The Limits of a Nonwaiver Agreement

Criminal Defendant Obtains Discovery Of Privileged Corporate Documents Produced to the Government

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A recent opinion of the U.S. Court of Appeals for the District of Columbia Circuit underscores the perils of privilege waivers by corporations cooperating with the government and the opportunities for discovery by individual criminal defendants that can result from those waivers.

Background

In *United States v. Thompson*,[1] the court of appeals considered a corporation's appeal of a district court discovery order compelling the government to disclose to defendant Scott Thompson privileged documents produced by the corporation to the government in the course of its cooperation in criminal and regulatory investigations. The district court ordered production despite the corporation's agreement with the government that its disclosures would not constitute a waiver of any privileges.

In 2002, in response to the California energy crisis, the federal government was examining practices of certain energy companies, including The Williams Companies and its subsidiary Williams Power Company (collectively "WPC"). WPC's trading practices were under investigation by the Commodity Futures Trading Commission ("CFTC"), the Department of Justice, and the Federal Energy Regulatory Commission ("FERC"). In response to the investigation, WPC retained a law firm and conducted an internal investigation. Subsequently, both a federal grand jury and the CFTC subpoenaed documents from WPC regarding its trading practices. WPC produced some responsive documents. Dissatisfied with the production, the CFTC advised WPC by letter that it was failing to "fully cooperate" with the investigation by not turning over certain documents and that "full cooperation" would entail disclosing the results of WPC's internal investigation.[2]

WPC produced additional documents to government investigators. The documents included attorney notes from interviews of WPC employees, data analyses and reports of natural gas transaction data developed under WPC's attorneys' supervision, and presentations to prosecutors by WPC attorneys aimed at influencing the government's charging decisions. Each disclosure was accompanied by a statement that the documents were privileged or that WPC was not waiving its privileges, at least as to other parties and/or other matters. For example, by a letter from its outside counsel to the Justice Department's Antitrust Division, WPC stated:

> We expressly reserve and do not waive any privilege and protection with respect to any other document and any other subject matter. Further, we expressly reserve and do not waive any privilege and protection for these docu-

ments as to any other action, investigation, case, matter, or party. We understand that these [redacted] will be afforded Rule 6(e) protection under the Federal Rules of Criminal Procedure, and *to the extent possible* you will assist WPC in preserving the confidentiality of these.[3]

In 2004, the CFTC approved WPC's offer of settlement regarding the gas reporting issues, and in 2006, the Justice Department executed a Deferred Prosecution Agreement ("DPA") under which WPC agreed to "cooperate fully" with federal prosecutors "regarding any matter about which [it] has knowledge … including any investigations or prosecutions of others." The DPA provided that cooperation would include not asserting the attorney-client privilege or work product protection as to certain factual documents from the internal investigation, although WPC reserved its right to assert the privilege with respect to certain other documents. The Justice Department acknowledged in the DPA that WPC's cooperation was a factor in the decision to defer criminal prosecution. WPC also agreed to pay a $50,000,000 penalty to the U.S. Treasury.[4]

In September 2006, former WPC employee Thompson was indicted for conspiracy to commit wire fraud and to manipulate gas prices in violation of the Commodities Exchange Act in connection with his energy trading activities while he worked for WPC. Thompson filed a motion pursuant to, *inter alia, Brady v. Maryland*[5] and Federal Rule of Criminal Procedure 16(a)(1)(E)(i) to compel the United States to produce "information that is material to preparing his defense" and that was provided to the government by WPC. The United States opposed the motion, stating that WPC had preserved the protected status of the produced work product and the government had agreed to these terms in receiving the documents. WPC filed a separate miscellaneous action also opposing Thompson's motion. The district court granted Thompson's motion to compel and denied WPC's application for relief. WPC appealed.

The *Thompson* Opinion

The court of appeals first determined that it had jurisdiction to review the interlocutory discovery order. Turning to the merits, the court acknowledged that the documents at issue were covered by the attorney-client privilege and the attorney work product doctrine. The court then distinguished the different principles of waiver applicable to the attorney-client privilege and attorney work product.

