

July 2012

# Defense Counsel Journal

Vol. 79 • No. 3 • Pages 243-376

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# The Perils of Oversharing: Can the Attorney-Client Privilege be Broadly Waived by Partially Disclosing Attorney Communications During Negotiations?

By Andrew Kopon Jr. and  
Mary-Christine Sungaila

*Acme Co. and Biz Corp. enter into negotiations to purchase the assets of Collaborative, Inc. One of these assets is the equity of a partnership that serves as general partner of Partnership, L.P. As part of that process, Acme Co. and Biz Corp. negotiate the terms of the purchase transaction, and in doing so, disclose their respective attorneys' views concerning the legal implications of the transaction, the tax implications of the partnership structure, the legal significance of the contracts under negotiation, and the rights and obligations of the parties to the transaction. Following the asset purchase, Partnership, L.P. sues Acme Co. and Biz Corp. for breach of fiduciary and contractual duties. During discovery, Partnership, L.P., though not a party to the asset purchase transaction, seeks to compel communications that Acme Co. and Biz Corp. shared among each other in negotiating to purchase the assets of Collaborative, Inc. Partnership, L.P. also seeks production of other, non-disclosed privileged communications, arguing that by discussing legal issues during negotiations, Acme Co. and Biz Corp. waived the attorney-client privilege with respect to all attorney-client communications concerning the purchase transaction. If sustained, the requested production would include over 1,500 documents that would otherwise be privileged. Is the court likely to order*



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*disclosure of this information? The answer is unclear. As courts continue to navigate the application and scope of the subject-matter waiver doctrine outside of litigation, attorneys and their clients must proceed cautiously to avoid inadvertent waiver.*

Most clients believe that if they discuss something with their attorneys, those discussions are unquestionably confidential and subject to the attorney-client privilege. Attorneys know that the attorney-client privilege has limits, but

rely on the basic premise that attorney-client communications are privileged unless the client waives that privilege. Less understood, however, is the developing subject-matter waiver doctrine, which, if broadly applied, can undermine both the scope and fundamental nature of the privilege. Until recently, the subject-matter waiver doctrine has not been invoked outside the context of testimonial disclosures. More and more, however, parties are claiming that partial disclosure of attorney-client communications in the context of real estate transactions and patent disputes, for example, should similarly result in waiver of the privilege as to related subject matter. This article provides background on the subject-matter waiver doctrine, outline the various ways different jurisdictions have applied the doctrine to communications and intentional disclosures made outside the litigation context, and provide guidelines for applying the doctrine<sup>1</sup> using as a case

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<sup>1</sup> *Center Partners* and other cases discussed in this article concern the intentional and purposeful disclosure of otherwise privileged information, not the inadvertent disclosure of privileged communications, outside of litigation. It is unclear whether inadvertent disclosures would be deemed to similarly give rise to a broad subject matter waiver. However, the reasoning underlying the case law on purposeful disclosures suggests that the subject matter waiver doctrine might not extend to inadvertent disclosures. The subject-matter waiver doctrine seeks to prevent parties from using the privilege as both a “sword” and “shield”; an inadvertent disclosure of privileged information not made for the purpose of gaining any tactical advantage would not give rise to these same concerns. Nonetheless, given the *Center Partners*

study *Center Partners, Ltd. v. Growth Head GP, LLC*,<sup>2</sup> a case pending in the Illinois Supreme Court which will provide the first opportunity for a State high court to weigh in on this developing area of the law.

## I. Background

### A. The Attorney-Client Privilege

To understand the subject-matter waiver doctrine, it is important to first revisit the legal underpinnings of the attorney-client privilege. The attorney-client privilege is one of the oldest

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decision and the still developing body of law in this area, attorneys should not presume that an inadvertent non-judicial disclosure will be exempt from the scope of the doctrine, or that privilege may not be broadly waived.

The 2008 amendments to Federal Rule of Evidence 502 may provide guidance to attorneys and clients about protecting against waiver due to an inadvertent disclosure. Under Rule 502, an inadvertent disclosure made during a federal proceeding does not result in a waiver of privilege if the disclosure is inadvertent, the privilege holder took reasonable steps to prevent disclosure, and the privilege holder promptly took reasonable steps to rectify the error. While the Rule only addresses inadvertent disclosures in the context of litigation, it still provides a helpful framework that can be used to avoid waiver in the extra-judicial context. By taking prompt steps to rectify inadvertent non-judicial disclosures, and having general policies in place to prevent disclosure, such as labeling communications privileged and confidential, an attorney can lay the groundwork for avoiding an adversary’s attempts to obtain such information in subsequent litigation through the subject-matter waiver doctrine.

