

1989

Gold Standard, Inc. v. American Barrick Resources Corporation : Unknown

Utah Supreme Court

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BRIEF
JONES, WALDO, HOLBROOK & McDONOUGH

A PROFESSIONAL CORPORATION

DOCKET NO.

890205

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INGEBRETSEN, RAY, RAWLINS & JONES 1948
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IN REPLY REFER TO:

Salt Lake City

JAN 10 1990

U.S. Supreme Court, Utah

Geoff Butler
Clerk of the Supreme Court of Utah
332 State Capitol Building
Salt Lake City, UT 84114

RE: Gold Standard, Inc. v. American Barrick
Resources Corporation; Barrick Resources
(U.S.A.), Inc.; Texaco, Inc.; Getty Oil
Company; and Getty Mining Company,
Case No. 890205

Dear Mr. Butler:

Enclosed please find ten copies of each of the following cases:

1. Hartman v. El Paso Natural Gas Co., 763 P.2d
1144 (N.M. 1988);
2. Niagra Mohawk Power v. Stone & Webster Eng.,
125 F.R.D. 578 (N.D.N.Y. 1989);
3. Intern. Digital Systems v. Digital Equipment
Corp., 120 F.R.D. 445 (D. Mass. 1988);
4. Baxter Travenol Laboratories v. Abbott Labora-
tories, 117 F.R.D. 119 (N.D. Ill. 1987).

Mr. Geoff Butler
January 10, 1990
Page Two

These four cases are being submitted to the Court pursuant to Rule 24(j) of the Rules of The Utah Supreme Court. They should be considered in conjunction with Appellant's briefs as a whole and, in particular, subsection III.

Very truly yours,

JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys for Appellant
Gold Standard, Inc.

By:



Deno G. Himonas

dgh/cs
Encs.

cc: Stephen G. Crockett, Esq.
Gordon L. Roberts, Esq.

107 N.M. 679

Doyle HARTMAN, an individual,
Plaintiff-Appellee,

v.

EL PASO NATURAL GAS COMPANY,
Defendant-Appellant.

No. 17094.

Supreme Court of New Mexico.

Oct. 4, 1988.

Rehearing Denied Nov. 2, 1988.

Seller and producer of oil and gas brought breach of contract action against buyer and sought permanent injunction requiring buyer to abide by and perform its obligations under contracts. The District Court of Lea County, Larry Johnson, D.J., entered judgment on jury verdict in favor of producer and issued permanent injunction, and buyer appealed. The Supreme Court, Sosa, Senior Justice, held that: (1) neither Natural Gas Act nor Natural Gas Policy Act precluded state court from deciding contractual issues involving gas purchase contracts which were regulated tangentially and peripherally by federal statutes; (2) striking buyer's affirmative defenses alleging applicability of force majeure clauses of contracts was not erroneous where clauses were used to force producer into submitting to buyer's scheme to manipulate Oil Conservation Division's mandate to producer as to how much gas he could produce and to compel producer to do business only on buyer's terms; (3) trial court did not infringe on jurisdiction of Oil Conservation Division in deciding that buyer manipulated Division's mandate to producer as to how much gas he could produce; and (4) buyer waived attorney-client privilege to allegedly protected documents by inadvertently producing documents.

Affirmed.

1. Gas \Rightarrow 13(1)States \Rightarrow 18.15

Neither the Natural Gas Act nor the Natural Gas Policy Act precluded state court from deciding contractual issues in-

volving gas purchase contracts which were regulated tangentially and peripherally by federal statutes. Natural Gas Act, §§ 1-24, 15 U.S.C.A. §§ 717-717w; Natural Gas Policy Act of 1978, §§ 2-602, 15 U.S.C.A. §§ 3301-3432; Public Utility Regulatory Policies Act of 1978, §§ 605-607, 15 U.S.C.A. §§ 717x-717z.

2. Gas \Rightarrow 13(1)

Force majeure clauses of gas purchase contracts could not be used to force producer into submitting to buyer's scheme to manipulate Oil Conservation Division's mandate to producer as to how much gas producer could produce, and to compel producer to do business only on buyer's terms, where buyer had assumed risk of changing market demands.

3. Mines and Minerals \Rightarrow 92.64

In breach of contract action brought by producer of oil against buyer of oil and gas, trial court did not infringe on jurisdiction of Oil Conservation Division when deciding, as part of contract action, that buyer manipulated Division's mandate to producer as to how much gas he could produce.

4. Witnesses \Rightarrow 219(3)

Litigant waived attorney-client privilege to documents where litigant inadvertently produced documents to opponent.

5. Pretrial Procedure \Rightarrow 34Witnesses \Rightarrow 219(3)

In determining whether document has lost its attorney-client privilege or work-product immunity by inadvertent disclosure to opponent, court should consider reasonableness of precautions taken to prevent inadvertent disclosure in view of extent of document production, number of inadvertent disclosures, extent of disclosure, delay and measures taken to rectify disclosure, and whether overriding interests of justice would be served by relieving party of its error.

6. Appeal and Error \Rightarrow 1043(6)

Order requiring production of additional documents after two documents allegedly subject to attorney-client privilege were inadvertently produced was not preju-

Cite as 763 P.2d 1144 (N.M. 1988)

dicial to client where inadvertently produced documents were sufficient in and of themselves to substantiate opponent's allegations concerning subject matter of those documents.

Montgomery & Andrews, Gary R. Kilpatrick, Joseph E. Earnest, W. Perry Pearce, Sarah M. Singleton, Santa Fe, Andrews & Kurth, Rush Moody, Jr., Atkin, Gump, Strauss, Hauer & Feld, Randall L. Sarosdy, Washington, D.C., Donald J. MacIver, Jr., James M. Gaitis, El Paso Natural Gas Co., El Paso, Tex., for defendant-appellant.

Atwood, Malone, Mann & Turner, Bob F. Turner, Susan Zeller, Jeffery D. Tatum, Roswell, Maddox, Renfrow & Saunders, Don R. Maddox, Hobbs, J.E. Gallegos, Campbell & Black, Michael B. Campbell, Santa Fe, for plaintiff-appellee.

OPINION

SOSA, Senior Justice.

PART ONE: PROCEDURAL CONTEXT

A. AMENDED COMPLAINT

On September 12, 1986, plaintiff-appellee, Doyle Hartman (Hartman), filed his amended complaint against defendant-appellant, El Paso Natural Gas Company (El Paso), alleging that El Paso had intentionally and maliciously breached various gas purchase contracts entered into between Hartman as seller-producer and El Paso as purchaser-pipeline. Hartman also alleged certain tortious conduct, violations of the New Mexico Antitrust Act, and sought a permanent injunction requiring El Paso to abide by and perform its obligations under the buy-sell contracts, to cease and desist from "shutting in" (closing down) certain of Hartman's wells, and requesting certain other minor injunctive relief. For purposes of this appeal, the relevant portions of Hartman's amended complaint are those allegations pertaining to breach of contract and the two items of injunctive relief specified above. Hartman sought both compensatory and punitive damages.

B. EL PASO'S AFFIRMATIVE DEFENSES

In addition to filing a general denial of Hartman's claims, El Paso, on several occasions, filed certain affirmative defenses. The most recently filed and only relevant affirmative defenses, insofar as this appeal is concerned, are as follows: (i) El Paso's *force majeure* defense, in which it alleged that it was excused from performance under the contracts at issue because "there had been an unforeseeable collapse of market demand in the middle portion of" the 1980's, coupled with new state and federal regulations which substantially changed the scope and thrust of the contracts at issue; (ii) El Paso's commercial impracticability and frustration of purpose defenses, in which it alleged that policies of the Federal Energy Regulatory Commission (FERC) "erode[d] the demand for higher priced [i.e., Hartman's] gas produced under contract to the [various gas] pipelines," thereby excusing its performance under the contracts; (iii) that enforcement of the contracts at issue would violate public policy, as determined by the State of New Mexico's Energy, Minerals and Natural Resources Department, and the Oil Conservation Division thereof (OCD), thereby excusing El Paso from performance of the contracts at issue; (iv) that the entire substance of the contracts at issue was (a) pre-empted by federal law and regulations promulgated thereunder by FERC, and (b) irreparably transformed to El Paso's detriment by regulations promulgated by FERC, OCD, and the California Public Utilities Commission, thereby excusing El Paso's performance under the contracts at issue.

C. PRE-TRIAL ORDERS

The parties filed various pre-trial motions, the full extent of which is not relevant to this appeal. Certain orders, however, issued by the trial court in response to these motions, constitute the core of El Paso's appeal:

(i) the court's "Order Pursuant to Rule 56(d), N.M.R.Civ.P [sic]" (correctly cited as SCRA 1986, 1-056(D)), 1986, which elimi-

nated from the case, as a matter of law, a major portion of El Paso's affirmative defenses, as to five of the natural gas contracts

(ii) the court's "Partial Summary Judgment on the Oil Well Casinghead Contracts," issued on November 12, 1986, which concluded that El Paso was "liable to take all of the gas under the Oil Well Casinghead Contracts¹ and to pay for such gas at the contract price" (Emphasis added.)

(iii) the court's "Order Striking Defenses" issued December 2, 1986, which extended the above ruling to the remainder of the contracts at issue. Thus, by December 2, 1986, all of El Paso's affirmative defenses as to all contracts at issue in this case had, as a matter of law, been stricken,

(iv) the court's "Order Denying [El Paso's] Motion for Reconsideration," issued on October 1, 1986, which upheld the court's earlier ruling that El Paso, in "inadvertently producing" certain documents and giving these documents to Hartman's counsel, waived its attorney-client privilege as to those documents. Further, by the same order, the court ruled that El Paso had also waived work-product immunity "on the same subject matter," and thus required El Paso to produce certain other pertinent documents. For reference *infra*, these documents came to be numbered as Hartman's exhibits, beginning with Number 124, the crucial "inadvertent document" triggering production of documents later numbered as exhibits 104, 120, 137, 146, 154, 206 and 207. The practical consequence of the court's order was to require El Paso to produce confidential,

in-house information written by key El Paso personnel during the period July 1, 1982 to June 18, 1986, a period when the events complained of in Hartman's amended complaint were taking place.

D TRIAL, JURY VERDICT AND JUDGMENT ON THE VERDICT

Jury trial lasted from December 1 to December 19, 1986. The jury found in favor of Hartman and awarded him \$2,153,000 in compensatory damages² and \$1,080,000 in punitive damages. The court entered judgment on the verdict on January 22, 1987, awarding post-judgment interest on the combined damages at the rate of fifteen percent.

E PERMANENT INJUNCTION

On March 24, 1987, the court issued its permanent injunction, issued thirty-five findings of fact and ten conclusions of law, and ruled, in pertinent part, as follows: (i) El Paso is required, as to the contracts covering Hartman's *dry gas wells*, to take Hartman's dry gas "in the maximum proportion of deliverability³ that gas is being produced within the terms of the applicable ratable take⁴ provisions" of the contracts involved, (ii) El Paso is required, as to the contracts covering Hartman's *casinghead wells* and *gas wells in oil pools*, to "take and pay contract price for all gas produced by casinghead wells and by gas wells in oil pools, up to allowable limits⁵ for casing head gas as defined" by certain regulations of the OCD, (iii) El Paso is required to "exercise good faith in the manner in which

according to a complicated formula which is not relevant to our determination of the issues on appeal.

3. As to the concept of 'maximum proportion of deliverability,' see generally, NMSA 1978, §§ 70-2-1 to -38, known as the 'Oil and Gas Act,' and in particular § 70-2-16(C).

4. As to the concept of 'ratable take,' see the balance of this opinion, *infra*.

5. As to the concept of 'allowable limits,' see NMSA 1978, § 70-2-16(C).

1. As will be developed in more detail later in this opinion, there were thirty three contracts governing the sale and purchase of casinghead gas, and forty three contracts governing the sale and purchase of gas produced from natural gas wells. Casing-Head Gas is defined as 'Natural gas from an oil well, saturated with oil vapors or gasoline.' *Black's Law Dictionary* 273 (4th ed. rev. 1968). The gas produced from natural gas wells, on the other hand, is commonly termed 'dry gas.'

2. The court allowed El Paso 'a credit against dry gas takes from non marginal wells in pools presently classified as prorated for the jury award of \$2,153,000 in compensatory damages.'

it performs" the requirements mandated by the permanent injunction.

F ISSUES RAISED BY EL PASO ON APPEAL

On appeal, El Paso contends: (i) that the trial court's jurisdiction to decide this case was pre-empted by federal law, (ii) that genuine issues of material fact existed as to the stricken affirmative defenses, (iii) that the OCD's jurisdiction pre-empted that of the trial court as to "nominations and allowables,"⁶ and (iv) that the trial court abused its discretion in ruling against El Paso as to the documents which El Paso alleged were protected from discovery by attorney-client privilege and work-product immunity. Accordingly, El Paso asks us to reverse and vacate the jury verdict and judgment thereon and quash the permanent injunction, or in the alternative, to vacate the judgment and remand the cause for a new trial in which El Paso is permitted "to introduce evidence substantiating its affirmative defenses," and in which "the jury not be permitted to hear evidence or arguments concerning the privileged or immune documents at issue."

G OUR HOLDING ON APPEAL

We reject each of El Paso's contentions on appeal, affirm the trial court's judgment on the jury verdict, and order El Paso to abide by and honor, in good faith and in detail, the trial court's permanent injunction.

PART TWO FACTS

A GEOGRAPHICAL AND HISTORICAL BACKGROUND

El Paso is a natural gas transporting and sales company, whose pipelines intersect the Permian Basin in Texas and New Mexico, the Anadarko Basin in Oklahoma, and the San Juan Basin in New Mexico. On appeal, the relevant pools of natural gas involved are the Eumont Pool and the Jalmat Pool, both located in southeastern New Mexico. Hartman is a producer of natural gas, and operates wells which pump gas from the Eumont and Jalmat pools. Most

6. See *id.*

of Hartman's wells lie in Lea and Eddy counties, New Mexico. Hartman operates some 95 dry gas wells on acreage dedicated to El Paso under the contracts at issue. El Paso's pipeline runs in roughly a north by northwest direction through the Jalmat and Eumont pools, which are located south to southwest of Hobbs, New Mexico.

For some reason, neither party on appeal has chosen to state when their contractual relationship began. From the record, however, we can glean enough information to conclude that well before 1982 the parties had been enjoying a mutually satisfactory and profitable relationship.

Our opinion would be too exhaustive to read if we were to quote extensively from all of the documents produced before and during trial. Thus, we shall quote only from the "triggering memo," relevant to the lower court's order of October 1, 1986, Exhibit 124, written to an El Paso executive by El Paso's in-house attorney, on May 24, 1984. Before summarizing relevant statutes in Oklahoma, Texas and New Mexico, the attorney states the purpose of his memo to be "the extent of El Paso's] . . . obligation to take ratably across its system and the extent of El Paso's ability to take more gas from less expensive systems. This memorandum sets forth my conclusions." The attorney's conclusions were as follows:

There are, however, certain risks to adopting such a limited least cost production scheduling policy. While El Paso could continue to raise the argument that, since it is complying with the letter of all applicable ratable take statutes, it is excused from prepayment obligations under take-or-pay contracts, a great deal of the persuasive force behind El Paso's position would have been lost. Producers which formerly were convinced not to press prepayment claims, because of their belief that El Paso was being fair and evenhanded, would likely file lawsuits claiming prepayments. Such suits could cover not only the current year but any past year in which El Paso's takes, though ratable across its system, were less than the contractual minimum. Be-

cause of the tendency to settle lawsuits rather than litigate, especially where the defenses are untested and questionable, a flood of lawsuits would doubtless result in a large amount of negotiated prepayments. This, of course, would lead to higher resale prices and possible lower sales, thereby aggravating El Paso's deliverability surplus and prepayment problem.

This memo inspired El Paso's decision makers to formulate its "least-cost production" strategy, as spelled out in other disputed documents, and in its May 1986 "Strategic Plan." This plan had already been outlined to producers, including Hartman, in El Paso's "Notice to Sellers," dated February 28, 1986. In that notice, El Paso advised Hartman:

El Paso intends to modify its production-scheduling procedures in a manner that maximizes, to the extent practicable and legally permissible, the purchases of gas from El Paso's lowest cost sources of supply

El Paso must take immediate action to reduce its sales rates

If El Paso's price becomes noncompetitive * * * with other gas supplies or with alternative fuels, El Paso may be forced to take more drastic price actions or to make further modification to its production-scheduling procedures. We will strive to keep you informed if such actions become necessary.

