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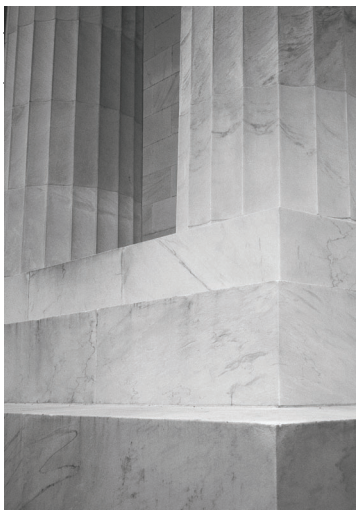

Selective Waiver And Privilege

Unlike the majority of other circuit courts to examine the issue, in *In re Steinhardt Partners, L.P.* the Second Circuit declined to adopt a *per se* rule against selective waiver and instructed district courts to examine selective waiver on a case-by-case basis. After *Steinhardt*, a number of courts in the Southern District of New York have examined the applicability of the selective waiver doctrine, with varying results.

U.S. Supreme Court Limits The Ability Of Arbitrators To Order Class Arbitration

In its April decision in *Stolt-Nielsen S.A. et al. v. AnimalFeeds International Corporation*, the Supreme Court ruled that imposing class arbitration on parties that have not agreed to it violates the Federal Arbitration Act. In so doing, it raised questions regarding the proper scope of judicial review of arbitral awards.

Extending Attorney-Client Privilege Protection To Communications Between Trade Associations And Their Counsel

The District Court for the District of Columbia recently ruled that the attorney-client privilege applies equally to confidential communications between a trade association's lawyers and its members' employees and agents. This ruling may have broader significance, because there is currently very little authority on the question of whether the attorney-client privilege applies in the trade association context.

Selective Waiver And Privilege

BY JEFFREY A. ROSENTHAL AND MOLLY M. LENS

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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 agreement 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 Second Circuit and, more particularly, the Southern District of New York.

In re 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] When the plaintiffs moved to compel production of the memorandum, 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.

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 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.

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*.

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]

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 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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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).

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 (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.

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 Fay II*").

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.

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 Gas II*").

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.

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.

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.*

U.S. Supreme Court Limits The Ability Of Arbitrators To Order Class Arbitration

BY HOWARD S. ZELBO AND JENNIFER L. GORSKIE

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On April 27, 2010, the U.S. Supreme Court issued its decision in *Stolt-Nielsen S.A. et al. v. AnimalFeeds International Corporation*,[1] holding that imposing class arbitration on parties who have not agreed to it is inconsistent with the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("FAA"). This is one of the Court's most significant arbitration decisions in years, and is likely to have a major impact on the ongoing class arbitration debate.

Background To The *Stolt-Nielsen* Case

Stolt-Nielsen S.A., a parcel tanker shipping company, and AnimalFeeds International Corporation, a distributor of certain food products, were parties to a standard maritime contract that contained an arbitration clause referring "[a]ny dispute arising from the making, performance or termination" of the contract to arbitration. In 2003, AnimalFeeds filed a demand for class arbitration,[2] seeking to represent a class of global purchasers of parcel tanker transportation services against Stolt-Nielsen and other parcel tanker shipping companies for alleged antitrust violations.

The parties agreed that a three-member arbitration panel, applying the American Arbitration Association's Supplementary Rules for Class Arbitrations, would determine whether class arbitration was permitted by the arbitration clause in the parties' contract. In submitting the question to the panel, the parties stipulated that the arbitration clause was "silent" on whether class arbitration was permissible. The arbitrators considered several published arbitration awards permitting class arbitration where the arbitration clause was silent, as well as AnimalFeeds' argument that public policy favored the construction of arbitration clauses to permit class arbitration even where the clause was silent on that issue.[3] In a partial award, the panel construed the arbitration clause in the parties' contract to permit class arbitration.

