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The Selective-Waiver Doctrine: Is It Still Alive?

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The attorney-client privilege is sacrosanct in our criminal-justice process. Its confidentiality protections are fundamental to effective representation. Yet in recent years, the attorney-client privilege and government demands for its waiver have become a controversial topic affecting companies seeking the benefits of cooperation in criminal investigations. Both the courts and Congress have struggled to determine what actions constitute a waiver of the privilege and to what extent. Meanwhile, corporations have had to balance the benefits of disclosing privileged information to government investigators against the risk of dramatic adverse consequences in parallel litigation and investigations.

Throughout this debate, the "selective-waiver doctrine" has been trumpeted by some as a compromise solution, although it has been rejected by U.S. courts. While a July 2008 California state court decision and proposed changes to the Federal Rules of Evidence each had the potential to give the doctrine new vitality, neither was ultimately successful. Nonetheless, they may be a signal of renewed interest in the doctrine.

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Origin of the Doctrine

The problem faced by corporations is all too familiar. Until very recently, the Justice Department and other federal enforcement agencies and departments have treated waiver of attorney-client privilege during investigations as an important consideration in determining whether the corporation has been cooperative. Failure to disclose privileged information, especially in criminal matters, could have serious adverse ramifications for companies in the federal investigations.

The selective-waiver doctrine first emerged 30 years ago in *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977). There, a civil plaintiff sought to compel Diversified to produce privileged documents that it had previously produced voluntarily in an SEC investigation. The court held that Diversified's production to the SEC amounted only to a limited waiver of the attorney-client privilege, reasoning that "to hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them." Some district courts and corporate counsel seized on this approach to allow cooperation with the government while maintaining the privilege in private litigation.

However, all the other federal circuits that examined this theory ultimately rejected it. In *In re Qwest Communications International, Inc.*, 450 F.3d 1179, 1192 (10th Cir. 2006), the Tenth Circuit joined the First, Second, Third, Fourth, Sixth and D.C. Circuits in rejecting selective waiver. Much like *Diversified*, the Qwest plaintiffs sought to compel production of privileged documents which Qwest had produced to the Justice Department and the SEC. After examining *Diversified* and each of the subsequent contrary decisions, the Tenth Circuit agreed with the majority that a selective-waiver exception would not promote the underlying goals of the privilege. The court explained that the confidentiality of attorney-client communications must be "jealously guarded," and that any voluntary waiver destroys confidentiality.

The almost uniform rejection of the selective-waiver doctrine has seemingly ended any judicial safe haven. In other words, once the privilege is waived during a government investigation, the underlying communications are no longer protected in subsequent civil litigation, Congressional hearings, or other investigations. Thus corporations are faced with the dilemma of determining whether disclosure of privileged information to the government is worth the risk of the information's being used against them by civil litigants.

A Different Approach to Waiver

In rejecting the selective-waiver doctrine, the courts focused on the voluntariness of the waiver by a company "cooperating" with a government investigation. However, a recent California state court decision seemingly breathed new life into the doctrine. *Regents of the University of California v. Superior Court*, 81 Cal. Rptr. 3d 186 (Cal. Ct. App. 2008). Disregarding

the position of the federal courts, *Regents* found that the Justice Department's policy of basing cooperation on waiver of the attorney-client privilege amounted to coercion. California's rules of evidence provide that the attorney-client privilege is waived only when "without coercion" a holder of the privilege discloses the content of a privileged communication. The court explained that when a company is confronted with the agonizing choice of waiver in order to obtain the benefits of cooperation with a governmental investigation versus the detrimental impact on civil litigation, the waiver is "coerced." Accordingly, the court held that disclosing privileged material to the Justice Department could not amount to a waiver of the attorney-client privilege.

The *Regents* analysis is somewhat bolstered by the Second Circuit's ruling in *U.S. v. Stein*, 541 F.3d 130, 142-43 (2d Cir. 2008), which affirmed a federal district court's finding that the Justice Department's policy of considering payment of attorneys' fees for employees in determining the level of the corporation's cooperation with an investigation amounted to government coercion in violation of the Sixth Amendment right to counsel.

Unfortunately, the *Regents* decision and its "coercion" approach may not have much lasting influence, for two reasons. First, in August 2008, the Justice Department released the "Filip Memorandum," which revised the Department's policies on corporate cooperation. The memorandum articulated that the Department will no longer condition a finding of cooperation on an express waiver of the company's attorney-client privilege or provide credit to companies that do so. Further, prosecutors are now instructed not to request non-factual or "core" attorney-client communications, including protected notes and memoranda generated by lawyers' interviews during internal investigations. Without coercion of the kind found in *Regents*, disclosure of privileged information to the government amounts to a waiver.

Second, despite the *Regents* court's statement that the Justice Department's coercive policies took the case outside the decisions of the federal courts, both the Second Circuit (*In re Steinhardt Partners, L.P.*, 9 F.3d 230 (2d Cir. 1993)) and Tenth Circuit in *Qwest* have addressed and rejected this argument. The *Steinhardt* court exhibited no sympathy for corporations facing the dilemma between waiving the privilege and losing the benefits of cooperation with authorities, saying that the existence of "difficult choices is insufficient justification for carving a substantial exception to the waiver doctrine." The *Qwest* court noted the *Steinhardt* rejection of this argument and determined that any selective-waiver exception should be created through legislation or rule-making, not by a court.

Legislative Approach to Selective Waiver

In the past few years, attorneys and commentators had sought to establish the selective-waiver doctrine by proposing changes to the Federal Rules of Evidence. Recently, a new Rule 502 was proposed to address problems of discovery created by the proliferation of e-mail and other forms of electronic documentation by providing protection for inadvertent disclosure of privileged documents. At the same time, the Advisory Committee on Evidence Rules considered but rejected a proposal to include the selective-waiver doctrine because the policy issues were outside their competence. Accordingly, Rule 502, as promulgated in 2008, says nothing about selective waiver.

Meanwhile, Congress has also attempted to address the waiver problem. Both the House and the Senate have considered versions of the Attorney-Client Privilege Protection Act, which would prevent government investigators and prosecutors from demanding or rewarding corporations for waiving the protections of the attorney-client privilege or work product doctrine. The House passed a version in November 2007, and a revised version was introduced in the Senate in July 2008. However, the bill remains in the Senate Judiciary Committee. The new changes in Justice Department policy announced in August 2008 appear to be an effort to forestall any legislation. In light of these changes, it is unclear whether the Senate will feel the same pressure to act.

Back Where We Were Before

Notwithstanding efforts at revivals, the selective-waiver doctrine is back where it has been for three decades — almost universally rejected. The *Regents* decision's focus on the coercive nature of the Justice Department's cooperation policy marked a clear departure from prior analysis. However, it may be of limited import given the new attitude at the Justice Department. The Filip Memorandum, drafted to forestall legislative change and quell increasing opposition in the courts, undercuts any arguments that a corporation's waiver was coerced.

A related question is what the new Justice Department policies mean for corporations. An important decision becomes how much privileged information, if any, should be provided and when. The rewards of disclosure have apparently been removed, while the risks remain. Whether the new Justice Department position is actually a change from the prior policy remains to be determined. Many defense counsel believe the new policy will not bring much change: though the requests will be tacit rather than overt, corporations will still feel pressured to waive the privilege. Perhaps this pressure will be enough to trigger the *Regents* analysis. Until then, corporations that decide to waive their privilege will continue to do so with significant risks.