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Privilege Caselaw Developments

In our fifth in a series of alerts on the law of privilege, we present several recent court cases considering the following important and recurring issues in the law of privilege: (1) the application of the attorney-client privilege to communications with outside consultants; (2) the applicability of the fiduciary exception to the attorney-client privilege; (3) the scope of the common interest doctrine (two different cases and two different outcomes); (4) choice of privilege law in a multi-district products liability litigation, and also the adequacy of the privilege log entries; and (5) application of the work product protection to litigation funding agreements.

1. Communications with Outside Consultants: *Frank* v. *Morgans Hotel Group Management LLC*, No. 154100/2016, 116 N.Y.S.3d 889 (N.Y. Sup. Ct. 2020)

In the corporate context, the attorney-client privilege generally extends to communications between a corporation's employees and the corporation's attorneys for the purpose of providing or obtaining legal advice.[1] The attorney-client privilege can also protect otherwise qualified communications between an outside consultant for the corporation (or another type of contractor) and the corporation's attorneys if the consultant is the "functional equivalent" of an employee, i.e., if the consultant is, "functionally speaking, acting as a corporate employee rather than a fully independent contractor."[2]

Frank v. *Morgans Hotel Group Management LLC*, 116 N.Y.S.3d 889 (N.Y. Sup. Ct. 2020), provides an example of a situation in which an outside consultant was deemed to be the "functional equivalent" of an employee for the purposes of the attorney-client privilege.

The plaintiff filed suit in New York state court, alleging that she sustained personal injuries by falling at a bar owned by Morgans Hotel Group LLC ("Morgans").[3] In discovery, Morgans identified non-party Steven Benjamin as a person with knowledge.[4] Benjamin had been employed by Morgans as its director of risk management at the time of the fall.[5] Since then, however, Morgans eliminated Benjamin's position and

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1 *Frank* v. *Morgans Hotel Grp. Mgmt. LLC*, 116 N.Y.S.3d 889, 891 (N.Y. Sup. Ct. 2020).

2 *Id.* at 891–92.

3 *Id.* at 890–91.

4 *Id.* at 891.

5 *Id.*

instead hired Benjamin as a consultant on a contract basis.[6] The question before the court was whether Benjamin's correspondence with Morgans' attorneys was protected by the attorney-client privilege after he transitioned from a Morgans employee to an outside consultant.[7]

The court held that it was because Benjamin was "the functional equivalent of a Morgans employee."[8] The court noted that:

- Benjamin was previously employed by Morgans for eleven years as its director of risk management and, after his position was eliminated, he was immediately retained on a contract basis as a consultant with the same title and with many of the same duties;[9]
- Benjamin had "a Morgans email address, a Morgans phone number, and access to a Morgans file server";[10]
- Benjamin was responsible for significant corporate functions, including negotiating the terms and conditions of Morgans' insurance policies, managing Morgans' insurance programs nationwide, and working with Morgans' financial staff on insurance-related budgeting and loss-forecasting issues;[11]
- Benjamin was "the only individual performing the duties and functions of the director of risk management role for Morgans" and "the only individual at Morgans with the requisite knowledge and experience of its insurance programs and the overall landscape of claims and litigation brought against it";[12]
- Benjamin retained some corporate decision-making authority, including selecting defense counsel and making certain settlement offers for Morgans;[13]

6 *Id.* at 891, 892–93.

7 *Id.* at 891.

8 *Id.* at 892.

9 *Id.* at 892–93.

10 *Id.* at 893.

11 *Id.*

12 *Id.*

13 *Id.*

- Benjamin reported to Morgans' general counsel and had a direct line of contact with Morgans' chief operating officer;[14] and
- Although other individuals beside Benjamin had knowledge of the plaintiff's accident, that fact had little bearing on whether Benjamin was a de facto employee because other individuals at Morgans would have been likely to have similar knowledge regardless of whether Benjamin was operating as an independent third party or a de facto employee.[15]

This decision illustrates the many factors courts consider in determining whether communications with an outside consultant, or another type of contractor, may be protected by the attorney-client privilege under the "functional equivalence" doctrine. The more like a full-time employee an outside contractor appears—in other words, the more it appears that treating the contractor as an independent third party "would exalt form over substance"[16]—the more likely a court will find that the "functional equivalence" doctrine applies.