Stolt-Nielsen petitioned the United States District Court for the Southern District of New York to vacate the award. The district court ruled in Stolt-Nielsen's favor, holding that the award should be vacated under Section 10(a)(4) of the FAA, which allows for an arbitration award to be set aside "where the arbitrators exceeded their powers,"[4] because the arbitrators had acted in "manifest disregard" of the law when they did not conduct a proper choice-of-law analysis.[5] Had the arbitrators done so, the district court held, they would have applied either federal maritime law or New York law and, under either law, would have found that class arbitration is not permissible where the parties' arbitration clause is silent on the subject.

The United States Court of Appeals for the Second Circuit reversed. In its decision, it held that courts may vacate arbitration awards under Section 10(a)(4) only in those rare instances in which "the arbitrator knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it."[6] The Second Circuit stated that a court may not, under this standard, merely disagree with an arbitrator's contract interpretation. Rather, the inquiry should focus on "whether the arbitrators had failed to interpret the contract at all, for only then were they exceeding the authority granted to them by the contract's arbitration clause."[7] Because the parties themselves had agreed that the arbitrators would decide whether the arbitration agreement permitted class arbitration, the arbitrators, according to the Second Circuit, had the power to decide the issue.[8] Therefore, the court held, "the arbitration panel did not exceed its authority in deciding that issue – irrespective of whether it decided the issue correctly."[9]

The Supreme Court granted *certiorari* on the question of whether imposing class arbitration where an arbitration clause is silent on the issue is consistent with the FAA.

The Supreme Court's Decision

A. The Court Finds That The Arbitrators "Exceeded Their Powers"

The Supreme Court began by analyzing whether the arbitrators' award should have been vacated under Section 10(a)(4) of the FAA.[10] It held that the arbitration award should have been vacated because the arbitrators, in interpreting the

arbitration clause to permit class arbitration, had "exceeded their powers" under FAA Section 10(a)(4).[11] Notably, the Supreme Court declined to resolve a circuit split on whether the manifest disregard standard survived its decision in *Hall Street Associates v. Mattel*.[12]

According to the Court, FAA Section 10(a)(4) applies in those cases where an arbitrator "strays from interpretation and application of the agreement and effectively dispense[s] his own brand of industrial justice."[13] Because the parties agreed that their contract was "silent" on the subject of class arbitration, the Court said, "the arbitrators' proper task was to identify the rule of law that governs in that situation."[14] Had they done so, the Court held, they would have looked to the "default rule" that would apply in the case of a silent contract under either the FAA or one of the two bodies of law that the parties had argued applied to their contract, federal maritime law or New York law. Instead, the Court held, "what the arbitration panel did was simply to impose its own view of sound policy regarding class arbitration," choosing to "proceed[ ] as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied" when the arbitration clause does not provide express consent to class arbitration.[15] This, held the Court, exceeded the arbitrators' powers.

B. The Court Holds That The FAA Requires A Contractual Basis For Compelling Class Arbitration

Having concluded that the award should be vacated, the Court did not "direct a rehearing by the arbitrators" under FAA Section 10(b), but instead proceeded to "decide the question that was originally referred to the panel" – whether the arbitration clause in this case permitted class arbitration when it was silent on that subject.

In determining the rule to be applied to establish whether class arbitration is permitted, the Court emphasized the need for the parties' consent to class arbitration. The Court explained that the purpose of the FAA is to give effect to the parties' intent and to enforce private agreements to arbitrate according to their terms – including those governing *with whom* the parties choose to arbitrate.[16] With this foundation laid, the Court set forth its holding: "From these principles, it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so . . . ."[17]

The Court emphasized that the panel had imposed class arbitration even though the parties concurred that the contract was silent and that there had been no agreement on that issue.[18] Thus, the arbitrators' finding was not rooted in any contractual basis at all, but instead on its view that there was no evidence that the parties intended to *preclude* class arbitration. This, said the Court, "is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent."[19]

Is *Stolt-Nielsen* A Commentary On FAA Review Or Class Arbitrations?

