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WHITE-COLLAR CRIME

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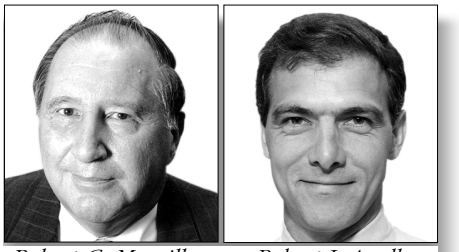
Waiver Issues in Corporate Investigations

IN CRIMINAL AND REGULATORY investigations, good corporate citizenship has become synonymous with a corporation's willingness to divulge its corporate confidences, upon request, at the first whiff of corporate wrongdoing.

The Department of Justice, the SEC, and other federal agencies now openly weigh whether a corporation has waived its attorney-client privilege and work-product protection when making charging decisions that are often key to a corporation's economic health and very survival. The calculus about whether and to what extent a corporation should cooperate with the government must take into consideration whether producing confidential material to one government agency will waive protection from disclosure as against other agencies or third parties, and whether any such waiver will expose, in parallel civil cases, not just the material the corporation has opted to reveal, but other information concerning the same subject matter. The answers to these critical questions vary from jurisdiction to jurisdiction making it impossible to predict with certainty the ripple effects of disclosing confidential information to the government. Some measures, however, have proved helpful in preserving confidentiality.



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Pressure to Provide Disclosure

In reissuing its guidelines for bringing criminal charges against corporations earlier this year, the Department of Justice signaled its intention to apply increased pressure on corporations to cooperate "effectively" with government investigators, indicating that efforts to "impede the quick and effective exposure of the complete scope of wrongdoing" will weigh in favor of taking action against the corporation.[1] Those guidelines direct that, although waiver of the privilege is not an absolute requirement to avoid prosecution, a corporation's willingness to waive both the attorney-client privilege and work-product protection with respect to internal investigations and communications between corporate counsel and its officers, directors and employees are an important factor in the exercise of prosecutorial discretion. The SEC similarly announced that a company's willingness to divulge the written results of a "thorough and probing" internal investigation is a critical factor in its charging decisions.[2]

The Scope of the Waiver

Can It Ever Be Selective? Some prosecutors and regulators have become increasingly willing to assist corporations in protecting privileged information from disclosure to third parties, particularly those outside the government. In December 2002, the SEC proposed, but subsequently withdrew a rule that would have provided that the sharing of information with the commission did not constitute a waiver of any applicable privilege or protection with respect to other parties.[3] It has filed amicus briefs supporting corporations' efforts to resist disclosure to third parties, and, along with the Department of Justice, it has entered into agreements with corporations providing that information disclosed will be kept confidential. Such agreements have been accorded widely inconsistent treatment by different courts.

The U.S. Court of Appeals for the Eighth Circuit has staked out the most permissive end of the spectrum and has maintained that position, virtually alone, for 25 years. In *Diversified Industries v. Meredith*,[4] the court, sitting en banc held that a company's disclosure of an internal investigation to the SEC resulted in only a "selective waiver" of the attorney-client privilege and did not expose the information to disclosure to other parties. It reasoned that "[t]o hold otherwise may have the

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effect of thwarting the developing procedure of corporations to employ independent counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers."

The opposite end of the spectrum is occupied by a larger field of courts that have refused to recognize any valid limitation on a waiver of confidentiality, whether based on the attorney-client privilege or work-product doctrine, and regardless of whether the disclosure occurred pursuant to a confidentiality agreement.[5] These courts generally have reasoned that any disclosure to an adversary is inconsistent with the purposes behind both the attorney-client privilege and the work-product doctrine, and that the existence of a confidentiality agreement does not alter that analysis.

The middle ground, which recently has been gaining increased acceptance, recognizes that, at least in theory, the disclosure of confidential information to the government does not automatically waive work-product protection covering that material as against other private litigants. Courts adopting this approach often have recognized that the waiver analysis differs under the attorney-client privilege, which exists to protect confidential communications between attorney and client and is waived by any disclosure outside the attorney-client relationship, and the work-product doctrine, which exists to promote the adversarial system by safeguarding trial preparation material from adversaries and which may survive disclosure to third parties in some circumstances.

