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WHITE-COLLAR CRIME

Expert Analysis

Scope of Disclosure When Investigative Reports Are Released to the Public

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When public companies and prominent individuals find themselves under investigation, they often face widespread condemnation in the press. Early conviction in the public mind is not uncommon.

The subject of the investigation —the target of the storm of criticism—understandably wants to push back and influence coverage of the story. At an early stage, a tension sometimes arises between defense counsel, who typically want to say little or nothing before the facts are more fully understood, and clients who feel wronged by misinformed criticism and injured in their businesses and reputation.

One strategy to deal with the impact of public attacks is for attorneys directly, or through intermediaries, to seek to influence the reporting. Often public relations experts can help by speaking with reporters for attribution or on background, correcting mistakes and providing additional facts to give balance and context to the reporting. But this approach can usually, at most, mitigate negative or unfair media coverage; it can rarely change the story or shift the grounds of discussion.

In this fraught situation another strategy has been used—the one recently employed by New Jersey Gov. Chris Christie: the commission of an investigation by counsel and release of a report in an effort to put difficult issues to rest, or at least provide a substantially different version of events, so as to change the nature of the public discussion. After news stories questioning Christie's claimed lack of prior knowledge of unnecessary lane closures on the George Washington Bridge, Christie's lawyers conducted an investigation and on March 27 released a 344-page report, including many exhibits, of its findings. The report maintained that Christie lacked knowledge of a plan by staff members to induce a traffic jam to hurt the mayor of Fort Lee, N.J., who had declined to endorse the governor.[1]

In this article, we consider the legal implications of the preparation and release of an investigative report, or White Paper, in the context of a government investigation and ongoing or anticipated civil litigation. While release of a report may advance a target's overall strategy, publication carries with it legal risks, from triggering the production of additional materials, such as interview memoranda underlying the report, to allegations of trying to minimize or cover up wrongdoing.

The Scope of Disclosure

Ordinarily, an internal investigation is protected by attorney-client privilege if it is conducted to enable lawyers to advise clients, and by the work-product doctrine if it is conducted in anticipation of litigation.[2] At the same time, information gathered during such an investigation may not be protected if the investigation is conducted as part of routine compliance processes or other business purposes,[3] or if privilege is waived by the person or entity holding the privilege.[4]

Under whatever circumstances public disclosure is made, the issue most likely to arise is one of scope: If a report is released to the public, to what extent are underlying business records, notes, memoranda and other information subject to discovery in government investigations and civil litigation?

The Merck Vioxx Case

In 1999, global pharmaceutical company Merck began selling Vioxx, an enormously successful and widely used prescription pain-killer. In late 2004, after results from a clinical study suggested that Vioxx might be increasing the risk of cardiovascular adverse events after long-term usage, Merck

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withdrew the drug from the market, and a storm of controversy followed. The company faced a Department of Justice criminal investigation and a wave of civil litigation claiming injuries caused by taking Vioxx.

A short time after the drug was taken off the market, a special committee of Merck's Board of Directors retained retired federal judge John S. Martin and Debevoise & Plimpton to conduct an investigation into the company's actions relating to, among other things, the safety of the drug. An exhaustive review was conducted, followed by public release of a lengthy and detailed report which concluded that Merck did not act improperly in connection with studying, selling and promoting Vioxx.[5] The report generated a range of responses, including condemnation from counsel for plaintiffs in litigation who said the report was a whitewash.[6]

In 2007, Merck entered into an agreement by which many thousands of plaintiffs agreed to settle their litigation with the company in exchange for Merck paying $4.85 billion into a fund from which settling plaintiffs were eligible to receive compensation. The company also later resolved a federal criminal investigation arising from the marketing and sale of Vioxx.[7] Though many factors no doubt contributed to these results, the amount of the civil settlement was seen as much smaller than the sums feared by Wall Street analysts when Merck withdrew Vioxx from the market, and some reports credited the release of Martin's report with helping Merck resolve the civil litigation favorably.[8]

In the civil litigation against Merck, plaintiffs sought production of documents relating to the creation, preparation and publication of the report prepared by Martin. Plaintiffs argued that report was primarily intended to influence public opinion so that attorney interview notes and memoranda underlying the report were not protected by the work-product doctrine or attorney-client privilege. Even if such protection were to apply, plaintiffs argued that it had been waived by Merck's publication of the report. Merck objected to production, and the issue was addressed by the federal district court supervising thousands of liability cases against Merck.

