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***In re Qwest Communications Int'l. Sec. Litigation*, No. 06-1070 (10th Cir. June 19, 2006)**

On June 19, 2006, the Court of Appeals for the Tenth Circuit decided *In re Qwest Communications Int'l. Securities Litigation*,[1] holding that Qwest waived its attorney-client privilege and non-opinion work-product protection by voluntarily producing documents to the SEC and DOJ in connection with those agencies' investigations, notwithstanding a "loose" confidentiality agreement. Accordingly, private plaintiffs were entitled to receive the documents produced to the SEC and DOJ.

I. BACKGROUND

In the modern regulatory environment, the SEC and DOJ routinely request that companies produce documents voluntarily and, in the spirit of cooperation, ask the companies to waive their attorney-client privilege[2] and work-product protection.[3] Private plaintiffs assert that any such waiver is universal, and move to compel production of those documents in civil litigation. In response, defendants have advanced the doctrine of selective waiver, arguing that attorney-client privilege and work-product protection are maintained as against private plaintiffs, notwithstanding production to the government.

The selective waiver doctrine has been rejected by the majority of federal appellate courts to have ruled on the issue. The Eighth Circuit is the only circuit that has adopted the selective waiver doc-

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1 No. 06-1070, slip op. (10th Cir. June 19, 2006).

2 Attorney-client privilege protects "communication between attorneys and their clients" in order to foster open communication with counsel. *Id.* at 12, quoting *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981).

3 The work-product doctrine prevents "unwarranted inquiries into the files and the mental impressions of an attorney" (*Id.* at 14, quoting *Hickman* v. *Taylor*, 329 U.S. 495, 510 (1947)), because "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Id.*, quoting *Hickman*, 329 U.S. at 510. "Opinion work-product" refers to documents embodying the mental impressions of the attorney, while "non-opinion work-product" refers to facts gathered by or on behalf of the attorney in anticipation of litigation.

trine with respect to attorney-client privilege,[4] whereas the First, Second, Third, Fourth, Sixth and D.C. Circuits have all rejected selective waiver of attorney-client privilege.[5] Similarly, the Fourth Circuit is the only circuit to expressly adopt the selective waiver doctrine for work-product (and only for opinion work-product).[6] No circuit court has expressly adopted selective waiver doctrine for non-opinion work-product. The First, Third, Fourth, Sixth, and Eighth Circuits have rejected selective waiver of non-opinion work-product,[7] while the Second and D.C. Circuits have left the possibility open.[8] In rejecting selective waiver, a number of courts have focused on the ability of the regulatory agencies to disclose the documents to additional third parties without meaningful restriction, and have indicated (in dicta) that the outcome may have been different under an adequate confidentiality agreement.

In *Qwest*, the Tenth Circuit for the first time addressed selective waiver of attorney-client privilege and the non-opinion work-product protection in the context of SEC and DOJ investigations.[9] After extensive consideration of existing caselaw on the subject, the court rejected selective waiver despite the existence of confidentiality agreements, expressing skepticism that selective waiver would ever be appropriate and holding that, in any event, the agreements at issue were insufficient.[10]

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4 *Id*. at 16, citing *Diversified Indus., Inc.* v. *Meredith*, 572 F.2d 596, 611 (8th Cir. 1977).

5 *Id*. at 17-20, citing *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1370 (D.C. Cir. 1984), *Permian Corp.* v. *United States*, 665 F.2d 1214, 1219 (D.C. Cir. 1981), *United States* v. *Mass. Inst. of Tech.*, 129 F.3d 681, 686 (1st Cir. 1997), *In re John Doe Corp.*, 675 F.2d 482, 489 (2d Cir. 1982), *Westinghouse Elec. Corp.* v. *Republic of the Phil.*, 951 F.2d 1414, 1425 (3d Cir. 1991), *In re Martin Marietta Corp.*, 856 F.2d 619, 623-24 (4th Cir. 1988), and *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302 (6th Cir. 2002). The Seventh Circuit has not foreclosed or embraced selective waiver of attorney-client privilege. *See Dellwood Farms, Inc.* v. *Cargill, Inc.*, 128 F.3d 1122, 1127 (7th Cir. 1997). The Federal Circuit rejected selective waiver in the context of careless disclosure. *See Genentech, Inc.* v. *United States Int'l Trade Comm'n*, 122 F.3d 1409, 1417 (Fed. Cir. 1997).

6 *Id.* at 23-24, citing *Martin Marietta.*, 856 F.2d at 626.

7 *Id*. at 24-26, citing *Mass. Inst. of Tech.*, 129 F.3d at 687, *Westinghouse*, 951 F.2d at 1429, *Martin Marietta*, 856 F.2d at 623, *Columbia/HCA Healthcare*, 293 F.3d at 306, and *In re Chrysler Motors Corp.*, 860 F.2d 844, 846 (8th Cir. 1988).

8 *Id*. at 26-28, citing *In re Sealed Case*, 676 F.2d 793, 824 (D.C. Cir. 1982), *Subpoenas Duces Tecum*, 738 F.2d at 1371-72, and *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 230 (2d Cir. 1993).

9 Both attorney-client privilege and work-product protection are generally waived by disclosure to a third-party. *See Qwest*, 06-1070 at 13, 15. However, there are exceptions to the general waiver rule, including, among others, the ability to share documents as part of a joint-defense.

10 *Id.* at 30, 34.

