District of Columbia Circuit Provides Good News and Bad News in a Work Product Case

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In his April 22, 2015 “Privilege Points” release, Tom Spahn discusses varying approaches to work product protection in different jurisdictions:

Ironically, federal courts applying the federal work product rule take widely varying positions on a number of key elements, including the protection's duration; its applicability to litigation-related business documents; and the standard under which adversaries can overcome a work product claim.

In *FTC v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 778 F.3d 142 (D.C. Cir. 2015), the D.C. Circuit held that: (1) work product "prepared... for one lawsuit will retain its protected status even in subsequent, unrelated litigation" (*id.* at 149); (2) the work product doctrine could protect documents memorializing a business arrangement included as part of adverse companies' litigation settlement agreement, even if the arrangement "has some independent economic value to both parties" — if it was "nonetheless crafted for the purpose of settling litigation" (*id.* at 150); and (3) an adversary can satisfy the "substantial need" element for overcoming a litigant's work product by demonstrating that the withheld materials "are relevant to the case" and "have a unique value apart from those already in the [adversary's] possession" — without showing "that the requested documents are critical to, or dispositive of, the issues to be litigated." (*id.* at 155-56.) The first two holdings represent a broad view of the work product protection, but the third holding makes it easier for adversaries to overcome a company's work product protection.

Other courts take different approaches to all of these issues. Unfortunately, defendant companies often do not know where they will be sued, and therefore will not know in advance what work product standards will apply to documents they may have already created.