The trial court found that El Paso ignored the ratable take provisions of its contracts with Hartman, and instead favored its own affiliates, notably "Meridian," and "Southland Royalty," in purchases of gas. The jury found that El Paso "nominated" or "predicted" in bad faith how much of Hartman's allowable production it would take. El Paso had created El Paso Gas Marketing Company to enter into and compete with other purchasers on the spot market, and to submit joint nominations with El Paso for purchasable gas. The record shows that El Paso and El Paso Gas Marketing Company were essentially interchangeable names for the same entity.

Since the allowable limits which the OCD established in its rules and regulations were to a large degree determined by previous purchasing patterns, the OCD's setting of allowables for Hartman's wells was based largely on El Paso's own purchasing volume. To that extent, the court found that El Paso manipulated the OCD's mandate to Hartman as to how much gas he could produce. As El Paso reduced its purchases from the Jalmat and Eumont Pools, for example, the OCD's determination of Hartman's allowables would decrease commensurately. On April 21, 1986, El Paso wrote to Hartman and other producers, announcing, "El Paso hereby proposes to release you from your commitment, under applicable contracts * * *"

In his amended complaint, Hartman alleged that beginning January 1, 1985, El Paso "unilaterally reduced the price paid for dry gas actually taken from certain of [his] wells," and that beginning June 1, 1986, "El Paso has unilaterally reduced the price paid for oil well casinghead gas and gas well casinghead gas taken under the Contracts." The trial court found that El Paso's actions were "in wanton disregard of [Hartman's] contractual rights."

El Paso's net worth in 1985 was \$1,069,258,000, while in 1986 its net worth had increased to \$1,140,300,000. Hartman filed his original complaint on April 8, 1986, following El Paso's "shutting in" (closing down) of some eighty-five of his wells. These wells remained shut in until the court issued its permanent injunction.

B NATURE OF THE CONTRACTS BREACHED

The contracts involved here are varied, complex and lengthy. We shall speak of four varieties of contracts containing ratable take clauses. These contracts cover both Hartman's *prorated gas*, that is, gas covered by the "allowable" system defined in NMSA 1978, Section 70-2-16, and pertinent OCD regulations, as well as his *non-prorated gas*. Generally speaking, the four varieties of ratable take contracts require that El Paso purchase gas from the prorated pools in some stated pro-rata portion of Hartman's allowable limit of pro-

duction, and at full deliverability for his *non-prorated* wells. There is, in addition, a type of contract clause designated by the parties as a "Type 5 Ratable Take Clause," which in actuality simply restates El Paso's obligation to purchase gas under all contracts up to allowable limits.

In addition to this classification system, the parties by stipulation classified the contracts according to "Wells for Which Damages Have Been Claimed For Alleged Non-Ratable Taking" (81 of such wells), "Wells for Which Price Claims Have Been Made" (32 of such wells), and "Wells on Which No Damages Have Been Claimed" (38 of such wells). With reference to the first two categories of wells discussed in this paragraph, there is overlap, in that some wells fall into both categories, while wells in the third category discussed in this paragraph are covered by the permanent injunction but were not wells for which contract damages were claimed.

The trial court based its conclusion of irreparable damage to Hartman largely on the fact that ninety-two percent of Hartman's gas production is subject to his contracts with El Paso, and that ninety-five percent of his income is derived from his Lea County production. The trial court found, based on the record as we have summarized it, that "[b]ecause of [El Paso's] ongoing breach of its contracts with [Hartman], [Hartman] will continue to suffer a substantial loss of revenue, inhibiting his present and future ability to explore for, produce and sell natural gas."

PART THREE LEGAL ISSUES RAISED ON APPEAL

A WAS THE TRIAL COURT'S JURISDICTION PRE-EMPTED BY FEDERAL LAW? OUR DECISION NO

[1] El Paso argues for an affirmative answer to this question by citing several Supreme Court and federal cases which are inapposite. The principal error El Paso makes is to confuse cases involving pipelines versus consumers, on the one hand, and state regulatory agencies' decisions versus federal statutory authority, on the other. The present appeal involves neither

of these issues. It is a contract case, and neither the Natural Gas Act (NGA) nor the Natural Gas Policy Act (NGPA)⁷ precludes a state court from deciding issues involving oil and gas contracts which are regulated *tangentially and peripherally*, insofar as the legal issues herein are concerned.

Thus, contrary to what El Paso argues, *Northern Natural Gas Co. v. State Corp. Commission of Kansas*, 372 U.S. 84, 83 S.Ct. 646, 9 L.Ed.2d 601 (1963), did not prohibit the trial court here from asserting jurisdiction. In that case the principal contract at issue was not before the Supreme Court on appeal. Further, the *producer* of natural gas was not a party to the suit. *Northern Natural Gas Co.* involved a state agency's entanglement in federal affairs. The case before us involves the issue of a private party attempting to enforce a private contract against a corporation. Likewise, *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board of Mississippi*, 474 U.S. 409, 106 S.Ct. 709, 88 L.Ed.2d 732 (1986), relied on by El Paso, is not on point. In that case, the issue was similar to the issue raised in *Northern*. Further, the Court in *Transcontinental Gas Pipe Line Corp.* explicitly distinguished between FERC's jurisdiction and the role which free market forces must play in oil and gas contracts such as the one before us.

To the extent that Congress denied FERC the power to regulate affirmatively particular aspects of the first sale of gas, it did so because it wanted to leave determination of supply and first-sale price to the market.

Id. at 422, 106 S.Ct. at 717.

In actuality, the issue which El Paso raises as to federal pre-emption versus freedom of contract has long been settled. "Neither the NGPA nor the NGA expressly preempt the application of state contract law to the interpretation of gas purchase contracts." *Pennzoil Co. v. FERC*, 645 F.2d 360, 384 (5th Cir. 1981), *see also Tencoco Oil Co. v. El Paso Natural Gas*, 687 P.2d 1049 (Okla. 1984), and *International Minerals & Chem. Corp. v. Llano*, 770 F.2d 879 (10th Cir. 1985) *cert. denied*, 475

7. 15 U.S.C. §§ 717 to -717z (1982) and 15 U.S.C.

§§ 3301 to -3432 (1982), respectively.

U.S. 1015, 106 S.Ct. 1196, 89 L.Ed.2d 310 (1986) (presumption of freedom of contract under state law without interference either by FERC's regulations or restraints imposed by the NGA or the NGPA). Cf. *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1025-26 (D.C.Cir.1987), cert. denied, — U.S. —, 108 S.Ct. 1468, 99 L.Ed.2d 698 (1988) (where, although the court disagreed with FERC's reasoning as to issuance of its Order No. 436,⁸ it did nothing to limit the private contract prerogatives of either pipelines or producers).

As we held in *Ashlock v. Sunwest Bank of Roswell*, 107 N.M. 100, 103, 753 P.2d 346, 349 (1988), so too here, we hold that state (contract) law and federal regulation are not in conflict, and thus there is no pre-emption by any applicable federal statute.

B. DID THE TRIAL COURT ERR IN STRIKING EL PASO'S AFFIRMATIVE DEFENSES? OUR DECISION: NO.

As to this issue, we agree with the reasoning employed by the court in granting summary judgment in *Thomas N. Berry & Co. v. Northern Natural Gas Co.*, No. CIV-85-1430-R (W.D.Okla. May 15, 1986):

[T]he defendant seems to labor under the misconception that it is the plaintiff's burden not only to prove its prima facie case, * * * but also to prove that the defendant has no affirmative defenses. Consequently, as the defendant has failed to submit any credible evidence to show issues of material fact exist as to [its] defenses, summary judgment will be granted to them * * *.

El Paso is right to argue on appeal that "[s]ummary judgment is a drastic remedy to be used with great caution." *Pharmaseal Laboratories, Inc. v. Goffe*, 90 N.M. 753, 756, 568 P.2d 589, 592 (1977). Here, however, the court cautiously and prudently applied the drastic remedy that was needed.

8. For Order No. 436, see 50 Fed.Reg. 42,408 (1985). In this case FERC's order was vacated and remanded for further proceedings because FERC inadequately addressed itself to "take-or-pay" problems raised by the issues before it. Footnote 25 of the decision, however, notes, "No

Trial courts have consistently struck down defenses which have no basis in either fact or law, as was the case here. See *International Minerals & Chem. Corp.*, holding in a natural gas seller's favor on the issue of a *force majeure* clause, where a buyer complied with a regulation of the New Mexico Environmental Improvement Board requiring the seller to shut down certain parts of its potash processing facility near Carlsbad. The buyer unsuccessfully sought a declaratory judgment in the United States District Court for the District of New Mexico, asking to be excused from its performance under the contract with the seller because of the *force majeure* clause. The United States Court of Appeals for the Tenth Circuit agreed with the trial court on the issue of *force majeure*, but reversed the trial court's decision because "there was no technically suitable way for [the plaintiff] to comply with [the state's regulation] without shutting down * * *" its operation. 770 F.2d at 887 (emphasis added). In the case before us, the shoe is on the other foot. It is Hartman who is being "shut down," not El Paso, and by El Paso's actions.

[2] The *force majeure* clauses of the pertinent contracts before us may not be sanctioned when used to force a producer into submitting to a seller's scheme and compel him to do business only on the seller's terms, as was the case here. The Supreme Court has taken a similar approach in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983), where in it held that a Kansas statute regulating the price of natural gas in a buy-sell agreement entered into between a Kansas public utility and an energy company did not void the parties' contractual obligations. See also *Exxon Corp. v. Eagerton*, 462 U.S. 176, 103 S.Ct. 2296, 76 L.Ed.2d 497 (1983).

As the United States Court of Appeals for the Seventh Circuit has ruled:

party here presents any argument for a view that FERC could exercise its § 5 power to modify nonjurisdictional wellhead contracts." *Associated Gas Distributors* at 1022. The contracts at issue in the case before us are purely and simply "nonjurisdictional wellhead contracts."

Since impossibility and related doctrines are devices for shifting risk in accordance with the parties' presumed intentions, which are to minimize the costs of contract performance, one of which is the disutility created by risk, they have no place when the contract explicitly assigns a particular risk to one party or the other.

Northern Indiana Pub. Serv. Co. v. Carbon County Coal Co., 799 F.2d 265, 278 (7th Cir.1986). We likewise agree with the court in *Resources Investment Corp. v. Enron Corp.*, 669 F.Supp. 1038, 1043 (D.Colo.1987), when it ruled:

[T]he parties clearly contemplated the likelihood of changing economic conditions, including alterations in fuel price levels "and such fluctuation was not the kind of completely unforeseeable event required to invoke the doctrine of frustration of purpose." [*United States of America v. Great Plains Gasification Associates, et al.*, 819 F.2d 831 (8th Cir. 1987)] at p. 835. "This court will not hold a contract to be frustrated merely because of an increase in cost to one of the parties." *Ross Industries v. M/V Gretke Oldendorff*, 483 F.Supp. 195, 199-200 (E.D.Tex.1980). . . . Similar considerations govern the claim based upon impossibility and commercial impracticability.

In the case before us, the affirmative defenses were devoid of any real contact with the facts, and the trial court prudently struck them from the case. If there was any risk to be assumed, it was El Paso which assumed it.

C. DID THE TRIAL COURT LACK SUBJECT MATTER JURISDICTION IN MAKING FACTUAL DETERMINATIONS AS TO CERTAIN MATTERS INVOLVING OCD REGULATIONS? OUR DECISION: NO.

[3] In its brief-in-chief, El Paso claimed the trial court "committed fundamental error by intruding into an area within the exclusive jurisdiction of the New Mexico OCD. This occurred when the court considered Hartman's claim that the process established by the OCD for setting allow-

ables under its proration scheme is no longer effective, when it adjudicated the reliability of the OCD system of nominations and allowables, and when it altered subsequent allowables without taking into account any of the factors required by statute or OCD regulations to be considered in setting allowables in order to conserve natural resources and prevent waste." The problem with this contention is that the trial court did none of the things of which El Paso accuses it. The trial court never ruled that OCD's system "is no longer effective." Nor did the trial court take any action to "adjudicate the reliability of the OCD system." Finally, it was El Paso, and not the trial court, which "altered allowables" through its manipulation of the market.

We take El Paso's contention on this issue to be a variety of the public rights vs. private rights argument resolved by the Supreme Court of Oklahoma in *Tenneco Oil Co. v. El Paso Natural Gas Co.* Quoting from *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), the court stated:

[I]t suffices to observe that a matter of public rights must at a minimum arise "between the government and others." In contrast, "the liability of one individual to another under the law as defined," is a matter of private rights * * *. Private-rights disputes * * * lie at the core of the historically recognized judicial power.

687 P.2d at 1053-1054 (emphasis in original).

The case before us is not one involving "the government and others." It is a contract case, involving a private individual and a corporation. The trial court did not infringe on the jurisdiction of the OCD.

D. DID THE TRIAL COURT ERR IN RULING THAT EL PASO HAD WAIVED ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT IMMUNITY INSOFAR AS THE DISPUTED DOCUMENTS ARE CONCERNED? OUR DECISION: NO.

[4] This is an issue of first impression in New Mexico. We take as our starting

point the principle stated by the United States Court of Appeals for the Second Circuit: "It is axiomatic that the burden is on a party claiming the protection of a privilege to establish those facts that are the essential elements of the privileged relationship." *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136, 144 (2nd Cir.), cert. denied, 481 U.S. 1015, 107 S.Ct. 1891, 95 L.Ed.2d 498 (1987).

El Paso argues its point by way of analogy to contract law, asserting the equitable defense of mistake of fact, in that it inadvertently produced two of the allegedly protected documents before the court ordered it to produce the others. See *Albuquerque Nat'l Bank v. Albuquerque Ranch Estates, Inc.*, 99 N.M. 95, 654 P.2d 548 (1982); *Talley v. Sec. Serv. Corp.*, 99 N.M. 702, 663 P.2d 361 (1983). El Paso bases its argument in favor of a rule supporting its position on a case that is frequently cited as foundational on this issue, *Mendenhall v. Barber-Greene Co.*, 531 F.Supp. 951 (N.D.Ill.1982), where the court held that counsel's inadvertent production of privileged letters to its adversary in a patent infringement action did not constitute waiver of the attorney-client privilege.

We disagree with El Paso that the rule in *Mendenhall v. Barber-Greene Co.* should be the New Mexico rule governing this issue. Instead, we favor the approach taken by the court in *Hartford Fire Insurance Co. v. Garvey*, 109 F.R.D. 323 (N.D. Cal.1985). There the court spoke of the rule in *Mendenhall* as being of weak precedential value and not the majority rule. *Id.* at 329. Our study of this issue persuades us that the court in *Hartford Fire Insurance Co. v. Garvey* was right in its assessment:

The modern trend seems to be towards a case by case determination of waiver based on a consideration of all circumstances. The majority of cases do hold or take for granted, that inadvertent disclosure of privileged documents may waive the privilege. . . . The "inadvertence" of the production is considered

as one factor in determining whether there has been a waiver.

Id. at 329-30 (citations omitted).

The court in *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 116 F.R.D. 46 (M.D.N.C.1987), while not extending the waiver or privilege to documents not already inadvertently produced, described the general principle behind the modern trend, as follows:

Notwithstanding its ancient roots and modern necessity, the [attorney-client] privilege must be strictly construed to ensure that it does not unduly impinge on the more general, overriding duty of insisting that investigations and decisions be based on truth and reality as opposed to fiction or fabrication.

Id. at 49 (citation omitted).

[5] The court then listed five factors which should assist a court in determining whether a document has lost its privilege:

(1) The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosures; (5) whether the overriding interests of justice would be served by relieving a party of its error.

Id. at 50.

When measuring El Paso's conduct by these factors, we find its conduct lacking. Therefore, we hold that the trial court did not abuse its discretion in ordering El Paso to produce the documents.

