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Selective Waiver and Privilege in the Southern District of New York

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The doctrine of selective waiver allows a party to maintain an assertion of privilege (either attorney-client privilege or work product protection) even though the privileged materials had been previously produced in another proceeding, in most instances to a government authority in the context of a criminal or regulatory investigation in another proceeding.[1] On March 10, 2010, Judge Paul Crotty of the U.S. District Court for the Southern District of New York issued a significant opinion on the doctrine of selective waiver in *Police and Fire Retirement System of the City of Detroit v. SafeNet Inc.*[2] For those interested in the continued acceptance of selective waiver, *SafeNet* should help to halt the shift toward the rejection of this doctrine. This article reviews the development of the selective waiver doctrine in the Southern District of New York and concludes that parties providing privileged materials to a government agency subject to a confidentiality agree-

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[1] For simplicity, this article will refer collectively to attorney-client privilege and work product protection as "privilege."

[2] No. 06 Civ. 5797, 2010 WL 935317 (S.D.N.Y. Mar. 12, 2010).

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ment can take reasonable comfort that a court in the Southern District will likely allow the continued assertion of privilege to resist a discovery request in a subsequent proceeding.[3]

Of course, because a party producing documents to a government agency does not know where it may be sued in an action in which the produced materials might be discoverable, it is important to be aware that many other courts have not recognized the selective waiver doctrine at all.[4] This article is limited to the development of this doctrine in the U.S. Court of Appeals for the Second Circuit and, more particularly, the Southern District of New York.

Steinhardt Partners

The leading decision in the Second Circuit examining the selective waiver doctrine is *In re Steinhardt Partners L.P.*[5] In that case, the plaintiffs brought a civil class action alleging that multiple defendants manipulated the market for two-year Treasury notes.[6] In response to discovery requests, Steinhardt Partners L.P., Steinhardt Management Co. and Michael Steinhardt (collectively ''Steinhardt'') refused to produce ''a memorandum prepared by its attorneys and previously submitted to the Securities and Exchange Commission (SEC).''[7] The plaintiffs moved to compel production of the memorandum, and the district court granted the motion, ''holding that the [previous production] of the memorandum to the SEC waived the claim for work product protection.''[8] Ultimately, the Second Circuit agreed that Steinhardt had waived any work product protection when it produced the materials to the SEC.[9] However, unlike the majority of the circuit courts to examine the doctrine of selective waiver, the Second Circuit declined to reject the doctrine in principle. Rather, as explained in more detail below, the court instructed trial courts to examine the applicability of the doctrine on a case-by-case basis.

The Second Circuit, in *In re Steinhardt Partners*, explicitly ''decline[d] to adopt a *per se* rule that all voluntary disclosures to the government waive work product protection.''

Examining whether the disclosure to the SEC waived the work product protection with respect to subsequent third parties, the Second Circuit first noted that ''[o]nce a party allows an adversary to share otherwise privileged thought processes of counsel, the need for the [work product] privilege disappears.''[10] Stating that ''[v]oluntary disclosure is generally made because a corporation believes there is some benefit to be gained from disclosure,'' the Second Circuit ''reject[ed] Steinhardt's attempt to use the [work product] doctrine to sustain the unilateral use of a memorandum'' and held that ''Steinhardt waived any work product protection by voluntarily submitting the memorandum to the SEC.''[11] In support, the Second Circuit stated that ''selective assertion of privilege should not be merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage.''[12]

This strong language notwithstanding, the Second Circuit did not altogether reject the doctrine of selective waiver. Rather, because ''[c]rafting rules relating to privilege in matters of governmental investigations must be done on a case-by-case basis,'' the Second Circuit explicitly ''decline[d] to adopt a *per se* rule that all voluntary disclosures to the government waive work product protection.''[13] The Second Circuit added that ''[e]stablishing a rigid rule would fail to anticipate situations in which the disclosing party and the government may share a common interest in developing legal theories and analyzing information, *or situations in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials*.''[14]

This statement has proved critical in subsequent courts' analyses of this issue. Following *Steinhardt*, a number of Southern District judges have examined the applicability of the selective waiver doctrine with respect to materials previously produced to the government subject to a confidentiality agreement.

