Cases Involving Government Agencies Present Unique Discovery Issues

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A company that finds itself in litigation with a state or federal government agency will quickly realize that the substantive and practical issues raised in such litigation are unique.

Unlike ordinary civil litigation between companies, government regulatory disputes often involve a political dimension, tempo and substantive legal issues that are foreign to companies inexperienced in such disputes.

Discovery issues in government regulatory litigation are no exception. For example, agency attorneys often participate in the decision that is at the heart of the litigation. As part of discovery, the company will often seek information regarding the agency's decision-making process.

If agency attorneys were involved in that decision, the agency is likely to argue that such information is protected from disclosure by the attorney-client privilege. To the extent that the agency coordinated its efforts with other agencies, the agency may also argue that the common interest privilege applies.

The agency may also argue that the requested materials were prepared in anticipation of litigation and therefore protected from disclosure by the work product doctrine. Finally, the agency may invoke the so-called "deliberative process privilege," a privilege that is entirely unique to litigation involving government entities.

The company may also want to probe the agency's treatment of similarly-situated companies, as well as the extent to which outside factors (including interest groups and other regulatory agencies) influenced the decision-making process. In such cases, the agency is likely to object on relevance grounds and to withhold the requested information.

Not all of these concepts are unique to agency litigation, but the way in which these concepts apply in litigation often is unique. Addressing these issues therefore requires a response tailored to the distinctive aspects of agency litigation.

For instance, the federal Administrative Procedure Act or its state analogue will often have some bearing on the agency's relevance claims. Likewise, there is case law applicable to privilege claims asserted by agencies. Although the discovery issues raised in agency litigation can be different, companies have arguments to respond effectively when such privilege or relevance claims arise.

Attorney-Client Privilege

Although the attorney-client privilege applies to government attorneys, it may apply differently depending on the precise role played by the government attorney.

An essential component to establishing an attorney-client relationship is that the attorney must be acting in a legal capacity, as opposed to a business or policy-making capacity. Thus, only when the attorney provides legal advice can the communications be privileged from discovery.

Government attorneys sometimes not only can act in a legal capacity, but also in a regulatory capacity. Wyoming v. United States Dep't of Agriculture, 239 F. Supp. 2d 1219, 1229 (D. Wyo. 2002). Recognizing this fact, courts consistently and uniformly have held that when a government attorney acts as a regulator or administrator, those communications are not protected by the attorney-client privilege. See, e.g., Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs, 60 F.3d 867, 884 (1st Cir. 1995); Coastal Corp. v. Duncan, 86 F.R.D. 514, 521 (D. Del. 1980).

State laws circumscribing the role of agency attorneys can also undermine the agency's reliance on the attorney-client privilege. For instance, in some states, only the Attorney General can form an attorney-client relationship with the state. Attorneys employed by other state agencies cannot form such a relationship. See, e.g., 1995 Op. Ga. Att'y Gen. No. 95-1. (In Georgia, no attorney-client relationship exists between agency attorneys and the agency. Only the state Department of Law can provide legal advice).

Common Interest Privilege

Information sharing is common among federal agencies, and is becoming more common among agencies in different states as state Attorneys General increasingly work together on matters of common interest, such as the national tobacco settlement and the multi-state case against Microsoft. By virtue of this information sharing, the agency may invoke the common interest privilege, which operates as an exception to the general rule that sharing privileged documents with third parties waives the privilege.

When faced with this privilege claim, it is important to remember that it "presupposes the existence of an otherwise valid privilege." In Re Grand Jury Subpoenas, 902 F.2d 244, 248-49 (4th Cir. 1990). When privileged information is shared with a third party sharing a common interest, the privilege will not be waived.

Of course, if the information shared with a third party is not privileged in the first instance, the common interest privilege has no application and will not protect otherwise non-privileged information.

Deliberative Process Privilege

While the attorney-client and common interest privileges certainly are not unique to agency litigation, the so-called "deliberative process" privilege is unique to litigation with the government.

The purpose of this privilege is to protect "the decision-making processes of the executive branch in order to safeguard the quality and integrity of governmental decisions." Marisol A. v. Giuliani, 95 Civ. 10533 (RJW) 1998 U.S. Dist. LEXIS 3719, at *17 (S.D.N.Y. Mar. 23, 1998). Thus, an agency may invoke this privilege to shield from disclosure documents relating to its decision-making process.