[6] The above criteria pertain both to the trial court's determination of the issue of attorney-client privilege as well as to its determination of the issue of work-product immunity. See *Hartford Fire Ins. Co.*, 109 F.R.D. at 327. As for the additional documents ordered to be produced, we conclude that the two inadvertently produced documents were sufficient in and of themselves to substantiate Hartman's allegations concerning the subject matter of those documents. Hence, since the cat was

already out of the bag, as far as the jury's knowledge of El Paso's conduct is concerned, it was not prejudicial to El Paso's case. The trial court to order production of the additional documents.

PART FOUR. CONCLUSION AND SUMMARY OF OUR HOLDING ON APPEAL

To summarize, we affirm the trial court's judgment on the verdict, and order El Paso to comply strictly, in detail and in good faith, with the trial court's permanent injunction.

IT IS SO ORDERED

SCARBOROUGH, C.J. and
STOWERS, J., concur



107 N.M. 688

Gayle D. RICHARDSON, as Personal Representative of the Estate of Wade Fitzsimmons Richardson, Deceased, Petitioner.

v.

CARNEGIE LIBRARY RESTAURANT, Inc., d/b/a The Country Connection, and Bennett-Cathey, Inc., Respondents.

No. 17432.

Supreme Court of New Mexico

Oct. 18, 1988.

Rehearings Denied Nov. 21, 1988.

Personal representative of decedent killed in automobile-dump truck accident brought suit against dramshop operator who served alcohol to driver of stolen dump truck and owner of dump truck. The District Court, Harvey W. Fort, D.J., granted summary judgment to dump truck owner and limited dramshop's liability to cap in statute. The Court of Appeals affirmed in an unpublished decision. On certiorari, the

Supreme Court, Walters, J., held that: (1) intermediate or heightened scrutiny test applied to equal protection challenge to cap in statute; (2) cap in dramshop statute was unconstitutional; and (3) a majority of the court was unable to reach agreement on whether dump truck owner was liable for negligence.

Reversed in part and affirmed in part.

Ransom, J., concurred in part and dissented in part.

Stowers, J., dissented with opinion.

1. Amicus Curiae ⇨3

Plaintiff's statement at trial that damage cap in Dramshop Act violated State Constitution was insufficient to preserve issues of separation of powers or state due process on appeal through amicus briefs.

2. Amicus Curiae ⇨3

Plaintiff's failure to demand a jury trial in a timely manner waived amicus curiae ability to brief on how dramshop damage recovery cap violated state right to jury trial. SCRA 1986, Rule 1-038, subd. D.

3 Constitutional Law ⇨245(3)

Claim of tort victims affected by damage cap in dramshop liability act was at least sensitive enough to injustice wrought to warrant application of intermediate or heightened scrutiny test in state equal protection challenge to the cap. Const. Art. 2, § 4; NMSA 1978, §§ 41-11-1 to 41-11-1, subd. I.

4. Constitutional Law ⇨209

Test for reviewing equal protection challenges are generally the same under New Mexico and federal law; minimum scrutiny also known as rational basis test, strict scrutiny, and intermediate or heightened scrutiny. Const. Art. 2, § 18; U.S.C. A. Const. Amend. 14.

5. Constitutional Law ⇨48(1)

Legislative acts are presumptively valid and normally are subject to rational basis test, and will not be declared invalid unless court is clearly satisfied that legislature went outside Constitution in enacting them.

g to have an otherwise valid judgment declared void, but is merely asking for recognition of the fact that the previous judgment is a legal nullity. Venue, on the other hand, is simply a privilege extended to each defendant, and is deemed to be waived unless a timely objection is interposed. 1 J. Moore, *Federal Practice*, ¶146[6] (2d ed. 1988). Defendant Lepore did not question venue during the pendency of the federal action and, indeed, has yet to interpose any objection to venue being laid in the district of Arizona. Accordingly, there is no basis for finding that the federal default judgment is void or that the portions of the action *sub judice* that relate to that judgment should be dismissed. The defendant's motion should therefore be denied.⁷

IV.

[6] Counts Two through Six of the present complaint involve the allegedly fraudulent conveyance of real property from defendant Lepore to the corporate defendant, Ultra Service, Inc. Pursuant to Federal Rule 64 and Conn.Gen.Stat. § 52-278c(a)(1), plaintiff's application for a prejudgment attachment on the two properties was granted on the basis of a finding of probable cause supporting the plaintiff's claims. See Order (Jan. 6, 1989). Defendant Lepore has now moved to vacate the attachments on the grounds that there is "sufficient doubt" that plaintiffs will be able to establish that the conveyance was made with a fraudulent intent as required by Conn.Gen.Stat. § 52-552.

A prejudgment remedy may be obtained when the plaintiff establishes that there is probable cause to sustain the validity of his claims. The plaintiff need not demonstrate, by a preponderance of evidence or otherwise, that he will prevail. *Dow & Condon, Inc. v. Anderson*, 203 Conn. 475, 525 A.2d 935 (1987). Contrary to defendant's assertions, the affidavit submitted in support of his motion does not cast "suffi-

cient doubt" on the validity of plaintiff's claims to impugn the prejudgment attachment. However, since a defendant will ordinarily move pursuant to Conn.Gen.Stat. § 52-278e for a hearing to vacate a prejudgment remedy, and since the defendant has called into question an affidavit submitted by plaintiffs in support of the attachment, the pending motion should be denied without prejudice to the defendant's filing a timely motion for a hearing in strict accordance with the above-referenced statute.

V.

For all of the foregoing reasons, the defendant's motion to dismiss or for summary judgment is denied in all respects. The motion to vacate the prejudgment attachment is denied without prejudice to the filing of a renewed motion to vacate and a request for a hearing as contemplated by Conn.Gen.Stat. § 52-278e.



NIAGARA MOHAWK POWER CORPORATION; Long Island Lighting Company; New York State Electric & Gas Corporation; Rochester Gas and Electric Corporation; and Central Hudson Gas & Electric Corporation, Plaintiffs,

v.

STONE & WEBSTER ENGINEERING CORPORATION, ITT Fluid Products Corporation, and ITT Fluid Technology Corporation, Defendants.

No. 88-CV-819.

United States District Court,
N.D. New York.

May 25, 1989.

Nuclear power plant owners brought action against construction manager and

sively resolved, the court cannot find, as a matter of law, that the judgments at issue were placed on an unsound jurisdictional foundation. Accordingly, defendant's motion for summary judgment should also be denied.

Cite as 125 F.R.D. 578 (N.D.N.Y. 1989)

field fabrication and piping contractors to recover for faulty design and construction of plant. One owner and manager moved for protective orders, and contractors moved to compel production of documents. The District Court, McCurn, Chief Judge, held that: (1) documents submitted in proceeding before New York Public Service Commission were work product; (2) owners waived work product protection as to some of those documents; and (3) manager was not entitled to depose owners' attorney.

Motions granted in part and denied in part.

1. Federal Civil Procedure ¶1600.2

Protected work product contained in documents and tangible things cannot be obtained through less tangible methods such as deposition questioning of persons with knowledge of protected information. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

2. Federal Civil Procedure ¶1600.2

Work product documents prepared for litigation in one action are protected from discovery in subsequent, related suit. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

3. Federal Civil Procedure ¶1600.2

Nuclear power plant's construction manager that provided architectural and engineering services and consultants were "representatives" of owners of nuclear power plant within meaning of work product rule; manager and consultants prepared or reviewed documents at direction of owners or their attorneys in anticipation of litigation before New York Public Service Commission. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

4. Federal Civil Procedure ¶1600.2

Documents prepared at direction of nuclear power plant owners or their attorneys in anticipation of litigation before New York Public Service Commission to determine prudence of costs for power plant were work product in suit by owners to recover for allegedly faulty design and con-

struction of plant by field fabrication and piping contractors and construction manager which also served as architectural and engineering firm; suit by owners was closely related to prudence proceeding before Commission. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

5. Federal Civil Procedure ¶1600.4

Generally, work product protection is waived when documents are voluntarily shared with adversary or when party possessing documents seeks to selectively present materials to prove a point, but then attempts to invoke privilege to prevent opponent from challenging assertion. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

6. Federal Civil Procedure ¶1600.4

Sharing work product material with friendly party does not waive work product protection as it applies to adverse third party. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

7. Federal Civil Procedure ¶1600.4

Protection of work product materials is not waived when disclosure occurs through excusable inadvertence. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

8. Federal Civil Procedure ¶1600.4

Knowing release of privileged documents constitutes waiver of work product protection and is not inadvertent, while simple mistake that is immediately recognized and rectified is not waiver of work product protection. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

9. Federal Civil Procedure ¶1600.4

Generally, work product protection is waived when protected materials are disclosed in manner which is either inconsistent with maintaining secrecy against opponents or substantially increases opportunity for potential adversary to obtain protected information. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

10. Federal Civil Procedure ¶1600.4

Owners of nuclear power plant in action against construction manager and field fabrication and piping contractors to recover for allegedly faulty design and construc-

7. Defendant Lepore is similarly not entitled to summary judgment at the present time. As the foregoing makes clear, there are still genuine issues of material fact regarding the nature and extent of Mr. Lepore's involvement in the partnership transactions. Until these are conclu-

on waived work product protection with respect to "Product Management Book" which was written by manager over course many years before New York Public Service Commission initiated proceeding to determine prudence of costs of power plant; manager, which also served as architect and engineer, did not obtain possession of excusable inadvertence or compulsion; and owners were apparently cognizant of potential for adversary legal relationship with manager and could have created "Book" without manager's assistance. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

13. Federal Civil Procedure \Rightarrow 1600.4

Owners of nuclear power plant in action against construction manager and field fabrication and piping contractors to recover for allegedly faulty design and construction did not waive work product protection with respect to draft answers to interrogatories by New York Public Service Commission in proceeding to determine prudence of plant costs, even though answers were disclosed to manager; manager, that also was architect and engineer, was only party in position to verify factual assertions contained in draft answers; and since owners had only 120 days to respond to interrogatories, there was de facto compulsion to disclose protected work product. Fed. Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

14. Federal Civil Procedure \Rightarrow 1600.4

Owners of nuclear power plant in action against construction manager and field fabrication and piping contractors to recover for allegedly faulty design and construction waived work product protection with respect to consultant reports which were disclosed to manager to be reviewed for actual accuracy and style before submission to New York Public Service Commission in proceeding to determine prudence of plant costs; Commission did not require reports; reports were disclosed to manager when one owner's president had serious doubts as to performance by manager, which also served as architect and engineer; and owners could have requested manager to verify factual assertions while keeping reports themselves confidential.

Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

15. Federal Civil Procedure \Rightarrow 1600.4

Field fabrication and piping contractors in action by nuclear power plant owners to recover for allegedly faulty design and construction by construction manager and contractors were entitled to discover owners' documents which lost work product protection after owners waived it with respect to manager; equal access of manager and contractors to documents was necessary to place all parties on equal footing. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

16. Federal Civil Procedure \Rightarrow 1600.2

Field fabrication and piping contractors in action by nuclear power plant owners to recover for allegedly faulty design and construction by architect and engineering firm and contractors would be unable without undue hardship to reconstruct "Project Management Book," which was work product prepared for proceeding before New York Public Service Commission and, therefore, were entitled to discover "Book"; "Book" took years to compile and involved millions of documents. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

17. Federal Civil Procedure \Rightarrow 1415

Construction manager in action by nuclear power plant owners to recover for allegedly faulty design and construction was not entitled to depose owners' attorney who also represented them in proceeding before New York Public Service Commission to determine prudence of plant costs; deposition would increase likelihood of attorney being called as witness; deposition had potential for invasion of privileged or protected material; and information sought by manager could be obtained through interrogatories or by deposition of owners. Fed.Rules Civ.Proc.Rules 26(b)(3), 26(c), 30(b)(6), 37(a), 28 U.S.C.A.

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Hughes, Syracuse, N.Y., John R. Ferguson, Washington, D.C., of counsel.

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Mudge Rose Guthrie Alexander & Fardon, New York City, Costello Cooney & Fearon, Syracuse, N.Y., for defendant Stone & Webster Engineering; Harold G. Levison, New York City, Vincent O'Neil, Syracuse, N.Y., of counsel.

McNamee Lochner Titus & Williams, Attorneys for Defendants ITT Fluid Products & ITT Fluid Technology, Albany, N.Y., Pepper Hamilton & Scheetz, Philadelphia, Pa., for defendants ITT Fluid Products & ITT Fluid Technology; Scott A. Barbour, Albany, N.Y., of counsel.

MEMORANDUM-DECISION AND ORDER

McCURN, Chief Judge.

I. Overview

The plaintiffs are five utilities who own, operate, and are tenants in common (together "the Cotenants") of the Nine Mile Point 2 nuclear power plant in Scriba, New York. The Niagara Mohawk Power Corporation, ("Niagara Mohawk") as the managing cotenant, has been the primary actor in coordinating efforts to develop the nuclear facility. The four other utilities, namely the Long Island Lighting Company, the New York State Electric & Gas Corporation, the Rochester Gas and Electric Corporation, and the Central Hudson Gas & Electric Corporation, played some lesser role in bringing Nine Mile Point 2 ("NMP2") to completion. The plaintiffs have brought this action against Stone & Webster Engineering Corporation ("SWEC"), ITT Fluid Products Corporation, and ITT Fluid Technology Corporation (collectively "ITT") for damages which allegedly resulted from the faulty design and construction of the Nine Mile Point 2 plant.

There are currently a number of motions pending before this court. This memorandum decision and order addresses the following: (1) the motion by plaintiff Niagara Mohawk for a protective order, pursuant to Fed.R.Civ.P. 26(c), to prevent the deposition by SWEC of attorney Steven J. Agresta; (2) the motion by defendant SWEC for a protective order, pursuant to Fed.R.Civ.P. 37(a), compelling William J. Donlon to answer certain deposition questions; (3) the cross motion by the plaintiffs, under Rule 26(c), for a protective order precluding the defendants use and/or retention of certain documents, and (4) the motion by ITT to compel the production of certain documents pursuant to Rule 37(a) Fed.R.Civ.P.

II. Background

In June of 1971 Stone & Webster Engineering Corporation was retained by the Cotenants as the architect/engineer and construction manager for a nuclear power plant planned to be built in upstate New York. The Nine Mile Point 2 nuclear power plant was to be owned by Niagara Mohawk and four other utilities. Construction commenced on the 1080 megawatt nuclear facility in 1975, the nuclear fuel was loaded in 1986, and NMP2 went into commercial operation in 1988. The plaintiffs hired ITT Grinnell Corporation in 1974 to perform field fabrication and erection of the piping at the nuclear facility. ITT Grinnell's alleged successors in business, and the defendants in this suit, are ITT Fluid Products Corporation and ITT Fluid Technology Corporation (hereafter "ITT").

On April 16, 1982, the New York Public Service Commission (the "PSC") issued a decision stating that its future policy would be to permit Niagara Mohawk and the Cotenants to recoup only those investments in NMP2 that were made prudently. Thereafter, Niagara Mohawk and the Cotenants retained Steven Agresta, a partner in the law firm of Swidler & Berlin, to represent it in an anticipated administrative proceeding before the PSC in which a determination would be made as to which of the capital costs of NMP2 were prudently incurred. This "prudence proceeding" would be of prime importance to the investor

owned utilities who were then in the process of constructing the Nine Mile Point 2 facility. Under the PSC's regulatory scheme, investor owned utilities are only allowed to earn a profit and recoup costs on monetary disbursements which are "prudent." Any non-prudent costs must be borne by the utilities' shareholders rather than the customers. Moreover, the utilities bear the burden of proving the propriety of their capital investments. See generally, N.Y.P.S.C. Case 29124, *Proceeding on the Motion of the Commission to Investigate the Prudence of Costs Incurred for the Construction of the Nine Mile Point 2 Nuclear Generating Facility*, (July 3, 1985).

The PSC initiated a prudence proceeding into the costs of NMP2 on July 3, 1985. Attached to the PSC's order were a number of interrogatories to which the utilities were required to respond within 120 days. The PSC staff and the utilities never actually litigated the matter before the Commission. Rather, on the 18th of September, 1985, the staff of the Public Service Commission and the Cotenants filed a joint motion proposing a settlement as to the amount of capital investment in NMP2 which would be deemed to have been prudently incurred.