Leslie Fay I

Just one month after the Second Circuit's *Steinhardt* decision, Judge William Conner confronted this very issue in a securities fraud class action against the Leslie

[3] This article does not address whether disclosure of privileged materials to the government may lead to a finding of waiver with respect to the subject matter of the materials, in addition to the disclosed materials themselves. This so-called ''subject matter waiver'' is the subject of the recently enacted Federal Rule of Evidence 502(a), which provides that a disclosure to a federal agency of privileged materials only extends to undisclosed information when the waiver was intentional, and the disclosed and undisclosed information concern the same subject matter and they ought in fairness to be considered together.

[4] *See, e.g., In re Qwest Commc'ns Int'l*, 450 F.3d 1179, 74 U.S.L.W. 1772 (10th Cir. 2006); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289 (6th Cir. 2002); *United States v. Mass. Inst. of Tech.*, 129 F.3d 681 (1st Cir. 1997); *Westinghouse Elec. Corp. v. Republic of the Phil.*, 951 F.2d 1414 (3d Cir. 1991); *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981); *but see Diversified Indus. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) (*en banc*).

[5] 9 F.3d 230 (2d Cir. 1993).

[6] *Id.* at 232.

[7] *Id.*

[8] *Id.*

[9] *Id.* at 236. The Second Circuit's analysis explicitly assumed, without deciding, that the memorandum actually constituted work product. *Id.* at 234.

[10] *Id.* at 234-35.

[11] *Id.* at 235.

[12] *Id.*

[13] *Id.* at 236.

[14] *Id.* (emphasis added). While Steinhardt had marked the document produced to the SEC ''FOIA Confidential Treatment Requested,'' it did not dispute that there was no agreement that the SEC would maintain the confidentiality of the document. *Id.* at 232.

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Fay Company.[15] After the Leslie Fay audit committee launched an internal investigation into certain accounting irregularities, the SEC, the U.S. Attorney's Office for the Southern District of New York and the U.S. Attorney's Office for the Middle District of Pennsylvania launched investigations of their own. In conjunction with their investigations, the governmental entities requested and received copies of the completed internal investigation report.

When the securities fraud plaintiffs sought production of the report, Judge Conner found it ''unnecessary to decide the question left open by the Court of Appeals, i.e. whether a confidentiality agreement with the SEC would avoid waiver,'' finding that, ''contrary to the audit committee's assertion, the SEC never agreed to maintain the confidentiality of the Report.''[16] Specifically, citing to a letter from the SEC to the audit committee, Judge Conner determined that the SEC explicitly rejected the audit committee's request to preserve the confidentiality of the Report and only agreed to treat the Report as confidential in response to Freedom of Information Act requests and to refrain from asserting that ''the submission of the Report constitutes a waiver by the audit committee of any . . . privilege.''[17] Accordingly, finding that the issue was ''governed'' by *Steinhardt*, Judge Conner rejected the audit committee's assertion of selective waiver and ordered the audit committee to produce the Report to the civil plaintiffs.[18]

Other parties who have been unable to show that they secured a confidentiality agreement with the government agency to which they previously produced the materials at issue have similarly been unsuccessful in arguing for the application of the selective waiver doctrine, absent special circumstances such as a finding of a common interest between the producing party and the government agency.[19]

Leslie Fay II

Judge Conner revisited the application of *Steinhardt* in a subsequent opinion in the *Leslie Fay* litigation. After *Leslie Fay I*, the company's audit committee entered into a confidentiality agreement with the Pennsylvania U.S. Attorney's Office and produced additional documents subject to that agreement.[20] Leslie Fay's former outside auditor then moved to compel production of documents prepared by outside counsel in connection with its representation of the audit committee, some of which had been produced to prosecutors under the confidentiality agreement.

Leslie Fay II was the first decision in the Southern District of New York to hold that a confidentiality agreement would preserve a claim of privilege for materials previously produced to the government.

Judge Conner first rejected the audit committee's argument that the documents underlying the Report were created ''primarily in anticipation'' of litigation, and thus held that the documents were not subject to any work product protection. With respect to the assertion of attorney-client privilege, the court noted that the disclosure was subject to a confidentiality agreement, providing that the prosecutors would disclose the materials ''only as necessary to further law enforcement objectives.''[21] With no additional analysis, Judge Conner held that this agreement ''satisfies the standard articulated in *Steinhardt*'' and rejected the claim that the audit committee had waived attorney-client privilege by virtue of its production.[22] As a result, *Leslie Fay II* became the first decision in the Southern District to hold that a confidentiality agreement would preserve a claim of privilege for materials previously produced to the government.

