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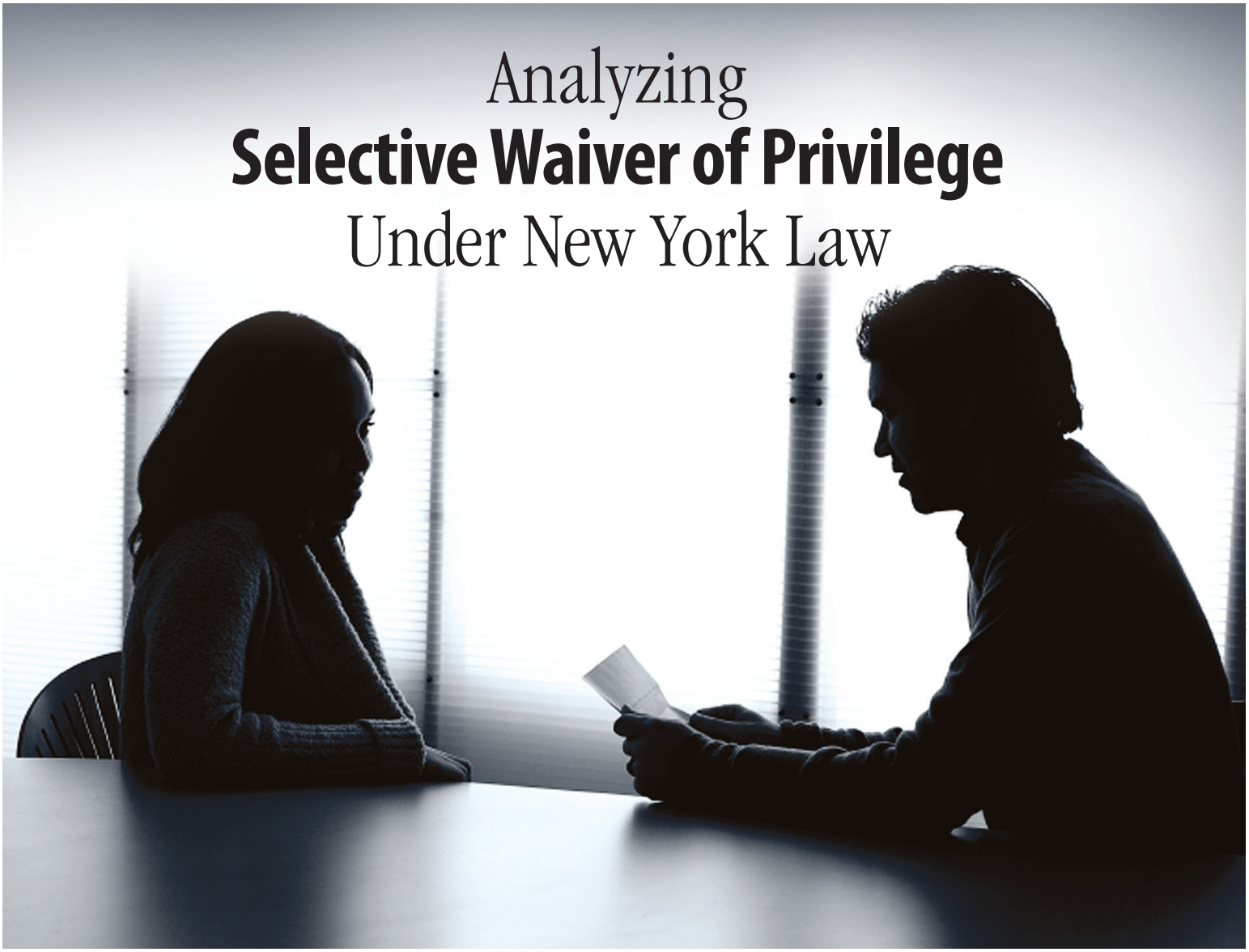

Analyzing Selective Waiver of Privilege Under New York Law

BY JONATHAN S. SACK AND ERIC M. RUBEN

During government investigations, companies must often decide whether to disclose privileged communications and attorney work product. Federal courts and commentators have considered at great length the consequences of such disclosure: whether a company may "selectively" waive privilege and work product protection when disclosing information to a government agency while preserving the protected status of that material as to other parties and proceedings. Federal case law reflects a clear trend toward rejection of the selective waiver doctrine, though the law is not uniform. Courts in the Second Circuit, notably, have allowed selective waiver under limited circumstances.

