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White Collar and Government Enforcement Practice

White Collar Watch

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Superman Case Unable to Save Selective Waiver Theory

By Nicholas J. Nastasi and Patrick M. Hromisin

In *In re Pacific Pictures Corp.*, No. 11-71844, 2012 WL 1293534 (9th Cir. Apr. 17, 2012), a dispute concerning royalties derived from the character of Superman, the Ninth Circuit Court of Appeals joined a majority of circuit courts eliminating the possibility of selective waiver. The theory of selective waiver would allow a party to claim attorney-client privilege, where applicable, over a document that it had previously produced to the government. Generally, voluntarily producing the document as part of a government investigation would constitute waiver of any privilege attached to that document, and the party could be forced to produce it in subsequent civil litigation. Under selective waiver, though, a party is free to produce documents to the government, and gain credibility through cooperation, without risking possible exposure in future civil litigation. The only federal court of appeals to recognize selective waiver is the Eighth Circuit. Its failure to gain wider acceptance means that businesses in highly-regulated industries must consider all collateral consequences when deciding what, if any, privilege to waive when responding to government subpoenas.

Selective waiver originated in *Diversified Indus. v. Meredith*, 572 F.2d 596 (8th Cir. 1978). There, the court considered "whether Diversified waived its attorney-client privilege with respect to the privileged material by voluntarily surrendering it to the SEC pursuant to an agency subpoena." *Id.* At 611. The plaintiff there had produced a report performed by outside counsel as part of an SEC investigation, but claimed attorney-client privilege over the same report in subsequent civil litigation. The court found that "[a]s Diversified disclosed these documents in a separate and nonpublic SEC investigation, we conclude that only a limited waiver of the privilege occurred." *Id.* The court reasoned 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, potential stockholders, and customers." *Id.*

The *Pacific Pictures* court referred to the *Diversified* court's decision as a "cursory analysis" 2012 WL 1293534 at *4, and as the *Pacific Pictures* court noted, no other circuit courts followed suit in recognizing the theory, leaving the Eighth Circuit in a proverbial fortress of solitude.[1]

In *Pacific Pictures*, the party claiming privilege had not been an unwilling target of a government investigation. There, litigation had been proceeding over royalties from Superman media for years between D.C. Comics and the heirs of Superman's creators, along with the heirs' business partner, Marc Toberoff. While the litigation was pending, David Michaels, a lawyer in Toberoff's employ, absconded with certain documents related to the case. Toberoff then "asked the Office of the United States Attorney for the Central District of California to investigate Michaels." 2012 WL 1293534 at *2. In response, the U.S. Attorney undertook the investigation and subpoenaed certain documents from Toberoff. Along with the subpoena, the government stated in a letter to Toberoff that it would not provide the documents at issue "'to nongovernmental third parties except as may be required by law or court order.'" *Id.* "Armed with this letter, Toberoff readily complied with the subpoena, making no attempt to redact anything from the documents." *Id.* Upon that production, D.C. Comics immediately demanded that the same documents be produced in the civil case.

The *Pacific Pictures* court determined that the principle of selective waiver "does little, if anything, to serve the public good underpinning the attorney-client privilege," because its main effect is to promote cooperation with the government rather than to preserve the possibility a client obtaining informed legal advice from his counsel. *Id.* at *4. The court was silent as to selective waiver's general impact on truth, justice and the American way. The court noted, "If we were to unmoor a privilege from its underlying justification, we would at least be failing to construe the privilege narrowly. And more likely, we would be creating an entirely new privilege." *Id.* (internal citations omitted).

The court noted it was not beyond its power to create a new privilege, but that, "Put simply, the balance of conflicting interests of this type is particularly a legislative function. Since *Diversified*, there have been multiple legislative attempts to adopt a theory of selective waiver. Most have failed." 2012 WL 1293534 at *4 (internal quotations omitted). The court cited to the 2007 Report of the Advisory Committee on Evidence Rules; as part of that Committee's effort to amend the federal rules of evidence, it had attempted to integrate a provision applying for selective waiver in the *Diversified* mold. However, the Committee ultimately dropped that provision from its proposed amendment, opting instead to report a proposed selective waiver provision separately. After this decision, the selective waiver provision failed to gain any traction and was never integrated into the federal rules. The *Pacific Pictures* court concluded, "Given that Congress has declined broadly to adopt a new privilege to protect disclosures of attorney-client privileged materials to the government, we will not do so here." *Id.*

Toberoff had argued that, apart from a general principle of selective waiver, the fact that he produced the documents to the government pursuant to a subpoena should merit protection for the documents, because responding to a subpoena does not constitute a voluntary waiver of privilege. The court noted, "Involuntary disclosures do not automatically waive the attorney-client privilege. But without the threat of contempt, the mere existence of a subpoena does not render testimony or the production of documents involuntary." *Id.* at *6. The court noted that "even though the subpoena specifically contemplated that Toberoff may choose to redact privileged materials, he did not." *Id.* Because he did not make any effort to assert the attorney-client privilege over the documents when responding to the subpoena, the court treated his disclosure as voluntary. As a voluntary disclosure, Toberoff's production of the documents amounted to a waiver of the attorney-client privilege over them.

The court also considered whether it "should enforce a purported confidentiality agreement based upon the letter from the U.S. Attorney's Office." Id. at *5. The court noted it was unclear that the letter at issue constituted a confidentiality agreement, but that even if it did, the court would decline to interpret it to protect the documents from production here.

