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'Comcast' Ruling Expands Third-Party Privileges in Massachusetts

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Introduction

In *Massachusetts Commissioner of Revenue v. Comcast Corp.*, decided in March, the Massachusetts Supreme Judicial Court narrowed the attorney-client privilege, while simultaneously expanding the work product protection applicable to communications with and advice received from third parties.¹

The court sua sponte transferred the case to settle the following issue:

[W]hether the attorney-client privilege or the work product doctrine protect from disclosure communications between an in-house corporate counsel and outside tax accountants consulted by him regarding the structuring of a sale of stock mandated by an antitrust consent judgment.²

Though the stated issue contemplates accountants, the court's decision will have broad application to third parties hired to assess litigation risk as part of a business decision.

The *Comcast* court narrowly applied the derivative privilege doctrine and refused to extend attorney client privilege protection to the accountants; however it went on to broadly apply the work product protection and protect the documents at issue from disclosure. The court's broad application of the work product doctrine signals an expansion of the protections offered to those hired to assist an attorney analyze litigation risk to advise on a purely business decision.

¹ *Massachusetts Commissioner of Revenue v. Comcast Corp.* (Mass., 3/3/09), 543 Mass. 293 (2009).

² *Id.* at 294.

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Facts of the Case

U.S. West Acquires Continental Cablevision

U.S. West, a Colorado-based company,³ in February 1996, announced its plan to acquire Continental Cablevision, a Massachusetts cable television company.

Through its wholly owned subsidiary, Continental Teleport Inc., Continental Cablevision owned 11.2 percent of the stock in Teleport Communications Group Inc. Like U.S. West, Teleport Communications Group was a local communications services provider.

U.S. West completed its acquisition of Continental Cablevision on Nov. 15, 1996, and Continental Cablevision was immediately merged into MediaOne Group Inc., a wholly owned subsidiary of U.S. West.

Justice Department Files Antitrust Action Against U.S. West and Continental Cablevision

On Nov. 5, 1996—just 10 days before the deal closed—the Justice Department filed a civil antitrust action against U.S. West and Continental Cablevision. Justice alleged that U.S. West's Teleport Communications Group acquisition would lessen competition in the dedicated telecommunications services market.

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The parties worked out a settlement of all claims. The settlement required U.S. West to reduce its ownership of Teleport Communications Group stock to less than 10 percent on or before June 30, 1997. US West had to divest all remaining interest in Teleport Communications Group on or before Dec. 31, 1998.

³ U.S. West is a predecessor to Comcast Corporation.

U.S. West Hires Arthur Andersen LLP To Advise on the Stock Sale

U.S. West asked attorney Andrew Ottinger, a member of its Colorado-based law department, to provide advice on structuring the sale of Teleport Communications Group stock.

Ottinger recognized that the sale could have significant tax consequences and while an experienced tax litigator, he was not familiar with Massachusetts tax law. Ottinger was concerned that the Massachusetts Department of Revenue could challenge the vehicle used for the stock sale.

Ottinger hired Massachusetts-based Arthur Andersen LLP (Andersen) to “interpret Massachusetts law” and “determine the best, legitimate vehicle by which to deal with the tax consequences from the sale of [Teleport Communications Group] shares, and to assess the risks of litigation associated with different vehicles.”⁴

During January and February 1997, Ottinger spoke with Andersen on several occasions and discussed the various options for the stock sale. Ottinger asked Andersen to draft a memorandum outlining the “pros and cons of the various planning opportunities and the attendant litigation risks.”⁵ Andersen provided Ottinger various drafts of its memorandum and a final report summarizing the litigation risks in light of applicable Massachusetts law.

Ottinger believed his communications with Andersen were attorney-client privileged and the memorandums he received attorney work product. He ensured that the Andersen memorandums remained confidential, including sending them to the segregated locked files U.S. West’s law department maintained for privileged documents.

U.S. West Sells the Teleport Group Stock

After receiving the advice from Andersen, U.S. West prepared to sell the Teleport Communications Group stock as required by the Justice Department settlement.

U.S. West on Feb. 11, 1997, established Continental Holding Co. as a Massachusetts corporate trust under Massachusetts General Laws chapter 62, Section 8. The same day, U.S. West dissolved Continental Teleport Inc. (the wholly owned subsidiary which owned the Teleport Communications Group stock) and transferred the assets to Continental Holding Co. Continental Holding Co. sold the Teleport Communications Group shares in four transactions between February and Nov. 30, 1997.