Maruzen

Several years later, in *Maruzen Co. Ltd. v. HSBC USA Inc.*,[23] Judge Richard Owen similarly applied *Steinhardt* to documents that had been produced to government authorities subject to confidentiality agreements. In a relatively brief opinion, Judge Owen first determined that the defendants had secured confidentiality agreements from the authorities in question.[24] Then, citing *Leslie Fay II*, Judge Owen found that these agreements ''satisf[ied] *Steinhardt*'' and denied the plaintiff's motion to compel production.[25] Thus, like Judge Conner in *Leslie Fay II*, Judge Owen essentially accepted as a given that a confidentiality agreement prevented a finding of waiver under *Steinhardt*.

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[15] *See In re Leslie Fay Cos., Inc. Sec. Litig.*, 152 F.R.D. 42 (S.D.N.Y. 1993) (''*Leslie Fay I*'').

[16] *Id.* at 45.

[17] *Id.* at 46.

[18] *Id.* at 44.

[19] *See Bank of Am. N.A. v. Terra Nova Ins. Co.*, 212 F.R.D. 166 (S.D.N.Y. 2002); *Spanierman Gallery, Profit Sharing Plan v. Merritt*, No. 00 Civ. 5712 (LTS) (THK), 2003 WL 22909160, at *2 (S.D.N.Y. Dec. 9, 2003); *cf. In re Cardinal Health Inc. Sec. Litig.*, No. C2 04 575 (ALM), 2007 WL 495150, at *9 (S.D.N.Y. Jan. 26, 2007) (finding that the failure to enter into a confidentiality agreement with prosecutors did not waive work product protection because the prosecutors and the company shared a common interest, notwithstanding the fact that the prosecutors were investigating the company); *United States v. Treacy*, No. S2 08 CR 366 (JSR), 2009 WL 812033 (S.D.N.Y. Mar. 24, 2009) (noting, without any discussion of whether there was a confidentiality agreement, that the court had previously ordered production of an interview memorandum); *In re Kidder Peabody Sec. Litig.*, 168 F.R.D. 459, 472, 474 (S.D.N.Y. 1996) (noting that the attorney-client privilege for a document produced to the SEC was ''of course'' waived where the party asserting privilege failed to demonstrate the circumstances of the submission to the SEC).

[20] *See In re Leslie Fay Cos. Inc. Sec. Litig.*, 161 F.R.D. 274 (S.D.N.Y. 1995) (''*Leslie FayII*'').

[21] *Id.* at 284.

[22] The decision made no mention that *Steinhardt* involved the work product doctrine, whereas the documents at issue were alleged to be protected by attorney-client privilege.

[23] No. 00 Civ. 1079 (RO), 2002 WL 1628782 (S.D.N.Y. July 23, 2002).

[24] *Id.* at **1-2.

[25] *Id.* at *2.

Natural Gas

This issue next arose in *In re Natural Gas Commodity Litigation*.[26] While Chief Magistrate Judge Peck characterized *Steinhardt* as ''reject[ing] a selective waiver approach,'' he noted that the Second Circuit had not directly addressed whether disclosure of privileged documents to government agencies under a confidentiality agreement constitutes a waiver of privilege.[27] While stating that ''the district court decisions in this Circuit have relied on the presence of an explicit confidentiality agreement to find no waiver from production of work product material to the government,'' Magistrate Judge Peck added that, ''in this [c]ourt's view, *Steinhardt* does not create a *'per se'* rule that if there is a confidentiality/non-waiver agreement with the government, the privilege is not waived.''[28] Accordingly, Magistrate Judge Peck found that he ''must examine other relevant factors.''[29] Magistrate Judge Peck determined that the ''second most important factor'' in this case was the plaintiffs' failure to demonstrate a substantial need for the requested documents because all of the underlying factual information had been previously provided to them.[30] In light of the confidentiality agreements and plaintiffs' failure to demonstrate substantial need, Magistrate Judge Peck held that the defendants had not waived work product protection for the documents at issue. Judge Marrero subsequently approved Magistrate Judge Peck's ruling.[31]