Between November of 1985 and January of 1986 the Public Service Commission conducted evidentiary hearings on the proposed settlement. During these proceedings the Cotenants submitted testimony, discovery responses, and legal briefs. The PSC adopted a settlement on October 3, 1986, by which the utilities were permitted to place \$4.16 billion of the costs of NMP2 into the rate base. According to the utilities this amounted to a disallowance of over \$2 billion. The settlement is now on appeal to the Appellate Division of the New York State Supreme Court, preserving the possibility of remand to the PSC for a full prudence proceeding.

A key concern of the parties herein is the extent to which documents prepared in anticipation of the PSC prudence proceeding are subject to discovery in this action. Many of the "prudence documents" are

already possessed by defendant SWEC. In fact, SWEC, as the architect/engineer and construction manager of NMP2, was in possession of much of the factual information necessary to respond to the PSC prudence investigation. SWEC also participated in drafting substantial portions of these prudence documents. However, the ITT defendants did not assist in the drafting of any of these materials and currently possess only a limited number of same.

The Prudence Documents

A. The Project Management Book

In April of 1983, well before the PSC initiated the NMP2 prudence proceeding, the Co-tenants, Swidler & Berlin, and SWEC combined efforts to create documents which attempted to set forth facts and circumstances substantiating the costs of the Nine Mile Point 2 facility. This document, termed the "Project Management Book", was to detail numerous aspects of the design and construction of NMP2 including: an overall description of the role of upper management; engineering and design; quality assurance; quality control; procurement; contract administration; document control; cost estimating and forecasting; construction management; the start-up process; testing, and planning. The Project Management Book (the "P.M. Book") was created to assist the utilities in responding to any questions posed by the PSC as part of the prudence inquiry as well as in the affirmative assertion of their case before the Commission.

The P.M. Book was initiated by an April 1983 letter from Mr. William Donlon, the President of Niagara Mohawk, to Mr. Frank Reis, then President of SWEC, relaying the Co-tenants' plans to assemble information in anticipation of the PSC prudence investigation. That letter stated in part:

We believe that the best way to document the prudent management of the project is to develop a book which would be a detailed history of the project management of NMP2. Such a book would describe, among other things, how engineering drawings were produced and processed, the methods for developing

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and revising cost estimates, the project's quality assurance and control programs and the supervision of contractors at the site. This project management book would not be an evaluation of management practices of Stone & Webster or the cotenants. Rather, it would be a detailed description of how the management structure evolved over time. It is our belief that a document neutral in tone and descriptive in nature would be the most persuasive approach to showing effective project management.

In the additional role of what Niagara Mohawk has termed a "paid litigation consultant", SWEC was to assist the utilities and Swidler & Berlin in developing a history of the operation of NMP2 which would help to demonstrate to the PSC that the facility was properly managed and its costs prudently incurred. SWEC was advised that Mr. Agresta was to direct this effort on behalf of Niagara Mohawk and the Co-tenants. For its part, SWEC appointed Harry Reese, a former project manager at NMP2, to head SWEC's fact finding team and coordinate efforts with the Swidler & Berlin firm.

The P.M. Book, according to SWEC, was developed over the course of 18 months and was substantially completed in 1984. Niagara Mohawk, however, contends that this document was never actually completed. In any event, the documents which comprise the P.M. Book are extensive. The P.M. Book was created through a process whereby the SWEC team drafted and re-drafted portions of the book in accordance with a detailed outline and subsequent editorial comments provided by Swidler & Berlin.

B. The Draft Responses

On July 3, 1985, the PSC commenced its investigation into the management and costs of Nine Mile 2. As part of its investigation the PSC served hundreds of interrogatories on the utilities who own NMP2 requesting information concerning the nuclear plant. The PSC ordered the utilities to respond within 120 days. Mr. Agresta and his law firm were charged by the utilities with drafting responses to the inter-

rogatories. According to the October 10, 1988, declaration of Mr. Agresta, the persons who actually drafted the answers to the PSC's questions were Thomas Lemberg and other attorneys at the Swidler & Berlin firm. Steven Agresta, who has been retained by Niagara Mohawk as a trial counsel in this action, asserts that he did not author or assist in the selection of documents for any of the draft responses.

On July 24, 1985, Mr. Agresta sent draft responses to PSC interrogatories #2 and #8 to Harry Reese for SWEC's comments. It is the plaintiffs' position that they had to send these draft responses to SWEC so that they could be reviewed for accuracy before submission to the PSC. SWEC claims to have also received a revised draft of answers to certain unspecified interrogatories from Swidler & Berlin on September 27, 1985.

The interrogatories required an extensive response. Question #2 of Appendix A stated in part:

For each major management area—project management, construction, engineering, licensing and regulatory affairs, and quality assurance/quality control—the co-tenants shall provide a written description of the methodologies or programs employed by the project in addressing the following managerial functions ...

Question 8 of Appendix A stated in part:

The co-tenants shall explain what techniques were used to measure the performance of project management and to control capital program costs ...

SWEC retained a copy of the draft responses to these questions. These particular draft responses were never filed by the utilities with the PSC as part of the prudence proceedings. Rather, the parties moved to settlement negotiations before any response was required to be formally submitted. However, the plaintiffs were required to make other submissions to the PSC as part of the process whereby the PSC determined whether to adopt the proposed settlement; these documents are on public record.

Other Prudence Documents

Defendant ITT was not involved in the development of the prudence documents and requests that it be permitted additional discovery to that discussed above. This could include all correspondence and other documents transmitted between Niagara Mohawk, the Co-tenants, and Swidler & Berlin to and from SWEC which were concerned with issues relevant to the present action, as well as reports prepared by the tenants' consultants in preparation for the prudence proceeding which were turned over to SWEC. It appears that consultant reports were prepared by Cresap, McCormick & Paget, Bechtel Corporation, and Arrey Pines Technology Inc.

On November 7, 1988, ITT served a demand upon the plaintiffs for the production of documents. On December 12, 1988, the plaintiffs served their response to this demand objecting to the first 22 of 41 numbered requests as demanding information covered by the attorney/client privilege or protected under the attorney work product doctrine. Currently, however, ITT is in possession of a number of the these documents which were provided either as exhibits to motion papers or given to ITT by SWEC at the deposition of Mr. William Donlon.

SWEC cites the following as documents which it was requested to prepare or comment upon in the course of preparing for the prudence proceeding.

1. July 1985 draft report on management of NMP2 prepared for the New York Public Service Commission.
2. September 1985 draft report on management of NMP2 prepared for the New York Public Service Commission.
3. September 1985 draft report on the Primary Containment Liner prepared for the New York State Public Service Commission.
4. September 1985 draft report on the 1974-75 slowdown prepared for the New York State Public Service Commission.
5. September 1985 draft report on geology prepared for the New York State Public Service Commission.

6. September 1985 draft response to Appendix B to the New York State Public Service Commission order instituting the NMP2 prudence proceeding.

7. Testimony of Messrs. Rinalli, Terry & Goyal dated October 30, 1985, in the New York Public Service Commission Case No. 29124 particularly concerning the 41 "enhancements" at NMP2.

8. The Cresap, McCormick & Paget report entitled "Swidler, Berlin & Strelow Step V—Assessment of Stone & Webster project Management, November 1984, Volumes I and II, including Swidler & Berlin's comments on the report."

These are the types of documents which ITT is apparently seeking to obtain through discovery.

D. The Donlon Deposition

SWEC deposed William Donlon, Chairman of the Board and Chief Executive Officer of Niagara Mohawk, on November 9, 10, 30, and December 1, 1988. At the deposition the plaintiffs' counsel contested the propriety of questions regarding statements contained in certain prudence documents, instructing his client not to respond. ITT was represented by counsel at this deposition. During the course of the deposition attorneys for SWEC marked as exhibits a number of the prudence documents and turned them over to ITT.

The Present Proceedings and Motion

On August 1, 1988, Niagara Mohawk and the Co-tenants filed a complaint against SWEC and the ITT defendants for damages arising out of the design, engineering, and construction of NMP2. Through claims sounding in both contract and tort, the plaintiffs seek to recover excess costs associated with the defendants work in such areas as overhead, overtime, delay in project completion, redesign, reconstruction, and other alleged mismanagement. SWEC served an answer on August 30th along with a notice to depose Steven Agresta, plaintiffs' counsel in the prudence proceeding, William Donlon, Chief Executive Officer of Niagara Mohawk, and Paul Briggs, Chief Executive Officer of Rochester Gas and Electric Corporation.

A central issue presented by these motions is whether the prudence documents are subject to discovery. The Cotenants contend that all of the documents are protected work product since they were prepared in anticipation of litigation. Plaintiffs request that the defendants be prohibited from retaining or using any of the prudence documents along with any notes which were made from these documents. Niagara Mohawk asserts that the only relevant information Mr. Agresta could provide is either privileged or protected from disclosure. On this basis Niagara Mohawk seeks to have the deposition of Mr. Agresta precluded, under Rule 26(c), or stayed pending defendants' attempts to secure the same information through other discovery methods. Plaintiffs also seek a protective order barring the deposition questioning of William J. Donlon concerning documents drafted in anticipation of the PSC prudence proceeding.

SWEC and ITT assert that the attorney work product protection does not apply to the prudence documents or, in the alternative, that any protection as to these documents was waived. Moreover, SWEC maintains that the deposition of Steven Agresta should be permitted. SWEC states that it does not intend to question Mr. Agresta about his legal thoughts or conclusions as to the prudence documents. Rather, SWEC will question Agresta about the sources of his facts: the persons and documentary sources of information that he relied upon to create both the draft responses to the PSC's interrogatories and the Project Management Book. Finally, SWEC asserts that Mr. Donlon should be

compelled to answer deposition questions concerning the prudence documents as they are fair ground for discovery.

III. Discussion

A. Discovery of Prudence Documents

The scope of discovery under the Federal Rules of Civil Procedure is broad.¹ The Rules open to inquiry not only matters which may be relevant to the subject matter of the suit but matters which appear "reasonably calculated to lead to the discovery of admissible evidence."² From a review of the complaint in this action it cannot be disputed that the information sought by ITT and the information sought to be retained by SWEC is relevant for the purposes of discovery under the Federal Rules.

"In *Hickman v. Taylor*, ... the Court recognized a qualified immunity from discovery for the 'work product of the lawyer'; such material could only be discovered upon a substantial showing of 'necessity or justification.'" *F.T.C. v. Grolier Inc.*, 462 U.S. 19, 103 S.Ct. 2209, 2212, 76 L.Ed. 2d 387 (1983). The holding of *Hickman* has largely been embodied in Fed.R.Civ.P. 26(b)(3) which outlines "the extent to which trial preparation materials are discoverable in federal court." *Id.* 103 S.Ct. at 213. Rule 26(b)(3) provides in pertinent part:

a party may obtain discovery of documents and tangible things ... prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seek-

subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

1. As stated in *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 392, 91 L.Ed. 451 (1947):

"[T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge what ever facts he has in his possession."

2. Fed.R.Civ.P. 26(b)(1) states in applicable part: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the

ing discovery has substantial need of the materials in the preparation of his case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

In other words, "three conditions must be met to earn work product protection. The material must (1) be a document or tangible thing, (2) that was prepared in anticipation of litigation, and (3) was prepared by or for a party, or by or for his representative." *In re Grand Jury Subpoenas Dated Dec. 18, 1981, etc.*, 561 F.Supp. 1247, 1257 (E.D. N.Y.1982). "Once these conditions are satisfied, the party seeking discovery must establish a substantial need for the material and a practical inability to secure the substantial equivalent thereof by alternate means." *Id.*

[1] In ordering discovery, after the required showing has been made by the party seeking discovery, the court "shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories" contained within these documents. Fed.R.Civ.P. 26(b)(3). It is a necessary corollary that protected work product contained in documents and tangible things cannot be obtained through less tangible methods such as the deposition questioning of persons with knowledge of the protected information. See *Hickman*, 67 S.Ct. at 393-94.³

3. As stated in *Hickman* 67 S.Ct. at 393:

"In our opinion, neither Rule 26 nor any other rule dealing with discovery contemplates production under such circumstances. That is not because the subject matter is privileged or irrelevant, as those concepts are used in these rules. Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims.

[2] The work product doctrine has been held to protect documents prepared in anticipation of an administrative proceeding such as the Public Service Commission's prudence proceeding. *Sprague v. Director of Office of Worker's Compensation*, 688 F.2d 862, 869-70 and n. 16 (1st Cir.1982). Rule 26(b)(3) also applies to protect work product materials "prepared for a party's representative, such as an attorney." *Id.* at 870. However, the definition of the term "representative" in Rule 26(b)(3) goes beyond attorney work product and includes the work product prepared on an attorney's behalf. As recited in *Sprague*:

[T]he Supreme Court noted in *United States v. Nobles*, 422 U.S. 225, 95 S.Ct. 2160, [45 L.Ed.2d 141] (1976), [that] the work-product doctrine must "necessarily" apply to materials prepared on an attorney's behalf, *id.* [422 U.S.] at 239 n. 13, 95 S.Ct. at 2170 n. 13, because an attorney must often rely on the assistance of others "in the compilation of materials in the preparation for trial." *Id.* at 238, 95 S.Ct. at 2170. "This view," the Court stated, "is reflected in the Federal Rules of Civil Procedure, see Rule 26(b)(3). . . ." *Id.* at 239 n. 13, 95 S.Ct. at 2170 n. 13.

688 F.2d at 870. Moreover, work-product documents prepared for litigation in one action are protected from discovery in a subsequent related suit. Fed.R.Civ.P. 26(b)(3) "protects materials prepared for any litigation or trial as long as they were prepared by or for a party to the subsequent litigation." *F.T.C. v. Grolier Inc.*, 103 S.Ct. at 2213.

[3, 4] Many of the prudence documents were prepared or reviewed by SWEC at the

Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney. . . . Proper preparation of a client's case demands that he assemble information, sift what he considers to be relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. . . . This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed . . . as the work product of the lawyer."

direction of the plaintiffs or their attorneys and in anticipation of litigation before the PSC. The same is true for the outside consultant's reports on NMP2. Thus, SWEC and the consultants were acting as "representatives" of the plaintiffs within the meaning of Rule 26(b)(3). Therefore, the prudence documents were protected work product for purposes of the PSC's prudence proceeding. The present action is closely related to the prudence proceeding initiated before the PSC. Thus, the prudence documents qualify as protected work product materials for purposes of this litigation. The issue therefore is whether the work product protection was waived as to the prudence documents which were turned over to SWEC.

[5, 6] Generally, the work product protection is waived when documents are voluntarily shared with an adversary or when a party possessing the documents seeks to selectively present the materials to prove a point, but then attempts to invoke the privilege to prevent an opponent from challenging the assertion. *United States v. Nobles*, 422 U.S. 225, 239-40, 95 S.Ct. 2160, 2170-71, 45 L.Ed.2d 141 (1975). Moreover, work product protection is waived when protected materials are disclosed in a manner which "substantially increases the opportunity for potential adversaries to obtain the information." *In re Grand Jury Subpoenas Dated December 18, 1981 and January 4, 1982*, 561 F.Supp. 1247, 1257 (E.D.N.Y.1982); see *GAF Corp. v. Eastman Kodak Co.*, 85 F.R.D. 46, 51-52 (S.D.N.Y. 1979); 8 Wright and Miller, *Federal Practice and Procedure* § 2024 at 209-210 (1970). However, sharing work product material with a friendly party does not waive the work product protection as it applies to an adverse third party. *United States v. Gulf Oil Corp.*, 760 F.2d 292, 295-96 (Temp.Emer.Ct.App.1985); *Western Fuels Ass'n v. Burlington Northern R. Co.*, 102 F.R.D. 201, 203 (D.Wyo.1984). As explained in *United States v. Gulf Oil Corp.*,

[T]he work product privilege does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an

attorney's trial preparations from the discovery attempts of the opponent. The purpose of the work product doctrine is to protect information against opposing parties, rather than against all others outside a particular confidential relationship, in order to encourage effective trial preparation. . . . A disclosure made in the pursuit of such trial preparation, and not inconsistent with maintaining secrecy against opponents, should be allowed without waiver of the privilege.