2. The Fiduciary Exception: *Scalia* v. *Reliance Trust Co.*, No. 17-cv-4540, 2020 WL 2111368 (D. Minn. May 4, 2020)

The "fiduciary exception" to the attorney-client privilege prevents a trustee from withholding attorney-client communications related to the exercise of the trustee's fiduciary duties from the beneficiaries of the trust.[17] The rationale for the exception is that the fiduciary has a duty to disclose such communications to the trust and that the fiduciary is not the attorney's "real client," but rather a representative of the beneficiaries' interests.[18] The fiduciary exception has historically been applied in the context of common-law trusts, and an increasing number of courts have also applied the exception in the context of Employee Retirement Income Security Act of 1974 ("ERISA") fiduciaries.[19] A recent case in the District of Minnesota, *Scalia* v. *Reliance Trust Co.*, 2020 WL 2111368 (D. Minn. May 4, 2020), analyzed the fiduciary exception in a lawsuit challenging the sale of a company's stock under ERISA.

In *Scalia*, the Secretary of the Department of Labor challenged the sale of all Kurt Manufacturing Company ("KMC") shares held by KMC's former president to KMC's Employee Stock Ownership Plan (the "ESOP")—called the "ESOP Transaction."[20] The Secretary of Labor brought an ERISA action against KMC, the ESOP,

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14 *Id.*

15 *Id.* at 893–94.

16 *Id.* at 893.

17 *Scalia* v. *Reliance Trust Co.*, 2020 WL 2111368, at *6 (D. Minn. May 4, 2020).

18 *Id.*

19 *Id.*

20 *Id.* at *1–3.

three KMC directors who had served as trustees of the ESOP before the ESOP Transaction, and the company that had served as the ESOP's trustee in connection with the ESOP Transaction for breach of fiduciary duty and prohibited transactions.[21]

The Secretary of Labor subpoenaed all documents relating to the ESOP Transaction from KMC's corporate ERISA counsel.[22] KMC's corporate ERISA counsel objected to the subpoena under the attorney-client privilege.[23] The Secretary of Labor filed a motion to compel against the director defendants and KMC's corporate ERISA counsel.[24] The Secretary argued that he was entitled to those documents because the ESOP was a shareholder of KMC at the time of the communications and the "fiduciary exception" applied to the communications.[25]

The director defendants opposed the motion compel, arguing that there was no indication that the ESOP was the "real client" of KMC's corporate ERISA counsel.[26] They also argued that the fiduciary exception did not apply because none of the director defendants were trustees of the ESOP at the time of the communications.[27] Both the director defendants and KMC's corporate ERISA counsel also argued that the fiduciary exception did not apply because the communications did not contain advice related to fiduciary functions.[28]

The court agreed with the director defendants that KMC, not the ESOP beneficiaries, was the attorney's "real client," because KMC paid the attorney's fees, the director defendants were not trustees of the ESOP at the time of the communications, and an *in camera* review revealed that the communications were for the benefit of KMC rather than the ESOP.[29] The court also disagreed with the Secretary of Labor that the ESOP and Secretary were entitled to the communications merely because the ESOP was a shareholder of KMC when the communications occurred.[30]

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21 *Id.*

22 *Id.* at *1, *3.

23 *Id.* at *4.

24 *Id.*

25 *Id.* at *7.

26 *Id.* at *8.

27 *Id.*

28 *Id.*

29 *Id.* at *9.

30 *Id.*

But the court also rejected the defendants' argument that, because the director defendants were not ESOP trustees when the communications occurred, the fiduciary exception should not apply.[31] The court instead undertook an *in camera* review to determine whether the fiduciary exception applied to each communication. It held that "[t]he fundamental question for whether the fiduciary exception applies is whether the communication is on matters of plan administration" (e.g., investing or liquidating plan assets), which would not be protected, or whether the communication involves legal advice on non-fiduciary matters such as settlor functions (e.g., modifying a plan), which would be protected.[32] Ultimately, the court concluded that the communications at issue were privileged and not subject to the fiduciary exception because they involved the following non-fiduciary or settlor matters: drafting and revising documents related to the ESOP Transaction, choosing a new ESOP trustee, proposed amendments to the ESOP, and liability and protection of KMC.[33]

Scalia demonstrates that the fiduciary exception to the attorney-client privilege, like so many of the other attorney-client privilege exceptions in the corporate context, requires a fact-specific inquiry regarding the relationship among the parties to the communications and the topics being discussed.

