



## SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

## Expert Analysis

# Invoking the Selection And Compilation Doctrine

Just how far does the work product doctrine go in shielding an attorney's thought processes from discovery in federal litigation? Courts have recognized an aspect of the work product doctrine that goes beyond protecting documents which were themselves prepared in contemplation of litigation, to protect, in some instances, documents from other sources that have been selected and compiled by the attorney in such a way as to reflect the attorney's litigation strategy.

Lawyers frequently invoke the selection and compilation doctrine in response to document requests and deposition questions, but only a handful of cases from courts in the U.S. Court of Appeals for the Second Circuit address the doctrine in any detail and its contours have not been fully defined. A recent opinion by Judge Shira A. Scheindlin of the U.S. District Court for the Southern District of New York, issued in *SEC v. Collins & Aikman Corp.*,<sup>1</sup> adds a new dimension to the discussion of the selection and compilation doctrine, exploring the interplay between selection and compilation protection, the realities of high document volume modern-day litigation, and the obligations imposed on a party producing documents by Federal Rule of Civil Procedure 34.

As a general rule, work product protection extends only to documents prepared by attorneys or their agents in anticipation of litigation or for trial.<sup>2</sup> Courts have recognized a limited extension of the work product doctrine to encompass documents selected and compiled by an attorney, where disclosure of the compilation would reveal the attorney's strategy or legal theories. This extension has its roots in two cases from outside the Second Circuit. In the first, *Sporck v. Peil*,<sup>3</sup> the Third Circuit held that the selection and ordering of documents for use in preparing a client for deposition was protected by the work product doctrine, even though the individual documents in that collection were each subject to discovery. The *Sporck* court based its decision on the observation that production of the attorney's compilation of a few documents out of thousands "could not help but reveal [to opposing counsel] important aspects of his understanding of the case."



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The second foundational selection and compilation case is *Shelton v. American Motors Corp.*,<sup>4</sup> in which the Eighth Circuit found improper questions to an in-house attorney about the documents with which she was familiar, because the "mere acknowledgement" that she was familiar with certain documents among many in the corporation's files "would indicate to her opponent that she had reviewed the document and that, since it was important enough to remember, she may be relying on it in preparing her client's case."

The Second Circuit has recognized the selection and compilation doctrine, but only as a narrow exception to the rule that documents created by third parties are presumptively discoverable. It has held that for the doctrine to apply the party asserting the selection and compilation protection must demonstrate "a real, rather than speculative, concern" that counsel's thought processes will be exposed through production of the compilation.<sup>5</sup> The Second Circuit has stressed that the party seeking to invoke the selection and compilation doctrine has an objective burden of proof, and observed that even if a party meets this burden, the work product protection might be overcome by a competing showing from the party seeking disclosure that the subject documents are not otherwise available.<sup>6</sup>

Applying these principles in the context of a grand jury investigation, the Second Circuit upheld Southern District Judge Denny Chin's refusal to quash a subpoena under the selection and compilation doctrine where the law firm asserting that protection failed to disclose ex parte the "carefully orchestrated defense strategy" it claimed would be revealed by producing a subset of bank records compiled by the firm. The court also found "troubling" the firm's failure to submit the documents in question for in camera review, a practice, the court noted was "both

long-standing and routine in cases involving claims of privilege."<sup>7</sup>

### Civil Litigation

Parties asserting protection for attorney selected and compiled documents have met with greater, albeit still mixed, success in the context of civil cases in the Southern District of New York.<sup>8</sup> In *McDaniel v. Freightliner Corp.*,<sup>9</sup> Magistrate Judge Frank Maas held that a personal injury attorney need not disclose documents he had "culled" from the files of other attorneys involved with litigation against the same defendant, holding that the attorney's selection of which documents to copy "necessarily would reveal his views" as to the types of vehicles manufactured by the defendant that were similar to the one involved in the accident in which his client was killed—an important strategic determination and one that was not obvious given the differences in vehicles manufactured by this defendant.

Magistrate Judge Maas also extended the selection and compilation doctrine to cover document selected and compiled not by the plaintiff's attorney directly, but by an information exchange organization comprised of plaintiffs' attorneys engaged in similar types of litigation that maintains a database permitting the member lawyers to pool their investigative resources.

Magistrate Judge Maas held that the documents selected by this organization were also protected work product because the group was acting as an agent for the plaintiff's attorney (much the same as would an investigator), and disclosure of the documents it selected would "reveal the attorney's thinking and strategy."<sup>10</sup>

In a decision filed in *In re Cardinal Health Inc. Securities Litigation*,<sup>11</sup> Southern District Judge Robert P. Patterson, Jr. found that the selection and compilation doctrine barred disclosure of a number of materials compiled by a law firm that had conducted an internal investigation for the audit committee of the board of directors of Cardinal Health Inc. Specifically, he found that these documents were provided by attorneys for individual witnesses in response to "specific tailored" requests from the law firm, and that to cause the firm to reveal the documents "would cause it to reveal, to some extent, its opinion as to the relevancy of the documents...."