760 F.2d at 295 (emphasis added) (quoting *United States v. American Tel. and Tel. Co.*, 642 F.2d 1285, 1299 (D.C.Cir.1980)). The work product protection is afforded a far broader scope than the attorney/client privilege, the latter being waived when the privileged information is disclosed to anyone, be they friend, foe, or merely neutral, who is outside of the confidence of the attorney client relationship. See *In re Horowitz*, 482 F.2d 72, 80-82 (2nd Cir.1973) (Friendly J.); *United States v. Gulf Oil Corp.*, 760 F.2d at 295; *Matter of Grand Jury Subpoena, Etc.*, Nov. 16 1974, 406 F.Supp. 381, 386-87 (S.D.N.Y.1985).

However, courts have been willing to preserve the work product protection over documents in circumstances where the disclosure to a potential adversary was compelled. In *Transamerica Computer Co. Inc. v. International Business Machines Corp.*, 573 F.2d 646 (9th Cir.1978), a court in a prior unrelated lawsuit had ordered expedited production of some 17 million documents by I.B.M. over a three month period. Though I.B.M. made great effort to maintain the privilege as to certain of these documents, a number of them were still disclosed. In the *Transamerica* case the plaintiffs sought to make use of the privileged documents disclosed in the previous litigation in its case against I.B.M. The court upheld I.B.M.'s assertion that the documents were protected, finding that there had been a "de facto compulsion" due to "the imposition of an extremely rigorous schedule for discovery." *Id.* at 651.

In *Simpson v. Braider*, 104 F.R.D. 515 522-23 (D.D.C.1985), the court held that the production of privileged information by

defendant in a criminal prosecution, that information being necessary to the defendant's assertion of mitigating circumstances in connection with sentencing, could not be considered a voluntary disclosure. Therefore, the documents retained their privileged status in a subsequent litigation. *Id.* at 522. In holding the information protected, the court noted the general reluctance "to find a waiver of a privilege when protected material] is involuntarily given such as pursuant to a subpoena, or to defend against criminal charges or under circumstances indicating there was realistically no voluntary disclosure." *Id.* at 523. Though the court made this general statement with regard to the waiver of the attorney/client privilege, it applies equally to the work product privilege, the work product protection being broader in scope than the attorney/client privilege. *United States v. Gulf Oil Corp.*, 760 F.2d at 295.

[7, 8] Moreover, the protection afforded work product materials is not waived when disclosure occurs through excusable inadvertence. *United States v. Zolin*, 809 F.2d 1411, 1417 (9th Cir.1987), *cert. granted on other grounds*, — U.S. —, 109 S.Ct. 257, 102 L.Ed.2d 246 (1988). The *Zolin* court, for example, found that no waiver had taken place with regard to tapes turned over to an adversary by a secretary who was under the mistaken impression that they were blank. *Id.* The knowing release of otherwise privileged documents constitutes a waiver and is not inadvertent, while a simple mistake, "immediately recognized and rectified" is not a waiver of the work product protection. See *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105-06 (S.D.N.Y.1985) (protected documents inadvertently produced in the course of large scale discovery did not lose protected status).

Plaintiff's Position

The Cotenants have moved for the entry of a protective order to preclude defendants' use and retention of the prudence documents. Plaintiffs claim that they did not waive the work product protection because (1) SWEC was a consultant at the

time of any disclosure and (2) that any disclosure to SWEC was compelled. The Cotenants assert that throughout their relationship with SWEC they never intended to waive the work product protection over the prudence documents, noting that almost all of the documents which were transmitted between plaintiffs and SWEC were marked "Attorney Work Product Privileged and Confidential."

Plaintiffs characterize SWEC's role as that of a "litigation consultant," as well as the architect/engineer and construction manager of the NMP2 project. They maintain, that since the complaint raises no claims against SWEC with respect to work performed as litigation consultants, the documents written or reviewed by SWEC are not needed for their defense. It is asserted that the consultant/client relationship between plaintiffs and SWEC is analogous to one in which an attorney is sued by a client for injuries suffered when hit by a car driven by the attorney. Plaintiffs contend that, as the attorney could not then disclose client confidences obtained while previously defending the client in a divorce action, *see U.S. v. Ballard*, 779 F.2d 287, 292 (5th Cir.), *cert. denied*, 475 U.S. 1109, 106 S.Ct. 1518, 89 L.Ed.2d 916 (1986), SWEC must maintain the confidential relationship in this suit.

Plaintiffs contend that the practical circumstances surrounding the preparation of materials for the prudence proceeding compelled them to transfer prudence documents to SWEC for review. In the prudence proceeding the Cotenants were required to justify the costs incurred in the construction of NMP2. Failure to do so would result in the costs being disallowed. Since SWEC was in control of the vast majority of information needed to make plaintiffs' case and because billions of dollars were at stake, plaintiffs claim that they were required to employ SWEC to prepare for the proceeding. According to the Cotenants, SWEC was the only party in a position to verify facts contained in the prudence documents. Moreover, because the draft answers to interrogatories were required to be submitted to the PSC,

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SWEC's verification of the documents was needed to avoid committing perjury.

The Cotenants argue that utilities should not be placed in a position where they have to choose between protecting their rights in a prudence proceeding and protecting their rights as against the construction manager of a project. It is asserted that neither SWEC nor ITT have shown a substantial need for the prudence documents, that the defendants are the ones in possession of the vast majority of the facts, and that the plaintiffs have filed with the PSC, and made part of the public record, the prudence material that was actually adopted by the plaintiffs in the course of reaching a settlement with the PSC. The Cotenants assert that defendants can fulfill their discovery requirements without the prudence documents.

Plaintiffs argue that the prudence documents represent the tentative testing of advocacy positions against the facts of the case and therefore should not be subject to use by the opposing parties. The use of lawyer drafts, according to plaintiffs, ultimately interferes with the plaintiffs' right to effective assistance of counsel.

Defendants' Position

While not conceding that the prudence documents constitute work product, defendants focus their argument on the question of waiver. It is asserted that any protection which may have once attached to the documents was waived because plaintiffs (1) brought suit against SWEC (2) the suit concerned the same subject matter as the prudence documents and (3) the prudence documents had been freely transferred to SWEC. Moreover, defendants assert that plaintiffs admitted in their motion papers concerning the deposition of Steven Agresta that they had waived the work product protection as it related to the prudence documents.

SWEC and ITT contend that the prudence documents are particularly relevant because statements contained therein are inconsistent with the allegations made in the complaint, and thus, may constitute admissions under Rule 801(d)(2) of the Fed-

eral Rules of Evidence. Under this theory it is necessary to inquire into the basis of the statements, the process used, and documents relied upon when writing the prudence documents so that defendants can determine (1) whether or not the statements will be admissible and (2) if admissible what evidence will be brought out by the plaintiffs to impeach or temper the damaging admissions.

Defendants maintain that the Cotenants were not compelled to employ SWEC when preparing documents for the prudence proceeding; rather, SWEC could have been requested to provide strictly factual information to the plaintiffs' litigation team, that team then proceeding in a completely confidential manner. Thus, according to defendants, the transfer of the prudence documents to SWEC was neither inadvertent nor compelled. SWEC notes that the plaintiffs spent many years preparing for the prudence proceeding. Under such circumstances there was no time pressure requiring plaintiffs to either use SWEC or go without a thorough defense. SWEC claims that an appropriate analogy to this case is the attorney malpractice action in which an attorney may disclose otherwise privileged communications to defend himself against charges of improper conduct without violating the attorney client privilege. See *e.g. U.S. v. Ballard*, 779 F.2d at 291-92.

SWEC and ITT claim that the subject matter of the prudence documents involves the same matters which are at issue in this suit—the design and construction of the NMP2 project. The work product protection is waived when the documents are disclosed to a person in a manner which substantially increases the likelihood that they will be obtained by an opponent. See *e.g. In re Grand Jury Subpoenas*, 561 F.Supp. 1247, 1257 (E.D.N.Y.1982). Defendants assert that plaintiffs knew SWEC was a potential legal adversary at the time the prudence documents were disclosed. SWEC cites the transcript of the Donlon deposition at pages 299 and 313 to support this position. Though, Mr. Donlon, the President and Chief Executive Officer of

Niagara Mohawk, did not state that plaintiffs were contemplating a lawsuit against SWEC, he did state that he was very disappointed with SWEC's performance as far back as 1980. SWEC argues that such disappointment reveals that there was a potential for an adversary relationship of which the plaintiffs were aware at the time the prudence documents were disclosed to SWEC. By proceeding to disclose the documents in the face of the potential dispute, plaintiffs allegedly waived the privilege.

Waiver of Work Product Protection

The parties do not draw distinctions between the prudence documents; the plaintiffs request a protective order covering all such materials while defendants argue for full disclosure. There are, however, significant differences between the documents which bear on the issue of whether a waiver has occurred. As noted above, the prudence documents fall into three general categories: the Project Management Book, the draft answers to the PSC's interrogatories, and the consultant reports.

[9] This court has determined as a threshold matter that the prudence documents which were transferred to SWEC constitute work product under Rule 26(b)(3) of the Federal Rules of Civil Procedure. The issue, therefore, is whether the plaintiffs waived the work product protection. Generally, the work product protection is waived when protected materials are disclosed in a manner which is either inconsistent with maintaining secrecy against opponents or substantially increases the opportunity for a potential adversary to obtain the protected information. See *United States v. Gulf Oil Corp.*, 760 F.2d at 295; *In re Grand Jury Subpoenas Dated December 18, 1981 and January 4, 1982*, 561 F.Supp. 1247, 1257 (E.D.N.Y.1982); *GAF Corp. v. Eastman Kodak Co.*, 85 F.R.D. 46, 51-52 (S.D.N.Y.1979); 8 Wright and Miller, *Federal Practice and Procedure* § 2024 at 209-10 (1970). However, courts are sometimes willing to preserve the work product protection, as well as the more restricted attorney/client privilege, in situations where the disclosure was essentially

compelled. See e.g. *Transamerica Computer Co. Inc. v. International Business Machines Corp.*, 573 F.2d at 651; *Simpson v. Braider*, 104 F.R.D. at 522-23; see also *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105-06 (S.D.N.Y.1985).

The parties advance many compelling arguments in support of their respective positions concerning discovery of the prudence documents. Two points are of particular relevance to the court's decision in this matter: (1) the President of plaintiff Niagara Mohawk, William Donlon, appears to have been cognizant of the potential for an adversarial legal relationship with SWEC, and (2) the plaintiffs were required to respond to the PSC's interrogatories under penalty of perjury.

[10] The plaintiffs have waived the work product protection with respect to the Project Management Book. This document, though the brainchild of the plaintiffs, was written by Stone & Webster Engineering Corporation in accordance with an outline provided by the plaintiffs. The P.M. Book was not placed in the possession of SWEC by a process which could be termed excusable inadvertence, see e.g. *United States v. Zolin*, 809 F.2d at 1417, or through force of compulsion. See *Transamerica Computer Co. v. International Business Machines Corp.*, 573 F.2d at 651. The document was developed over the course of many years and during a time when the PSC had not yet initiated the prudence proceeding. Moreover, plaintiffs were apparently cognizant of the potential for an adversary legal relationship with SWEC. Under such circumstances the plaintiffs could have created the P.M. Book without SWEC directly assisting in drafting the document. The P.M. Book was, therefore, treated in a manner which "substantially increas[ed] the opportunity for potential adversaries to obtain the information." *In re Grand Jury Subpoenas Dated December 18, 1981 and January 4, 1982*, 561 F.Supp. at 1257. Under these circumstances, this court concludes that plaintiffs have waived the protection cover-

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ing the P.M. Book; it is properly the subject of discovery.

[11] This court holds, however, that the draft answers to the PSC's interrogatories have retained their protected status and therefore are *not* subject to discovery by the defendants. These documents were written by the plaintiffs' attorneys, for submission in an adversarial proceeding, and at the direction of a government agency to whom the Cotenants were legally responsible. Thus, the draft answers contained the initial testing of legal opinions and theories by plaintiffs' counsel; this constitutes core work product material. See *Hickman v. Taylor*, 67 S.Ct. at 393. Moreover, the plaintiffs were responsible for being able to substantiate the assertions made in those documents under threat of perjury. Since SWEC was the architect/engineer and construction manager of NMP2, it was the only party in a position to verify the factual assertions contained in the draft answers. Given the relatively short 120 day time period in which the Cotenants were required to develop responses to the PSC's interrogatories, practical circumstances required the Cotenants to disclose the draft answers to SWEC. Under these circumstances there was a "de facto compulsion" to disclose the protected work product in a manner similar to that in *Transamerica Computer Co. v. International Business Machines Corp.*, 573 F.2d 646, 651 (9th Cir.1978).

[12] The consultant reports present a close question. On the one hand they were written by consultants to the plaintiffs in anticipation of litigation. This would normally subject the documents to the work product protection under Fed.R.Civ.P. 26(b)(3) and (4). However, these documents were turned over to SWEC to be reviewed for factual accuracy as well as edited for style. There is nothing in the record which indicates that the PSC required the consultant reports to be commissioned or submitted as part of the prudence proceeding. These documents were not prepared under strict time constraints or the threat of perjury as were the draft responses to the PSC's interrogatories.

Thus, the disclosure of these documents to SWEC was not under force of compulsion.

Given the evidence that the President and Chief Executive Officer of Niagara Mohawk had serious doubts as to the performance of SWEC as far back as 1980 it is apparent that this was a knowing disclosure to a potential adversary. As noted above, such disclosure operates to waive the work product protection. The Cotenants could have prevented the transfer of the consultant reports to SWEC by requesting verification of the factual assertions contained in the reports while keeping the reports themselves confidential. The transfer of consultant reports to SWEC in 1984 and 1985 was a disclosure of confidential information that was neither necessary or compelled. Therefore, the court denies plaintiffs motion to have the consultant reports returned. Those reports were treated in a manner inconsistent with the maintenance of the attorney work product protection and are now properly the subject of discovery.

B. The Donlon Deposition

The plaintiffs have moved for a protective order, pursuant to Rule 26(c), to prevent the deposition questioning of William Donlon concerning statements made in certain prudence documents. The basis of this motion is that those documents, protected as work product and, thus, defendant SWEC is barred from employing them in discovery. Now that the work product protection issue is settled, it is this court's ruling that Mr. Donlon answer any questions which are based on prudence documents which are not protected work product. Defendants are thus free to ask questions concerning the consultants' report to the Project Management Book. However, the defendants are precluded from inquiring into the draft answers to the PSC's interrogatories.

C. ITT's Motion to Compel Disclosure

[13] In opposition to ITT's motion to compel the prudence documents plaintiffs argue (1) that the documents constitute protected work product material which

maintained its protection as against SWEC and is therefore protected from disclosure to ITT (2) that work product which is shared with a litigation consultant maintains its protection as against third parties and (3) that ITT has failed to make the requisite showing under Rule 26(b)(3) (that there is a substantial need and an inability without undue hardship to obtain the equivalent of the prudence documents by other means). Plaintiffs assert that even should this court hold the work product protection waived as to SWEC, ITT should not be provided with the prudence documents. This, because such a denial of discovery would prejudice ITT only to the extent that any party who is denied access to an opposing party's work product is prejudiced. The Cotenants maintain that ITT possesses most of the facts relevant to this suit and that those underlying facts it desires are freely discoverable. Finally, plaintiffs assert that as a large corporation with sophisticated counsel, ITT has the resources to reconstruct a factual history of NMP2 sufficient to litigate this action. Plaintiffs, however, are unable to cite case law which directly supports the proposition that the waiver of a plaintiff's work product protection as to one defendant does not waive the protection as to a second defendant in the same action.

[14] Notwithstanding the Cotenants' assertions, this court holds that ITT may proceed with discovery of the non-protected prudence documents under dispute in this motion to the same extent as SWEC. The P.M. Book was developed over the course of many years by persons intimately involved in the construction of NMP2. It is clear that ITT, no matter what its resources, would be "unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed.R.Civ.P. 26(b)(3). However, even if ITT could reconstruct such a document this court would still order disclosure. Equal access of both defendants to the prudence documents is necessary to place all parties on an equal footing. It would certainly be unfair to permit one defendant to employ documents in discovery and, potentially, at trial while barring a co-defendant from

making use of the same documents. ITT would also be prejudiced by the delay involved in being required to piece together information which took years to compile and involved literally millions of documents. However, while ITT may discover and inquire into the non-protected work product material in the same manner as SWEC, it too must return or destroy any answers to the PSC interrogatories which it may have received in the course of this litigation. Defendants may retain their notes of the draft answers to the PSC interrogatories but they are barred from using of the notes in this litigation.

