Securities Litigation Alert

In re Pacific Pictures: New Ninth Circuit Decision May Be Kryptonite To Claims Of Privilege Under The Selective Waiver Doctrine

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Corporations subject to criminal and civil regulatory investigations have long grappled with the highly charged decision over whether to provide the government with privileged communications and attorney work product or whether to maintain those materials as privileged despite a governmental inquiry. On the one hand, a corporation may hope to avoid criminal prosecution or civil regulatory action, as well as potential downstream effects of such actions on insurance rights and indemnification, by forthright disclosure of "relevant facts" to the government, including information that may be protected by attorney-client privilege or the attorney work product doctrine. *See Principles of Federal Prosecution of Business Organizations*, reprinted in *United States Attorneys' Manual*, tit. 9 ch. 9-28.710, 9-28.720(a). On the other hand, in disclosing privileged materials and work product to the government, the corporation risks having waived the privilege over those very same materials as to third parties, including civil litigants seeking to recover monetary damages from the corporation.

The Eighth Circuit and several district courts have responded to this apparent no-win dilemma by adopting a theory of selective waiver – holding that documents may be selectively disclosed to the government, but still retain their privileged nature as to third party civil litigants.[1] Earlier this week, however, the Ninth Circuit weighed in and joined the First, Second, Third, Fourth, Sixth, Seventh, Tenth, D.C. and Federal Circuits in rejecting the doctrine of selective waiver. *See In re Pacific Pictures Corp.*, --- F.3d ---, 2012 WL 1293534 (9th Cir. Apr. 17, 2012). An offshoot in the long-running legal battle between D.C. Comics and the heirs of the creators of Superman over royalties, petitioners in *Pacific Pictures* sought to shield privileged materials produced to the government (pursuant to a grand jury subpoena in an ancillary matter) from discovery by D.C. Comics in the instant action. The Ninth Circuit held that the voluntary production of privileged information by petitioners had waived the privilege, not just as to the government, but as to all third parties.

In rejecting the doctrine of selective waiver, the *Pacific Pictures* Court primarily focused on the salutary purposes underlying attorney-client privilege and noted that selective waiver simply "does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance." *Id.* at *4. Rather, the Court found, the doctrine "merely encourages voluntary disclosure to government agencies, thereby extending the privilege beyond its intended purpose." *Id.* For similar reasons, the Court found that a confidentiality agreement entered into with the government likewise failed to avert waiver. *Id.* at *5. Such an agreement (occurring *after* the privileged communication in question took place) merely "protects the expectations of the parties" regarding subsequent disclosure but "does little to serve the 'public ends' of adequate legal representation that the attorney-client privilege is designed to protect." *Id.* While the Court noted that it was "not beyond [its] power to create such a privilege," such authority was not expansive, especially where Congress had already considered the question of selective waiver, but had "declined . . . to adopt a new privilege to protect disclosures of attorney-client privileged materials to the government." *Id.* at *4.

Although *Pacific Pictures* rejects the theory of selective waiver in fairly broad terms, the decision suggests there may yet be certain circumstances where a party can produce privileged materials to the regulators without waiving the privilege as to third-parties. As the Court noted, "[i]nvoluntary disclosures do not automatically waive the attorney-client privilege." *Id.* at *6 (suggesting that the threat of contempt accompanying a subpoena

1 *See Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) (*en banc*); *In re McKesson HBOC, Inc. Sec. Litig.*, 2005 WL 934331 (N.D. Cal. Mar. 31, 2005); *In re Natural Gas Commodities Litig.*, 232 F.R.D. 208 (S.D.N.Y. 2005), *aff'g* 2005 WL 1457666 (S.D.N.Y. Jun. 21, 2005).

might compel a different result). The Court's nod to a concept of "compelled" production raises the very issue recently addressed by the California Court of Appeals in *Regents of Univ. of Cal. v. Superior Court*, 165 Cal. App. 4th 672 (Cal. Ct. App. 2008). In *Regent*s, the Court noted that "the threat of regulatory action and indictment" and the severe consequences and costs for declining to cooperate in a governmental investigation are a "means of coercion . . . more powerful than a court order." *Id.* at 675, 683. Because the disclosure of privileged information to the government could not truly be considered voluntary, the *Regents* Court held, cooperation with the government *did not* waive the attorney-client privilege or attorney work product doctrine as against third parties. *Id.* at 684. The question posed by *Regents* - whether the context of a criminal or civil regulatory investigation is so inherently coercive as to render involuntary any cooperation with the government - was not squarely before the Ninth Circuit in *Pacific Pictures* inasmuch as petitioners were not "targets" of the grand jury's investigation and did not face the difficult choice over whether to produce relevant privileged materials, in an effort to ward off a potential criminal suit, or maintain the privilege to their potential detriment. Indeed, the *Pacific Pictures* Court noted petitioners had affirmatively solicited the subpoena (to aid the government in going after an individual who had absconded with key documents in the battle over Superman) and did not themselves face criminal liability or the threat of contempt had they failed to comply. *Id.* The Court also took petitioners to task for not redacting the production, noting the failure to assert the privilege, in appropriate circumstances, was relevant to the waiver analysis and to whether such disclosures are "properly treated . . . as voluntary." *Pacific Pictures*, 2012 WL 1293534, at *6.

Whether a future court might find that sacrificing privilege in a more compelling context (following *Regents*) was involuntary remains to be seen. For now, *Pacific Pictures* counsels against the application of the selective waiver doctrine in the Ninth Circuit.

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