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FEDERAL E-DISCOVERY

'Pearlstein' Offers a Primer On Privilege and Waiver


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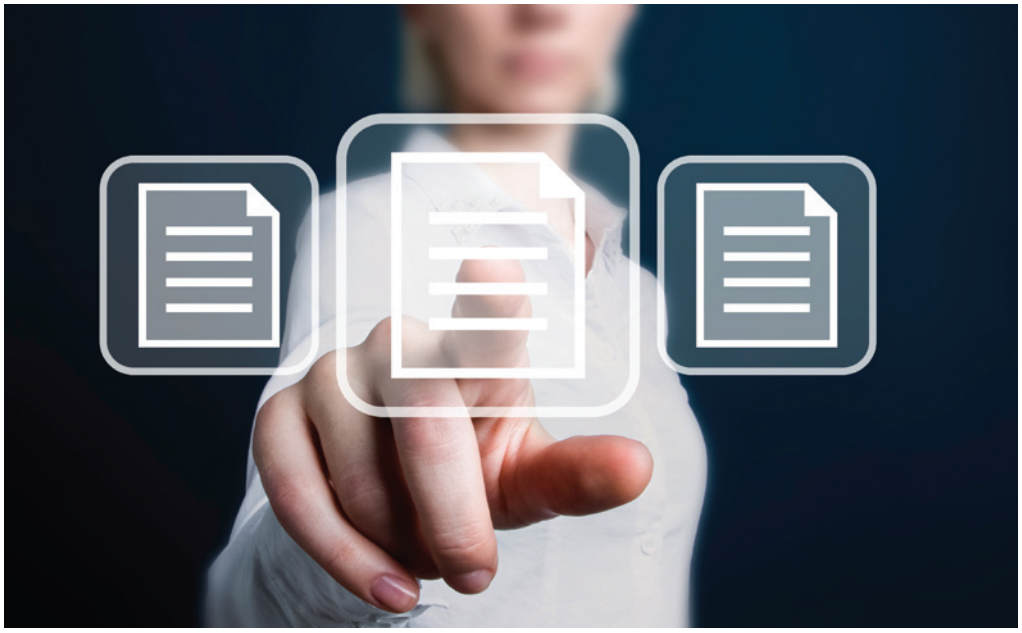
We are confident that any survey of practicing lawyers would show "privilege logs," "legal holds," and "subject-matter waiver" very low on any list of "things I enjoy most about the practice of law." Nonetheless, those are exactly the topics that Magistrate Judge Katharine H. Parker of the U.S. District Court for the Southern District of New York was forced to rule on in *Pearlstein v. BlackBerry Ltd.*, 2019 WL 1259382 (S.D.N.Y. Mar. 19, 2019).

In this putative class action, the plaintiffs alleged that defendant BlackBerry committed securities fraud when it purportedly made material misrepresentations and omissions regarding the sales performance of its Z10 smartphone. The plaintiffs alleged these supposed misstatements artificially inflated the company's stock price.

During discovery, a dispute arose concerning BlackBerry's assertion of privilege over certain documents. The plaintiffs moved to compel production of communications involving BlackBerry's former chief legal officer (also a named defendant) that had been designated as attorney-client privileged, as well as additional documents on BlackBerry's privilege log, with some also marked as attorney work product.



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Privilege Log

In one of their motions, as part of seeking to compel production of documents from BlackBerry's privilege log, the plaintiffs criticized the adequacy of the log itself, referring to it as "inadequate and vague as a whole." *Id.* at *2. The requirement to produce a privilege log stems from Federal Rule of Civil Procedure 26(b)(5) and, as applicable for this matter, Local Civil Rule 26.2, which "specifies that the party must provide complete identifying information, date, type of document, and subject matter in a privilege log at the time the party responds to discovery." *Id.* at *3 (citation omitted). Additionally, to overcome privilege log challenges, the party withholding the documents must ensure that each corresponding privilege log entry contains enough information to satisfy every element of the privilege designation.