D. The Agresta Deposition

[15] The plaintiffs have moved for a protective order, under Fed.R.Civ.P. 26(c), to prevent the deposition of Steven J. Agresta. Mr. Agresta was counsel for the plaintiffs in the prudence proceeding before the PSC. He has also been retained as trial counsel in the present litigation. SWEC has noticed the deposition of Mr. Agresta. Plaintiffs assert that the deposition of counsel should not be permitted unless there has been a showing that the information sought cannot be obtained by other means. This, because the attorney work product doctrine as well as practice consistent with our system of jurisprudence makes such a deposition an inappropriate method of discovering the desired information.

SWEC wants to ask Mr. Agresta about a number of items which they claim are neither privileged nor protected, including the names of persons and the location of documents which Agresta relied upon when representing the plaintiffs in the prudence proceeding. Defendants also want to question Mr. Agresta about specific statements which were made in the prudence documents in order to determine exactly what information supplied the basis for a particular statement. Moreover, the defendants want to review the process by which the prudence documents were developed so that the credibility of the documents and the potential for impeachment of the statements contained therein can be ascertained.

Cite as 125 F.R.D. 578 (N.D.N.Y. 1989)

Defendants claim that there is no better person than Agresta for locating the sources of information relevant to this suit. Defendants claim that they would not inquire into Agresta's mental impressions and legal conclusions with respect to these documents.

The law on this issue seems to be moving toward a position where courts generally will permit the deposition of opposing counsel only upon a showing of substantial need and only after alternate discovery avenues have been exhausted or proven impractical.⁴ That is so despite the fact that Fed.R. Civ.P. 30(a) does not afford attorneys any special protection from being deposed.⁵ Courts have become critical of the increasing use of depositions against opposing counsel. As stated in *Shelton v. American Motors Corp.*:

Taking the deposition of opposing counsel not only disrupts the adversarial system and lowers the standards of the profession, but it also adds to the already burdensome time and cost of litigation. It is not hard to imagine additional pre-trial delays to resolve work-product and attorney-client objections, as well as delays to resolve collateral issues raised by the attorney's testimony. Finally, the practice of deposing opposing counsel detracts from the quality of client representation. Counsel should be free to devote his or her time and efforts to preparing the client's case without fear of being interrogated by his or her opponent. Moreover, the "chilling effect" that such practice will have on the truthful communications from the client to the attorney is obvious.

805 F.2d 1323, 1327 (8th Cir.1986). See *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. 83, 84-86 (M.D.N.C. 1987); *In re Arthur Treacher's Franchise Litigation*, 92 F.R.D. 429, 437-39 (E.D.Pa.1981); *Walker v. United Parcel*

Services, 87 F.R.D. 360, 361-62 (E.D.Pa. 1980). Moreover, the deposition of counsel increases the likelihood that the attorney will be called as a witness at trial. Under such circumstances the attorney would normally be disqualified from providing further services. "N.Y.Jud.Law, Disciplinary Rule 5-102(A) (McKinney 1975) of the Code of Professional Responsibility requires that when 'it is obvious that [a lawyer] ... ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial.'" *United States v. McKeon*, 738 F.2d 26, 29 (2nd Cir.1984).

This school of thought also asserts that the act of choosing which documents to review and which persons to interview is itself a reflection of a lawyer's thought process and, as such, is protected work product. For example in *Shelton* the court held that where "the deponent is opposing counsel and has engaged in a selective process of compiling documents from among voluminous files in preparation for litigation, the mere acknowledgment of the existence of those documents would reveal counsel's mental impressions which are protected as work product." *Id.* at 1326. To protect attorney work product, as well as for other prudential reasons, the *Shelton* court limited the deposition of opposing counsel to situations where "the party seeking to take the deposition has shown that (1) no other means exist to obtain the information than to depose opposing counsel ...; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case." *Shelton*, 805 F.2d at 1327 (8th Cir. 1986). There is no Second Circuit case directly on point. The plaintiffs, however, cite *Gould v. Mitsui Mining & Smelting Co.*, which in dicta stated that the *Shelton* court's concern with the deposition of op-

4. There are instances where the deposition of an attorney is clearly appropriate. This is usually where the attorney is a fact witness or an actor, the creator of non-privileged records, or the attorney's advice is used by the client as a defense. See *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. 83, 85 n. 2 (M.D.N.C. 1987) and cases cited therein.

5. Fed.R.Civ.P. 30(a) states simply states that "[a]fter commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination." Emphasis added. See *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir.1986).

posing, counsel is "generally well taken." 825 F.2d 676, 680 n. 2 (2d Cir.1987).

In support of their request that Mr. Agresta submit to a deposition, SWEC first notes that Rule 30(a) does not provide opposition counsel with any special protection from being deposed. There is a basis in case law for the position that an attorney cannot avoid a deposition by asserting that he or she has no relevant, nonprivileged information, *see Cooper v. Welch Foods, Inc.*, 105 F.R.D. 4, 6 (W.D.N.Y.1984); *Shiner v. American Stock Exchange*, 28 F.R.D. 34, 35 (S.D.N.Y.1961), and that, at a minimum, the attorney must submit to a deposition so that his lack of knowledge may be tested and any claimed privilege placed on the record, any motion for a protective order at this time being premature. *Hunt Intern. Resources Corp. v. Binstein*, 98 F.R.D. 689, 690 (N.D.Ill.1983); *Scovill Manufacturing Company v. Sunbeam Corporation*, 61 F.R.D. 598, 603 (D.Del. 1973); *Shiner v. American Stock Exchange*, 28 F.R.D. at 35. Respected commentators have also asserted that the attorney's knowledge concerning the facts and sources of information relied upon in creating work product are not protected work product and may properly be the subject of discovery. According to Wright & Miller, *Federal Practice and Procedure: Civil* § 2023, p 194 (1970):

The courts have consistently held that the work product concept furnishes no shield against discovery, by interrogatories or by deposition, of the facts that the adverse party's lawyer has learned, or the persons from whom he has learned such facts, or the existence or nonexistence of documents, even though the documents themselves may not be subject to discovery.

Under this view Mr. Agresta would probably be subject to deposition by Stone & Webster to find out about the people and documents he relied upon while drafting the prudence proceeding papers. This court also notes the strong dissent in the *Shelton* case which argued that the attorney deposition should be allowed in order to discover the existence of documents—

citing the rule as espoused by Wright & Miller.

This court finds that due in part to the potential for the invasion of privileged or protected material, as well as for other prudential reasons discussed above, a protective order, pursuant to Rule 26(c) should issue to stay the deposition of Mr. Agresta. "Because deposition of a party's attorney is usually both burdensome and disruptive, the mere request to depose a party's attorney constitutes good cause for obtaining a Rule 26(c), Fed.R.Civ.P., protective order." *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. at 85. Plaintiffs argue effectively that the same information which is sought in the deposition of Mr. Agresta can be obtained through interrogatories. Niagara Mohawk also cites Rule 30(b)(6) as a feasible alternative to Stone & Webster's request to depose Mr. Agresta. Fed.R.Civ.P. 30(b)(6) provides that a party may name a corporation as the deponent "and describe with particularity the matters on which examination is requested." The corporation then must designate a person to testify on behalf of the corporation and the matters on which that person will testify. If Niagara Mohawk conducts discovery in good faith these devices should be sufficient.

If it should appear that defendants' future discovery progress has been frustrated by plaintiffs' intransigence, and other federal discovery procedures have proven to be futile, the defendants may always return to the court for appropriate relief.

IV. Conclusion

This court hereby
ORDERS, that:

(1) the motion by plaintiff Niagara Mohawk for a protective order, pursuant to Fed.R.Civ.P. 26(c), to prevent the deposition of Steven J. Agresta is GRANTED;

(2) the motion by defendant Stone & Webster Engineering Corporation for an order, pursuant to Fed.R.Civ.P. 37(a), compelling William J. Donlon to answer certain deposition questions is GRANTED to the extent that he is not questioned concerning statements made in documents which have

Cite as 125 F.R.D. 595 (S.D.N.Y. 1989)

been classified as the draft answers to PSC interrogatories;

(3) the cross motion by plaintiffs, under Fed.R.Civ.P. 26(c), for a protective order precluding the defendants use and/or retention of documents which have been termed "prudence documents" is GRANTED in part and DENIED in part as described in the body of this opinion; and

(4) the motion by ITT to compel the production of certain documents, pursuant to Rule 37(a) Fed.R.Civ.P., is GRANTED in part and DENIED in part as described in the body of the opinion.

IT IS SO ORDERED.



Jose VENTURA, on behalf of himself
and on behalf of all others similarly
situated, Plaintiffs,

v.

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, a municipal entity, Woodhull Hospital, a hospital facility within and part of the New York City Health and Hospitals Corporation, Doctor Benker, Chief/Head of Employee Health Services Unit of the Woodhull Hospital, Carlos Loran, Administrator of the Woodhull Hospital Facility, Doctor Jo Ivey Bofford, Chief Operating/Executive Officer of the New York City Health and Hospitals Corporation, Defendants.

No. 88 Civ. 0334 (JMW).

United States District Court,
S.D. New York.

Jan. 11, 1989.

Employee who brought civil rights action challenging hospital's drug testing policies moved for order certifying action as class action. The District Court, Walker, J., held that action would be conditionally

certified as class action, with class comprised of all employees of hospital facilities previously subjected to drug testing without their consent, pending further discovery relating to numerosity of class members.

Motion conditionally granted.

1. Federal Civil Procedure ¶172

When considering whether to certify class, court should take allegations of merits of case, as set forth in complaint, to be true. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

2. Federal Civil Procedure ¶172

Party seeking class certification has burden of establishing that prerequisites of class action rule are satisfied. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

3. Federal Civil Procedure ¶184.5

Employee's action challenging hospital's drug testing policies would be conditionally certified as class action, although employee lacked knowledge as to exact number of employees subjected to drug testing without their consent, where hospital had means to identify which employees were tested for drugs, and which consent forms, if any, were given to each employee tested, and thus employee could obtain such information through discovery. Fed. Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

4. Federal Civil Procedure ¶163

Plaintiff's lack of knowledge as to exact number of affected persons is not bar to maintaining class action, when defendants have means to identify those persons at will. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

5. Federal Civil Procedure ¶184.5

Employee's assertion that at least 100 hospital employees, and numerous other hospital employees working in similar facilities had been subject to drug testing without their consent, was sufficient to satisfy numerosity requirement for obtaining class certification in action challenging hospital's drug testing policies. Fed.Rules Civ.Proc. Rule 23(a), 28 U.S.C.A.

Plaintiff's counsel asserts that at no point during these pre-filing contacts did defendants' counsel expressly deny the factual allegations of the complaint. As such, plaintiff's counsel argues that the lack of a denial inferentially supported plaintiff's belief that its factual allegations were "well grounded in fact."

Research has uncovered no Rule 11 cases which involved similar circumstances. It may be argued that, by giving defendants a pre-filing opportunity to deny the factual allegations in the complaint, plaintiff was engaging in the type of careful investigation that Rule 11 requires. Several factors weigh against this conclusion, however. First, plaintiff's counsel apparently never asked defense counsel about the factual basis for the complaint; rather, plaintiff's sole purpose in forwarding the complaint evidently was to encourage settlement of all disputes between the parties. It, therefore, is difficult to construe defendants' failure to deny the factual allegations as an implicit acknowledgement of their truth. Second, plaintiff's counsel admitted during the oral argument of this motion that defendants had, in substance, previously denied similar allegations of antitrust violations. Indeed, plaintiff's counsel stated that, even had defendants expressly denied the factual allegations, he likely would not have believed them. Third, accepting plaintiff's argument could effectively shift the burden of compliance with Rule 11. In every case in which advance notice of a lawsuit was provided, the party receiving such notice would be required to make point-by-point denials of the complaint's factual allegations or risk waiving the ability to seek Rule 11 sanctions. Neither the language nor the purpose of the 1983 amendments to Rule 11 supports such a result.

B. Selection of Sanctions

Because the Court concludes that Rule 11 has been violated, the imposition of sanctions is required. See *Westmoreland*, 770 F.2d at 1174-75. The selection of an appropriate sanction, however, is left to the discretion of the district court. *Id.* at 1178. Rule 11 provides for an award of expenses

"incurred because of the filing of the pleading, motion, or other paper." Thus, courts typically require the party who has violated Rule 11 to compensate the opposing party for his attorneys' fees and costs related to responding to the improper pleading. See *Westmoreland*, 770 F.2d at 1178-79; *Eastway Construction Corp. v. City of New York*, 762 F.2d at 254 n. 7; *Hudson v. Moore Business Forms, Inc.*, 609 F.Supp. 467, 484-85 (N.D.Cal.1985).

[5] The Court has carefully reviewed the detailed statement of attorney's fees and expenses submitted by defendants and concludes that the amount requested is excessive. From the outset of this case, defendants insisted that no foundation existed for plaintiff's allegations. Nevertheless, defendants' counsel launched a full-scale assault on all the legal issues raised by the complaint. Five attorneys and additional paralegals spend countless hours researching a variety of antitrust, class certification, Rule 11, and factual issues; however, the results of much of that research were not reasonably necessary to achieve dismissal of the case. Such a response was unreasonably disproportionate.

Particularly unreasonable were defendants' research efforts regarding class certification. While the issue might ultimately have been presented for the Court's determination, defendants' insistence that plaintiff had failed to state a claim rendered the certification issue secondary. Legal efforts regarding that issue would have been appropriate only after plaintiff's complaint survived a 12(b)(6) challenge, which it did not.

In addition, the Court finds excessive the staffing of this case by defendants' counsel and the amount of research effort devoted to the Rule 11 issue and motion to dismiss. The repeated travels of one associate from Chicago to Washington seem especially unreasonable. This associate's many hours of research and writing on Rule 11 and the repeated review of his work by at least three other attorneys unjustifiably multiplied the amount of effort required to produce a superior brief on this issue.

Cite as 120 F.R.D. 445 (D.Mass. 1988)

For the reasons outlined above, the Court finds that an award of \$32,103.78 is appropriate as a sanction for violation of Rule 11.

[6] The sole remaining question is apportionment of the sanction. As plaintiff's counsel noted, plaintiff relied entirely on the advice of its attorneys in prosecuting this case. However, a party is not absolved of responsibility under Rule 11 simply because he is ignorant of the law. Danik authorized the prosecution of this lawsuit albeit on the advice of counsel and must assume some of the burden of sanctions. For this reason, counsel for Danik—the law firm of Cooter & Gell—will be assessed a sanction of \$21,402.52 and Danik will be required to pay the remaining amount of \$10,701.26. Because counsel for Hartmarx has already been paid its fees, the sanctions shall be paid directly to Hartmarx.

III. CONCLUSION

The Court concludes that, under the objective test used in assessing Rule 11 motions, plaintiff failed to make a "reasonable inquiry" into the factual allegations contained in the complaint. The record establishes that plaintiff made an inadequate investigation of its claim that defendants maintained an exclusive retailer agency policy, and that plaintiff made no investigation into its claims of price-fixing, resale price maintenance, and other anticompetitive practices. While Danik's counsel is primarily responsible for this neglect, Danik authorized this lawsuit and must bear a portion of the sanction.

ORDER

Upon consideration of defendants' Motion for Sanctions Pursuant to Federal Rule of Civil Procedure 11, the oppositions thereto, and the record herein, and for the reasons stated in the accompanying memorandum, it is this 25th day of February, 1988

ORDERED that defendants' motion be, and hereby is, granted; and it is further

ORDERED that the law firm of Cooter & Gell shall forthwith pay to the Hartmarx Corporation Twenty-One Thousand Four Hundred Fifty-Two Dollars and Fifty-Two Cents (\$21,452.52) as a sanction for violating Federal Rule of Civil Procedure 11; and it is further

ORDERED that Danik, Incorporated shall forthwith pay to the Hartmarx Corporation Ten Thousand Seven Hundred One Dollars and Twenty-Six Cents (\$10,701.26) as a sanction for violating Federal Rule of Civil Procedure 11.