The *Stolt-Nielsen* decision is one of the most significant arbitration cases decided by the Supreme Court in recent years. It addresses several important issues regarding the permissibility of class arbitration and the requirements that the FAA imposes on arbitrators. The decision also raises several substantive questions regarding the proper scope of judicial review of arbitral awards.

The Court's requirement that class arbitration be rooted in a "contractual basis" is uncontroversial – it has long been the central task of the arbitrator to interpret a contract in accordance with party intent. But the Court left open the question of "what contractual basis may support a finding that the parties agreed to authorize class-action arbitration."[20] As Justice Ruth Bader Ginsburg pointed out in her dissent, the Court does not insist on express consent to class arbitration,[21] yet the decision provides little guidance as to what besides express consent *would* suffice. In the first part of its opinion, the Court stated that the arbitrators should have identified the rule of law that governed in the face of a silent contract. But the Court's later FAA-based contractual analysis appears to suggest that, because the parties stipulated that the contract was silent on the subject, the arbitrators could *not* have found any contractual basis for permitting class arbitration, regardless of what rule of law it applied.[22]

Perhaps the more fundamental question is this: Why did the Court choose this particular occasion to clarify its position on the FAA's requirement that an arbitration clause be construed in accordance with the parties' intent as reflected in their contract, and to pass judgment on the decision of an arbitration panel that was specifically requested by agreement of the parties to express its view on the silence of the clause? After all, there has been no shortage of occasions for the Court to revisit the scope of U.S. court review of arbitral awards, which it has declined to do on multiple occasions in recent years. It is

unlikely that the Supreme Court would be particularly interested in scaling back the traditional scope of court deference to arbitration rulings, or giving license to the courts to engage in a more rigorous review of arbitral awards. In fact, given that party consent has always been the fundamental premise on which arbitration is based, there is no reason to assume that the Court's ruling on contractual intent has really altered the landscape of U.S. review of arbitral awards at all.

Instead, the Court appears to be establishing a heightened standard of review specifically applicable to the question of whether an arbitration clause permits *class* arbitration. The Court's sensitivity to this issue is aptly demonstrated by the Court's lengthy discussion regarding the nature of class arbitration and the fundamental and crucial differences between it and non-class arbitration. Importantly, the Court distinguished the question presented in *Stolt-Nielsen* whether an arbitration clause permits class arbitration – from that presented by cases that have held that arbitrators have the authority to decide *procedural* issues in order to give effect to the parties' agreement. Unlike certain procedural questions, the Court cautioned that "[a]n implicit agreement to authorize class arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate."[23]

The Court's statements regarding the nature of class arbitration further indicate that it views class arbitration as fundamentally different from non-class arbitration. As the Court explained it, "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."[24] With class arbitration, the parties risk losing the benefits that arbitration is known for, such as "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes,"[25] which the parties to an arbitration agreement expect to obtain in return for "forgo[ing] the procedural rigor and appellate review of the courts."[26]

Finally, the Court recognized that class arbitration fundamentally alters the parties' risks and benefits, noting that "the commercial stakes of class-action arbitration are comparable to those of class-action litigation . . . even though the scope of judicial review is much more limited." This was aptly illustrated by the *Stolt-Nielsen* case itself: Whereas arbitration with AnimalFeeds alone involved a damages claim of approximately $500,000, class arbitration posed the potential for an award of over $6.5 billion. Ultimately, the Court concluded that these "fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration" were too much for the FAA to bear where the parties had not agreed in the contract to authorize class arbitration.[27]

In sum, while the U.S. Supreme Court's decision in *Stolt-Nielsen* likely leaves the scope of court review of arbitration awards substantively unchanged, it announces unequivocally that when it comes to class arbitration, parties and arbitrators alike should consider carefully the scope of the arbitration clause in question, and that class arbitration may not be imposed without a clear basis for concluding that the parties consented to it. In the wake of *Stolt-Nielsen*, parties desiring to permit class arbitration would be well advised to explicitly provide for it in their arbitration clause.