3. The Common Interest Doctrine:

a. *Wayne Land & Mineral Group, LLC* v. *Delaware River Basin Commission*, No. 3:16-cv-00897, 2020 WL 762835 (M.D. Pa. Feb. 14, 2020)

The common-interest doctrine is an exception to the rule that disclosing attorney-client privileged communications to third parties waives the privilege. This recent decision addresses under what circumstances the common-interest doctrine may shield communications between government agencies. The decision is relevant to private litigants who regularly deal with agencies at various levels of government and may be entitled to discovery of inter-agency communications over which privilege has been waived. It also illustrates important differences between the common interest doctrine in different circuits, to which litigants should pay attention.

The Delaware River Basin Commission ("Commission") is a regional government agency for the conservation and management of water and related natural resources in the Delaware River Basin.[34] Plaintiff Wayne Land and Mineral Group LLC ("Wayne") owns 75 acres of land located in the basin.[35] When the Commission asserted that Wayne needed its approval before Wayne could start the construction of a

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31 *Id.* at *11.

32 *Id.* at *7.

33 *Id.* at *12–14.

34 *Wayne Land & Mineral Grp., LLC* v. *Del. River Basin Comm'n*, 2020 WL 762835, at *2 (M.D. Pa. Feb. 14, 2020).

35 *Id.* at *1.

natural gas well on Wayne's property, Wayne sued for a declaration that the Commission lacked the authority to review or preclude the development of the well.[36]

This decision resolved, among other things, a discovery dispute in which Wayne moved to compel disclosure of a 1965 letter sent by the Commission's Executive Director, a non-lawyer, to non-lawyers at other government agencies.[37] The letter included, as an attachment, a privileged memorandum authored by the Commission's General Counsel.[38] Wayne claimed the memorandum was relevant to determining the scope of the Commission's authority to review construction projects and that the memorandum's privilege was waived when it was sent to third parties outside the Commission.[39] The Commission argued that the privilege was not waived under the common-interest doctrine because the governmental agencies and personnel that received the memorandum shared a common interest with the Commission.[40]

In analyzing the motion, the court relied on the Third Circuit's test for general application of the common-interest doctrine. The court did not view the various agencies involved as a singular government entity free to share privileged material among themselves.

The court held that the communication was not protected by the common-interest doctrine for two independent reasons. First, under applicable Third Circuit law, the common-interest exception avoids a privilege waiver only where communications are exchanged between the parties' attorneys, not the parties themselves.[41] This requirement is rooted in the origins of the common-interest doctrine, which was originally intended to "allow *attorneys* to coordinate their clients' criminal defense strategies."[42] The court concluded that, because the 1965 letter was sent by the Commission's Executive Director, a non-lawyer, to non-lawyers at third-party agencies, the common-interest doctrine did not apply.[43]

Second, the court concluded that the agencies at issue did not share a common interest with respect to the memorandum. It distinguished the case relied on by the Commission, *Animal Welfare Institute* v. *National Oceanic & Atmospheric Administration*, 370 F. Supp. 3d 116 (D.D.C. 2019), because the three agencies at issue there—the National Oceanic and Atmospheric Administration ("NOAA"), the Marine Mammal Commission ("MMC"), and the Fish and Wildlife Services ("FWS")—shared "a substantial identity of legal

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36 *Id.*

37 *Id.* at *5.

38 *Id.* at *5.

39 *Id.*

40 *Id.*

41 *Id.* at *7 (citing *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 364 (3d Cir. 2007)).

42 *Teleglobe*, 493 F.3d at 364–65.