Initial Public Offering Securities Litigation

In *In re Initial Public Offering Securities Litigation*, Judge Shira Scheindlin struck a significant blow to the selective waiver doctrine by holding that a party had waived privilege as the result of prior disclosures despite the existence of confidentiality agreements with the agencies that received those disclosures. The plaintiffs contended that Credit Suisse had waived work product protection through its disclosures—pursuant to confidentiality agreements—to the U.S. Attorney's Office for the Southern District of New York, the SEC, the National Association of Securities Dealers Regulation, and the production of these disclosures—pursuant to an arbitration order—to a private party.[32] Judge Scheindlin opened her analysis by characterizing the Second Circuit's instructions in *Steinhardt* that selective waiver be considered on a case-by-case basis as ''dicta.''[33] She then proceeded to review the other circuit court decisions and the district court decisions within the Second Circuit for guidance as ''neither the Supreme Court nor the Second Circuit has expressly upheld a claim of selective waiver.''[34]

[26] No. 03 Civ. 6186, 2005 WL 1457666 (S.D.N.Y. June 21, 2005).

[27] *Id*. at *5.

[28] *Id*.

[29] *Id*.

[30] *Id*.

[31] *In re Natural Gas Commodities Litig.*, 232 F.R.D. 208, 210 (S.D.N.Y. 2005) (''*Natural GasII*'').

[32] *In re Initial Public Offering Sec. Litig*., 249 F.R.D. 457, 458 (S.D.N.Y. 2008).

[33] *Id*. at 462.

[34] *Id*. at 461.

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Judge Scheindlin found that, within the Second Circuit, some courts have ''held that the existence of a confidentiality agreement precludes a finding of waiver''[35] while others ''have held the existence of a confidentiality agreement is just one of several factors to be considered.''[36] Next, Judge Scheindlin examined the policy reasons underlying the doctrine and stated that ''selective waiver is not in the long term best interest of the government, the adversarial system, or litigants.''[37] Judge Scheindlin reached this conclusion by examining both the short- and long-term effects of selective waiver. Specifically, Judge Scheindlin stated that in the short term, private parties argue for selective waiver to preserve privilege once disclosure to the government has already occurred and the government supports selective waiver so that it can easily obtain information from targets. However Judge Scheindlin found that, in the long term, ''the erosion of the attorney-client and attorney work product privileges through such disclosures will reduce incentives for companies to discover and correct their wrongdoings, thus reducing the value of the information available to the government, and ultimately reducing the bargaining ability of individual defendants, as well as the ability of attorneys to prepare for litigation.'' Judge Scheindlin concluded that ''there is a strong presumption against a finding of selective waiver, and it should not be permitted absent special circumstances.''[38]

Turning next to whether the production to prosecutors and the SEC waived protection, Judge Scheindlin

[35] Judge Scheindlin cited *Cardinal*, *Maruzen*, and *Leslie Fay II* for that proposition. The citation to *Cardinal* is a bit curious because, as noted previously, *Cardinal* held that there was no waiver because of a common interest with the governmental agencies.

[36] *Id*. at 462. Judge Scheindlin cited *Natural Gas, Urban Box Office Network Inc. v. Interfase Managers L.P.*, No. 01 Civ. 8854 (LTS) (THK), 2004 WL 2375819 (S.D.N.Y. Oct. 21, 2004), and *United States v. Wilson*, 493 F. Supp. 2d 348 (S.D.N.Y. 2006). Again, Judge Scheindlin's citation to two of these decisions seems misplaced. First, the confidentiality agreement at issue in *Urban Box* was between private litigants. *See Urban Box*, 2004 WL 2375819, at *5. Additionally, the issue in *Wilson* was whether a criminal defendant had waived medical privilege by producing medical records to the government in an effort to convince the state not to seek the death penalty against him. *See Wilson*, 493 F. Supp. 2d at 361.

[37] *Id*. at 464.

[38] *Id*. at 465.