Two requirements must be met for the deliberative process privilege to apply. First, the communications must be pre-decisional, that is, those communications were made to aid the agency decision-maker in making a decision. Second, the communications must be deliberative, meaning they are connected to the policymaking process. The privilege also extends to the mental processes of an agency official in reaching a decision.

The deliberative process privilege, however, is inapplicable "[w]here the decision-making process itself is the subject of the litigation." as is often the case in agency litigation. Giuliani, 1998 U.S. Dist. LEXIS at *20 (quoting Burka v. New York City Transit Auth., 110 F.R.D. 660, 667 (S.D.N.Y. 1986).

Thus, when a company is challenging an agency's decision, for instance, to deny the company a license to operate in the state, the agency's decision-making process is not protected by the deliberative process privilege because it is the subject of litigation.

Work Product Doctrine

The work product doctrine generally protects from disclosure information generated "in anticipation of litigation." It is not uncommon for an agency to invoke the work product doctrine to shield from disclosure information generated in its regulatory capacity, arguing that litigation was anticipated in the event of an adverse decision, such as one denying the company a license.

The agency may argue that it naturally assumed the company would litigate its license denial and, therefore, all materials generated in the context of considering the license application are protected work product.

A company should be able to overcome such arguments, because courts have not construed the work product doctrine nearly so broadly. Under the agency's argument, the agency always faces the possibility that a company will challenge its decision in court.

The mere possibility of litigation, however, is not the test for invoking the work product doctrine. In In re Grand Jury Investigation, 599 F.2d 1224, 1229 (3rd Cir. 1979), the Third Circuit discussed several "formulas" that courts have used when applying the work product doctrine.

Under one approach, there must be a "substantial probability that litigation will occur" when the documents were generated. Other courts hold that the commencement of the litigation must be "real and imminent." In any event, all formulations of the work product doctrine share a common theme: The work product doctrine covers tangible, not merely hypothetical, litigation threats.

An agency is not likely to be successful invoking the work product doctrine where the agency's only argument is that it anticipated that its regulatory decision would be challenged. Moreover, "materials prepared in the ordinary course of business or pursuant to regulatory requirements or for other non-litigation purposes are not documents prepared in anticipation of litigation." National Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 984 (4th Cir. 1992). Regulatory decisions are decisions made in an agency's "ordinary course of business" and documents generated in the context of such routine regulatory decisions are therefore not protected by the work product doctrine.

Relevance Issues

One relevance objection common in agency litigation is when a company claims that it received less favorable treatment than a similarly-situated company, such as with respect to a licensing decision, and requests information relating to the agency's treatment of that similarly-situated company.

Another relevance objection common in agency litigation arises when a company claims that the agency's decision was prompted by influence from outside the agency, whether from politicians, interest groups or other agencies.

In either case, the agency is likely to object on relevance grounds, arguing that the only issue is whether the agency's decision is "right or wrong," not whether a similarly-situated company received more favorable treatment or whether third parties influenced the decision.

The appropriate response often relies on the federal Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq., or its state analogue, see, e.g., Va. Code 2.2-4000 et seq. These statutes govern agency decision-making as well as litigation challenging those decisions.

The APA gives courts authority to set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or that are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706; see also Va. Code § 2.2-4027.

In City of Sausalito v. O'Neill, 386 F.3d 1186, 1206 (9th Cir. 2004), the court described an agency's actions as arbitrary and capricious when "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

In determining whether an agency's action is "arbitrary and capricious," clearly the agency's treatment of similarly-situated companies is relevant, and therefore discoverable, information. If an agency denied a license to one company and granted a license to another, similarly-situated company with no relevant distinction between the two companies, the agency's decision would be "arbitrary and capricious."

Likewise, if the agency relied on interest group or political pressure or another agency's influence, as opposed to the statutory factors, this likewise would be considered "arbitrary and capricious" in that the agency relied on factors that the legislature did not intend for the agency to consider. Such information would be considered relevant and discoverable.

The standards of relevance in agency litigation are arguably broader than in commercial litigation between two companies. By way of example, in a breach of contract action, a court would likely deem irrelevant discovery regarding whether the defendant's actions were prompted by third-party influence or whether the defendant treated similarly situated companies differently. The relevant inquiry in such cases is simply whether the defendant complied with the parties' contract.

In agency litigation, on the other hand, the issue is not necessarily whether the agency was "right or wrong," but may depend on whether the agency treated regulated parties consistently and whether the agency's decision was influenced by factors outside those mandated by statute.