* * *

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1 Docket No. 08-1198, 559 U.S. __ , 130 S. Ct. 1758 (2010). Justice Sonia Sotomayor did not participate in the consideration or decision of the case.

2 AnimalFeeds and other similarly situated claimants initially brought class action lawsuits in various federal courts, which were ultimately consolidated before a Judicial Panel on Multi-District Litigation and transferred to the District of Connecticut, where Stolt and other respondents moved to compel arbitration. The U.S. Appeals Court for the Second Circuit held that the antitrust claims had to be arbitrated. *See JLM Ind. Inc. v. Stolt-Nielsen S.A.*, 387 F.3d 163 (2d Cir. 2004).

3 *See id.* at 1768.

4 *See* 9 U.S.C. § 10(a)(4) (2010).

5 *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 435 F. Supp. 2d 382, 385-86 (S.D.N.Y. 2006).

6 *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 95 (2d Cir. 2008) (internal citation and quotation marks omitted) (alteration in original). In so holding, the Second Circuit opined that the manifest disregard standard survived the Supreme Court's decision in *Hall Street Associates v. Mattel*, 552 U.S. 576, 585 (2008), not as an independent standard of review but as a "judicial gloss" on Section 10(a)(4)'s provision for *vacatur* "where the arbitrators exceeded their powers." *Stolt-Nielsen S.A.*, 548 F.3d at 94-95.

7 *See id.* at 95 (citing *Wise v. Wachovia Sec.*, LLC, 450 F.3d 265, 269 (7th Cir. 2006)).

8 *See id.* at 101.

9 *Id.*

10 *See Stolt-Nielsen S.A.*, 130 S. Ct. at 1768 n.3.

11 *Id.* at 1770.

12 552 U.S. 576, 585 (2008).

13 *Stolt-Nielsen S.A.*, 130 S. Ct. at 1767 (internal quotation marks omitted) (alteration in original).

14 *Id.* at 1768.

15 *Id.* at 1767-68, 69.

16 *Stolt-Nielsen S.A.*, 130 S. Ct. at 1773.

17 *Id.* at 1775 (emphasis in original).

18 *Id.* at 1770.

19 *Id.* at 1775.

20 *Id.* at 1776 n.10.

21 *Id.* at 1783 (Ginsburg, J., dissenting).

22 Some have posited that a contractual basis might be found if the arbitration clause refers to an arbitral institution whose rules contemplate class arbitration, such as the AAA. But the AAA's rules expressly state that the arbitrator shall not consider their existence "to be a factor either in favor of or against permitting the arbitration to proceed on a class basis. AAA Supplementary Rules on Class Arbitration, Clause 3 ("Construction of the Arbitration Clause"). Moreover, it seems unlikely that such references would rise to the level of contractual consent required by the Court.

23 *Stolt-Nielsen S.A.*, 130 S. Ct. at 1775.

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.* at 1776.

Extending Attorney-Client Privilege Protection To Communications Between Trade Associations And Their Counsel

BY JOANNE L. WERDEL AND SUSAN H. TORZILLI

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On September 28, 2010, Magistrate Judge John Facciola of the U.S. District Court for the District of Columbia ruled in *In re: Rail Freight Fuel Surcharge Antitrust Litigation* that the attorney-client privilege applies to confidential communications between a trade association's lawyers and its members' employees and agents, and that trade association members do not waive the privilege by sharing confidential communications with other members.

In civil antitrust litigation against the four largest U.S. freight railroads, the plaintiffs sought to compel production of documents involving confidential communications between the trade association's in-house counsel and trade association members. The plaintiffs also sought to compel communications among association members reflecting those confidential communications. Magistrate Judge Facciola found that the proposition that association members have an attorney-client relationship with the association's lawyer is "intuitively correct" and that the attorney-client privilege applies to a trade association in the same manner it would a corporation.