II. FACTS AND PROCEDURAL HISTORY

In 2002, the SEC and DOJ began investigating the business practices of Qwest. In order to cooperate with these investigations, Qwest provided over 220,000 pages of documents protected by attorney-client privilege and the work-product doctrine (the "Waiver Documents").[11] The production of these materials was pursuant to a subpoena and written confidentiality agreements between Qwest and each agency. Each of these agreements stated that Qwest did not intend to waive either attorney-client privilege or work-product protection when handing over the materials. The SEC agreed to "maintain the confidentiality of the [Waiver Documents] pursuant to [the] Agreement and . . . not disclose them to any third party, except to the extent that the Staff determine[d] that disclosure [was] otherwise required by law or would be in furtherance of the Commission's discharge of its duties and responsibilities."[12] The DOJ agreed to maintain confidentiality of the documents and not divulge them to third parties, "except to the extent that DOJ determine[d] that disclosure [was] otherwise required by law or would be in furtherance of DOJ's discharge of its duties and responsibilities."[13]

The Waiver Documents became the subject of a discovery dispute in civil litigation against Qwest in the United States District Court for the District of Colorado. Although Qwest produced millions of pages of documents to the private plaintiffs, it did not produce the Waiver Documents, claiming that they were protected by attorney-client privilege and work-product immunity. Plaintiffs moved to compel production and the magistrate judge concluded Qwest had universally waived both attorney-client privilege and work-product protection when it produced the Waiver Documents to the government. The district judge refined the order by allowing Qwest to redact opinion work-product from the document production and maintained the order with respect to attorney-client privilege and non-opinion work-product, but stayed production pending Qwest's petition for a writ of mandamus in the Tenth Circuit.[14]

III. RATIONALE OF THE COURT (PER MURPHY, J.)

Whether Qwest waived attorney-client privilege and work-product protection as to third-party litigants when it released privileged materials to federal agencies was an issue of first impression for the Tenth Circuit in *Qwest*.[15] The court engaged in a lengthy consideration of holdings among its sister circuits, noting the trend against adopting any selective waiver doctrine. After making clear that it was very hesitant to grant an extension of existing protections under any circumstances, the Court limited its hold-

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11 The court noted, however, that Qwest also chose not to produce an additional 390,000 privileged documents to the agencies, indicating that Qwest made a strategic assessment of the risk of waiver. *Id.* at 38-39.

12 *Id*. at 3-4.

13 *Id.* at 4.

14 The district judge initially maintained the order in full, but refined the order on reconsideration.

15 *Id*. at 2.

ing to the particular facts before it, ruling that the record in this case was not strong enough to justify the adoption of selective waiver.[16] The court focused on the vacuous nature of the confidentiality agreements, which did "little to limit further disclosure by the government . . . and any restrictions on [the Waiver Documents'] use were loose in practice."[17] Equally important, the DOJ had shared many documents with third parties and they were not required to, and no one had, kept a record of which documents were or were not disclosed. Now potentially in the hands of numerous parties outside the SEC and DOJ, the once-protected documents were public information.[18]

The court found insufficient evidence in the record to support the argument that selective waiver is necessary to ensure defendants' cooperation during government investigations.[19] The court observed that that Qwest had cooperated despite nearly universal rejection of selective waiver by the appellate courts and no indication that the Tenth Circuit would hold otherwise.[20] The court further noted the absence of *amici* support by the DOJ and SEC for the company's non-waiver arguments.[21]

The court also rejected the argument, made by *amici*, that the current regulatory environment has made disclosure to the government a "pre-requisite to fair treatment by prosecutors" and not truly voluntary.[22] Though sympathetic to the argument, the court was not persuaded, as Qwest had conceded that their disclosures were "voluntary" and there was no support in the record for any other conclusion.[23]

In rejecting selective waiver, the court likened the doctrine to a "new privilege," in that its justification departed from the need for confidentiality underlying the attorney-client privilege and work-product doctrines, to instead consider the benefits of encouraging cooperation with the government. Characterizing selective waiver as a new privilege also allowed the court to find support in the principle that testimonial privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth."[24] The court did not, however, explain how its analogy to "new" privileges such as a

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16 *Id*. at 30.

17 *Id*. at 30, 35.

18 *Id*. at 35.

19 *Id*. at 31.

20 *Id*.

21 *Id*. at 32-33.

22 *Id*. at 46.

23 *Id*. at 46-47.

24 *Id*. at 36, quoting *United States* v. *Nixon*, 418 U.S. 683, 710 (1974).

reporter's privilege or a psychiatrist's privilege was more apt than the analogy to exceptions to waiver for purposes such as joint defense.

The court was particularly concerned that selective waiver would turn attorney-client privilege and work product protection into just another page in the litigation play-book, to be used strategically by counsel as best fit their immediate circumstances — a concern that was all the more prevalent given Qwest's strategic decision to disclose some, but not all, protected materials to the government in the first place. "Qwest perceived an obvious benefit from its disclosures but did so while weighing the risk of waiver."[25]

IV. SIGNIFICANCE OF DECISION

The holding in *Qwest* represents the latest addition to a body of law rejecting the doctrine of selective waiver in the context of cooperation with government investigations. While it is unclear whether more restrictive confidentiality agreements would have altered the outcome, the absence of meaningful restrictions on further disclosure was fatal. *Qwest* emphasizes the need for strict controls in any confidentiality agreement and adds to the doubt that even a strict confidentiality agreement with the government will have any benefit in the context of private litigation. As the court in *Quest* noted, this is an area for rule-making and legislation.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or e-mail Charles A. Gilman at (212) 701-3403 or cgilman@cahill.com; Jonathan I. Mark at (212) 701-3100 or jmark@cahill.com; or John Schuster at (212) 701-3323 or jschuster@cahill.com.

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25 *Id*. at 39.