1 The *Pacific Pictures* court cited the following cases rejecting selective waiver: *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 Corp. 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, Inc. v. United States Int'l Trade Comm'n*, 122 F.3d 1409, 1416–18 (Fed. Cir. 1997); *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993); *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1425 (3d Cir. 1991); In re Martin Marietta Corp., 856 F.2d 619, 623–24 (4th Cir. 1988); *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981).

The court pointed out that enforcing "post hoc contracts regarding how information may be revealed" would do "little to serve the public ends of adequate legal representation that the attorney-client privilege is designed to protect." *Id.* For that reason, the court declined to rule that the documents should be protected under the terms of the U.S. Attorney's letter.

The Ninth Circuit's ruling here may ensure that the selective waiver principle disappears from American jurisprudence faster than a speeding bullet. In light of *Pacific Pictures* and the prior tide of decisions declining to adopt the theory, it is clear that parties must give careful consideration to privilege issues when responding to government subpoenas. When responding to a government investigation, a company often seeks to cooperate as fully as possible, in order to build credibility with the government and achieve a favorable resolution. However, companies must balance this consideration with a recognition that anything they produce to the government may be subject to production in later civil litigation, as well. Just as Clark Kent changes into Superman, a document that helps with a government investigation can become kryptonite in subsequent civil litigation. Companies should therefore make the effort necessary to identify and assert privilege when faced with government investigations. In addition, because many companies have more than one firm handling government investigations and civil litigation, it is critical that counsel consider the implications of producing documents beyond their own engagements, and company counsel must recognize and coordinate such interactions.

Although selective waiver would likely make it easier for parties to respond to government investigations, its failure to gain acceptance outside the Eighth Circuit means that companies must be mindful of the implications of production for future civil litigation.

The D.C. Circuit Empowers Relators in *Qui Tam* Actions in *United States ex rel. Schweizer v. Océ N.V.*

By Christopher R. Hall and Jennifer L. Beidel

As discussed in the March 2012 edition of the White Collar Watch, the case of *United States ex rel. Schweizer v. Océ N.V.* highlights the tension between the interests of *qui tam* relators and the United States Department of Justice ("DOJ") when it comes to settling *qui tam* actions. As of our March edition, the case was pending before the Court of Appeals of the D.C. Circuit on the question whether the DOJ could settle a *qui tam* action over the objection of a relator without the court reviewing the reasonableness of the settlement agreement. On April 20, 2012, the D.C. Circuit held that the DOJ could not exercise unfettered discretion. Lower courts must examine the reasonableness of a settlement agreement reached in a *qui tam* action. *See United States ex rel. Schweizer v. Océ N.V.*, No. 11-7030, 2012 WL 1372219 (D.C. Cir. Apr. 20, 2012).

By way of background, Stephanie Schweizer and Nancy Vee filed a *qui tam* action in April 2006 against their former employer, Océ N.V. ("Océ"). Schweizer's job responsibilities required her to monitor Océ's supply contracts to provide copying and printing products to the government. Schweizer claimed that she discovered in early 2005 that Océ had offered significant discounts to private sector customers without passing the savings to the government as required. After Schweizer reported her concern internally, Océ terminated her because she "refused to follow orders" and "ignored the chain of command." (Schweizer included a claim of retaliation in her complaint.) Initially, the United States declined to intervene. In 2009, Océ, Schweizer, Vee, and the United States attempted to negotiate a settlement. Océ offered to pay the United States $1.2 million, plus post-settlement interest. The United States agreed to pay 19 percent of this amount to Schweizer and Vee. All parties except Schweizer agreed to accept these terms.

When the negotiations broke down, the United States first intervened, and then moved to dismiss the case with prejudice. The DOJ cited its unlimited authority to settle and dismiss *qui*

tam complaints in taking this action. Schweizer objected on the ground that the lower court should review and reject the settlement as unreasonable.

Section 3730(c)(2)(B) of the False Claims Act ("FCA") requires district courts to hold a hearing to determine whether settlements are "fair, adequate, and reasonable under all circumstances" and permits dismissal "over the relator's objection as long as the relator has been notified of the motion to dismiss and given an opportunity to be heard on the motion." The lower court in *Schweizer* held a hearing but declined to rule on the reasonableness of the settlement. Instead, the court noted that there was a "serious question" regarding the constitutionality of requiring a hearing and court approval of a settlement. The lower court reasoned that the executive, rather than the judicial, branch traditionally controls the decision whether to settle. The lower court also reasoned that the DOJ had "unfettered dismissal power." The lower court proceeded to grant the motion to dismiss all claims, including Schweizer's retaliation claim.

In its appellate decision recently handed down, the D.C. Circuit reversed. It ruled that lower courts must conduct a hearing to determine whether proposed settlements of *qui tam* actions are "fair, adequate, or reasonable under all circumstances" if the relator objects. The court stated:

> Section 3730(c)(2)(B) contains no opt-out clause for rare cases or unusual circumstances. It does not permit the Attorney General to decide when there shall be a hearing on the settlement: the statute says that the government may settle a matter over a relator's objection if the court holds a hearing and finds the proposed settlement reasonable. The meaning is clear. The government may not settle a case when the relator objects unless the court approves the settlement.

The D.C. Circuit also reversed the lower court's dismissal of Schweizer's retaliation claim, finding that a jury could find that Schweizer was fired at least in part because of her protected activity.

The D.C. Circuit's ruling will provide relators' counsel with additional leverage in their settlement negotiations with the government. DOJ can no longer "strong-arm" a settlement without judicial review. This new arrow in the relators' quiver will require the government instead to engage in more diplomatic efforts to resolve even frivolous claims.

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