Court Recognizes a Troubling Expansion of the "At Issue" Doctrine

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In his August 8, 2012 “Privilege Points” release, Tom Spahn discusses implied waiver by assertion of affirmative defenses.

The "at issue" doctrine represents the most extreme form of implied waiver, because it can waive the privilege without the owner's disclosing privileged communications or even referring to them. The most common example involves a company's affirmative defense (called the Faragher-Ellerth defense) that it fully investigated a Title VII hostile work environment claim, and took reasonable remedial measures. Although not disclosing privileged communications or even referring to them, a company asserting such a defense normally waives the privilege for otherwise protected investigation materials.

In United States v. Dish Network, L.L.C., No. 09-cv-3073, 2012 U.S. Dist. LEXIS 80844 (C.D. Ill. June 12, 2012), the plaintiff alleged that defendant Dish Network violated various FTC regulations by improperly soliciting people on the Do Not Call list. Dish filed an affirmative defense relying on a "Safe Harbor" provision – which allows companies to avoid liability if they have (among other things) monitored and enforced compliance with the Do Not Call list provisions. The court analogized that defense to the Faragher-Ellerth defense, and held that "[t]he same principle applies here with respect to Dish's counsels' participation in compliance and monitoring functions." Id. at *10. Because Dish's lawyers "actively participated in performing monitoring and compliance functions . . . the attorneys' participation in monitoring and compliance are part of the defense and cannot be shielded by claims of privilege." Id. at *12.

As in the Faragher-Ellerth context, companies arranging lawyer involvement in an effort to carefully comply with the law can actually hurt themselves. In this case, the court noted that "[i]f the attorneys did not participate in performing monitoring, then the privilege would not have been waived." Id.