The U.S. Court of Appeals for the Second Circuit paved the way for this intermediate approach in *In re Steinhardt Partners LP*,[6] where it found that a party had waived work-product protection for a report provided to the SEC, but expressly declined to adopt a per se rule that all voluntary disclosures to the government waive work-product protection. It observed 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."

Litigants have seized on both of the circumstances which the *Steinhardt* court recognized might theoretically permit disclosure to the government without broader waiver. The common interest exception has, for the most part, proved unavailing, whereas courts appear to be showing an increased willingness to grant continued work-product protection to materials disclosed to the government pursuant to a confidentiality agreement.

Confidentiality agreements are more availing to firms trying to limit the scope of waivers.

Common Interest Rule

The common interest exception to waiver looks to whether the party with whom the confidential information is shared is in an adversarial position to the disclosing party. While this doctrine has considerable vitality in the context of documents exchanged between true codefendants, private litigants rarely prevail in showing that they stand in a non-adversarial position with investigative agencies, such as the SEC, to whom they disclose confidential information.[7] Even when the context is less adversarial, disclosures to law enforcement generally fall outside the common interest exception. Thus, Southern District Magistrate Judge Gabriel W. Gorenstein rejected the common interest argument put forward by the defendant insurance company in *Bank of America v. Terra Nova Insurance Co.*,[8] finding that work-product protection had been waived for documents provided to state regulators and federal prosecutors after the insurer discovered that a rogue insurance agent had written policies without authorization. The court rejected the insurer's argument that because it was not the subject of an investigation and had itself initiated the contact with the governmental authorities, the common interest exception to the waiver doctrine should apply. It reasoned that the circumstances in this case suggested that the insurer was trying to forestall or narrow the scope of a government investigation by coming forward with this information and, accordingly, stood in a potentially adversarial position to the government.

Confidentiality Agreements

The second exception to the waiver doctrine recognized in *Steinhardt* — the existence of a confidentiality agreement — has proved more availing to corporations seeking to limit the scope of waivers. Even before *Steinhardt*, the U.S. Court of Appeals for the District of Columbia Circuit recognized that confidentiality agreements effectively could limit the extent of any waiver for work-product material. Thus, in *Permian Corp. v. United States*,[9] the court found a confidentiality agreement that was insufficient to insulate disclosed documents from a waiver of the attorney-client privilege to be sufficient to maintain their confidential status vis-à-vis third parties under the work-product doctrine.[10]

The Delaware Chancery Court recently issued a decision in *Saito v. McKesson HBOC Inc.*,[11] giving the strongest endorsement of the selective waiver doctrine since the Eighth Circuit's decision in *Diversified*. Although the *Saito* court stopped short of finding that selective waiver was applicable in the context of the attorney-client privilege, it embraced the concept of selective waiver for work-product material, relying on policy arguments that such a rule would encourage compliance with government enforcement agencies. The court

reasoned that a practical rule, which would reduce the risk of unintended disclosure to third parties, would benefit both law enforcement and private plaintiffs inasmuch as savings and efficiency to the SEC translate into better protection for shareholders.[12]

Although, ordinarily, the burden rests with the party resisting disclosure to prove that work-product protection has not been waived, Southern District Judge Richard Owen recently upheld continued work-product protection for documents produced to the U.S. Attorney's Office based on the existence of an oral confidentiality agreement. The defendant in *Maruzen Co. Ltd. v. HSBC USA Inc.*[13] successfully established the existence of that agreement through submission of a declaration from its attorney and a letter from the assistant U.S. attorney to whom the documents were disclosed confirming that his office had agreed to maintain the material in confidence.

Notwithstanding the favorable outcome in *Maruzen*, parties entering into confidentiality agreements would be well-advised to reduce them to writing and should consider making them as broad as possible. Perhaps a broader, confidentiality agreement in *United States v. Bergonzi*[14] might have been sufficient to avoid a waiver. In that case, the corporation disclosed work-product to the SEC and the U.S. Attorney's Office pursuant to an agreement that provided that the company and the government had a common interest in the investigation; that the company did not waive work-product protection for materials it provided to the government; and that the government would maintain the confidentiality of the materials except to the extent it determined that disclosure was otherwise required by federal law. In finding this agreement an insufficient buffer against waiver, the *Bergonzi* Court relied, in part, on the fact that the confidentiality agreement was not unconditional.