While the divergence among federal courts creates some uncertainty, the viability of selective disclosure is even less clear in New York state courts. The case law is sparse. An Appellate Division opinion in 2008 commented on selective waiver in dicta; two later unpublished state Supreme Court decisions reached different results regarding selective disclosure without addressing the doctrine expressly.

The lack of clarity in state law is of importance as state authorities play an expanding role in the investigation and litigation of complex corporate transactions. Substantial investigations are being conducted by the district attorney for New York

County and the attorney general of New York state (NYAG), among others, with the New York State Department of Financial Services being the newest state authority to make its presence felt.[1] In the same vein, much high-profile litigation following the recent financial crisis is being litigated in state court.[2] In the future, issues of privilege, work product and waiver may increasingly be litigated under state law in state courts, not just under federal law in federal courts.

In light of the minimal guidance under state law, if a dispute arises in state court over waiver of privilege or work product protection, the relevant issues are likely to be considered by reference to federal law. Below we provide an overview of federal case law and then turn to a discussion of the limited state case law.

Selective Waiver Under Federal Law

In *Diversified Industries v. Meredith*, the U.S. Court of Appeals for the Eighth Circuit considered whether a defendant company's prior disclosure of attorney-client privileged materials to the U.S. Securities and Exchange Commission constituted a waiver of the privilege.[3] In one paragraph, the Eighth Circuit adopted the selective waiver doctrine and held that the materials remained privileged as to a plaintiff in a related civil proceeding despite the defendant's surrender of those materials to the SEC. The Eighth Circuit explained that "[t]o hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders."[4]

The Eighth Circuit was the first and only federal circuit to embrace the selective waiver doctrine. After *Diversified Industries*, each circuit considering the selective waiver doctrine has rejected it, at least in the broad formulation articulated by the Eighth Circuit.[5] In addition to judicial deliberation, Congress considered, but decided against, incorporating the selective waiver doctrine in the Federal Rules of Evidence.[6]

The federal court opinions rejecting selective waiver of the attorney-client privilege share a fairly straightforward legal rationale, as expressed in a recent Ninth Circuit decision:

> [S]elective waiver does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance; it merely encourages voluntary disclosure to government agencies, thereby extending the [attorney-client] privilege beyond its intended purpose.[7]

Likewise, federal circuit courts that have rejected selective waiver of attorney work product agree that "[o]ther than the fact that the initial waiver must be to an 'adversary,' there is no compelling reason for differentiating waiver of work product from waiver of attorney-client privilege."[8] Courts point to the basis for the work product protection as articulated in *Hickman v. Taylor*[9]—to prepare a case in confidence to promote the adversary system—and the "tactical litigation decision" that applies to waiver of both work product protection and attorney-client privilege.[10]

While the Eighth Circuit is the only circuit to embrace the selective waiver doctrine in full, at least with respect to attorney-client privileged material,[11] other federal circuits have adopted intermediate positions that permit selective waiver under certain circumstances. For example, the D.C. Circuit has rejected in toto the selective waiver doctrine in the context of the attorney-client privilege, but affirmed a district court finding of selective waiver of attorney work product in a case in which "the SEC agreed to limit confidential documents submitted…to its own use, and to afford [the company] an opportunity to raise claims of privilege before disclosure to all third parties."[12] The D.C. Circuit justified the different treatment of selective waiver of attorney-client privileged material and work product on the different rationales underlying the two protections. In particular, "the work product privilege does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney's trial preparation" and, accordingly, a disclosure that is "not inconsistent with maintaining secrecy against opponents… should be allowed without waiver of the privilege."[13]

If the type of protection or privilege asserted over a document—work product or attorney-client—is critical in the D.C. Circuit's selective waiver jurisprudence, the existence of a confidentiality agreement has become a deciding factor in the Second Circuit. In *In re Steinhardt Partners*, the Second Circuit considered the selective waiver doctrine in the context of attorney work product previously produced to the SEC.[14] The Second Circuit rejected the selective waiver doctrine on the facts of that case, and in so doing rejected the rationale adopted with respect to attorney-client privileged communications in *Diversified Industries* that selective waiver should apply because of "a Hobson's choice between waiving work product protection through cooperation with investigatory authorities, or not cooperating with the authorities."[15] Significantly, the Second Circuit expressly declined to hold that *all* voluntary disclosures of privileged material to the government effect a waiver, leaving room for selective waiver:

> [in] 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.[16]