The court held that attorney interview notes and memoranda developed in preparation of the report were protected attorney work-product because the "primary motivating purpose" of the internal investigation was to "aid in possible future litigation." In the court's view, the existence of an additional, business purpose, such as creating positive media coverage, did not defeat the work-product protection.[9]

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The court further rejected the plaintiffs' argument that Merck's public release of the report waived work-product protection. "The publication of a final investigative report does not waive the protection for the underlying drafts and materials because the work-product doctrine exists not to protect a 'confidential relationship,' but rather 'to promote the adversary system by safeguarding the fruits of an attorneys' trial preparations from the discovery attempts of an opponent.'"[10] The court noted, however, that if Merck sought to use the report offensively in the civil litigation, its determination that the underlying documents were unavailable to plaintiffs because they remained protected by the work-product doctrine would have to be reconsidered.

Scope of Waiver

The scope of waiver arises generally when a company cooperates with a government investigation by providing a copy of a report to the authorities or otherwise providing the government with the fruits of an internal investigation. Often adversaries in civil litigation seek not only the substance of what was disclosed to the government but also the underlying factual material, such as compilations of documents and interview memoranda. As a general matter, questions as to the scope of waiver of privilege depend ultimately on the fairness to an adversary or other party of allowing the disclosing party to select and limit what is disclosed.[11]

Two recent Southern District of New York cases shed light on courts' consideration of the scope of a waiver of privilege and work-product protection.

In *Gruss v. Zwirn*,[12] a hedge fund retained law firms to conduct internal investigations of possible misconduct by its former CFO, which resulted in presentations of findings to the Securities and Exchange Commission staff, including PowerPoint presentations that contained excerpts of interview notes and summaries made by attorneys during witness interviews. The former CFO sued the hedge fund, alleging defamation and breach of contract arising out of the internal investigation.

The plaintiff sought production of "factual interview notes" taken by attorneys from both firms during witness interviews, arguing that any privilege associated with the materials had been waived when one of the firms included excerpts of the summaries and notes in the SEC presentations. In addition to rejecting the hedge fund's claim of "selective waiver" of attorney-client privilege and work-product protection,[13] the court held that "when a party selectively disclose[s] attorney-client communications to an adverse government entity, the privilege is waived not only as to the materials provided, but also as to the underlying source material." The waiver, in this view, encompassed the factual portions of notes and summaries created by outside counsel for the defendant corporation during employee interviews.[14]

The scope of waiver was explored further in *In re Weatherford International Securities Litigation*.[15] In that case, the defendant shared the fruits of internal

investigations with the SEC staff. The court ruled that attorney-client privilege and work product protection had been waived as to material provided to the SEC in oral as well as written form, and as to factual material "explicitly referenced" in the communications to the SEC. The court explained that "information is discoverable if it has been actually disclosed or referenced in such detail that it has been 'effectively produced' to an investigatory government agency."[16] In that case, the defendants conceded waiver as to some underlying materials but the court denied the full breadth of disclosure sought by plaintiffs, holding that the disclosures to the government had not been as extensive as those in *Gruss*, where the interview notes and summaries had been "deliberately, voluntarily, and selectively disclosed" to the SEC, and in another case, *SEC v. Vitesse Semiconductor Corp.*,[17] where "near-verbatim recitations" of interview notes taken by counsel had been given to the SEC.

The decision in *In re Vioxx* can be distinguished from *Gruss* and *In re Weatherford* in two respects. First, the substance of the disclosure was different. In the Vioxx case, much of the material disclosed in the final investigation report released to the public was publicly available through either media sources or other civil proceedings. Although many Merck employees were interviewed as part of the investigation, as a general matter witnesses were not directly quoted or expressly cited in the report. In contrast, in *Gruss*, the lawyers specifically quoted certain portions of the interview notes and summaries in their presentation to the SEC, resulting in waiver as to the items specifically disclosed and other factual portions of those documents. If the disclosure does not include direct quotes or citations, as in *Weatherford*, the waiver analysis should be different.

Second, the Vioxx case is distinguishable because of the circumstances of the disclosure. It was significant in *Vioxx* that Merck was not using the privilege as both a "sword and shield." The company had not cited, relied upon or otherwise used the report in the civil litigation. Further, because much of the material cited in the report was otherwise available to them, plaintiffs failed to demonstrate substantial need for the underlying work product. They should not "rely on [the internal] investigation to uncover a 'smoking gun' when they have access to the same materials by 'other means.'"[18] The same cannot be said in *Gruss* or *Weatherford* where the information provided to the government was not otherwise unavailable to plaintiffs.