Other courts remain resistant to the notion that the extent of a waiver from disclosure to the SEC or any other adversary can ever be altered by a confidentiality agreement. The U.S. Court of Appeals for the Third Circuit in *Westinghouse v. Philippines*,[15] and the U.S. Court of Appeals for the Sixth Circuit, in its decision last year in *Columbia/ HCA Healthcare*,[16] have each found waivers of the work-product doctrine, notwithstanding that disclosure to the government was made pursuant to a confidentiality agreement. Both courts reasoned that deliberate disclosure of confidential material to an adversarial agency is inimical to the principles supporting the work-product doctrine, even if that disclosure serves the rational objectives of forestalling prosecution or obtaining lenient treatment.

Separate and apart from the question of whether disclosure to one party waives protection from disclosure to other parties is the question of whether disclosure of limited confidential information exposes other related, but undisclosed information to discovery under the theory of subject-matter waiver. As a general rule, waiver will be limited to the actual material disclosed, unless incomplete access to the material is unfair to the adversary.[17] Thus, where outside accountants in *In re Leslie Fay Companies Sec. Lit.*,[18] used the results of an internal investigation to exonerate themselves at the expense of their predecessor auditors, the court reasoned that it would be unfair to permit them to make affirmative use of the report's conclusions without disclosing the facts on which the report was based. Although the inquiries into selective and partial waiver are separate, they can overlap. Accordingly, where an argument for selective waiver is unsuccessful, a party may be forced to disclose not simply the confidential material shared with the government, but any other information on the same subject matter that it would be unfair to withhold. This problem often is presented by the government's request to obtain copies of interview memos of corporate employees. Since such interviews are subject to the attorney-client privilege,[19] production of wide-ranging interview memos could be construed to constitute a broad subject-matter waiver requiring ultimate production of almost every conceivable document generated.

The trend toward disclosure and waiver could have an impact on whether comprehensive internal investigations will be initiated, the manner in which they will be conducted and the degree of cooperation from potential interviewees, particularly those who have retained counsel.

(1) Memorandum from Deputy Attorney General Larry D. Thompson re Principles of Federal Prosecution of Business Organizations, Jan. 20, 2003.

(2) Accounting and Auditing Enforcement Release No. 1470, Oct. 23, 2001, Report of Investigation Pursuant to §21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation and Agency Enforcement Decisions.

(3) Proposed Rule on the Implementation of Standards of Professional Conduct, Subsection 205.3(e)(3), withdrawn from Final Rule adopted on Jan. 29, 2003, 17 CFR Part 205.

(4) 572 F2d 596 (8th Cir. 1978).

(5) See, e.g., *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F2d 1414 (3d Cir. 1991); *In re Columbia/HCA Healthcare Corporation Billing Practices Litigation*, 293 F3d 289 (6th Cir. 2002).

(6) 9 F3d 230 (2d Cir. 1993).

(7) See, e.g., *Steinhardt*, 9 F3d 230; *Westinghouse v. Philippines*, 951 F2d 1414; *Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622 (Del. Chanc. Nov. 13, 2002). But see *McKesson HBOC v. Adler*, 562 SE2d 809 (Ga. App. 2002) (recognizing that corporation may have a common interest with SEC where investigation focused on former officers and employees rather than on corporation itself).

(8) 212 FRD 166 (SDNY 2002).

(9) 665 F2d 1214 (D.C. Cir. 1981).

(10) See also *In re Sealed Case*, 676 F2d 793 (D.C. Cir. 1982) (recognizing that the government may agree to limit disclosure of documents, but concluding that "courts should not imply such agreements on a categorical basis [preferring] to leave to the SEC the question of what guarantees of confidentiality it will offer to corporations undertaking voluntary disclosure.").

(11) 2002 WL 31657622.

(12) See also, *Dellwood Farms Inc. v. Cargill, Inc.*, 128 F3d 1122 (7th Cir. 1997); *United States v. Billmyer*, 57 F3d 31 (1st Cir. 1995).

(13) 2002 WL 1628782 (SDNY July 23, 2002).

(14) 2003 WL 1948783 (N.D. Cal. Jan. 10, 2003).

(15) 951 F2d 1414.

(16) 293 F3d 289.

(17) See *In re Von Bulow*, 828 F2d 94 (2d Cir. 1987).

(18) 161 FRD 274 (SDNY 1995).

(19) *Upjohn Co. v. United States*, 449 US 383 (1981).