The D.C. Circuit, as most courts, has declined to adopt a selective waiver doctrine that would allow a party voluntarily to produce documents covered by the attorney-client privilege to one party and yet assert the privilege as a bar to production to a different party.[6] However, production of attorney work product is not always subject to the selective waiver doctrine. "Because the work product doctrine is designed to 'promote the adversary system by safeguarding the fruits of an attorney's trial preparation from the discovery attempts of the opponent' and not, as the attorney-client privilege is designed, 'to protect a confidential relationship,' not all disclosures to third parties waive the protection afforded by the doctrine."[7] Yet "disclosure of work product materials can waive the privilege for those materials if 'such disclosure, under the circumstances, is inconsistent with the maintenance of secrecy from the disclosing party's adversary.'"[8] The court identified three main factors used to determine whether work product protection has been waived: "(1) 'the party claiming the privilege seeks to use it in a way that is not consistent with the purpose of the privilege'; (2) the party had no reasonable basis for believing that the disclosed materials would be kept confidential by the [government]; and (3) waiver of the privilege in these circumstances would not trench on any policy elements now inherent in this privilege."[9]

As to the first factor, the court determined that WPC "independently and voluntarily chose to participate in a thorough disclosure program, in return for which it received the *quid pro quo* of lenient punishment for any wrongdoing exposed in the process."[10] Consequently, "[i]t would … be inconsistent and unfair to allow [WPC] to select according to [its] own self-interest to which adversaries [it] will allow access to the materials."[11]

As to the second factor, the court acknowledged that WPC had a reasonable basis for believing that the Justice Department and the CFTC would keep its documents confidential. However, WPC did not demonstrate that disclosure of its documents to a criminal defendant under *Brady* and Rule 16 lay beyond the scope of its confidentiality agreement with the government. The court noted that the government committed to preserving WPC's privileges only "to the extent possible." In view of this phrasing, WPC's expectation of confidentiality could not reach the disclosures grounded in the government's *Brady* obligations, which are constitutionally based, and may not reach disclosures the government would be required to make under Rule 16.[12]

Moreover, WPC made the disclosures pursuant to grand jury subpoena and thus the materials were disclosed with the understanding that they potentially would be used at trial. In producing one set of documents to the government, WPC stated through independent counsel that it was "waiv[ing] the attorney work product privilege with respect to [the law firm's] investigation of reports to various publications that publish gas indices," and confirmed the privilege was waived with respect to the government's use of the documents. In transmitting interview notes, WPC stated it was waiving its work product privilege with respect to "this grand jury investigation by your office," and the prosecutors' "investigation of natural gas price reporting issues." Given this evidence of the scope of the waiver under the confidentiality agreement with the government, WPC had not shown that it reasonably expected the government would guard the confidentiality of the documents despite its *Brady* and Rule 16 obligations.[13]

As to the third factor, which turns on the public policy interests inherent in the work product doctrine, the court concluded that if public policy favored an exception to waiver for cooperation with investigative regulatory bodies, it was not the appropriate forum in which to craft such an exception. However, the court also noted that "the company can insist on a promise of confidentiality before disclosure." Here, WPC sought confidentiality, but the assurances it secured were neither sufficiently strong nor sufficiently unqualified to prevent the government's disclosure of documents material to preparation of a criminal defense.[14]

Although all three factors supported disclosure of the privileged materials to Thompson, the court of appeals remanded for further proceedings, because the district court had issued a broad order requiring disclosure of all privileged materials and failed to make specific findings. The court of appeals directed the district court first to consider which of the documents at issue met the materiality standards of *Brady* and

Rule 16.[15] "Because the government's criminal investigation was far broader than WPC and its employees and did not focus on Thompson alone, discovery by Thompson must proceed in a manner that avoids a fishing expedition," the court admonished.[16] The court of appeals directed the district court to then weigh WPC's interest in confidentiality against Thompson's discovery rights and right to a fair trial under the standards of Rule 16(d)(1). That subsection provides that "for good cause" the district court may issue a protective order and "deny, restrict, or defer discovery or inspection or grant other appropriate relief."[17] The court did not specify the weight to be given each of the competing interests.