<sup>2</sup> 2011 IL App (1st) 110381, Para. 16.

privileges known to the common law. The privilege ensures that a client may provide information to his or her attorney, in confidence, with the knowledge that such information is protected, and neither the client nor the attorney may be forced to disclose the information that has been shared to their judicial adversaries.<sup>3</sup> Indeed, an attorney's ability to advise a client is directly dependent upon that client's willingness to engage in such full and frank discussions. In this vein, the attorney-client privilege serves both the immediate needs of the individual client and public ends by ensuring sound and fully-informed legal advice and advocacy.

The privilege extends both to information relayed by the client to the attorney, and to advice and communications from the attorney to the client, made for the purpose of securing legal advice.<sup>4</sup> Further, the privilege attaches to material shared between the attorney and client both inside and outside of litigation.<sup>5</sup> Thus, when an individual seeks legal counsel from an attorney in any context, the communications between the two are protected, provided all of the elements<sup>6</sup> of

the privilege are satisfied. If the information or material shared is later deemed to be relevant to a legal proceeding, is sought in discovery, or is the subject of a subpoena or other judicial inquiry, the privilege may be invoked to avoid disclosure.<sup>7</sup>

## B. The Subject-Matter Waiver Doctrine

The subject-matter waiver doctrine functions as a restraint on both the protection offered by the privilege and the scope of waiver if otherwise privileged information is disclosed. Like the attorney-client privilege, the subject-matter waiver doctrine is a long-standing and widely-recognized principle of law.

Illinois, for example, first recognized the subject-matter waiver doctrine in *People v. Gerold*, a 1914 decision.<sup>8</sup> In *Gerold*, the defendant was prosecuted for embezzling money while in corporate office. The defendant happened to be a former client of the attorney retained by the State to direct the prosecution. In his defense, the defendant testified that the prosecutor had used their prior relationship to gain information that was later used in the prosecution of the criminal case. The prosecutor then testified as a witness, disputing the testimony of the defendant. The defendant objected to the prosecutor's testimony, asserting that the attorney-client privilege barred the prosecutor

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<sup>3</sup> *Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc.*, 727 N.E.2d 240, 243 (Ill. 2000).

<sup>4</sup> *United States v. Defazio*, 899 F.2d 626, 635 (7th Cir. 1990); *Ill. Emcasco Ins. Co. v. Nationwide Mut. Ins. Co.*, 913 N.E.2d 1102, 1105 (Ill. App. Ct. 2009).

<sup>5</sup> *Ill. Emcasco Ins. Co.*, 913 N.E.2d at 1105.

<sup>6</sup> *See, e.g., Fischel & Kahn, Ltd.*, 727 N.E.2d at 243 (defining the attorney-client privilege as follows: "[W]here legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are protected from disclosure by

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himself or the legal adviser," provided the privilege has not been waived.).

<sup>7</sup> *See, e.g., Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co.*, 579 N.E.2d 322, 326 (Ill. 1991).

<sup>8</sup> 107 N.E. 165 (Ill. 1914).

from testifying about confidential communications. The Court, however, ruled that, by testifying to the conversations himself, the defendant had waived the attorney-client privilege not only as to the matters that the defendant chose to disclose, but also as to any other conversations with the attorney concerning the same subject matter.<sup>9</sup>

As *Gerold* shows, the subject-matter waiver doctrine prevents a party to a lawsuit from transforming the attorney-client privilege from a defensive protection into an offensive weapon by using it to reveal only portions of confidential matters favorable to its case, while hiding portions which might be harmful. Other courts have similarly invoked the subject-matter waiver doctrine as a means of preventing parties from partially disclosing otherwise privileged communications with their attorneys to gain a tactical or strategic advantage in litigation; i.e., to prevent the simultaneous use of the privilege as both a “sword” and “shield.”<sup>10</sup> Where a party voluntarily discloses some privileged information during litigation, he is deemed to have waived his ability to invoke the privilege if he is compelled to produce or testify about undisclosed

communications concerning the same subject matter.<sup>11</sup>

While courts have most often addressed subject-matter waiver in the context of partial disclosures made during litigation, they have recently been called to determine the scope and application of the doctrine outside of litigation as well. There are a myriad of situations in which clients may be called upon to make limited or partial disclosures of privileged information for purposes other than to gain a tactical advantage in litigation. The scope and application of the subject-matter waiver doctrine in these extrajudicial contexts is less clear and attorneys should be cautious in advising their clients about the potential impact of making such non-judicial disclosures. Here are a few contexts in which the subject-matter waiver doctrine might arise, and some courts’ responses to a subject-matter waiver argument.

