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Federal court finds company broadly waived privilege by disclosing investigation findings to DOJ

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A recent District of New Jersey ruling in the case involving alleged FCPA violations by two former Cognizant executives demonstrates the potential risks of government downloads. Judge Kevin McNulty found that Cognizant broadly waived privilege when it summarized for DOJ the findings of its internal investigation of potential FCPA violations.

On February 1, 2022, Judge Kevin McNulty of the District of New Jersey issued a key ruling on motions related to subpoenas served by two former Cognizant Technology Solutions Corporation (Cognizant) executives on their former employer and its construction partner. The court's ruling is most notable for its finding that Cognizant broadly waived privilege in summarizing the findings of its internal investigation of potential Foreign Corrupt Practices Act (FCPA) violations to the Department of Justice (DOJ). The court's ruling also hit on a number of other relevant issues, finding that Cognizant's communications with its forensic accounting firm about the internal investigation were privileged; finding that draft press releases were not protected; granting discovery requests to allow for a proper assessment of any *Garrity* issues; and granting a motion to quash filed by Cognizant's India-based construction partner, Larsen & Toubro Construction Company, for lack of personal jurisdiction.

Background

Defendants Gordon Coburn and Steven Schwartz, Cognizant's former President and Chief Legal Officer, respectively, were indicted in February 2019 for violating and conspiring to violate the FCPA's anti-bribery and accounting provisions. According to the indictment, between 2014 and 2016, Coburn and Schwartz engaged in a scheme to bribe government officials in India—where more than half of Cognizant's employees worked—to obtain a planning permit needed for construction of an office campus. DOJ issued a declination letter to Cognizant under the FCPA Corporate Enforcement Policy, citing, among other factors, Cognizant's voluntary self-disclosure, full cooperation, lack of prior criminal history and full remediation. Coburn and Schwartz, meanwhile, await trial. Although trial is currently scheduled to begin next month, the judge indicated it was likely to be continued to October.

The court's ruling follows numerous interrelated motions to compel compliance with and quash the subpoenas issued by the defendants. The defendants argued that Cognizant effected a subject-matter waiver over a broad category of documents when it disclosed a summary of its investigation findings to DOJ. The waiver, they argued, included "any communications regarding conduct alleged in the indictment and any materials related to Cognizant's internal investigation." Cognizant maintained that it did not waive the privilege over the entire internal investigation as the result of simply cooperating with DOJ or disclosing portions of investigative documents.

District of New Jersey's ruling

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Subject-matter privilege waiver

Judge McNulty agreed that Cognizant effectuated a subject-matter waiver of privilege. The court observed that Cognizant had made significant disclosures to the government consisting of “detailed accounts of 42 interviews of 19 Cognizant employees, including Defendants.” In support of its finding of a waiver, the court explained that “by disclosing this information to the Government while under threat of prosecution, Cognizant handed these materials to a potential adversary and destroyed any confidentiality they may have had, undermining the purpose of both attorney-client and work-product privileges.” As authority for its finding, the court cited *In re Chevron Corp.*, which held that “purposeful disclosure of [] purportedly privileged material to a third-party” may waive attorney-client and work product privileges “if that disclosure undermines the purpose behind each privilege.” 633 F.3d 153, 165 (3d Cir. 2011).

With regard to the breadth of Cognizant’s privilege waiver, Judge McNulty determined it to be “significant,” albeit not quite as expansive as the defendants had contended. First, he found that Cognizant had waived its privilege to all memoranda, notes, summaries or other records of interviews to the extent summaries of the interviews had been provided to the government. Second, he ruled that Cognizant had waived its privilege to underlying documents or communications whose content had been directly conveyed through the summaries. Third, he determined Cognizant had waived its privilege to any documents and communications that were reviewed and formed the basis of any presentation to DOJ.

The recent Cognizant ruling follows other findings of privilege waivers. In *U.S. Securities & Exchange Commission v. Sandoval Herrera*, for example, the court ruled that the company had waived the work product privilege to 12 sets of interview notes and memoranda that had been disclosed to the SEC during an oral download. *See* 324 F.R.D. 258, 267 (S.D. Fla. 2017).

Additional findings

In addition to his findings on the waiver of privilege related to presentations to DOJ, Judge McNulty ruled on privilege questions about draft press releases and Cognizant’s communications with accountants. The court found that drafts of press releases, public disclosures and communications with public relations firms were not privileged. It reasoned that such drafts and communications were neither created for the predominant purpose of legal advice nor to prepare for litigation. It also determined that Cognizant maintained its privilege with respect to its communications with its accounting firm concerning the internal investigation and related updates to DOJ and the Securities and Exchange Commission because they were “closely related to the provision of legal advice.”

The court further addressed the scope of the defendants’ subpoenas and the question of whether it had jurisdiction over the subpoenas issued to Cognizant’s India-based construction partner. The defendants were seeking evidence to support the argument that incriminating statements made during their interviews are inadmissible at trial under *Garrity v. New Jersey* because they were made as a result of state action and coercion. *See* 385 U.S. 493, 495-96 (1967). The court agreed with the defendants that Cognizant should expand the time frame for its document search to include material from prior to their interviews in order to properly capture any potential *Garrity* issue. The court also granted Larsen & Toubro Construction Company’s motion to quash because it found a lack of specific jurisdiction. The court relied on the absence of any indication that the company’s U.S. offices or employees had any contact with the project at issue. It also rejected the defendants’ argument that the parent company purposefully availed itself of the forum by cooperating with DOJ’s investigation, which the court said, “shows only voluntary cooperation with federal law enforcement, no more and no less.”

Key takeaways

The way in which clients manage the production of potentially privileged materials to government authorities in connection with internal investigations continues to implicate significant risk. Although DOJ, as a matter of policy, is prohibited from punishing a company for failing to provide privileged materials, or rewarding a company for producing such materials, prosecutors nevertheless sometimes request materials that courts have determined to be privileged. The Cognizant case is but the most recent example, and a reminder of the collateral consequences of such a waiver. Clients and their counsel should attempt to engage in a productive dialogue with prosecutors to ensure they secure cooperation credit without exposing the company to a subject-matter waiver in the process.

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