ORDER ON MOTION FOR TECHNICAL AMENDMENT

The Motion of Danik, Inc. for Technical Amendment of the Memorandum dated February 25, 1988, having come before the Court without opposition of Hartmarx Corporation, it is hereby ORDERED that the said Memorandum shall be amended to reflect that H. Kenneth Kudon was not in the law firm of Cooter & Gell and did not represent Danik at the time the complaint was prepared or filed in the captioned case, and did not violate Rule 11 of the Federal Rules of Civil Procedure.



INTERNATIONAL DIGITAL SYSTEMS CORPORATION,

v.

DIGITAL EQUIPMENT CORPORATION.

Civ. A. No. 87-0536-S.

United States District Court,
D. Massachusetts.

June 6, 1988.

Plaintiff sought protective order compelling defendant to return copies of documents which were protected by attorney-client privilege and which plaintiff turned

over to defendant allegedly inadvertently as part of document production in case. The District Court, Robert B. Collings, United States Magistrate, held that disclosure of documents protected by attorney-client privilege operated as waiver of attorney-client privilege as to any documents disclosed by inadvertence, and therefore, plaintiff was not entitled to return of inadvertently disclosed documents.

Order denied.

Federal Civil Procedure §1600.4

Disclosure of documents protected by attorney-client privilege in course of pre-trial discovery in which documents were being produced pursuant to Rule 34 operated as waiver of attorney-client privilege as to any documents disclosed by inadvertence, and therefore, disclosing party was not entitled to return of inadvertently disclosed documents. Fed.Rules Civ.Proc. Rule 34, 28 U.S.C.A.

Joel Lewin, Dennis M. Ryan, Elissa Tonkin, Hinckley, Allen, Snyder & Comen, Boston, Mass., for plaintiff.

Robert J. Stillman, William L. Patton, Ropes & Gray, Boston, Mass., for defendant.

MEMORANDUM AND ORDER ON INTERNATIONAL DIGITAL SYSTEMS CORPORATION'S MOTION FOR PROTECTIVE ORDER (# 36)

ROBERT B. COLLINGS, United States Magistrate.

The plaintiff International Digital Systems Corporation (hereinafter, "IDSC") seeks a protective order compelling the defendant, Digital Equipment Corporation

(hereinafter, "DEC"), to return copies of twenty documents which are protected by the attorney-client privilege but which IDSC turned over to DEC, allegedly inadvertently, as part of the document production in this case. The issue is whether the disclosure by IDSC is to be held to be a waiver of the privilege as to the documents disclosed.

There is no dispute that the documents are protected by the attorney-client privilege if the privilege has not been waived. There is also no dispute that the disclosure was "inadvertent," at least in the sense that it was not an intentional or purposeful disclosure. From this it follows that IDSC did not disclose the documents for the purpose of gaining an advantage for itself, or, put another way, for "offensive" purposes. See *AMCA International Corporation v. Phipard*, 107 F.R.D. 39, 43-44 (D.Mass., 1985).¹

DEC served the request for documents in May, 1987. IDSC claims that the request was very broad and necessitated a review of 500,000 of IDSC's documents. The sorting, reviewing and copying of the requested documents was supervised by Attorney Gary A. Cohen who was assisted by three paralegals from his law firm² and the entire staff of IDSC comprising thirteen employees. A week after receipt of the document request, IDSC moved its offices to another location in Manchester, New Hampshire; so far as appears, no review of documents began until after the move to the new location.

In the new location, a conference room was set aside as a central area where documents could be reviewed and copied. The three paralegals were instructed by Attorney Cohen as to the "parameters" of the

subject matter. See *Standard Chartered Bank PLC v. Ayala International Holdings*, 111 F.R.D. 76, 85 (S.D.N.Y., 1986); *Parkway Gallery v. Kittinger/Pennsylvania House Group, Inc.*, 116 F.R.D. 46, 53 (M.D.N.C., 1987).

2. The law firm which represented the plaintiff at the time at which the document production took place is not the same law firm which presently represents the plaintiff.

work product rule and the attorney-client privilege and were instructed to "err on the side of caution" in choosing documents which should be withheld. Affidavit of Attorney Gary A. Cohen, Etc. (# 38) at ¶ 9. The paralegals affixed different colored "post-its" to documents which were to be withheld or to documents about which they had questions. When the documents were copied, the "post-its" were affixed to the copies which were then shipped to the office of Attorney Cohen's law firm in Boston. Pink "post-its" were affixed to documents which were to be withheld on grounds of work product or attorney-client privilege; yellow "post-its" were placed on documents as to which the paralegals had questions. Affidavit, Etc. (# 38) at ¶ 13.

By late August, 1987, copies of all relevant documents in IDSC's possession, both privileged and unprivileged, had been assembled in the law firm's Boston office; the documents totalled ninety cases. The entire set of copies was then shipped to Sir Speedy, a professional copying company, to be Bates-stamped and duplicated in identical form. In September, the duplicate set of copies was returned to the law firm's office, with the documents bearing the same labels as to what was privileged. Affidavit, Etc. (# 38) at ¶¶ 18-19.

So far as I can glean from Attorney Cohen's affidavit, no segregation of attorney-client or work product material was made until after Sir Speedy had Bates-stamped the copies which had been shipped to the law firm and had then made a duplicate set of those documents. In other words, it was only the pink or yellow "post-its" on the copies which had been shipped from Manchester to the law firm which identified documents which would be withheld.

Attorney Cohen avers that the "last phase of screening" for privileged documents took place under his supervision and comprised two steps:

First, the complete document index prepared by the paralegals during the New Hampshire phase was reviewed. This review, together with an examination of the boxes which were marked with

"Post-it" stickers, confirmed that privileged documents were concentrated in groups distributed throughout the ninety cartons we were preparing to produce. Next, the entire contents of every folder identified by sticker as containing one or more pages of privileged matter was carefully reviewed again. As a result of this two-part screening process, approximately 2,600 documents were withheld on grounds of privilege.

Affidavit, Etc. (# 38) at ¶ 20.

From this I gather that there was no plenary review of all the documents to cull out those which had pink or yellow "post-its" on them. Instead, reliance was placed on the "document index." However, there is nothing in Attorney Cohen's affidavit which indicates that the indices contained any notations as to whether a document was privileged or not; the only notation which is mentioned is the affixing of the pink or yellow "post-it" to the document itself. Next, Attorney Cohen speaks of examining "boxes" with "post-it" stickers on them. This is the first mention of any "post-it" stickers going on boxes in which privileged documents were kept; the only previous mention is of "post-its" being affixed to the documents themselves. Then he avers that "... the entire contents of every folder identified by sticker as containing one or more pages of privileged matter was carefully reviewed again" [and] "[a]s a result of this two-part screening process, approximately 2,600 documents were withheld on grounds of privilege." The problem with this explanation is that there is nothing in the affidavit to indicate that "folders" were marked with "post-its" if they contained privileged documents. As I stated, the only marking as to privileged documents which is mentioned in the affidavit is the placing of pink or yellow "post-its" on the documents themselves, not on "folders" or "boxes."

In sum, Attorney Cohen seems to have relied on "post-its" put on "folders" and/or "boxes" to determine whether or not any privileged documents were contained in the "folder" and/or "box." However, his affidavit contains no information as to how

these "post-its" came to be applied to the folders and/or boxes, by whom, and at what stage of the process. In addition, there is no description of how the privileged documents were removed from the copies which Sir Speedy made and which were to be turned over to DEC; presumably, these copies did not contain "post-its." Perhaps the privileged documents were culled from the original copies by "post-its" and then the documents with the same Bates numbers were culled from the copies Sir Speedy made. I am not told.

What is clear is that DEC received twenty documents comprising eighty-eight pages which were privileged and confidential. DEC represents that all of the documents came from one of the boxes, i.e., the box which was numbered 42. The eighty-eight pages of documents have been submitted to the Court as Exhibit C to the Affidavit Of Robert Stillman (#41).³ The documents should have appeared to any paralegal as being privileged. One document, comprising twenty-five pages, is a transcript of an interview of IDSC's President conducted by Attorney Cohen himself; several other documents are enclosures to cover letters written on the law firm's stationery. There is also a thirty-two page draft complaint in this action with commentary.

If the first step in the process was a review of the document index prepared by the paralegals, I do not see how these documents could have been overlooked if the description of the documents by the paralegals was even close to the mark.

However, going on to step two, the most likely explanation for the failure to cull out these documents is that the pink or yellow "post-it" which was on the "box" numbered 42 was either never put on the box, or was mistakenly removed, or was overlooked. This would seem to explain the fact that all

3. The Affidavit Of Robert Stillman (#41) and attachments thereto have been impounded by the Court pursuant to an agreement of counsel for the parties.

4. Neither of these courts had to decide the issue. In the *Transamerica* case, the Ninth Circuit held that there was no waiver because disclosure had been compelled and "a party does not waive the

the privileged documents which were produced were found in that box."

The law to be applied to the question as to whether there has been a waiver of the privilege by inadvertent disclosure is not uniform, and there does not appear to be any controlling First Circuit case on the question. In *Re Standard Financial Management Corp.*, 77 B.R. 324, 330 (Bkrcty, D.Mass., 1987); *Transamerica Computer Company, Inc. v. International Business Machines Corp.*, 573 F.2d 646, 650 (9 Cir., 1978).⁴

In *Connecticut Mutual Life Insurance Co. v. Shields*, 18 F.R.D. 448, 451 (S.D. N.Y., 1955), the Court seems to hold that inadvertent disclosure can never result in a waiver because if the disclosure was inadvertent, there was no intention to waive the privilege and that one cannot waive the privilege without intending to do so. To the same effect is *Kansas-Nebraska Natural Gas v. Marathon Oil Company*, 109 F.R.D. 12, 21 (D.Neb., 1983) in which the Court seems to indicate that an "inadvertent" disclosure would not operate as a waiver of the privilege unless the "failure to catch" a document prior to production of a mass of documents was a "deliberate" act or "the result of conscious but erroneous decision."

On the other hand, the Court in *Underwater Storage, Inc. v. United States Rubber Co.*, 314 F.Supp. 546, 548-49 (D.D.C., 1970), in response to a claim of inadvertent disclosure, refused to look beyond the "objective fact" that the document was turned over to opposing counsel as part of document production "... to determine whether the [party] really intended to have the document examined." The Court reasoned that regardless of whether production was "inadvertent" or not, the "confidentiality" of the document was "breached" by the

attorney-client privilege for documents which he is compelled to produce." 573 F.2d at 650-51 (emphasis in original). In the *Standard Financial* case, the Bankruptcy Judge determined that there was no evidence that there was an attorney-client relationship at the time the communication was made, and, thus, no privilege attached to the communication. 77 B.R. at 330.

disclosure, "thereby destroying the basis for the continued existence of the privilege." *Id.* at 549. Magistrate Dwyer seems to follow the decision in *Underwater Storage* in the case of *Chubb Integrated Systems v. National Bank of Washington*, 103 F.R.D. 52, 66-68 (D.D.C., 1984).

Another line of cases follows a middle ground whereby inadvertent disclosures "may" or "may not" result in a waiver of the privilege depending on whether or not the party producing the documents took precautions to protect the privilege. This doctrine seems to have originated in cases in which it was claimed that the privilege was waived when a party or attorney placed the documents in a place where third parties could view them. In *Re Horowitz*, 482 F.2d 72, 81 (2 Cir., 1973), *cert. denied*, 414 U.S. 867, 94 S.Ct. 64, 38 L.Ed. 2d 86 (1973); In *Re Grand Jury Proceedings*, 727 F.2d 1352, 1356 (4 Cir., 1984); *Suburban Sew 'N Sweep, Inc. v. Swiss-Bermina, Inc.*, 91 F.R.D. 254, 258-60 (N.D. Ill., 1981); *O'Leary v. Purcell Co., Inc.*, 108 F.R.D. 641, 644 (M.D.N.C., 1985).

Even though the doctrine does not seem to have originated in cases in which the disclosure was "inadvertent" during the course of a production of documents in litigation, it has been applied to this situation. *Lois Sportswear, U.S.A. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D. N.Y., 1985); *Parkway Gallery v. Kittinger/Pennsylvania House Group, Inc.*, *supra*, 116 F.R.D. at 50. (M.D.N.C., 1987); *Liggett Group v. Brown & Williamson Tobacco Corp.*, 116 F.R.D. 205, 207-08 (M.D. N.C., 1986).

I do not find the application of this doctrine to "inadvertent" disclosure during document production in litigation particularly useful. The reason is that the court applying the doctrine to this situation comes quite close to applying a *per se* rule or something akin to the doctrine of *res ipsa loquitur*. Put another way, the opinions of the courts in these cases, after a substantial amount of verbiage, can be reduced to a bottom line to the effect that the precautions were inadequate because they were not effective in preventing the disclo-

sure of privileged documents. If the precautions had been adequate, the disclosure would not have occurred. Frankly, I do not see this result as a significant advance in jurisprudence.

Accordingly, I see little benefit to making a judgment about the adequacy of the plaintiff's precautions. I have indicated where there were deficiencies, but I do not think I am saying any more than that the precautions were inadequate because they were ineffective in preventing the disclosure.

In addition, I see little benefit to doing a painstaking evaluation of the precautions taken by plaintiff's counsel when it is noted that the whole basis for the privilege is to maintain the confidentiality of the document. It cannot be doubted that the confidentiality of the document has been destroyed by the "inadvertent" disclosure no less than if the disclosure had been purposeful; it equally cannot be doubted that the confidentiality of the communication can never be restored, regardless of whether the disclosure was "inadvertent" or purposeful. In other words, regardless of how painstaking the precautions, there is no order I can enter which erases from defendant's counsel's knowledge what has been disclosed. There is no order which can remedy what has occurred, regardless of whether or not the precautions were sufficient.

Plaintiff suggests that a protective order be issued prohibiting the defendant from "using" the documents, a sort of "use immunity." I reject the suggestion because I do not see what purpose would be served. Such an order would not restore the confidential nature of the document. The most that can be said is that it would prohibit the defendant's attorneys from using documents to which they were not entitled in the first place. But as I see it, the only reason that the defendant received the document in the first place is because the precautions were insufficient.

In sum, I agree with the Court in the case of *Underwater Storage, Inc. v. United States Rubber Company*, *supra*. When confidentiality is lost through "inad-

vertent" disclosure, the Court should not look at the intention of the disclosing party. 314 F.Supp. at 549. It follows that the Court should not examine the adequacy of the precautions taken to avoid "inadvertent" disclosure either.

I also agree with the Bankruptcy Court in the case of *In Re Standard Financial Management Corp.*, *supra*. Despite theoretical arguments to the contrary, "... in the real world, unforced disclosure is disclosure and should support the waiver argument." 77 B.R. at 330. "[M]istake or inadvertence is, after all, merely a euphemism for negligence, and, certainly ... one is expected to pay a price for one's negligence." *Id.*

In this latter vein, a strict rule that "inadvertent" disclosure results in a waiver of the privilege would probably do more than anything else to instill in attorneys the need for effective precautions against such disclosure.

Considering all the facts and circumstances, I rule that disclosure⁵ of documents protected by the attorney-client privilege in the course of pre-trial discovery in which documents are being produced pursuant to Rule 34, F.R.Civ.P., operates as a waiver of the attorney-client privilege as to any documents disclosed by "inadvertence." I find that such a rule is most consistent with the purposes of the privilege, and the interest of the administration of justice generally.

For all these reasons, it is ORDERED that International Digital Systems Corporation's Motion For Protective Order (# 36) be DENIED.



5. That is, disclosure which is not compelled. See *Transamerica Computer Company, Inc. v.*

Dimitrios AVRAMIDIS, et al., Plaintiff,
v.

ATLANTIC RICHFIELD COMPANY, et
al., Defendants.

Civ. A. No. 85-3972-WD.

United States District Court,
D. Massachusetts.

June 15, 1988.

Gasoline franchisees brought action against former and current franchisors for alleged violations of Petroleum Marketing Practices Act. On plaintiff's motion to compel discovery, the District Court, Joyce London Alexander, United States Magistrate, held that: (1) relevant geographic market for discovery purposes consisted of all retail marketing districts which included Massachusetts franchises, and (2) franchisor was required to specify, in sufficient detail, records sought by franchisees, so that franchisees could inspect and/or copy records.