### 1. Settlement Negotiations

Parties often rely on the presumption that matters discussed during settlement negotiations are, generally speaking, not available for use as evidence in a case. Accordingly, they may make limited disclosure of privileged information to effect a settlement. For example, in *AMCA International Corporation v. Phipard*,<sup>12</sup> which involved a dispute over the defendant’s assignment of certain patent rights to the plaintiff, a memorandum/opinion letter prepared by

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<sup>9</sup> *Id.* at 178.

<sup>10</sup> *In re Estate of Hoover*, 589 N.E.2d 899, 906 (Ill. App. Ct. 1992); see also *Goldman, Sachs & Co. v. Blondis*, 412 F. Supp. 286, 288 (N.D. Ill. 1976) (noting that the privilege “is intended only as an incidental means of defense and not as an independent means of attack, and to use it in the latter character is to abandon it in the former”).

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<sup>11</sup> *In re Consol. Litig. Concerning Int’l Harvester’s Disposition of Wis. Steel*, Nos. 81 C 7076, 82 C 6895, 85 C 3521, 1987 WL 20408, at \*3 (N.D. Ill. Nov. 20, 1987).

<sup>12</sup> 107 F.R.D. 39 (D. Mass. 1985).

the plaintiff's corporate counsel was disclosed to the defendant during settlement negotiations. Based on this disclosure, the defendant sought to discover all prior and subsequent communications between the plaintiff and its counsel concerning the interpretation of the contracts at issue, without regard to whether those communications were prepared during or prior to the pending litigation. The District Court of Massachusetts denied the defendant's request, limiting the scope of the waiver to the disclosed letter and communications relating to the writing of that letter.<sup>13</sup>

## 2. Public/Media Disclosures

Courts have also distinguished disclosures made in public or other media contexts from disclosures made during litigation, finding the subject-matter waiver doctrine to be inapplicable in the former situation because no *legal* prejudice has been imposed on the party's adversary. For example, in *In re von Bulow*,<sup>14</sup> the Second Circuit considered disclosures made by the attorney who had represented von Bulow in a celebrated criminal action in which von Bulow was accused of killing his wife. Following the conclusion of the criminal case, which ultimately resulted in von Bulow's acquittal, von Bulow consented to his attorney writing a book which contained several conversations between the two of them. At the same time, the family of von Bulow's wife pursued a civil claim against von Bulow, and argued that the

disclosure of certain conversations in the attorney's book should result in a waiver of attorney-client privilege as to all other communications concerning the same subjects as the disclosed conversations.

The Second Circuit, however, refused to extend the subject-matter waiver doctrine to the disclosures made by von Bulow's counsel in the book. The court explained:

[W]here, as here, disclosures of privileged information are made extrajudicially and without prejudice to the opposing party, there exists no reason in logic or equity to broaden the waiver beyond those matters actually revealed. Matters actually disclosed in public lose their privileged status because they obviously are no longer confidential. The cat is let out of the bag, so to speak. But related matters not so disclosed remain confidential. Although it is true that disclosures in the public arena may be "one-sided" or "misleading", so long as such disclosures are and remain extrajudicial, there is no legal prejudice that warrants a broad court-imposed subject matter waiver. The reason is that disclosures made in public rather than in court—even if selective—create no risk of legal prejudice until put at issue in the litigation by the privilege-holder.<sup>15</sup>

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<sup>13</sup> *Id.* at 44.

<sup>14</sup> 828 F.2d 94 (2d Cir. 1987).

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<sup>15</sup> *Id.* at 103; *see also* Brown & Williamson Tobacco Corp. v. Wigand, No. 101678/96, 1996 WL 350827 (N.Y. Sup. Ct. Feb. 28, 1996) (television interview).