Following *Steinhardt*, some district courts in the Second Circuit have permitted selective waiver of privileged material, interpreting *Steinhardt* to require a case-by-case assessment in which the existence of confidentiality agreements is granted "weighty consideration."[17] But treatment of the selective waiver doctrine in the Second Circuit is not uniform. One oft-cited opinion expresses a quite narrow view of the selective waiver doctrine, holding that:

> "selective waiver should not be found simply because of the existence of a confidentiality agreement" and "there is a strong presumption against a finding of selective waiver, and it should not be permitted absent special circumstances."[18]

Selective Waiver Under State Case Law

Unlike federal case law, New York state courts have not thoroughly considered the validity of selective waiver of attorney-client privilege and work product protection. We first look at one published appellate decision that addressed the selective waiver doctrine in dicta and then discuss two later decisions that reached different results without expressly considering the validity of the doctrine.

In *People v. Greenberg* in 2008,[19] the Appellate Division, First Department, weighed AIG's assertion of the attorney-client privilege and work product protection over legal memoranda that had previously been produced to the SEC. The court concluded that two former AIG directors who had subpoenaed the memoranda maintained a qualified right to inspect the documents under common law,[20] rendering moot the issue of whether AIG's production to the SEC constituted

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a waiver. Nonetheless, in dicta *Greenberg* briefly addressed Second Circuit case law on selective waiver doctrine and, citing two opinions that predate *Steinhardt*, commented that "the principle that a voluntary production of privileged documents must be deemed a complete waiver of the privilege is now well settled in the [Second Circuit]."[21]

After *Greenberg*, two unpublished opinions considered competing claims of waiver and privilege without reference to *Greenberg* or reliance on federal selective waiver jurisprudence. In *James, Hoyer, Newcomer, Smiljanich & Yanchunis v. Cohen*,[22] the Supreme Court, New York County, addressed the interplay between a law enforcement agency's receipt of privileged material and a subsequent request for that material under New York's Freedom of Information Law (FOIL). A lender, Sallie Mae, produced privileged material to the NYAG as part of its cooperation with an NYAG investigation.

According to the opinion, at the time of the production, Sallie Mae expressly sought to "preserve" its rights as to attorney-client privilege and work product protection and requested that the documents be maintained as confidential and exempt from disclosure under FOIL.[23] Subsequently, a law firm submitted a FOIL request to the NYAG for documents produced by Sallie Mae. One document in question was withheld by the NYAG solely on the basis of attorney-client privilege or work product protection (the exact nature of the document is unclear in *James*) and, without explicitly invoking the selective waiver doctrine, the court, observing that Sallie Mae had "specifically preserved rights as to attorney-client and work product privileges when it submitted documents to the [NYAG]," held that the document should be exempt from production.[24]

In *AMP Services v. Walanpatrias Foundation*,[25] another unpublished opinion, the Supreme Court, New York County, came to a different conclusion and held that AMP had waived the attorney-client privilege and work product protection by communicating protected information to the Internal Revenue Service, even though the IRS agreed to "use its best efforts to keep confidential any information or material provided by AMP."[26] *AMP* does not discuss selective waiver even though it was raised by AMP;[27] rather, the opinion relies on traditional, unqualified statements regarding the limits of the attorney-client privilege and work product protection. With regard to the attorney-client privileged material, the court stated that "[i]t is well-established that the attorney-client privilege is waived if the holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the communication to a third-party or stranger to the attorney-client relationship."[28] The court found a waiver of work-product protection because "a voluntary disclosure of work product to an adversary waives the privilege as to other parties."[29]

The reasoning in *AMP* is open to question because the court did not discuss the importance of the confidentiality agreement between AMP and the IRS. *AMP* cited a district court decision[30] that in turn relied upon the Second Circuit's decision in *Steinhardt*. Following *Steinhardt*, the district court recognized the possibility of selective waiver when materials had been produced pursuant to a confidentiality agreement, though it ultimately rejected selective waiver on the facts of that case, particularly the absence of such a confidentiality agreement.[31] In *AMP*, even though a confidentiality agreement was in place, the court did not address its significance in rejecting the claimed privilege and work product protection.

Conclusion

New York state case law regarding selective waiver is less developed than federal case law. The discussion of selective waiver in *Greenberg* is dicta and does not address Steinhardt and later district court decisions. *James* and *AMP* are unpublished state Supreme Court decisions that reached different conclusions in circumstances in which selective waiver was asserted, and they did not expressly address the doctrine as a matter of law or policy. In this uncertain environment, a company should exercise caution when deciding whether, and under what terms, to provide work product or attorney-client privileged materials to state agencies in New York.[32]

At a minimum, a company that decides to make a disclosure should craft a confidentiality agreement that maximizes the potential for arguing selective waiver in state court proceedings, and should expect to rely upon federal case law, including the *Steinhardt* line of cases, if litigation arises over whether the waiver extends beyond the government investigation.