Continental Holding Co. reported a \$495,733,830 capital gain from the sale on its Dec. 31, 1997, federal tax return. It claimed an exemption as a Massachusetts corporate trust under Massachusetts General Laws ch. 62, Section 8(b) and did not file a Massachusetts corporate excise tax return for the 1997 taxable period. Continental Holding Co. was dissolved on Feb. 12, 1999 and its assets transferred to U.S. West’s successor, Comcast Corp.

Procedural Posture

Massachusetts Department of Revenue Audit

The Massachusetts Department of Revenue (the Department) in June 2000 audited Comcast Corp. (Com-

cast) to determine if U.S. West had a “legitimate business purpose” for reorganizing Continental Teleport Inc. as a Massachusetts corporate trust (Continental Holding Co.) when it was contemplating the sale of Teleport Communications Group stock.

From 2000 to 2004, the Department issued three information document requests concerning Continental Teleport Inc. In May 2004, the Department issued an administrative summons pursuant to Massachusetts General Laws ch. 62C, Section 70 seeking Continental Teleport Inc. documents.

In response to the Department’s requests, Comcast produced certain records and withheld others, including the Andersen memorandums, as protected from production by the attorney-client privilege and work product doctrine.

Department Files Complaint in Superior Court

The Department in May 2005 filed a complaint in Massachusetts Superior Court seeking to compel Comcast to produce all documents withheld on privilege claims, including the Andersen memorandums.

The Superior Court held a non-evidentiary hearing and reviewed the documents in camera. The Superior Court denied the Department’s motion, holding that the Andersen memorandums were protected by the attorney-client privilege because they contained “a detailed analysis of Massachusetts tax law” and “provided in-house counsel with legal information critical to his ability to effectively represent his client.”⁶

The Superior Court also held that the Andersen memorandums were protected by the work product doctrine as “prepared in anticipation of litigation.”⁷

The Superior Court judge denied the Department’s motion for reconsideration.

The Supreme Judicial Court Sua Sponte Transfers Case

The Supreme Judicial Court transferred the case on its own motion. The court would decide the application of the attorney-client privilege and work product doctrine to third-party communications with counsel related to a business decision.

The court unanimously held that the Andersen memorandums were not protected by the attorney-client privilege; however the documents were covered by the work product doctrine and could be withheld on that basis. The court rejected the Department’s efforts to overcome the work product protection.

The Supreme Judicial Court’s Ruling

Attorney-Client Privilege Does Not Protect Communications Between Ottinger, Andersen

Court Rejects Comcast’s Derivative Privilege Argument. Generally, disclosing attorney-client communications to a third party destroys any attorney-client privilege.⁸ There is an exception to this rule where the third party was “employed to facilitate communication between

⁴ Id. at 298.

⁵ Id. at 299.

⁶ Id. at 301.

⁷ Id.

⁸ Id. at 306.

the attorney and client and thereby assist the attorney in rendering legal advice to the client.”⁹

Massachusetts has long recognized and applied this exception. It is known as the derivative privilege exception and can apply to accountants.

The rationale for the derivative privilege is that the third party “is necessary, or at least highly useful, for the effective consultation between the client and the lawyers which the privilege is designed to permit.”¹⁰ The derivative privilege will only apply if the communication with the third party is intended to facilitate the client’s securing legal advice.¹¹ “If what is sought is not legal advice but only accounting service . . . or if the advice sought is the accountant’s rather than the lawyer’s no privilege exists.”¹²

The court noted that the majority of cases decided after *Kovel* narrowly interpret the derivative privilege, applying it only when the third party’s role is to clarify or facilitate communications between the attorney (in this case Ottinger) and the client (U.S. West).