43 *Wayne Land*, 2020 WL 762835, at *7.

interest."[44] This stemmed from the fact that under the Marine Mammal Protection Act, the MMC had oversight over other agencies' compliance with the Act, and both NOAA and the FWC shared similar responsibilities.[45]

The court here found nothing similar because the agencies with whom the memorandum was shared had no oversight or responsibilities as to the Delaware River Basin.[46] The court also discussed and rejected the Commission's separate claim that the letter is entitled to the deliberative-process privilege.[47]

Wayne Land serves as a reminder that the "government" is not a singular entity and that inter-agency communications may waive the attorney-client privilege. Private litigants that become aware of inter-agency communications should consider whether privilege may have been waived, especially in cases where communications are sent by non-lawyers or a recipient agency lacks statutory oversight.

b. *Bennett* v. *CIT Bank, N.A.*, No. 2:18-cv-00852, 2020 WL 108377 (N.D. Ala. Jan. 9, 2020)

Another recent case analyzing the common-interest doctrine is *Bennett* v. *CIT Bank, N.A.*, 2020 WL 108377 (N.D. Ala. Jan. 9, 2020). The question before the court in *Bennett* was whether Alabama's common-interest doctrine would apply to a privileged communication forwarded by the client to a third party with a common legal interest outside the presence of counsel.[48]

Because there were no cases directly on point from either the Alabama Supreme Court or the Eleventh Circuit, the court looked to how other courts had applied Alabama's common-interest doctrine and the federal common-interest doctrine.[49] The *Bennett* court determined that the common-interest doctrine should apply regardless of whether the privileged communications were made in the presence of the qualifying third party or were later disclosed by the client to the qualifying third party outside the presence of counsel.[50]

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44 *Id.* (quoting *Animal Welfare Inst.* v. *Nat'l Oceanic & Atmospheric Admin.*, 370 F. Supp. 3d 116, 133 (D.D.C. 2019)).

45 *Id.* (citing *Animal Welfare*, 370 F. Supp. 3d at 131–34).

46 *Id.* at *8.

47 *Id.* at *13. This alert only discusses the court's analysis of the common-interest doctrine.

48 *Bennett* v. *CIT Bank, N.A.*, 2020 WL 108377, at *1–3 (N.D. Ala. Jan. 9, 2020).

49 *Id.* at *4.

50 *Id.* at *4–8.

The different results reached in *Bennett* and *Wayne Land* based on the presence or absence of counsel on communications reflect that litigants should carefully consider the governing law in each jurisdiction regarding common-interest communications before sharing privileged information with a third party.

4. Choice of Law and Privilege Log Requirements: *In re 3M Combat Arms Earplug Products Liability Litigation*, No. 3:19-md-2885, 2020 WL 1321522 (N.D. Fla. Mar. 20, 2020)

In re 3M Combat Arms Earplug Products Liability Litigation, 2020 WL 1321522 (N.D. Fla. Mar. 20, 2020), analyzed a variety of attorney-client and work product privilege related issues in the context of a multi-district products liability litigation. Of particular note are (a) the court's analysis of when the forum state's law of privilege governs in a multi-district products liability litigation involving state law claims, and (b) the court's reluctance to impose bright line privilege log requirements.

Choice of Privilege Law. In civil federal cases, state privilege law applies to claims and defenses that arise under state law, while federal privilege law applies to claims and defenses that arise under federal law.[51]

In *3M*, the plaintiffs' state-law products liability claims were consolidated in a Florida federal court as a multi-district litigation based on diversity subject matter jurisdiction, but the defendants' federal government contractor defense had been at the forefront of the litigation.[52] One question before the court was whether it was required to apply a "heightened level of scrutiny" to the defendants' assertions of privilege regarding communications with their in-house counsel, which is required by Florida's privilege law (but not federal privilege law).[53]

The court concluded that although state law "supplies the rule of decision" for the plaintiffs' state law claims, the plaintiffs had "fail[ed] to demonstrate that *Florida's* attorney-client privilege governs [the defendants'] communications."[54] The court explained that "'where the communications at issue are between individuals foreign to the forum, whose relationship is centered outside of the forum, and whose communications regard subject matter not centered in the forum, the forum's privilege law is not controlling,' and, instead, the [c]ourt must apply 'the law of the state with the most significant relationship to the communication.'"[55]

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51 *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, 2020 WL 1321522, *4 (N.D. Fla. Mar. 20, 2020) (summarizing Fed. R. Evid. 501).