1. See Liz Rappaport, "Bank Settles Iran Money Case: Standard Chartered to Pay New York Regulator $340 Million; Other Probes Loom," *Wall Street Journal*, Aug. 15, 2012, at A1.
2. See, e.g., *MBIA Insurance v. Countrywide Home Loans*, No. 602825-08 (N.Y. Sup. Ct.).
3. 572 F.2d 596 (8th Cir. 1978) (en banc).
4. Id. at 611.
5. *In re Pacific Pictures*, 679 F.3d 1121 (9th Cir. 2012); *In re Qwest Commc'ns Int'l*, 450 F.3d 1179, 1197 (10th Cir. 2006); *Burden-Meeks v. Welch*, 319 F.3d 897, 899 (7th Cir. 2003); *In re Columbia/HCA Healthcare Billing Practices Litig.*, 293 F.3d 289, 295 (6th Cir. 2002); *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 686 (1st Cir. 1997); *Genentech v. United States Int'l Trade Comm'n*, 122 F.3d 1409, 1416-18 (Fed. Cir. 1997); *In re Steinhardt Partners*, 9 F.3d 230, 236 (2d Cir.1993); *Westinghouse Elec. v. Republic of Philippines*, 951 F.2d 1414, 1425 (3d Cir. 1991); *In re Martin Marietta*, 856 F.2d 619, 623-24 (4th Cir. 1988); *Permian v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981).
6. See Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence, 154 Cong. Rec. H. 7817 (2008).
7. *Pacific Pictures*, 679 F.3d at 1127 (quoting *Westinghouse Elec.*, 951 F.2d at 1426).
8. *Columbia/HCA Healthcare*, 293 F.3d at 307.
9. 329 U.S. 495 (1947).
10. *Columbia/HCA Healthcare*, 293 F.3d at 306.
11. See *In re Chrysler Motors Overnight Evaluation Program Litigation*, 860 F.2d 844 (8th Cir. 1988) (holding that the disclosure of work product to an adversary in civil litigation pursuant to a confidentiality agreement waived work product protection in a related criminal action).
12. *Permian*, 665 F.2d at 1218; see also *In re Sealed Case*, 676 F.2d 793, 824 (D.C. Cir. 1982) ("We prefer to leave to the SEC the question of what guarantees of confidentiality it will offer to corporations undertaking voluntary disclosures."); *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1375 (D.C. Cir. 1984) ("[T]he company can insist on a promise of confidentiality before disclosure to the SEC.").
13. Id. at 1219 (quoting *United States v. American Telephone & Telegraph*, 642 F.2d 1285, 1299 (D.C.Cir.1980)).
14. 9 F.3d 230.
15. Id. at 236.
16. Id.
17. *Police and Fire Retirement System of the City of Detroit v. Safenet*, 2010 WL 935317, at *1 (S.D.N.Y. 2011).
18. *In re Initial Public Offering Securities Litig.*, 249 F.R.D. 457, 464-65 (S.D.N.Y. 2008).
19. 50 A.D. 3d 195 (1st Dept. 2008).
20. Id. at 201.
21. Id. at 203 (citing *Teachers Ins. and Annuity Assn. of Am. v. Shamrock Broadcasting*, 521 F. Supp. 638 (S.D.N.Y. 1981) and *In re John Doe*, 675 F.2d 482 (2d Cir. 1982)).
22. 27 Misc. 3d 1223(A) (N.Y. Sup. Ct. 2010).
23. Id. at *6, *14.
24. Id. at *14-15.
25. 2008 WL 5150654 (N.Y. Sup. Ct. 2008).
26. Id.
27. See id. at n.3.
28. Id. (quoting *Denney v. Jenkens & Gilchrist*, 362 F. Supp. 2d 407, 412 (S.D.N.Y. 2004)).
29. Id. (quoting *Bank of America v. Terra Nova Ins.*, 212 F.R.D. 166, 170 (S.D.N.Y. 2002)).
30. See id.
31. *Terra Nova*, 212 F.R.D. at 174.
32. See Samuel W. Seymour, The Interplay Between Commercial Litigation and Criminal Proceedings, in 4C Commercial Litigation in New York State Courts §91:4 (Robert L. Haig ed., 3d ed. 2010) (discussing likelihood of waiver following disclosures to the government).