) acted promptly in taking reasonable steps to rectify the error, including if necessary following the procedure set forth in Federal Rule of Civil Procedure 26(b)(5)(B) for notifying receiving parties that privileged information has been mistakenly disclosed.[6]

Rule 502(a) addresses deliberate disclosure such as that at issue in *Swift Spindrift*. Specifically, 502(a) provides that when a party intentionally discloses information protected by the attorney-client privilege or work-product doctrine in a federal proceeding or to a federal office or agency, the waiver will only extend beyond the actual material disclosed to other non-disclosed communication if the undisclosed communication concerns the same subject matter as the disclosed communication and "ought in fairness" to be considered together with the disclosed information.

Again invoking the advisory committee notes, Maas, in discussing Rule 502(a), explained that "a subject matter waiver…is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective or misleading presentation of evidence to the disadvantage of the adversary." Citing *Seyler v. T-Systems N.A.,* one of the very few other cases from the Southern District of New York to discuss Rule 502(a), he concluded that "even when a disclosure is intentional, the scope of any subject matter waiver ordinarily is quite 'narrow.'"[7]

Applying the standards set out in Rule 502(a), Maas concluded that the *Swift Spindrift* plaintiff's intentional disclosure of the two privileged email chains did not result in a broader waiver of the attorney-client privilege. Focusing on the question of fairness, he found that the plaintiff had obtained no tactical advantage through disclosure of the first email chain concerning whether the war-risk policies would cover the loss. Noting that those emails were actually unfavorable to plaintiff's coverage case, Maas concluded that they could not be used to the defendant's detriment at trial and that accordingly, plaintiff's production of the email chain did not warrant compulsory disclosure of other privileged documents related to the same subject matter.

Similarly, Maas held that the emails concerning the status of the Libyan proceeding and the amount of security required to obtain release of the vessel were "innocuous" and the related deposition testimony "unremarkable," such that it was unclear how the defendant could be prejudiced without disclosure of additional privileged information. He rejected the argument that plaintiff's assertion of the privilege regarding the measures it took to obtain the ship's release "conceal[ed]" important factual information, noting that the mere need for information does not overcome the attorney-client privilege.[8] Finding that the defendant had not demonstrated how it would be prejudiced by plaintiff's partial disclosure, Maas concluded that "none of the fairness concerns enunciated in Rule 502 appear to be implicated…."

Disclosure to Federal Agency

Rule 502(a) also carves out a zone of relative safety for the "selective disclosures" entities often make to regulators or prosecutors in an effort to cooperate with a government investigation. Following the U.S. Court of Appeals for the Second Circuit's seminal decision in *In re Steinhardt Partners*,[9] declining to adopt a per se rule as to whether and in what circumstances such disclosure to the government would result in waiver, and if so, to what extent, courts examined such questions on a case-by-case basis, leaving entities open to doubt as to how much of their internal investigations might become fodder for private plaintiffs.

As Magistrate Judge Maas instructed, Rule 502 makes a distinction between intentional and unintentional, or inadvertent disclosure.

Rule 502(a) provides express assurance that the scope of any waiver resulting from disclosure of otherwise privileged materials to the federal government will generally be limited to the materials themselves, and will not result in a broad subject matter waiver vis-à-vis third parties. Southern District Judge Jed S. Rakoff noted this aspect of Rule 502(a) in the context of a criminal defendant's efforts to obtain certain interview memoranda created by a law firm conducting an internal investigation into options backdating at Monster Worldwide Inc. In *United States v. Treacy*,[10] Rakoff relied in part on Rule 502(a) in quashing the defendant's subpoena to the law firm seeking interview memoranda it had not provided to the government, rejecting the defendant's theory that furnishing some interview memoranda to the government waived the privilege as to all memoranda on the same subject. [11]

Rakoff was unpersuaded by the defendant's argument that the law firm was using the privilege as both a "sword and shield" in choosing which memoranda it disclosed to the government, noting that the holder of the privilege was not a party to the proceeding and thus was not seeking any advantage against an adversary. He noted that Rule 502(a) supported his finding that no subject matter waiver had occurred, relying on the advisory committee's note that a broad subject matter waiver should be reserved for the narrow situation where a party seeks to disadvantage an adversary through selective or misleading disclosure. Because neither the law firm nor its client was an adversary in the criminal proceeding, and no suggestion had been made of selective or misleading conduct, Rakoff concluded that the case did not present the unusual circumstances required to find a waiver of the privilege.

Conclusion

Disclosure of certain otherwise privileged documents can, from time to time, serve a client's interests for a variety of reasons. Rule 502(a) was intended to help lawyers make those difficult strategic decisions with greater clarity about the extent to which such disclosures will result in a broader waiver. Although its precise contours may need to be fleshed out through additional litigation, presumably once lawyers begin to invoke the rule more frequently, it will deliver on its promise of greater predictability and less litigation over the scope of intentional waivers.

1. *Swift Spindrift v. Alvada Insurance*, 2013 WL 3815970 (S.D.N.Y. July 24, 2013).

2. Id. at *4 (citing Paul W. Grimm, Lisa Yurwit Bergstrom & Matthew P. Kraeuter, "Federal Rule of Evidence 502: Has It Lived Up to Its Potential?" XVII Rich. J.L. & Tech. 8 (2011)).

3. 2013 WL 3815970, at *4.

4. Id. at *4 (citing *In re County of Erie*, 546 F.3d 229; *In re Sims*, 534 F. 3d 117, 132 (2d Cir. 2008)).

5. Id. at *4 (quoting Rule 502 Advisory Committee Note (alterations in original)).

6. Rule 26(b)(5)(B) provides that: "[i]f information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved."

7. 2013 WL 3815970, at *5 (citing 771 F.Supp.2d 284, 288 (S.D.N.Y. 2011) (Koeltl, J.)).

8. Id. at *6.

9. 9 F.3d 230 (2d Cir. 1993).

10. 2009 WL 812033 (S.D.N.Y. March 24, 2009).

11. Although Rule 502(a) was designed to reduce the risk of a broad subject matter waiver from selective disclosure to the government, Steinhardt Partners continues to generate litigation over the scope of waiver flowing from such disclosures. See, e.g., *Gruss v. Zwirn*, 2013 WL 3481350 (S.D.N.Y. July 10, 2013) (Gardephe, J.) (finding privilege waived not only as to materials disclosed to government but also as to underlying source materials in a case where neither party referenced Rule 502(a)).

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