The Subject Matter Waiver Risk Continues to Recede

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In his April 1, 2015 “Privilege Points” release, Tom Spahn discusses subject matter waiver of the privilege:

In some situations, disclosure or reliance on privileged communications or protected work product triggers a "subject matter waiver" — requiring the owner's disclosure of additional related communications or work product. Historically, some jurisdictions found a subject matter waiver in many counterintuitive contexts — for instance, based even on litigants' inadvertent production of a protected document.

Many jurisdictions eventually adopted a common law doctrine finding subject matter waivers only upon intentional disclosure in a judicial setting. Recently, Federal Rule of Evidence 502 has limited subject matter waivers to litigants' disclosure or use of protected communications to paint a misleading picture in litigation. Courts are taking these developments to heart. In Mitre Sports International, Ltd. v. Home Box Office, Inc., No. 08 Civ. 9117 (GBD) (HBP), 2015 U.S. Dist. LEXIS 3812, at *3 (S.D.N.Y. Jan. 13, 2015), defendant HBO argued that Mitre triggered a subject matter waiver covering its investigation of possible child labor violations by (1) allowing its Rule 30(b)(6) witness to testify about the investigation, and (2) "attaching the products of its investigation to its complaint" against HBO. The court rejected HBO's argument, holding that (1) the witness's deposition answers and Rule 30(b)(6) designation did not amount to "an attempt by Mitre to use protected information to influence a decision maker" (noting that Mitre had not cited any of the testimony in its summary judgment motion) (id. at *7); and (2) Mitre's "attaching the products of its investigation to its complaint seems to have been done more for public relations reasons than legal reasons" — because "[t]he complaint is not evidence, and Mitre cannot offer it as such." Id. at *13-14.

Corporations should be relieved by the declining threat of subject matter waivers, although they should still avoid the disclosure of, affirmative use of, or reliance on privileged communications or protected work product to gain some advantage in litigation.