52 *Id.*

53 *Id.* at *3–4.

54 *Id.* at *4.

55 *Id.* (quoting *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, 2011 WL 1375011, at *8 (S.D. Ill. Apr. 12, 2011)).

Because the plaintiffs did not dispute that Florida had no significant relationship to the privileged communications at issue, the court held that Florida's attorney-client privilege laws did not govern those communications.[56]

Privilege Log Requirements. The court also rejected three challenges to the adequacy of the defendants' privilege log.

First, the court held that the defendants were not required to include the number of pages for each entry on its log.[57]

Second, the court held that the defendants were not required to itemize each email in a withheld email chain, in part because such a requirement would pose a risk of revealing privileged information.[58]

Third, the court held that the defendants were not required to substantiate their assertions of work product privilege by identifying the specific litigation that had been anticipated on the privilege log; the court noted that the plaintiffs should be able to surmise that information on their own and, if they could not, the defendants had agreed to provide that information for particular entries.[59]

This decision demonstrates that while parties should take care to ensure that privilege logs reflect sufficient detail for the parties and the court to assess claims of privilege, courts are reluctant to set forth additional minimum requirements regarding the format and structure of privilege logs that may be unduly burdensome or reveal privileged information.

5. Discoverability of Litigation Funding Agreements: *Continental Circuits LLC* v. *Intel Corp.*, No. CV16-02026, 2020 WL 416109 (D. Ariz. Jan. 27, 2020)

As litigation funding agreements become more prevalent, their discoverability is also becoming an important question in an increasing number of lawsuits. Litigants have sought discovery of such agreements to combat a David vs. Goliath narrative at trial, as evidence of the value of the litigation, to demonstrate potential bias or prejudice of witnesses who may appear at trial that have a stake in the litigation, and to identify any jurors who may have a relationship with a litigation funder.[60]

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56 *Id*.

57 *Id*. at *2–3.

58 *Id*. at *3.

59 *Id*.

60 *Cont'l Circuits LLC* v. *Intel Corp.*, 2020 WL 416109, *2 (D. Ariz. Jan. 27, 2020).

In *Continental Circuits LLC* v. *Intel Corp.*, 2020 WL 416109 (D. Ariz. Jan. 27, 2020), the District of Arizona analyzed the discoverability of the plaintiff's litigation funding agreements in a patent infringement suit brought by a non-practicing entity. The court held that while the litigation funding agreements' existence was not itself privileged, the funding agreements were protected work product because they were created "because of" the litigation they would fund.[61]

The court explained that even if the litigation funding agreements served a "dual purpose" of providing the non-practicing entity with sufficient funds to conduct its business, that would not defeat work product protection because "any business-sustaining purpose of the litigation funding agreements in this case is 'profoundly interconnected' with the purpose of funding the litigation."[62] The court also held that the work product protection had not been waived by the plaintiff's disclosure of the litigation funding agreements to the litigation funder because the agreements included confidentiality provisions and the litigation funder shared a common interest with the plaintiff.[63]

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61 *Id.* at *3–4.

62 *Id.*

63 *Id.* at *5.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Robert A. Atkins
+1-212-373-3183
ratkins@paulweiss.com

Craig A. Benson
+1-202-223-7343
cbenson@paulweiss.com

Jessica S. Carey
+1-212-373-3566
jcarey@paulweiss.com

Yahonnes Cleary
+1-212-373-3462
ycleary@paulweiss.com

William B. Michael
+1-212-373-3648
wmichael@paulweiss.com

Jane B. O'Brien
+1-202-223-7327
jobrien@paulweiss.com

Jacqueline P. Rubin
+1-212-373-3056
jrubin@paulweiss.com

Liza M. Velazquez
+1-212-373-3096
lvelazquez@paulweiss.com

Associates Benjamin Bergmann, Kirsten Dedrickson, and Stefan Geirhofer contributed to this Client Memorandum.