In his January 21, 2015 “Privilege Points” release, Tom Spahn discusses Selective Waivers:

Last week's Privilege Point explained that Federal Rule of Evidence 502's legislative history rejected the notion of selective waivers, despite the black letter rule's recognition that federal courts can enter orders indicating that disclosure of privileged communications in one proceeding does not operate as a waiver in other proceedings.

Rule 502's Explanatory Note indicates that such a court order may "provide for return of documents without waiver irrespective of the care taken by the disclosing party." Advisory Committee Notes to Fed. R. Evid. 502, Explanatory Note (revised Nov. 28, 2007), subdivision (d). In essence, such an order can save the producing party from a waiver if it conducts a sloppy privilege review or no privilege review at all. But as the legislative history indicates, Rule 502 does not change the waiver analysis "resulting from [the producing party] having acquiesced in any use of otherwise privileged information." In other words, the black letter rule's provision allows the producing party to retrieve privileged documents without triggering a waiver. But allowing the producing party to acquiesce in adversaries' continued possession and use of protected documents would permit the type of "selective waiver" the Judicial Conference explicitly abandoned early in the Rule 502 drafting process.

Rule 502's non-waiver provision supports federal courts' claw-back orders. However, an increasing number of courts point to that provision as permitting selective waivers. The next Privilege Point will focus on those decisions.