Andersen Not Necessary to Render Legal Advice. The Department argued that the derivative privilege would only protect the Andersen memorandums if Andersen’s purpose was to “translate or interpret” so that Ottinger could understand U.S. West’s situation.¹³

The court agreed that the third party’s presence must be “necessary for the effective consultation between client and attorney” for the privilege to attach.¹⁴ The necessity element of the privilege means more than “just useful or convenient.”¹⁵ The court held that for the derivative privilege to protect Ottinger’s communications with Andersen, Andersen must have been “nearly indispensable or serve some specialized purpose in facilitating attorney-client communications.”¹⁶

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The court found that Ottinger consulted Andersen to procure professional advice about Massachusetts tax law. Ottinger did not need Andersen’s assistance to understand U.S. West information and there was no translator role for Andersen to play. Ottinger asked

⁹ Id. (citing *United States v. Kovel*, 296 F.2d 918, 921-22 (2d Cir. 1961)).

¹⁰ Id. (quoting *Kovel*, 296 F.2d at 922).

¹¹ Id.

¹² Id.

¹³ Id. at 307.

¹⁴ Id.

¹⁵ Id.

¹⁶ Id.

Andersen to provide an analysis of Massachusetts tax law, which is exactly what they did.

In rejecting the derivative privilege, the court held:

We do not doubt . . . that the Andersen memoranda were critical to [Ottinger’s] ability to effectively represent his client. But we agree with those courts holding that the privilege does not apply where the accountant provides additional legal advice about complying with the tax code even where doing so would assist the attorney in advising the client.¹⁷

Neither U.S. West nor Ottinger needed Andersen to facilitate their communications and therefore the communications could not be protected by the derivative privilege. Through this case, Massachusetts has adopted a narrow application of the privilege, seriously limiting the instances where communications with a third party adviser will be privileged.

Did Ottinger Seek Tax or Legal Advice From Andersen? Moreover, for the derivative privilege to apply to accountant communications, the client must seek legal advice from its attorney, not professional tax advice from the accountant. The Department argued that the Andersen memorandums contained tax, not legal, advice and therefore could not qualify for the derivative privilege.

The court acknowledged that it was difficult to distinguish between legal advice and tax advice in this situation, but determined it did not need to resolve the issue. The court noted that “[h]ere, whether characterized as accounting advice or legal analysis, it was advice provided by third parties in circumstances that we have determined are not covered by the privilege, derivative or otherwise”¹⁸

In rejecting Comcast’s argument that the court’s holding would “reduce the attorney-client privilege to a meaningless protection,” the court stated:

Colorado-based Ottinger was free to seek advice on Massachusetts tax law from a Massachusetts attorney, where the privilege would apply. Instead, he sought advice on Massachusetts tax law from Massachusetts accountants, where no privilege applies. If his actions left his client potentially at risk, that is the inevitable consequence of having to reconcile the absence of a privilege for accountants and the effective operation of the privilege of client and lawyer under conditions where the lawyer needs outside help.¹⁹

However, Andersen Memorandums Are Work Product

While refusing to classify the Andersen memorandums as attorney-client privileged, the court nevertheless protected the documents from disclosure under a liberal application of the work product doctrine.

The court held that a document prepared by an attorney’s agent is work product if it was “prepared because of existing or expected litigation.”²⁰ Work product protection under this standard will apply to documents analyzing litigation risk even if the main purpose is to facilitate a party’s informed business decision.

The court held that the Andersen memorandums were prepared “because of” the reasonable possibility of litigation with the Department and designed to allow

¹⁷ Id. at 309.

¹⁸ Id. at 311.

¹⁹ Id. at 311 (quoting *Kovel*, 296 F.2d at 922).

²⁰ Id. at 318.

U.S. West to make a business decision based on those potential litigation risks. Comcast was entitled to withhold the documents from production.

Doctrine Protects Strategic Litigation Planning. The purpose of the work product doctrine is to “establish a zone of privacy for strategic litigation planning . . . to prevent one party from piggybacking on the adversary’s preparation.”²¹ The work product doctrine protects from disclosure “documents and tangible things otherwise discoverable . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative”²² The protection extends to work prepared by third parties and is “rightly seen as a protection of the adversary system, not simply the attorney.”²³

Importantly, the work product protection is qualified and may be overcome if the requesting party makes a showing of “substantial need” for the materials and that it cannot “without undue hardship” obtain the substantial equivalent of the documents by other means.²⁴

As the party claiming privilege, Comcast bore the initial burden of proving that the Andersen memorandums were prepared in anticipation of litigation.²⁵ Once Comcast met its burden, the burden shifted to the Department to show substantial need for the Andersen memorandums and that it could not be obtain the substantial equivalent without undue hardship.²⁶