Courts have also refused to apply the doctrine to public statements made about a pending investigation. *Sullivan v. Warminster Township*<sup>16</sup> involved a civil action brought against a police department, arising out of the shooting death of the plaintiffs' son. Following the shooting, counsel for the police department performed an internal investigation and issued a report with its conclusions. Upon conclusion of the investigation, the police department publicly announced that the investigation had revealed no improprieties in the officers' behavior or department policies. Specifically, the chief of police was quoted as saying, "We've gotten a clean bill of health on everything." Plaintiffs learned of the existence of the attorney's report during subsequent discovery in a later litigation proceeding and sought its production, arguing, in part, that any privilege had been waived by the police chief's statement to the press.

The court, however, denied the plaintiffs' request, holding that the police chief's disclosure, made before the plaintiffs filed the lawsuit, did not effect a waiver of the attorney-client privilege concerning the remainder of the attorney's report.<sup>17</sup> The court recognized a distinction between waivers that occur within the context of judicial proceedings, and extrajudicial waivers. Applying that distinction, the court reasoned that no prejudice or unfairness resulted to the plaintiffs on account of the extrajudicial disclosure, as they were entitled to cross-

examine witnesses at trial regarding the underlying facts of the action.<sup>18</sup>

### 3. Grand Jury Investigations/Testimony

In connection with a grand jury investigation, clients may receive subpoenas compelling them to provide testimony or produce documents that would otherwise be shielded by the attorney-client privilege. Due to the compelled nature of grand jury testimony and document production, courts have expressed reluctance in applying subject-matter waiver in subsequent litigation proceedings.<sup>19</sup>

For example, the Second Circuit addressed this issue in a pair of cases concerning a grand jury investigation into John Doe Co.'s allegedly illegal sale of firearms and other contraband.<sup>20</sup> As part of the investigation, John Doe Co. submitted a letter to the U.S. Attorney's Office, asserting that it had proceeded in the good faith belief that its actions in connection with the firearms transactions conformed with the law, based in part on discussions with the Bureau of Alcohol, Tobacco, and Firearms ("ATF") personnel and counsel.<sup>21</sup> As a further part of the investigation, the grand jury subpoenaed four John Doe Co. employees to testify. One witness made several statements that included generalized references to his counsel's advice, which

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<sup>18</sup> *Id.*

<sup>19</sup> *See, e.g.,* John Doe Co. v. United States, 350 F.3d 299 (2d Cir. 2003); *In re* Grand Jury Proceedings, 219 F.3d 175 (2d Cir. 2000).

<sup>20</sup> *See, e.g.,* John Doe Co., 350 F.3d at 300; *Grand Jury Proceedings*, 219 F.3d at 179.

<sup>21</sup> *John Doe Co.*, 350 F.3d at 301.

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<sup>16</sup> 274 F.R.D. 147 (E.D. Pa. 2011).

<sup>17</sup> *Id.* at 154.

the government argued constituted a waiver of the attorney-client privilege. Based on these disclosures, the government sought production of other withheld documents in the subsequent district court proceeding, including the notes taken by John Doe Co. attorneys during their meetings with ATF personnel.

Relying on fairness principles, the Second Circuit vacated the district court's order of disclosure, recognizing that the "unfairness and distortion of process" identified by the *von Bulow* court as justification for a finding of forfeiture "has been found when one party advanced a contention to a decision maker, such as a court or jury, while denying its adversary access to privileged materials which might have been used to rebut the privilege holder's contention."<sup>22</sup> The court found no such unfairness to be present in the case at bar. The Second Circuit further expressed reluctance about recognizing a waiver of the attorney-client privilege in the employee's compelled testimony before the grand jury, and in applying the subject-matter waiver doctrine to such a disclosure. The court noted that grand jury investigations are not restrained by the procedural and evidentiary rules that govern criminal and civil trials, and are more akin to other "extrajudicial" contexts. The Second Circuit advised "that it would be unfair to impute a waiver to Doe Corp. on the basis of Witness's mention of his reliance on the advice received from Doe Corp.'s attorneys."<sup>23</sup>

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<sup>22</sup> *Id.* at 306.

<sup>23</sup> *Grand Jury Proceedings*, 219 F.3d at 189.