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stated that ''selective waiver should not be found simply because of the existence of a confidentiality agreement.''[39] Judge Scheindlin then found that Credit Suisse failed to show the existence of any special circumstances that would lead to a finding of selective waiver and accordingly held ''that the privilege was waived by its disclosure to the [U.S. Attorney's Office] and SEC.'' Judge Scheindlin explicitly did not examine the effect of the disclosures to the private litigant pursuant to the arbitral order or to the NASDR.[40] However, even though the holding was so limited, she stated that Credit Suisse's ''repeated voluntary disclosures to adversarial parties threaten to turn its use of waiver into 'merely another brush on an attorney's palette'.''[41]

After *Initial Public Offering*, there was great concern that other courts in the Southern District might follow Judge Scheindlin's lead and effectively gut the doctrine of selective waiver.

SafeNet

On May 18, 2006, SafeNet publicly announced that it was under investigation by federal prosecutors and the SEC.[42] During the course of this investigation, SafeNet produced both non-privileged and privileged documents to the SEC and prosecutors subject to confidentiality agreements.[43]

Subsequently, the plaintiffs in a securities fraud class action against SafeNet sought production of the privileged materials that SafeNet had previously produced, including ''(i) thirty-nine interview memoranda prepared by counsel in anticipation of litigation, and (ii) a report of SafeNet's Special Litigation Committee, summarizing counsel's conclusions and recommendations regarding the investigation.''[44] After SafeNet refused to produce these privileged materials, the plaintiffs argued that SafeNet's previous production of these materials to prosecutors and the SEC waived any right it previously had to assert either attorney-client privilege or work product protection, and requested that the court compel the materials' production.

Examining the plaintiffs' claim, Judge Crotty noted that ''[t]he *Steinhardt* Court reasoned that a *per se* rule against selective waiver would not account for situations where, like here, 'the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials.' ''[45] While noting that *Steinhardt* did not hold that entering into such an agreement necessarily preserves the disclosing party's ability to claim privilege with respect to subsequent private litigants, Judge Crotty found that the Second Circuit nevertheless used ''suggestive'' language that an agreement would have that effect.[46]

Judge Crotty found the plaintiffs' heavy reliance on *Initial Public Offering* unavailing because, in that case, ''Judge Scheindlin noted that the disclosing party made 'repeated voluntary disclosures to adversarial parties.' ''[47] Judge Crotty did not mention that Judge Scheindlin's holding specifically did not address the effect of disclosures to any entity other than prosecutors and the SEC.[48] Rather, he simply noted that ''here, by contrast, SafeNet has not undermined the confidentiality of the Privileged Materials through repeated voluntary disclosures to adversarial parties.''[49]

Judge Crotty then recognized the ''strong public interest in encouraging disclosures and cooperation with law enforcement agencies'' and found that ''violating a cooperating party's confidentiality expectations jeopardizes this public interest.''[50] Finally, Judge Crotty also found that the plaintiffs failed to demonstrate a pressing need for the privileged materials, that they had access to the underlying factual materials and that the privileged documents would disclose counsel's analytical process. For these reasons, ''under *Steinhardt*'s case-specific selective waiver test,'' Judge Crotty denied the plaintiffs' motion to compel.[51]

Conclusion

Under *Steinhardt*'s case-by-case approach, a party in the Southern District may be able to successfully maintain an assertion of privilege over documents previously produced to a governmental agency if it can prove that the previous disclosure was subject to a confidentiality agreement. While a confidentiality agreement on its own may not be sufficient to maintain privilege, *SafeNet* does provide comfort that *Initial Public Offering* is not representative of a larger movement away from the doctrine of selective waiver in the Southern District.

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[39] *Id*. at 466.

[40] *Id*. (''Because I [find] that the disclosure to the USAO and SEC constituted a waiver, I need not address the effect of the disclosure to Grunwald.'') and at 466 n.73 (''Plaintiffs further argue that Credit Suisse waived any privilege protecting the memoranda when it discussed their contents with the NASDR staff . . . . Once again, I need not address these arguments.'').

[41] *Id*. at 466 (citation omitted).

[42] *SafeNet,* 2010 WL 935317, at *1.

[43] *Id*.

[44] *Id*. Judge Crotty's opinion does not specify whether these materials were subject to attorney-client privilege as well as work product protection. Indeed, the decision treats these two doctrines as interchangeable for the purpose of its analysis.

[45] *Id*. (citation omitted).

[46] *Id*.

[47] *Id*. at *2 (citation omitted).

[48] *Id*.

[49] *Id*.

[50] *Id*.

[51] *Id*.