Ordered accordingly.

1. Federal Civil Procedure §1503

Relevant geographic market area, for purpose of determining permissible scope of interrogatories propounded by gasoline franchisees in their Petroleum Marketing Practices Act against franchisors, consisted of all retail marketing districts containing Massachusetts franchisees, in that action involved only Massachusetts franchises. Petroleum Marketing Practices Act, § 101(16), 15 U.S.C.A. § 2801(16).

2. Federal Civil Procedure §1534

Where defendant's business records which were relevant to answering plaintiff's interrogatories were housed out of state, and many file cabinets were used to store those records, defendant was required to specify, in sufficient detail, records sought by plaintiff, so that plaintiff could then go to where records were stored to inspect and/or copy them. Fed.Rules Civ.Proc.Rule 33(c), 28 U.S.C.A.

International Business Machines Corp., *supra*, 573 F.2d at 650.

Myles Jacobson, Marc A. Friedman, Thompson, Thompson, Nagel & Jacobson, Springfield, Mass., for plaintiff Vincent Cuttone.

William G. Lowerre, Shell Oil Co. Legal Dept., Houston, Tex., and Stephen J. Brake, Nutter, McClennan & Fish, Boston, Mass., for defendant Shell Oil Co.

ORDER ON PLAINTIFF VINCENT CUTTONE'S MOTION TO COMPEL ANSWERS TO INTERROGATORIES BY SHELL OIL COMPANY

JOYCE LONDON ALEXANDER,
United States Magistrate.

Plaintiffs, gasoline franchisees, brought this action against defendants, former and current franchisors, under the Petroleum Marketing Practices Act ("PMPA"). Plaintiff Vincent Cuttone's instant motion to compel seeks responses to certain interrogatories, Numbers 1, 2, 8 and 10, propounded to defendant Shell Oil Company. The dispute here is twofold: 1) plaintiff and defendant disagree as to the scope of the relevant geographical market; and 2) plaintiff and defendant disagree as to who shoulders the responsibility, under Fed.R. Civ.P. 33(c), to inspect the many files containing documents and identify those responsive to plaintiff's interrogatories.

RELEVANT GEOGRAPHICAL MARKET

Under the PMPA, 15 U.S.C. § 2801(16), the term "relevant geographic market area" is defined as "includ[ing] a State or a

standard metropolitan statistical area as periodically established by the Office of Management and Budget." Defendant contends that under this section, the Commonwealth of Massachusetts alone constitutes the relevant geographic market in the instant case, and thus plaintiff should be able to obtain the information he seeks as it concerns only other franchisee-dealers operating in Massachusetts. Plaintiff, on the other hand, contends that under the Act, the issue is whether Shell, as Atlantic Richfield's ("ARCO") successor franchisor, offered a franchise to plaintiff which was discriminatory when compared to Shell's existing franchisees, and the question should be answered without geographical limitation. See *Memorandum of Plaintiff in Support of Motion to Compel* (# 190), 5, 8. Plaintiff, therefore, asserts that defendant's responses to plaintiff's interrogatories should not be limited to concern only franchisees in Massachusetts, but must provide information within a national scope for Interrogatory Number 1.¹ For Interrogatories Numbers 2 and 10², plaintiff seeks information concerning dealers in the New England Retail Marketing District and the Hartford Retail Marketing District since Massachusetts dealers are split and included in either district. There appears to be no dispute that information concerning only Massachusetts dealers is all that is called for in Interrogatory Number 8.³

[1] This Court finds that under § 2801(16), the relevant geographic market area consists of both the New England and the Hartford Retail Marketing Districts.

Interrogatory Number 10: For every Shell station in the New England Retail Marketing District and the Hartford Retail Marketing District during the period from the beginning (sic) of the earliest period considered in setting the Plaintiff's contract rents to present, state the following:

- (a) The name and address of the station;
- (b) the name of the franchisee;
- (c) the Contract Rent;
- (d) the number of gallons per month purchased;
- (e) the threshold volume.

3. Interrogatory Number 8 states:

As to each plaintiff's station, identify the existing Shell dealers deemed to be similar facilities in the same area for purposes of initially computing the Contract Rents initially speci-

1. Interrogatory Number 1 states:

Identify all pending and concluded lawsuits in which Shell Oil Co. (hereinafter "Shell") is a defendant and in which a claim based on rent charged to a franchisee is made.

2. Interrogatories Numbers 2 and 10 state:

Interrogatory Number 2: For the period from January 1985 to date, state the total number of service stations in the New England Retail Marketing District and the Hartford Retail Marketing District as to which an "adjustment" to the VRP, contract rent or optimum volume was made in accordance with the procedure described in paragraph 13 of the Affidavit of J. William Schutzenhofer, and identify each station, giving its mailing address, the name of the adjustment, the period covered by the franchise, and the reasons for the adjustment.

If you wish to remain a member of the class, you need do nothing at this stage of the proceedings.

If you wish to be excluded from the class, you must submit a written request for exclusion. For your convenience, the attached form, entitled "Request for Exclusion," If you received this notice by a Request for Exclusion form should accompany it. If you did not receive a Request for Exclusion form, you may obtain a copy by writing to the Clerk of Court, P.O. Box _____, Cincinnati, Ohio 45201. A written Request for Exclusion must be submitted without using the Request for Exclusion form, but it must refer to the litigation as *Ronald J. Thompson, et al v. Midwest Foundation Independent Physicians Association d/b/a ChoiceCare, et al*, No. C-1-86-744, in your name and address, and the name and address of your chosen counsel if you do not choose class counsel, in your name and address. Any request for exclusion must be received on or before October 23, 1987 by the clerk of the United States District Court for the Southern District of Ohio at P.O. Box _____, Cincinnati, Ohio 45201.

The plaintiffs in this class action are represented by two firms which have been designated as class counsel. They are:

Stanley M. Chesley, Esq.
 STEPHEN SCHNEIDER, BAYLESS &
 CHESLEY CO., L.P.A.
 1513 Central Trust Tower
 Cincinnati, Ohio 45202
 513-621-0267

James R. Cummins, Esq.
 JOHN W. CUMMINS & BROWN CO.,
 L.P.A.
 500 Carew Tower, 441 Vine Street
 Cincinnati, Ohio 45202
 513-381-2121

13) The approved class representatives in this class action are:

John A. Brunaman
 11325 Springfield Pike
 Cincinnati, Ohio 45246

Paul Grote
 7320-A Kingsgate Way
 West Chester, Ohio 45069

John J. Jaeger
 629 Oak Street
 Cincinnati, Ohio 45206

S. George Lesinski
 629 Oak St. Suite 201
 Cincinnati, Ohio 45206

Richard T. Marnell
 3333 Vine Street
 Cincinnati, Ohio 45220

Ronald J. Thompson
 4452 Eastgate Boulevard
 Cincinnati, Ohio 45242

14) *Examination of pleadings and papers.* This notice is not all inclusive. References to pleadings and other papers and proceedings are only summaries. For full details concerning the class action and the claims and defenses which have been asserted by the parties, you or your counsel may review the pleadings and other papers filed at the office of the Clerk of the United States District Court for the Southern District of Ohio, Room 324, U.S. District Court & Courthouse, 100 East Fifth Street, Cincinnati, Ohio 45202, on any business day from 9:00 A.M. to 5:00 P.M.

15) *Interpretation of this Notice.* Except as indicated in the orders and decisions of the United States District Court for the Southern District of Ohio, Western Division, no court has yet ruled on the merits of any of the claims or defenses asserted by the parties in this class action. This notice is not an expression of an opinion by the Court as to the merits of any claims or defenses. This notice is being sent to you solely to inform you of the nature of the litigation, your rights and obligations as a class member, the steps required to be excluded from the class, the Court's certification of the class, and the forthcoming trial.

Daniel J. Lyons, Jr.
 Deputy Clerk
 United States District Court for
 the Southern District of Ohio,
 Western Division

Dated: _____

EXCLUSION REQUEST FORM

Clerk
 United States District Court for the
 Southern District of Ohio, Western Division
 P.O. Box _____
 Cincinnati, Ohio 45201

Re: Ronald J. Thompson, M.D., et al.
 v.
 Midwest Foundation Independent
 Physicians Association d/b/a
 ChoiceCare, et al.

No. C-1-86-744

I hereby request to be excluded from the class action in the above captioned matter.

(Signature)

Name (Print)

Address

Name of Chosen Counsel

Address



BAXTER TRAVENOL LABORATORIES, INC., Robert P. Popovich,
 and Jack W. Moncrief, Plaintiffs,
 v.
 ABBOTT LABORATORIES, Defendant.
 No. 84 C 5103.

United States District Court,
 N.D. Illinois, E.D.

May 26, 1987

On Reconsideration July 22, 1987

Patent action was brought. Plaintiffs moved for return of document they claimed was privileged and was inadvertently produced. The District Court, Elaine E. Bucklo, United States Magistrate, held that attorney-client privilege was waived by plaintiffs' failure to claim privilege for several months after inadvertent production of document, in face of defendant's repeated use

1. Federal Civil Procedure 1600.4

Plaintiffs' failure to claim attorney-client privilege for months after they knew that document had been produced waived privilege, if document was ever privileged.

2. Federal Civil Procedure 1600.1

Plaintiffs' vague statements about circumstances of conversation coupled with poor memory as to alleged privileged nature of document to begin with were simply insufficient to sustain plaintiffs' belated claim of attorney-client privilege with respect to document.

On Reconsideration

3. Federal Civil Procedure 1600.4

Inadvertent production of otherwise privileged documents did not waive privilege as to those documents, under protective order.

4. Federal Civil Procedure 1600.4

Delay in claiming attorney-client privilege can result in waiver, even where initial production of allegedly privileged document may have been inadvertent, it may be unfair and unrealistic to uphold the privilege, where documents have been examined and used by opposing party prior to assertion of privilege.

5. Federal Civil Procedure 1600.4

Plaintiffs waived attorney-client privilege in inadvertently produced document by failing to assert privilege for several months in face of defendant's repeated use of and reliance on document.

Granger Cook, Jr., Gary W. McFarron, Cook, Wetzel & Egan, Ltd., Chicago, Ill., for plaintiffs

Dennis Allegretti, Timothy J. Malloy, Paul H. Berghoff, Allegretti, Newitt, Witcoff and McAndrews, Chicago, Ill., for defendant

ORDER

ELAINE E. BUCKLO, United States Magistrate

inadvertently produced. The parties agreed at the start of this litigation that inadvertent production of privileged documents would not waive any privilege. Defendant says, however, that this document has not been shown to be privileged, and that if it is, plaintiff did not inadvertently produce it. The document consists of some handwritten notes by Dr. Popovich, a plaintiff who is one of the inventors of the patents in issue. Defendant was allowed to inspect the notes and requested a copy of the document in August, 1986. Defendant represents that it was told that plaintiffs' counsel had reviewed the documents for privileged material prior to production. Thereafter, defendant, taking note of the fact that Popovich makes the statement in the document that "Oreopouli (sic) invented this," referring to part of what plaintiffs are claiming as their own invention, quoted from and attached the document in various motions filed with the court in September, October and November, 1986. It is not denied that Popovich saw these motions and he was surely aware of the potential importance of the document as a very damaging admission.

Popovich says, however, that while he was aware of the fact that the document had been produced, he did not remember that the document consisted of notes of a telephone conversation he had with his attorney until he was preparing for his deposition. He says he then remembered what the notes were because the original document had his attorney's telephone number on it. (If so, that document has not been produced to the court. The document that have seen does not have a telephone number on it.)

Despite the fact that Popovich says that he belatedly remembered that the document in question was privileged on the eve of his deposition, when questioned about it at his deposition, he did not claim privilege.

[1] It seems clear that if the document in question was ever privileged, plaintiffs waived their privilege at some point in time after its production. Inadvertent means accidental. Once Popovich knew the doc-

ument had been produced it was incumbent on him to say something. When he failed to do anything over a period of months, its continued production can no longer be deemed inadvertent. Furthermore, Popovich admits that in preparation for his deposition he determined the document was privileged. Yet he failed to raise any claim of privilege at the deposition. I conclude that if the document was ever privileged, the privilege was waived by Popovich's failure to claim privilege for months after he knew that the document had been produced.

[2] I also find that Popovich has failed to sustain his claim of privilege. The attorney-client privilege is an exception to the rule that all relevant evidence should be disclosed in an adversary proceeding. As such, the courts repeatedly have warned that the privilege must be narrowly construed. One seeking to rely on it bears the burden of proving that a document is in fact privileged. In this case, there is nothing in the document itself to indicate any privilege. Popovich says that he does not know when the allegedly privileged conversation took place. He did not remember that the notes were even of such a conversation until months after he was aware of the production of the document.

Popovich, the person claiming the privilege, has the burden of proving privilege. In this case, Popovich's vague statements about the circumstances of the conversation coupled with his poor memory as to the alleged privileged nature of the document to begin with, are simply insufficient to sustain his belated claim of privilege.

ON RECONSIDERATION

Baxter moves for reconsideration of this court's order of May 26, 1987 denying Baxter's motion to compel the return of a privileged document. Baxter produced the document to Abbott in August 1986, assertedly inadvertently. The court denied Baxter's motion on the grounds that Baxter had waived any privilege it had in the document. In finding waiver, the court noted that Abbott had quoted the document in or

attached it to legal memoranda submitted to the court in September, October, and November without objection by Baxter, and that at his deposition, Popovich, who made the document, had not claimed the privilege, although he claimed to have determined that the document was privileged prior to his deposition.

[3] The last factor relied on was incorrect. Transcripts show that at the deposition, Popovich's attorney did assert that the document was privileged. This does not, however, change the outcome of Baxter's motion. Under the protective order, inadvertent production of otherwise privileged documents does not waive the privilege as to those documents. Baxter asserts that its production of the document was inadvertent. The cases discussing whether production was inadvertent consider such factors as the scope and volume of discovery, the time available for review of the documents by the party asserting the privilege, the adequacy of the party's procedures for review, the time taken to rectify the error, and the overreaching issue of fairness and protection of the privilege. *Hartford Fire Ins. Co. v. Gavey*, 109 F.R.D. 323, 330-31 (N.D.Cal.1985); *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y.1985).

[4] Even where the initial production may have been inadvertent, however, delay in claiming the privilege can result in waiver. Where prior to the assertion of the privilege, the documents have been examined and used by the opposing party, it may be unfair and unrealistic to uphold the privilege. *In re Grand Jury Investigation of Ocean Transportation*, 604 F.2d 672, 674-75 (D.C.Cir.), cert. denied sub nom, *Sea-Land Service, Inc. v. United States*, 444 U.S. 915, 100 S.Ct. 229, 62 L.Ed.2d 169 (1979).

[5] Under these standards, Baxter's privilege was waived although it was asserted at the time of the deposition. The document Baxter claims is privileged was one document of among eight boxes of documents produced by Baxter for inspection in August. Baxter has not explained its procedures for reviewing documents for

privilege prior to disclosure, but under the circumstances its initial production of the document may have been inadvertent. Cf. *Lois Sportswear, U.S.A., Inc., supra*, 104 F.R.D. at 105 (where privilege is claimed as to only 22 documents out of 16,000 pages inspected and 3,000 pages requested to be produced, disclosure was inadvertent).

However, upon Abbott's request, Baxter produced a copy of the document without objection in September, 1986, and Abbott thereafter quoted from the document and attached copies of it to its memoranda in September, October, and November. Popovich was aware that the document had been produced, and of its potential importance, by September, 1986. By failing to assert the privilege until mid-December, in the face of Abbott's repeated use of and reliance on the document, Baxter waived any privilege it had in the document.

Popovich has established that the document was privileged. McLemore's Supplemental Affidavit provides a reasonably precise date for the conversation, and also identifies the subject matter sufficiently that it appears the conversation involved the request for or provision of legal advice. However, the privilege was waived by Popovich's failure to claim the privilege until mid-December, 1986.



Renard TAYLOR, Plaintiff,

v.

Bruce WAGNER, Defendant.

No. 87 C 422.

United States District Court,
N.D. Illinois, E.D.

Sept. 18, 1987.

Application was brought for Rule 11 sanctions. The District Court, Bua, J., held