#### 4. Patent Disputes

Clients may also need to make limited disclosures of otherwise privileged information during ongoing patent disputes, particularly concerning the validity and potential infringement of the patent at issue. Courts have found that disclosure of these communications does not give rise to a broader waiver of the privilege. For example, in *Aspex Eyewear, Inc. v. E'Lite Optik, Inc.*,<sup>24</sup> the defendant sent a letter to its customers, stating that its patent lawyers had concluded that it was not infringing on the plaintiff's patent and that a patent was pending for its own design. Attached to the letter was the opinion letter regarding the infringement allegation, written by the defendant's litigation counsel. The court held that the distribution of the letter did not constitute a waiver of the attorney-client privilege as to the subject matter of the letter, because "the disclosure of the communication is extrajudicial and poses no risk of truth garbling."<sup>25</sup>

#### 5. Compliance with SEC Filing Requirements

Companies subject to regulation by the Securities and Exchange Commission ("SEC") are compelled to file periodic statements with the agency, such as a "Report on Form 6-K," which reports on a company's financial position.<sup>26</sup> When a "material event" occurs that could potentially impact a company's financial

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<sup>24</sup> No. CIV.A.3:98-CV-2996-D, 2002 WL 1592606 (N.D. Tex. July 17, 2002).

<sup>25</sup> *Id.* at \*4.

<sup>26</sup> *See, e.g., In re BP Prods. N. Am., Inc.*, 263 S.W.3d 106, 115 (Tex. Ct. App. 2006).

standing, the company must file additional reports. In preparing those reports, companies are often aided by their attorneys, who, in turn, create or rely on otherwise privileged documents in making the required disclosures.<sup>27</sup>

For example, shortly after an explosion at a Texas City Refinery, BP Products of North America, Inc. (“BP”) filed with the SEC a Report on Form 6–K, stating that it had reserved \$700 million to resolve its estimated liability for personal injuries and fatalities arising from the incident.<sup>28</sup> The reserve figure was computed by BP’s in-house counsel. The materials used to compute the reserve figure and the attorney’s methodology were not disclosed to the SEC. Subsequently, the plaintiffs in the underlying lawsuit moved to compel production of the additional documents used by BP to compute its reserve figure. BP argued that its disclosure of the \$700 million reserve figure to the SEC and to the media did not waive its attorney-client and work product privileges as to the supporting documents and methodology that the plaintiffs sought in discovery. The Court of Appeals of Texas agreed, finding that because BP strictly limited its disclosure to the reserve figure itself, it had not waived its attorney-client and work product privileges with regard to the underlying methodology or supporting documents.<sup>29</sup>

## 6. Business Negotiations

Clients frequently involve counsel in a variety of business negotiation settings, where they will often disclose advice received from counsel as a reason for their insistence on particular terms. Unlike litigation, parties to business negotiations, or any negotiations, are not prohibited from disclosing only advantageous information and withholding information that weakens their bargaining position. Absent a special relationship giving rise to a duty, parties to a commercial transaction have no duty to disclose that would give rise to a negligent misrepresentation claim for information withheld during a negotiation; indeed, all parties are obligated to conduct their own due diligence.<sup>30</sup>

The application and scope of the subject-matter waiver doctrine in the context of business negotiations is precisely the issue currently before the Illinois Supreme Court in the case of *Center Partners, Ltd. v. Growth Head GP, LLC* (“*Center Partners*”).

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<sup>27</sup> See Julie Hardin et al., *Complying with SEC Filing Requirements: Do you Risk Waiving the Privilege?*, 74 DEF. COUNS. J. 195 (2007).

<sup>28</sup> *BP Prods. N. Am., Inc.*, 263 S.W.3d at 108.

<sup>29</sup> *Id.* at 117.

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<sup>30</sup> See *Moorman Mfg. v. Nat’l Tank*, 91 Ill.2d 69 (1982); *Freeman v. Ernst & Young*, 516 N.W.2d 835 (Iowa 1994); *Safeco Ins. Co. of Am. v. Dain Bosworth Inc.*, 531 N.W.2d 867 (Minn. App. 1995); *Onita Pac. Corp. v. Trustees of Bronson*, 315 Ore. 149 (Ore. 1992).

## II. Testing the Limits of the Subject-Matter Waiver Doctrine: *Center Partners, Ltd. v. Growth Head GP, LLC*

*Center Partners*<sup>31</sup> highlights both the potential use of the subject-matter waiver doctrine in connection with disclosures made during business negotiations, as well as the danger of an overly-broad interpretation of the doctrine. The case raises two novel questions: (1) whether the subject-matter waiver doctrine extends to undisclosed portions of an attorney-client communication that was partially disclosed outside of litigation; and (2) if so, how broadly the term “subject matter” should be defined. Since few states have well-developed law on the scope and application of the subject-matter waiver doctrine, the Illinois Supreme Court’s decision in *Center Partners* could have a significant impact on the doctrine’s development throughout the country.

