The Strange History of Rule 502 and Selective Waivers: Part III

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In his January 28, 2015 “Privilege Points” release, Tom Spahn discusses the History of Rule 502 and Selective Waivers:

The last two Privilege Points (Part I and Part II) discussed Federal Rule of Evidence 502, which contains a non-waiver provision intended to allow producing parties' retrieval of inadvertently or even sloppily produced privileged documents without triggering a waiver. The Rule's legislative history and Explanatory Note indicate that the provision does not allow for selective waivers.

However, several courts have entered or offered to enter Rule 502 orders allowing litigants to disclose protected communications to their adversaries — without triggering a broader waiver permitting other third parties to obtain those documents. Chevron Corp. v. Weinberg Grp., 286 F.R.D. 95, 101 (D.D.C. 2012); Radian Asset Assurance, Inc. v. Coll. of Christian Bros. of N.M., No. Civ. 09-0885 JB/DJS, 2010 U.S. Dist. LEXIS 144756, at *23-26 (D.N.M. Oct. 22, 2010). Most recently, the Eastern District of Pennsylvania took this approach. In In re Processed Egg Products Antitrust Litigation, MDL No. 2002 08-md-02002, 2014 U.S. Dist. LEXIS 160747 (E.D. Pa. Nov. 17, 2014), defendant trade associations produced privileged documents to one category of plaintiffs, but resisted efforts from other plaintiffs to obtain the same documents. The court denied the other plaintiffs' Motion to Compel, pointing to a magistrate judge's earlier Rule 502 order. That order permitted the first plaintiff category to "inspect the ostensibly privileged documents, consider their import, and use them in determining future action." Id. at *21. The court did not address Rule 502's legislative history — which indicated that traditional waiver doctrines apply when a producing party "acquiesced in the use of otherwise privileged information." Addendum to Advisory Comm. Notes, Statement of Congressional Intent Regarding R. 502 of Fed. Rules of Evid. (Sept. 14, 2009), subdivision (d).

An increasing number of courts have entered Rule 502 orders purporting to allow selective waivers. Time will tell whether other courts will honor those orders. Despite Rule 502's legislative history and Explanatory Note, courts relying on comity and their inherent power may well do so.