Factual Background

The AAR. The Association of American Railroads ("AAR") is a trade association for the North American railroad industry whose members include major freight railroads, Amtrak, smaller railroads and others. The AAR works on a wide variety of issues related to the rail industry, including safety, security, environmental matters, economic regulation, improved efficiency of the rail network and other matters. The AAR has a small full-time staff, but much of its work is conducted through various industry committees. AAR committees are composed primarily of employees of member railroads selected based on their expertise in a particular subject matter. AAR staff typically provide legal and administrative support to AAR committees.

The Alleged Violation. The plaintiffs alleged that the defendants, four major freight railroads, agreed to apply fuel surcharges to rail freight traffic and agreed on the manner in which the fuel surcharges would be applied, in violation of the antitrust laws.

The Requested Documents. The plaintiffs moved to compel the production of documents shared among the AAR and its members, including (1) documents originating with in-house counsel that were then shared with other defendants and other members of AAR and (2) documents reflecting confidential communications between counsel to the AAR and an AAR member.[1] The communications at issue related to AAR committee business and legal advice that AAR committees and members sought from AAR's in-house counsel.[2]

Magistrate Judge Facciola's Ruling

Following an *in camera* review, Magistrate Judge Facciola ruled that the attorney-client privilege applies to confidential communications between a trade association's in-house counsel and the association's members and agents[3] and that the privilege is not waived when one member shares such privileged communications with another member.

In ruling that the relationship between the AAR's in-house counsel and the AAR's members and agents falls within the attorney-client privilege, Magistrate Judge Facciola compared trade associations to corporations. He reasoned that "[d]enying those persons [association members] that privilege when they choose to do their business as an association [instead of a corporation] literally exalts the form of their association over the substance of the lawyer's work and defeats, for no good reason, their expectation that the lawyer will maintain their confidences and secrets as she is obliged to do."[4]

The court further ruled that there is no waiver when trade association members "shar[e] the lawyer's advice among themselves," because the association's lawyer owed each member the same duty to maintain confidences, noting that "[s]uch dissemination cannot possibly be described as a purposeful and knowing surrender of the privilege."[5]

Implications Of This Decision

Magistrate Judge Facciola's ruling clarifies that members of a trade association may be treated as clients of the trade association's lawyer for privilege. The ruling may also have broader significance because there is currently very little authority on the question of whether the attorney-client privilege applies in this context.[6] Some courts have recognized that the attorney-client privilege is potentially applicable to communications between a trade association's lawyer and the association's members, but have not formulated a blanket rule regarding privilege and trade associations.[7]

This decision is also significant because the U.S. Court of Appeals for the District of Columbia Circuit has tended to construe the attorney-client privilege strictly.[8] Notwithstanding this strict construction, Magistrate Judge Facciola found "no good reason" to defeat trade association members' expectations that an association's lawyer will maintain their confidences.[9]

* * *

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1 *In re: Rail Freight Fuel Surcharge Antitrust Litig.*, MDL No. 1869, Misc. No. 07-489 (PLF/JMF/AK) (D.D.C. Sept. 28, 2010) (Dkt. No. 437), Mem. Order at 2.

2 *Id.*

3 *Id.* at 3.

4 *Id.*

5 *Id.* at 4.

6 *Id.* at 3 (citing Edna Selen Epstein, *The Attorney-Client and the Work-Product Privilege* 190 (2007)).

7 *See, e.g., Harper-Wyman Co. v. Conn. Gen. Life Ins. Co.*, No. 86 C 9595, 1991 WL 62510, at *5 (N.D. Ill. Apr. 17, 1991) (finding that the expectation of confidential communications between an association member and the association's lawyer as "potentially applicable" but noting that the analysis must be on a case-by-case basis); *Robinson v. Texas Auto. Dealers Ass'n*, 214 F.R.D. 432, 451-52 (E.D. Tex. 2003) ("Accordingly, while members of a trade association may certainly establish an attorney-client relationship with the trade association's attorney(s), it must be determined on a case-by-case basis whether those members actually took the necessary action to do so.").