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<sup>31</sup> Although *Center Partners, Ltd. v. Growth Head GP, LLC* predominantly concerns extrajudicial disclosures made during business negotiations, the case also involves a subject-matter waiver argument founded on partial disclosures made during subsequent litigation. Therefore, it is possible that the Court might not reach the broader issue of extrajudicial disclosures on which it granted review, should it find that testimonial waiver occurred during the course of litigation itself. This article, however, focuses on the primary issue presented to the Illinois Supreme Court: the scope and application of the subject-matter waiver doctrine to extrajudicial disclosures made outside of litigation, during business negotiations.

### A. The Business Negotiation

The *Center Partners* defendants, Westfield,<sup>32</sup> Rouse,<sup>33</sup> and Simon,<sup>34</sup> own and operate retail shopping malls throughout the United States. In late 2001, Westfield, Rouse, and Simon began negotiating to purchase the assets of Rodamco North America, N.V. (“Rodamco”). One of Rodamco’s assets was Head Acquisition, L.P. (“Head”), the sole general partner of Urban Shopping Centers, L.P. (“Urban”). The transaction was finalized in early 2002, at which time Westfield, Rouse, Simon, and Rodamco executed a purchase agreement for Rodamco’s assets, including Head. Concurrently, Westfield, Rouse, and Simon entered into a separate joint purchase agreement, which addressed matters such as asset allocation and purchase price. On the date that the purchase transaction closed, Westfield, Rouse, and Simon executed an amended partnership agreement for Head, which addressed the partnership structure of Urban following the purchase transaction.

As is common in such business negotiations, Westfield, Rouse, and Simon discussed legal issues while negotiating the terms of the purchase transaction, and in doing so, disclosed their respective attorneys’ views

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<sup>32</sup> “Westfield” refers to Growth Head GP, LLC, Westfield America Limited Partnership, Westfield America, Inc., and Westfield America Trust.

<sup>33</sup> “Rouse” refers to Rouse-Urban, LLC, TRCGP, Inc., The Rouse Company, L.P., The Rouse Company, Rouse LLC, GGP L.P., and General Growth Properties, Inc.

<sup>34</sup> “Simon” refers to Simon Property Group, L.P. and its affiliates.

concerning the legal implications of the transaction and joint purchase agreement, the tax implications of the partnership structure, and the rights and obligations of the parties to the transaction. During the course of business negotiations, Westfield, Rouse, and Simon also received extensive private legal advice from their respective attorneys regarding the transaction, which they each kept confidential.

### **B. The Subsequent Lawsuit**

The limited partners of Urban later sued, alleging that Westfield, Rouse, and Simon had breached fiduciary and contractual duties they owed to Urban and the Plaintiffs. Specifically, Plaintiffs alleged that Defendants' division of the responsibility for Urban's mall interests among the joint purchasers was a breach of their alleged duties, and that Defendants failed to present sufficient corporate opportunities to Urban. During discovery, Plaintiffs filed a series of motions to compel production of documents and testimony that Defendants withheld on privileged grounds. The Plaintiffs were not party to the Rodamco purchase transaction or to the negotiations leading up to it. Nonetheless, in their first motion to compel, Plaintiffs sought those communications that Defendants had shared among each other in negotiating the Rodamco purchase transaction. Over Defendants' objection, the circuit court granted Plaintiffs' motion; however, the court protected Defendants' right to withhold from production any attorney-client communication that had *not* been shared among the joint purchasers.

Thereafter, Plaintiffs filed a motion to compel production of non-disclosed privileged communications, arguing that by discussing legal issues during negotiations, Defendants had waived the attorney-client privilege with respect to all attorney-client communications concerning the Rodamco purchase transaction, including those which were not disclosed to the other joint purchasers. Plaintiffs' motion requested production of over 1,500 documents identified in Defendants' privilege logs. Following an *in camera* review of some of the requested documents, the circuit court granted Plaintiffs' motion, finding that Defendants' partial disclosure of the communications to the other joint purchasers during negotiations resulted in the waiver of all attorney-client communications concerning the Rodamco purchase transaction in subsequent litigation. Defendants refused to produce the documents and were held in "friendly contempt," the order from which they appealed.