Because the plaintiffs seeking the documents had not shown a substantial need for the documents, Judge Patterson concluded that their production "will only serve to disclose [the firm's] theories and

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opinion as to what the relevant issues were in its investigation."<sup>12</sup>

### 'Collins & Aikman'

In her recent decision in *SEC v. Collins & Aikman Corp.*,<sup>13</sup> Southern District Judge Shira A. Scheindlin takes a more restrictive approach to the selection and compilation analysis, limiting the type of attorney "thinking" the doctrine can reasonably protect, and also grounding application of the doctrine in the context of the producing party's obligations under Rule 34.

The decision in that securities fraud case brought by the SEC, addresses a challenge by one of the defendants to the SEC's response to his requests for production.<sup>14</sup> The requests sought, among other things, documents supporting particular factual allegations in the complaint. The defendant maintained, and the SEC did not contest, that prior to receiving the document requests, the SEC had already segregated documents into approximately 175 folders correlated to specific factual allegations in the complaint. Rather than produce those folders, however, the SEC produced 1.7 million documents (consisting of 10.6 million pages), in 36 Concordance databases, many of which used different metadata protocols.

The requesting defendant objected to the SEC's response as an impermissible "document dump," arguing that the SEC should have produced the documents in the folders it had created. The SEC resisted this suggestion, contending that the defendant was seeking to determine the SEC's litigation strategy and that the "compilation itself is attorney work product and its disclosure would reveal the 'mental impressions, conclusions, opinions, and legal theories' of Commission counsel."

Judge Scheindlin rejected the effort to shield these documents under the selection and compilation doctrine. She drew a distinction between document compilations that reflect an attorney's thought process concerning witness preparation and strategy (as was the case in *Sporck and Berkey Photo Inc. v. Eastman Kodak Co.*<sup>15</sup>) and those that reflect the attorney's thinking about the broader facts of the case. Judge Scheindlin determined that an attorney's selection of documents to support factual allegations cannot be "core work product." She reasoned that to be core work product, a compilation must reveal legal theory or strategy, concluding that "[t]he SEC's theory, that every document or word reviewed by an attorney is "core" attorney work product-leaves nothing to surround the core."

Noting that the first step in responding to any document request is the attorney's assessment of relevance, Judge Scheindlin found that it "would make no sense to then claim that an attorney's determination of relevance shields the selection of responsive documents from production."<sup>16</sup>

She concluded, by extension, that the selection of documents according to facts alleged in a pleading is similarly not core work product. Observing that Rule 11 requires that a party have evidentiary support for facts alleged in pleadings, she found that "producing the compilations of documents that support the factual allegations of a complaint reveals no more than that already revealed by the filing of the complaint."<sup>17</sup>

Judge Scheindlin went on to find that even if the SEC folders were entitled to some work product protection under the "tenuous" theory that they were compiled in anticipation of litigation, the requesting

defendant had demonstrated a substantial need for the documents and that he could not obtain them without undue hardship. His need for the documents to prepare his defense was, in her view, "obvious."

She also concluded that although he could search the database using appropriate search terms, "the inaccuracy of such searches is by now relatively well known,"<sup>18</sup> and that the expense (both in monetary and human terms) of a page-by-page manual review of 10 million pages "constitut[ed] 'undue hardship' by any definition."

Noting that the Second Circuit permitted equitable considerations to be weighed in the selection and compilation analysis, Judge Scheindlin concluded that it was patently inequitable to require a party to search through 10 million pages to find documents already identified by its adversary. She held that under either the undue hardship or the equitable approach the file folders already assembled by the SEC were not protected work product.<sup>19</sup>

The SEC made an additional, unsuccessful attempt to avoid production of the file folders by arguing that under Rule 34 it had the option of producing the complete, unfiltered and unorganized investigatory file because that is how the documents were "maintained in the usual course of its business." Judge Scheindlin roundly rejected the notion that Rule 34 would permit production of such an unorganized mass of documents. She found that the choice presented by Rule 34 to permit a disclosing party to produce documents organized

Judge Scheindlin's ruling explores the interplay between selection and compilation protection, the realities of high document volume modern-day litigation, and the obligations imposed by Federal Rule of Civil Procedure 34.

by the subjects of the discovery request or as the documents are maintained in the usual course of business, assumes that "in either case the documents will be organized—that records kept in the usual course of business would not be maintained in a haphazard fashion."