8 Mem. Order at 5.

9 *Id.* at 3.

Cleary Gottlieb Wins Appellate Victory For The Dow Chemical Company

Cleary Gottlieb won a victory for The Dow Chemical Company in the U.S. Court of Appeals for the Second Circuit, when the court affirmed in all respects the trial verdict that Cleary Gottlieb had won for Dow before U.S. District Judge Alvin Hellerstein. The case arose out of Dow's divestiture of its ethanolamines plant in Plaquemine, Louisiana to Ineos Oxide at the time of Dow's merger with Union Carbide in 2000. Ineos claimed that Dow breached a 35-year agreement under which Dow supplies ethylene oxide to Ineos for use at the ethanolamines plant. Contending that Dow failed to offer Ineos an opportunity to participate in an alleged capacity expansion project at Dow's ethylene oxide plant, Ineos sought tens of millions of dollars in damages and additional supply of product at below manufacturing cost for the 25 plus years remaining on the contract. Following a ten day bench trial, Judge Hellerstein ruled that Ineos was entitled to only nominal damages of $100 and no additional product. The Court of Appeals affirmed Judge Hellerstein's decision in its entirety, holding that Ineos suffered no monetary damages and rejecting Ineos's claim for specific performance.

Cleary Gottlieb Wins Dismissal Of $500 Million Securities Fraud Action Against Countrywide Financial Corporation

Cleary Gottlieb won the dismissal for mortgage company Countrywide Financial Corporation of a securities fraud action filed by a hedge fund whose investment in Countrywide was once valued at over $500 million, alleging that Countrywide misrepresented its liquidity and viability prior to being acquired by Bank of America Corporation in 2008. In dismissing the complaint with prejudice, U.S. District Judge Richard Berman held that Countrywide "clearly disclosed" certain allegedly omitted information concerning one of its most-troubled mortgage products and that the hedge fund failed to allege that Countrywide knew its disclosures were fraudulent at the time they were made.

Cleary Gottlieb Successfully Defends The Republic Of Iraq In An International Arbitration

Cleary Gottlieb successfully defended the Republic of Iraq in proceedings brought by Transportmaschinen Handelshaus GmbH ("TMH"), a German state-owned company in liquidation, before an arbitral tribunal constituted under the rules of the International Arbitration Center of the Austrian Federal Economic Chamber. The dispute involved issues of compliance with the UN sanctions enacted against the Saddam Hussein regime during the 1990s.

Cleary Gottlieb demonstrated that the financial arrangement on which the claims were based was a scheme to release frozen Iraqi assets in violation of the financial sanctions imposed by the UN Security Council, Germany and Austria.

The arbitral tribunal dismissed all of TMH's claims and awarded Iraq attorneys' fees and costs.

Cleary Gottlieb Wins Grant Of Asylum For Tibetan Monk

After a long and complex process, Mr. T, a Tibetan Buddhist monk, was granted asylum in the United States with the assistance of Cleary Gottlieb lawyers. Mr. T is a high-ranking Tibetan monk who suffered serious persecution by the Chinese government for his religious beliefs while living in Tibet. Mr. T was instrumental in helping the Gyalwa Karmapa, the highest ranking Buddhist leader after the Dalai Lama, to flee Tibet.

Mr. T soon thereafter sought refuge in the United States. After the renewal of his religious worker visa, under which he had been living and working legally in the United States, was rejected, Mr. T applied for political asylum. The case was researched, compiled and presented to the Asylum Officer through the pro bono efforts of another law firm. When these attorneys had to disengage Mr. T because of conflicts, the Cleary Gottlieb team took on his representation. The Cleary Gottlieb team secured Mr. T's employment authorization and prepared for further asylum proceedings if necessary. Mr. T was granted asylum and is thrilled that he can legally remain in New York and open his Tibetan spirituality center in Queens.