The Lessons of *Thompson*

For Corporate Counsel

Thompson is a reminder to corporate counsel that once produced to the government, privileged material generated in internal investigations may be further disseminated to defendants in criminal proceedings despite efforts to preserve privileges through agreements with the government. While this lesson is not a new one, the issue of waiver resulting from disclosures to the government typically has arisen in the context of the broader discovery permitted in shareholder class actions and other civil proceedings against the corporation.[18] Production of privileged material to a defendant in a criminal case may make it more difficult to assert privilege for the same material in a related civil case. On a more positive note for corporate counsel, *Thompson* acknowledges that a corporation's privilege is an important interest to be weighed in deciding the extent of criminal discovery. *Thompson* also implies that a more stringent nondisclosure agreement with the government may have limited further disclosure of the privileged material.

The *Thompson* opinion may prove helpful to corporate counsel who wish to invoke the prospect of expanded criminal discovery as an argument to the government that privileged material should not be produced as an element of cooperation.[19] Prosecutors often are unsympathetic to one of the principal concerns of corporate counsel in producing privileged material to the government – the prospect of disclosure of those materials to civil litigants arising from the entity's misconduct. Indeed, some prosecutors view civil liability as an appropriate consequence for an entity's misconduct. But expanding the material a criminal defendant obtains in discovery? Prosecutors care about that, and some may be willing to forego review of privileged material in order to avoid it.

For Individual Defense Counsel

If *Thompson* curtails disclosure of privileged material to the government by corporations, counsel for individuals usually will benefit. Counsel for a corporate employee under investigation usually has a joint interest in limiting disclosure of privileged material to the government if the employee has made inculpatory statements to corporate counsel or other inculpatory information has been developed during the internal investigation.

If privileged material has been produced, *Thompson* makes it clear that a

corporation's nonwaiver agreement with the government is not a bar to discovery by the individual criminal defendant. The material generated by corporate counsel may prove extremely useful to the defense. For example, corporate counsel's notes or memoranda may contain initial statements by an important witness on the subject matter at issue, made before government agents have influenced his or her recollection. The memoranda may provide a useful summary of corporate structure, documents, witnesses, or issues. Disclosure of the privileged material may be sought under Rule 16, *Brady*, or *Jencks*. Alternatively, a subpoena for pretrial production of the material may be issued directly to the entity, although the standards for pretrial production under Federal Rule of Criminal Procedure 17(c) are more restrictive than those under Rule 16.[20]

On the other hand, *Thompson* prohibits wholesale disclosure of all privileged material produced by the corporation to the government. The material must be exculpatory under *Brady*, *Jencks* material, or "material to preparing the defense" or within another subsection of Rule 16. The corporation's interest in preserving work product protection may be weighed by the district court under Rule 16(d)(1) in deciding whether the item should be disclosed. One would think that in most circumstances, a criminal defendant's interest in obtaining documents material to preparing his defense will outweigh the corporation's interest in protecting material that already has been produced to the government. That is especially so when the court can issue a protective order preventing further disclosure beyond the defendant and his counsel. Defense counsel must be prepared to argue the materiality of any privileged material sought in discovery and generally should be willing to limit further disclosure.

Notes

1. 562 F.3d 387 (D.C. Cir. 2009).

2. *Thompson*, 562 F.3d at 390.

3. Thompson, 562 F.3d at 390-91. Other correspondence with the government reiterated the understanding: "Moreover, it is also our understanding that production of these notes will not be considered a waiver of any privilege as to any party other than the United States, and will not be considered a waiver as to any other subject or issue." *Id*. at 391 n.1. WPC also requested that CFTC return all produced documents.