Specifically the court was charged with determining whether work product protection applied “to a litigation analysis prepared by a party or its representative in order to inform a business decision which turns on the party’s assessment of the likely outcome of litigation expected to result from the transaction.”²⁷

Court Adopts Broad Definition of Work Product. In *United States v. Adlman*, the Court of Appeals for the Second Circuit evaluated two tests for determining if documents prepared in anticipation of expected litigation but used to inform a business decision could qualify as work product.²⁸

The first test required a document to have been prepared “primarily or exclusively to assist in litigation”; the principal motivation for creation of the document must be to aid in possible future litigation.²⁹ The second test required that “in light of the nature of the document and the factual situation of the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.”³⁰

The *Adlman* court determined that the first test would not protect documents assessing the strengths and weaknesses of an anticipated litigation, the likelihood of settlement, or the expected costs of litigation if

the documents were prepared for a business purpose rather than to directly assist in the litigation.³¹ The court found this result “unwarranted.”³²

Conversely the “because of” test would protect documents analyzing litigation whose primary purpose was to inform a business decision. The *Adlman* court held that the “because of” test was most in keeping with the policy behind the work product doctrine.³³

The *Comcast* court agreed with the Second Circuit and adopted the more liberal “because of” test. The court held that the test “is consistent with both the literal terms [of the rule] and the purposes of the work product doctrine, both of which suggest strongly that work product protection should not be denied to a document that analyzes expected litigation merely because it is prepared to assist in a business decision.”³⁴

In Massachusetts, after *Comcast*, a document is protected by the work product doctrine if it was created because of current or anticipated litigation, even if its main purpose is to assist in a business decision.³⁵

Limits on Work Product Protection. The court rejected the Department’s argument that Ottinger failed to identify any specific prospect of litigation. The court found that Ottinger’s concern focused on the reasonable possibility that the Department would challenge the structure of the sale of Teleport Communications Group shares and the capital gains realized by U.S. West. Andersen gave him an analysis “in order to inform a business decision which turns on the party’s assessment of the likely outcome of litigation expected to result from the transaction” and the memorandums were protected from disclosure as work product.³⁶

The court also rejected the Department’s attempt to overcome the work product protection by a showing of substantial need. The court characterized the Department’s claim that substantially the same information in the Andersen memorandums was unavailable from other sources as “conclusory.”³⁷

While the court rejected the Department’s argument in this case, the possibility that work product protection can be overcome by the party requesting the information is an important limit on work product protection.

The court went on to find that the Andersen memorandums would not have been prepared but for U.S. West’s fear of litigation concerning the Teleport Communication Group stock sale. There is no work product protection for documents prepared in the regular course of business rather than specifically due to litigation concerns.³⁸ However where, as in this case, a document has the dual purpose of being created because of the prospect of litigation and intended to advise a business decision, those documents can be protected from disclosure by the work product doctrine.

²¹ *Id.* at 312.

²² Massachusetts Rule of Civil Procedure 26(b)(3).

²³ *United States v. Textron Inc.*, 553 F.3d 87, 94 (1st Cir. 2009). In *Textron*, the U.S. Court of Appeals for the First Circuit held that tax accrual work papers were protected by the work product doctrine. The First Circuit granted the plaintiff’s request for en banc review; the en banc hearing was June 2.

²⁴ Mass. R. Civ. P. 26(b)(3).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 316.

²⁸ 134 F.3d 1194, 1198-1203 (2d Cir. 1998).

²⁹ *Id.* at 1198

³⁰ *Id.* at 1202.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Comcast*, 453 Mass. at 316.

³⁵ *Id.* at 317.

³⁶ *Id.*

³⁷ *Id.* at 319.

³⁸ *Id.* at 318.

Conclusion

While narrowly applying the derivative privilege, the court extended the protection afforded third parties under the work product doctrine.

The court's broad application of the work product doctrine signals an expansion of the protections offered to those hired to assist an attorney in analyzing possible litigation risk in a business decision. Documents cre-

ated by outside advisers who work with clients may be protected from disclosure under the liberal work product doctrine set out in this case.

While more expansive, the protection for this third-party work is not absolute. Third parties must carefully consider if their work is truly because of litigation and would not have been created in the same format irrespective of the litigation, as it will only be work product if both those questions are true.