The appellate court affirmed the trial court's ruling. The court reviewed the case history of the attorney-client privilege and subject-matter waiver doctrine in Illinois, which had previously addressed only disclosures made in litigation. The appellate court extended the waiver doctrine to disclosures made in a business negotiation setting, holding, for the first time in Illinois, that there is "no reason to distinguish between a waiver occurring during the course of litigation or during a business negotiation."<sup>35</sup> The court then ordered

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<sup>35</sup> *Center Partners, Ltd.*, 2011 IL App (1st) 110381, ¶16.

the Defendants to produce over 1,500 documents, relying only on the circuit court's *in camera* review of some of the documents to determine that the privilege had been waived as to all of them.

On November 30, 2011, the Illinois Supreme Court granted Defendants Westfield's and Rouse's petitions for leave to appeal. The matter is now pending before the Court.

### C. Analysis

If the Illinois Appellate Court opinion is upheld, it would stand as the most expansive interpretation of the subject-matter waiver doctrine in the United States to date. The Illinois cases that analyze the logical underpinnings of the subject-matter waiver doctrine focus on the need to prevent the simultaneous use of the privilege as both a "sword" and "shield" in litigation.<sup>36</sup> The effects of extrajudicial disclosures have been more narrowly construed in other jurisdictions,<sup>37</sup> in recognition that, in a

myriad of contexts, lawyers and their clients may be called upon to make limited or partial disclosures of privileged information for purposes other than to gain a tactical advantage in litigation.

In the context of business negotiations, in particular, courts in other jurisdictions have differentiated between a party attempting to make tactical use of a disclosure in litigation, and an extrajudicial disclosure in business negotiations, which imposes no legal prejudice on the party's subsequent litigation adversary.<sup>38</sup> For example, in *Calvin Klein Trademark Trust v. Wachner*,<sup>39</sup> the Southern District of New York refused to extend the subject-matter waiver doctrine to disclosures made in connection with a proposed asset purchase of Calvin Klein, Inc. ("CKI"). When CKI began exploring the possibility of selling CKI to prospective purchasers, its attorneys drafted various offering memoranda and other disclosure documents to be given to such potential buyers. As part of that process, CKI formally sought its attorney's advice as to

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<sup>36</sup> See, e.g., *In re Grand Jury* Jan. 246, 651 N.E.2d 696, 700 (Ill. App. Ct. 1995); *People v. O'Banner*, 575 N.E.2d 1261, 1270 (Ill. App. Ct. 1991); *Newton v. Meissner*, 394 N.E.2d 1241, 1255 (Ill. App. Ct. 1979); *People v. O'Connor*, 345 N.E.2d 520, 524 (Ill. App. Ct. 1976).

<sup>37</sup> See, e.g., *Pensacola Firefighters' Relief & Pension Fund Bd. of Dirs. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 3:09CV53/MCR/MD, 2010 WL 4683935, at \*7 (N.D. Fla. Nov. 10, 2010); *United States ex rel. Hunt v. Merck-Medco Managed Care, LLC*, No. 00-CV-737, 2004 WL 1950318, at \*4 (E.D. Pa. Aug. 31, 2004) (Scuderi, Mag. J.); *Transamerica Title Ins. Co. v. Superior Court (Bank of the West)*, 188 Cal. App. 3d 1047, 1053 (Ct. App. 1987); *Kowalonek v.*

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*Bryant Lane, Inc.*, No. CV 960324942S, 2000 WL 486961, at \*9 (Conn. Super. Ct. Apr. 11, 2000) (limiting the scope of waiver to the communications actually disclosed at an extrajudicial grievance hearing).

<sup>37</sup> See, e.g., *Calvin Klein Trademark Trust v. Wachner*, 124 F. Supp.2d 207, 210 (S.D.N.Y. 2000); *Fed. Election Comm'n v. Christian Coal.*, 178 F.R.D. 61, 74 (E.D. Va. 1998).

<sup>38</sup> See, e.g., *Calvin Klein Trademark Trust*, 124 F. Supp.2d at 210; *Fed. Election Comm'n*, 178 F.R.D. at 74 ("[S]ubject matter waiver is appropriate only when the party seeking the privilege previously waived the attorney-client privilege to make some tactical use of the documentation.").

<sup>39</sup> 124 F. Supp.2d 207.

what disclosures, if any, should be made to such prospective purchasers regarding its disputes with entities with whom it had various contractual relations. CKI subsequently brought suit against those entities, asserting claims for breach of contract and trademark infringement. The defendants sought disclosure of CKI's offering memoranda and other disclosure documents, and sought further discovery of undisclosed communications that formed the basis for such disclosures.