As a general matter, questions as to the scope of waiver of privilege depend ultimately on the fairness to an adversary or other party of allowing the disclosing party to select and limit what is disclosed.

Conclusion

In mid-April, Governor Christie's lawyers supplemented their disclosure with the release of 75 internal memoranda summarizing the witness interviews conducted as part of the investigation.[19] The lawyers said that the additional disclosure was made to "facilitate cooperation with other ongoing investigations and to conduct a thorough investigation of allegations" including the George Washington Bridge lane realignment. Media reports suggested that release of the documents came in response to possible subpoenas from state legislative committees.[20]

As the investigation of Christie highlights, a public company or prominent individual faces many difficulties when a government investigation becomes widely known and negative publicity follows. The desire to rebut ostensibly false claims and correct the record immediately is strong. If the strategic decision is made to commission and release a report thought helpful to the target of the investigation, the likely consequences should be kept in mind—exposure of the fact-finding process giving rise to the report and of the nuts and bolts of what the investigators were told and shown.

1. Report of Gibson, Dunn & Crutcher LLP Concerning its Investigation on Behalf of the Office of the Governor of New Jersey into Allegations Regarding the George Washington Bridge Lane Realignment and Superstorm Sandy Aid to the City of Hoboken (March 2, 2014) (available at: http://gdcreport.com/).
2. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).
3. *United States ex rel. Barko v. Halliburton*, 2014 WL 1016784 (D.D.C. Mar. 6, 2014); *In re Leslie Fay Companies, Inc. Securities Litig.*, 161 F.R.D. 274 (S.D.N.Y. 1995).
4. *In re Kidder Peabody Securities Litig.,* 168 F.R.D. 459, 468 (S.D.N.Y. 1996).
5. Alex Berenson, "Merck Inquiry Backs Conduct Over Vioxx," The New York Times (Sept. 7, 2006).
6. John Carreyrou and Heather Won Tesoriero, "Merck Vioxx Probe Clears Officials," Wall Street Journal (Sept. 7, 2006).
7. Department of Justice Press Release, "U.S. Pharmaceutical Company Merck Sharp & Dohme Sentenced in Connection with Unlawful Promotion of Vioxx" (April 19, 2012).
8. Alex Berenson, "Merck Agrees to Settle Vioxx Suits for $4.85 Billion," The New York Times (Nov. 9, 2007).
9. *In re: Vioxx Products Liability Litig.,* 2007 WL 854251 (E.D.La. March 6, 2007).
10. Id. at *5 (citing *Shields v. Sturm, Ruger & Co*., 864 F.2d 379, 382 (5th Cir. 1989)). See also *In re Traysol Products Liability Litig.*, 2009 WL 2575659 (S.D.Fla. Aug. 12, 2009) (relying on *In re Vioxx* to grant protective order rejecting production of materials underlying publicly disclosed report).
11. See *McCormick* on Evidence §93 (updated March 2013) (discussing fairness doctrine and scope of waiver).
12. 2013 WL 3481350 (S.D.N.Y. July 10, 2013).
13. Under the "selective waiver" doctrine, disclosure to the government of information governed by attorney-client privilege and work product protection is not deemed to be a waiver as to third parties. Recent decisions suggest that the doctrine may be on the wane in the Second Circuit. See Jonathan Sack, "Selective Waiver in the Second Circuit—Is It Dead, or Just Dying?" Forbes.com (Dec. 11, 2013).
14. 2013 WL 3481350 at *12 (citing *In re Kidder Peabody Securities Litigation*, 168 F.R.D. 459 (S.D.N.Y. 1996)).
15. 2013 WL 6628964 (S.D.N.Y. Dec. 16, 2013).
16. Id. at *2.
17. 2011 WL 2899082 (S.D.N.Y. July 14, 2011).
18. 2007 WL 854251 at *6.
19. See Letter from Randy Mastro to Office of New Jersey Governor Christopher J. Christie dated April 14, 2014, with interview memoranda attached (available at: http://gdcreport.com/pdf/Interview_Memoranda.pdf).
20. Associated Press, "Christie Lawyers Release Interview List to Legislative Panel" (April 11, 2014).

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