4. *Thompson*, 562 F.3d at 391.

5. 373 U.S. 83 (1963).

6. *Thompson*, 562 F.3d at 394 (citing *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989); *Permian Corp. v. United States*, 665 F.2d 1214, 1219 (D.C. Cir. 1981)).

7. *Thompson*, 562 F.3d at 394 (quoting *United States v. AT&T*, 642 F.2d 1285, 1299 (D.C. Cir. 1980)).

8. *Thompson*, 562 F.3d at 394 (quoting *Rockwell Int'l Corp. v. Dep't of Justice*, 235 F.3d 598, 605 (D.C. Cir. 2001) and *AT&T*, 642 F.2d at 1299).

9. *Thompson*, 562 F.3d at 394 (quoting *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1372 (D.C. Cir. 1984) (internal citation omitted)).

10. *Thompson*, 562 F.3d at 394.

11. *Thompson*, 562 F.3d at 394 (quoting *In re Subpoenas Duces Tecum*, 738 F.2d at 1372).

12. *Thompson*, 562 F.3d at 394-95.

13. *Thompson*, 562 F.3d at 395.

14. *Id*.

15. In *Brady*, the Supreme Court established the prosecution's affirmative duty to disclose material evidence "favorable to an accused," 373 U.S. at 87. The Court has defined "material evidence" to mean "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (internal quotation marks and citations omitted). Rule 16, in turn, requires the government to disclose, upon request, *inter alia*, statements by the defendant and documents and objects in the government's control where "the item is material to preparing the defense," FED. R. CRIM. P. 16(a)(1)(E)(i), or the government intends to use the item in its case-in-chief, *id*. 16(a)(1)(E)(ii). *See United States v. Marshall*, 132 F.3d 63, 67-69 (D.C. Cir. 1998); FED. R. CRIM. P. 16(a)(2), (3).

16. *Thompson*, 562 F.3d at 397.

17. The court of appeals did not reach WPC's contention that its production of documents was involuntary due to government coercion or the government's and WPC's contentions that the documents at issue were entitled to protection under FED. R. EVID. 408 ("Compromises and Offers to Compromise") or a common law, federal settlement privilege. *Thompson*, 562 F.3d at 397. The court also did not address the distinct issue of subject matter waiver or FED. R. EVID. 502(a), effective September 19, 2008, which limits the circumstances in which the production of privileged material to a federal office or agency waives the privilege with respect to all privileged material regarding the same subject matter.

18. *See, e.g., In re Qwest Communications Int'l, Inc.* 450 F.3d 1179 (10th Cir. 2006) (exhaustively surveying law on selective waiver and civil litigants' access to privileged material produced to government).

19. At the time WPC entered into its DPA, the Thompson Memorandum guided prosecutors in judging a corporation's cooperation: In gauging the extent of cooperation, the prosecutor is required to consider "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client privilege and work product protection." Memorandum from Larry Thompson, Deputy Att'y Gen., U.S. Dep't of Justice to Component Heads and U.S. Attorneys on Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003). The revised Department of Justice (DOJ) waiver policy in the "Filip Memorandum," issued in August 2008, has, from DOJ's perspective, removed waiver of attorney-client privilege and the attorney work product protection from the cooperation calculus. *See* "Principles of Federal Prosecution of Business Organizations," Memorandum from Mark R. Filip, Deputy Attorney General, to Heads of Department Components and U.S. Attorneys (Aug. 28, 2008) (*available at* http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf). Although the merit of the Filip Memorandum is not the subject of the article, some corporate and defense counsel believe that the Filip Memorandum is unlikely to significantly curtail entities' production of attorney work product to DOJ, the SEC, and other investigative agencies, based on the belief that it is necessary to do so in order to get cooperation credit and avoid indictment or regulatory sanctions. *See* N. Richard Janis, *DOJ's Latest Gambit*, NAT'L L.J., Sept. 29, 2008.

20. *See United States v. Nixon*, 418 U.S. 683 (1974). ■

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