In denying the defendant's request of the undisclosed communications, the court acknowledged that "some authority suggests that a party's voluntary disclosure to a third party waives privilege not only with respect to the details underlying the data which was to be published, including *inter alia*, all preliminary drafts of the document, and any attorney's notes containing material necessary to the preparation of the disclosure."<sup>40</sup> However, the court reasoned that "such cases would render it virtually impossible for a corporate client to have a candid and full discussion with its counsel." Further, upon closer reading, the court distinguished that the aforementioned cases, and other cases relying upon them, in addition to involving very different factual scenarios, typically involve situations in which the party making the disclosure was seeking to make tactical use of it in litigation, "the classic sword instead of shield."<sup>41</sup>

### III. The Future Beyond *Center Partners*

#### A. Statutorily-Defined Privileges

*Center Partners* notwithstanding, the trend appears to be toward narrowing the subject-matter waiver doctrine. In states where the attorney-client privilege and waivers are statutorily defined, courts have been reluctant to unilaterally broaden the circumstances of waiver where the legislature or other rule-making body articulated a much narrower standard.<sup>42</sup> Rule 502 of the Federal Rules of Evidence may serve as an example to states in their attempts to narrow the application of the subject-matter waiver doctrine. Amended in 2008, Federal Rule of Evidence 502 applies the subject-matter waiver doctrine only to disclosures made within the context of a federal court proceeding or to a federal office or agency, and does not extend waiver to extrajudicial proceedings.<sup>43</sup>

#### B. Scope of the Subject-Matter Waiver Doctrine

If the subject-matter waiver doctrine is extended to other contexts, another issue to be determined is the scope of the subject matter that may be waived. There currently exists little guidance as to how the "subject matter" of a waiver is to be defined. Absent guidance as to how the subject matter of a waiver will be defined,

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<sup>42</sup> See H. Thomas Watson, *No "Implied Waiver" of the Attorney-Client Privilege*, VERDICT, 1st Quarter 2009, at 15, 15-16 (citing *Wells Fargo Bank v. Superior Court* (Boltwood), 22 Cal. 4th 201, 206 (2000)).

<sup>43</sup> FED. R. EVID. 502.

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<sup>40</sup> *Id.* at 210.

<sup>41</sup> *Id.*

parties are left with a level of uncertainty that is arguably little better than having no privilege at all. Clients and attorneys will be encouraged to share as little as possible—even if sharing information would help complete a transaction—in order to avoid having been found to waive the attorney-client privilege in its entirety.

One court has articulated helpful factors to consider in determining whether disclosed and undisclosed communications relate to the same subject matter.<sup>44</sup> In *United States v. Skeddle*, the Northern District of Ohio articulated the following factors:

1) the general nature of the lawyer's assignment; 2) the extent to which the lawyer's activities in fulfilling that assignment are undifferentiated and unitary or are distinct and severable; 3) the extent to which the disclosed and undisclosed communications share, or do not share, a common nexus with a distinct activity; 4) the circumstances in and purposes for which disclosure originally was made; 5) the circumstances in and purposes for which further disclosure is sought; 6) the risks to the interests protected by the privilege if further disclosure were to occur; and 7) the prejudice which might result if disclosure were not to occur.<sup>45</sup>

The *Skeddle* court explained, “[B]y applying these factors, and such other factors as may appear appropriate, a court may be able to comply with the mandate that it construe ‘same subject matter’ narrowly while accommodating fundamental fairness.”<sup>46</sup> *Skeddle* provides a reasoned approach to defining the scope of the subject matter that may be waived.

## Conclusion

Regardless of the outcome in *Center Partners, Ltd. v. Growth Head GP, LLC*, the case serves as a cautionary tale. All attorneys should be aware of the subject-matter waiver doctrine's potential application to extrajudicial disclosures in their respective jurisdictions so as to protect themselves and their clients' best interests. Similarly, should courts endorse application of the subject-matter waiver doctrine outside the litigation context, the legal community will require guidance concerning the contours of the “subject matter” that might be waived.

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<sup>44</sup> *United States v. Skeddle*, 989 F. Supp. 917, 919 (N.D. Ohio 1997).

<sup>45</sup> *Id.*

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<sup>46</sup> *Id.*