Cleary Gottlieb Wins Dismissal Of Second Antitrust Suit Against Toho Tenax

Cleary Gottlieb won dismissal on statute of limitations grounds of a lawsuit accusing Toho Tenax of conspiring with other carbon fiber manufacturers to fix prices in the 1990s. This decision, in federal court in California, followed the dismissal of a parallel case filed in California state court. The plaintiff relied on a tolling agreement signed in 2003 to preserve its claims beyond the four-year statute of limitations. The district court agreed with Toho Tenax that the plaintiff terminated its participation in the tolling agreement in 2007 when it sued another party to the agreement, and not in 2010 when it sued Toho Tenax. In addition, the court sided with Toho Tenax in holding that the tolling agreement was limited to four years under a California statute, and therefore expired in 2007.

Cleary Gottlieb Wins Rulings For People's United Bank, Defeating Injunctions Against Its Renaming Of Newly-Acquired Banks

Cleary Gottlieb won a victory for Connecticut-based People's United Bank when U.S. District Judge Peter Dorsey rejected the request by Massachusetts-based PeoplesBank for a preliminary injunction against People's United's planned renaming of two banks it had recently acquired in western Massachusetts with the "People's United Bank" trademark. PeoplesBank had complained that use of the "People's United Bank" name in western Massachusetts would cause consumers to be confused that the banks were associated with PeoplesBank, and thereby infringe PeoplesBank's trademark rights in its name. Following a six day evidentiary hearing, the court ruled that PeoplesBank had failed to satisfy any of the requirements for a preliminary injunction, noting in particular its failure to show that it would suffer irreparable injury without an injunction. The court also rejected PeoplesBank's contention that it was likely to succeed on its trademark infringement claim, noting that the word "people" is commonly used in bank names (it is currently used by 159 banks nationwide), the banks' logos are dissimilar, consumers' sophisticated decision-making in choosing among banks renders any name-based confusion unlikely and the two banks already had a long history of coexisting without actionable consumer confusion in their shared cross-border market.

Soon after Judge Dorsey's upholding of People's United's use of its name in western Massachusetts, Cleary Gottlieb won a second victory for People's United by defeating an attempt by Peoples Federal Savings Bank to prevent People's United from using its name in eastern Massachusetts. In mid-April, People's United acquired branches in the greater Boston area townships of Lowell, Andover and Marlborough, when the Federal Deposit Insurance Corporation selected People's United to assume the deposits and banking operations of the failed Butler Bank. People's United immediately rebranded these branches with its own distinctive name and logo, reassuring customers that they can rely on People's United's strength and stability. Peoples Federal Savings Bank, which also operates branches in greater Boston, later filed a lawsuit in federal district court and moved for a preliminary injunction to block People's United from using its name in eastern Massachusetts, claiming that such use would cause consumer confusion.

On August 9, Judge Nathaniel Gorton of the District of Massachusetts denied Peoples Federal's motion, ruling that it had not met any of the requirements for injunctive relief. Most importantly, Judge Gorton echoed Judge Dorsey's prior ruling in concluding that Peoples Federal had failed to demonstrate a likelihood of success on its claim that People's United's use of its name would cause consumer confusion.

Cleary Gottlieb Obtains Waiver Of Commitment For Sky Italia

Cleary Gottlieb successfully represented Sky Italia before the EU Commission in proceedings involving a request for a waiver from the implementation of a commitment preventing it from participating in the public tender for the allocation of nationwide digital terrestrial television (DTT) frequencies in Italy. The commitment was given in 2003, when News Corporation acquired control of Telepiù Spa and Stream Spa, which gave rise to a new digital satellite television company named Sky Italia. Under the commitment Sky Italia was not allowed to operate as a DTT infrastructure owner. The decision will allow the company to bid for one multiplex and to use it only to broadcast free-to-air TV. The restriction not to use the multiplex for pay-TV will be limited in time.

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