Judge Parker analyzed BlackBerry's privilege log and provided a detailed accounting of the log's format and fields. "The log is on an excel spreadsheet that lists the document control number; a document class; if the document is an email chain, the date of the document and the date of the parent email; author; recipient; individuals

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copied and blind copied (if applicable); an indicator as to whether any of the persons who authored, sent, or received the document is an attorney; the general subject of the document; a general description of the document; and the privilege asserted." *Id*. at *11. As such, Parker concluded that the log was compliant with the applicable "Local Rule and this court's prior directions" and found the plaintiffs' protests as to the adequacy of the privilege log to be "without merit." *Id*.

Litigation Hold Memo

In addition to challenging the sufficiency of the privilege log, the plaintiffs also sought to compel production of certain documents listed on the log, claiming they were improperly designated as privileged. Some of these documents were submitted for in camera review; one was a litigation hold memorandum designated as subject to both the attorney-client privilege and the work product doctrine.

Noting that "[t]here are few cases in this Circuit discussing applicability of the attorney-client privilege and work product doctrine to litigation hold notices[,]" *id.* at *18, Parker turned to the guidance of other circuit courts. She concluded that a legal hold memo should not be protected automatically; "[r]ather, the content and circumstances of its issuance, as well as the context of the litigation, will determine applicability of any privilege or work product protection." *Id.* at *19.

Here, the litigation hold memo was prepared by BlackBerry's internal legal department based on counsel's mental impressions, was distributed to select individuals in anticipation of litigation, provided legal advice in the form of a description of legal obligations, reflected work product in the description of potentially relevant information, and was labeled "Privileged & Confidential," thereby implying expectations of confidentiality. As a result, Parker determined that the memo was both privileged and attorney work product and that no basis for waiver existed. She therefore denied the plaintiffs' motion to compel.

Rule 502(a)

The plaintiffs also moved to compel production of documents on BlackBerry's privilege log that concerned sales, return rates, and customer complaints about the Z10 smartphone. BlackBerry had voluntarily provided information on these topics to the Securities and Exchange Commission (SEC) as part of its effort to persuade the SEC to investigate a third party that had issued a negative report about the Z10. The plaintiffs argued "that because BlackBerry shared information about Z10 returns with the SEC, it has waived any claim of privilege, at least with respect to factual information about Z10 sales and returns." *Id*. at *17.

Privilege and waiver issues can be especially vexing, particularly when amplified in the e-discovery context. In 'Pearlstein,' Judge Parker helps unravel some of these issues, presenting what amounts to a primer on these topics.

Federal Rule of Evidence 502(a) governs whether subject matter waiver has occurred after a selective waiver to a government agency. It states, "When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together." Fed. R. Evid. 502.

The applicable Advisory Committee note adds, "a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary." Fed. R. Evid. 502 Advisory Committee's note (revised 11/28/2007).

While Judge Parker was satisfied that the documents were protected by the attorney-client privilege, she explained that this situation met the requirements of the exception described in Rule 502(a). "First, the disclosure of information to the SEC about Z10 sales and returns was voluntary and intentional. Second, any undisclosed communications and information concerning Z10 sales and return rates clearly relates to the same subject of the disclosures to the SEC.

Third, in fairness, the disclosed and any undisclosed factual information regarding Z10 sales and return rates ought to be considered together. The emails discussing customer complaints also are relevant to the company's sales and returns projections to the extent shared with the SEC." *Pearlstein*, 2019 WL 1259382 at *17. While finding waiver as to the subject matter and ordering BlackBerry to produce the documents, Parker noted that BlackBerry could redact from the documents certain legal opinions and work product.

Conclusion

Privilege and waiver issues can be especially vexing, particularly when amplified in the e-discovery context. In *Pearlstein*, Judge Parker helps unravel some of these issues, presenting what amounts to a primer on these topics. And, of particular note, Parker's determinations not only offer a road map for a sufficient privilege log and develop Second Circuit precedent regarding the applicability of evidentiary privileges to litigation hold memoranda, but also provide a rare opinion on the unusual circumstances in which a subject matter waiver will be found. *Pearlstein* thus provides much needed guidance to practitioners and parties in the Second Circuit and beyond.