Drawing by analogy on the legislative history of Federal Rule of Evidence 803(6) (the hearsay rule exception for regularly conducted business activity), Judge Scheindlin held that because the purpose of Rule 34 is to "facilitate production of records in a useful manner and to minimize discovery costs[,]...it is reasonable to require litigants who do not create and/or maintain records in a 'routine and repetitive' manner to organize the records in a usable fashion prior to producing them."<sup>20</sup>

Because the SEC's conduct of an investigation was by its nature not "routine and repetitive," she found it no surprise that the documents were maintained in large disorderly databases, and would have to be organized or labeled by the SEC prior to their production. She ordered that the SEC produce the documents according to the defendant's requests, and that to the extent that any file folders contained the complete set of documents related to a particular request, they must be produced.

### Conclusion

The Second Circuit has noted that work product

protection for an attorney's selection and compilation must be narrowly tailored to guard only against requests aimed at learning the opposing attorney's "thinking or strategy."<sup>21</sup> But, as Judge Scheindlin's recent decision in *Collins & Aikman* makes clear, the mere fact that an attorney's "thinking" is reflected or revealed in a response to a discovery request should not make the request off limits or provide grounds for refusal to comply. Where a request seeks documents that support factual allegations, particularly in cases involving voluminous documents, the work product protection, if any, may be too weak to overcome the requesting party's need for the documents and the responding party's obligation to produce documents in an organized and usable fashion.

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1. 2009 WL 94311 (S.D.N.Y. Jan. 13, 2009).  
2. See, e.g., *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998); *In re Grand Jury Subpoenas Dated Oct. 22, 1991, and Nov. 1, 1991*, 959 F.2d 1158, 1166 (2d Cir. 1992) ("*Grand Jury Subpoenas 1991*").

3. 759 F.2d 312 (3d Cir. 1985).  
4. 805 F.2d 1323, 1329 (8th Cir. 1986).

5. *In re Grand Jury Subpoenas Dated March 19, 2002 and Aug. 2, 2002*, 318 F.3d 379, 386 (2d Cir. 2003) ("*Grand Jury Subpoenas 2002*") (quoting *Gould Inc. v. Mitsui Mining & Smelting Co.*, 825 F.2d 676, 680 (2d Cir. 1987)).

6. *Id.*; *Gould*, 825 F.2d at 680.

7. *Grand Jury Subpoenas 2002*, 318 F.3d at 386-87. See also *Gould*, 825 F.2d at 679-80 (reversing district court order quashing subpoena in part because documents in question had not been submitted for in camera review).

8. The cases discussed below address selection and compilation as an objection to request for the production of documents. Selection and compilation concerns are also frequently implicated by deposition questions that delve into the subject of documents shown to a witness during preparation. Under *Sporck*, broad questions seeking to ascertain generally what the witness has been shown are off-limits. But Federal Rule of Evidence 612, requiring disclosure of documents used to refresh a witness' memory, permits some inquiry into what a witness has seen in preparation. Witnesses are routinely asked, and are often permitted to answer, if they have seen a particular document prior to being shown the document at deposition. The competing considerations of Rule 612 and the selection and compilation doctrine can be reconciled by (i) instructing the witness to answer without discussing whether the document was used in deposition preparation, and (ii) requiring the questioning attorney to ask specifically if the document refreshed the witness' recollection for the purpose of testifying.

9. 2000 WL 303293 (S.D.N.Y. March 23, 2000).

10. *Id.*, at \*7.

11. 2007 WL 495150 (S.D.N.Y. Jan. 26, 2007).

12. *Id.* at \*7 (citing *McDaniel*, 2000 WL 303293, at \*4).

13. 2009 WL 94311.

14. The authors' law firm is co-counsel for this defendant in connection with this litigation.

15. 74 F.R.D. 613 (S.D.N.Y. 1977). See also *SEC v. Morelli*, 143 F.R.D. 42, 47 (S.D.N.Y. 1992) (prohibiting deposition of attorney intended to ascertain SEC litigation strategy).

16. 2009 WL 94311, at \*4.

17. *Id.*, at \*5.

18. *Id.* (citing, inter alia, George L. Paul and Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 Rich. J.L. & Tech. 10, at \*36-\*40 (2007)).

19. Judge Scheindlin also rejected the SEC's efforts to resist production of two additional sets of documents, one compiled by an SEC accountant and another by the law firm that had previously conducted an internal investigation of the defendant company. The theory advanced in support of application of the work product doctrine was that the decision to include these collections in the lead attorney's file resulted from "independent judgment" of the attorney rendering them protectable work product. Judge Scheindlin held that shielding documents based simply on an attorney's decision to continue to hold them in the same manner would "result in impermissible gamesmanship and an unwarranted expansion of the work product doctrine." *Id.*, at \*6.

20. *Id.*, at \*7.

21. *Grand Jury Subpoenas 1991*, 959 F.2d at 1166.