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In Absence of a 502(d) Order, Court Finds Waiver of Privilege

By H. Christopher Boehning and Daniel J. Toal
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Federal Rule of Evidence 502 was enacted in 2008 as a response to the ongoing challenges of privilege review in the e-discovery era. Considering the volume and complexity frequently involved in discovery of electronically stored information (ESI) and the often compressed time frames and massive costs for privilege review, parties faced significant hurdles to meeting their e-discovery obligations while still protecting privilege and managing costs.

The federal circuits applied varying standards on when a disclosure resulted in privilege waiver. And even though many parties had begun to enter into "clawback" agreements allowing them to retrieve privileged documents that had been inadvertently produced without risking waiver, it was not clear whether these agreements were valid and, if so, if they would be binding on non-parties or in other matters.

Christopher Boehning

Daniel J. Toal

Rule 502 sought to address multiple issues in one rule. For instance, subdivision (a) limited "subject matter waiver," subdivision (b) resolved the circuit split on whether an inadvertent disclosure of privileged materials results in a waiver, setting forth a test to determine if a waiver occurred, and subdivision (d) authorized courts to order clawback agreements and enforce them against non-parties and in any other federal or state proceeding.

CHRISTOPHER BOEHNING *and* DANIEL J. TOAL *are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison.* ROSS M. GOTLER, *deputy chair and counsel, e-discovery, and* LIDIA M. KEKIS, *e-discovery attorney, assisted in the preparation of this article.*

And while courts at first wrestled with the interplay between 502(b) and 502(d), over the years some standard practices emerged, including recognition that a well-crafted 502(d) order was the most effective way to ensure that disclosure of privileged materials will not result in waiver; that courts were encouraged to enter 502(d) orders, even over the objection of a party; and that 502(d) orders were controlling with respect to how to handle waiver, removing the need for waiver analysis under Rule 502(b) in such matters.

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A recent decision on the topic of privilege waiver from the District of Massachusetts, though, casts doubt on the reach of some of these standard practices. Ultimately, the decision helps underscore the importance of 502(d) orders while also raising the question of whether courts, in the absence of 502(d) orders, will conduct their waiver analyses under Rule 502(b) or some other standard.

'Omni'

In *United States ex rel. Omni Healthcare, Inc. v. MD Spine Solutions LLC*, 2024 WL 2883365 (June 7, 2024), the plaintiff-relator Omni Healthcare ("Omni"), on behalf of the United States, brought a *qui tam* action against several defendants, alleging fraud related to urinary tract infection testing.

After Omni filed its original complaint alleging violations of the False Claims Act by the defendants, the United States investigated the allegations for nearly three years while the case was under seal. The government eventually disclosed the existence of the investigation to the defendants and requested productions of documents from them. As part of discovery, "the United States proposed a plan to address the issue of attorney-client privilege in connection with the defendants' production of documents." *Id.* at *1.

The parties disagreed on the terms of the government's proposal. Omni maintained that the "United States proposed entering an order under Federal Rule of Evidence 502(d), which would have protected the defendants from any potential waiver," while the defendants denied this. *Id.* Regardless, "it is undisputed that the defendants rejected the proposal. Instead, the defendants conducted their own internal privilege review before producing documents to the United States.

The defendants also included a cover letter with each production stating that the defendants did not intend to waive any privilege and reserved the right to claw back any inadvertently disclosed privileged materials." *Id.*

Defendants' Disclosure of Privileged Material

The defendants produced multiple sets of documents to the United States, with the last production occurring on December 30, 2020. *Id.* at *5. On April 6, 2021, the government alerted the defendants that they had produced twelve potentially privileged documents as

part of this final production; the defendants reviewed these documents and clawed them back. Notably, "[h]owever, at that time, the defendants did not review the rest of the Dec. 30, 2020, production or any other production to see if they had inadvertently produced any other privileged documents." *Id.* at *2

Although the United States and the defendants settled on Oct. 20, 2021, Omni continued to press some claims. *See id.* Over a year later, "on or about Oct. 31, 2022, unbeknownst to the defendants, Omni and the United States entered into a Common Interest Agreement to facilitate the sharing of information and materials between them…. Around that same time, the United States provided Omni with the documents that the defendants had previously produced to the United States." *Id*. c

The defendants did not learn that the United States had shared their productions with Omni until Nov. 28, 2023, when Omni used some of those documents as exhibits during a deposition. *Id.* The defendants then reviewed the productions they had made to the United States and eventually determined that 613 of the 91,202 total were privileged. Claiming they had inadvertently disclosed these privileged documents, the defendants attempted to claw them back. Omni objected, leading to the dispute before the court. *See id.* at *2, *6.

The Court's Analysis

Setting forth its determination of the legal standard to apply in the matter, the court observed that "[i]n federal cases such as this one, federal common law governs claims of privilege unless the United States Constitution, a federal statute, or rules prescribed by the Supreme Court provide otherwise." *Id.* at *3.

The court then cited the test set forth in Federal Rule of Evidence 502(b), "Disclosure of privileged material in a federal proceeding does not effect a waiver if '(1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).'" *Id*.

In its analysis, though, the court turned to a different standard. Citing district precedent specific to implied waiver from *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 190 F.R.D. 287 (D. Mass. 2000), the court wrote, "[i]n determining whether an inadvertent disclosure constitutes a waiver, the court examines five factors: '(1) the reasonableness of the precautions taken to prevent inadvertent disclosure, (2) the amount of time it took the producing party to recognize its error, (3) the scope of the production, (4) the extent of the inadvertent disclosure, and (5) the overriding interest of fairness and justice.'" *Id*. at *4. Adding some detail in a footnote, the court explained, "Although *Amgen* predates the introduction of Federal Rule of Evidence 502, courts in this district and elsewhere continue to use the five factors it sets forth in evaluating asserted implied waivers." *Id.* at n.6.

Reviewing the facts of the matter against the *Amgen* factors, the court found the defendants' precautions to be inadequate, the amount of time taken by the defendants to recognize their error to be significant, the scope of the

production to be a neutral factor, the extent of the disclosure to be significant, and the interest of fairness factor to favor waiver. Based on these findings, the court ruled that the defendants had waived privilege and ordered them to return the documents to Omni. *See id.* at *5, *6, *7.

Observations and Takeaways

The court's decision in *Omni* raises some interesting questions and implications for practitioners and judges dealing with privilege issues in e-discovery. First, the court applied a five-factor test from a district precedent, *Amgen*, to determine whether the defendants had impliedly waived privilege by their inadvertent disclosure, rather than the test set forth in Rule 502(b). This could indicate that the court viewed implied waiver as a distinct concept in privilege waiver analysis from the scope of Rule 502(b), or that the court preferred the *Amgen* test for the circumstances of the case.

Alternatively, the court may have considered the *Amgen* test to be consistent with Rule 502(b). Regardless, it is notable that the court proceeded in this way, which raises the question whether other courts may do the same and follow district or circuit precedent instead of Rule 502(b).

Second, the court's decision illustrates the potential consequences of not entering into a 502(d) order, which would have protected the defendants from any waiver resulting from their disclosure of privileged materials.

The court noted that the defendants had rejected the government's proposal, which may have included entering into such an order, and instead relied on their own privilege review and cover letters reserving the right to claw back any inadvertent disclosures.

The court found these measures to be insufficient and ineffective, a key factor in finding privilege waiver. The decision highlights the value of 502(d) orders as a safeguard against waiver and a means of certainty and increased efficiency for parties engaged in e-discovery. Parties should carefully consider the benefits and risks of entering into or declining a 502(d) order, and be prepared to face the consequences of their choice.