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OPTREX AND THE ATTORNEY-CLIENT PRIVILEGE: IMPLICATIONS AND POTENTIAL SIGNIFICANCE

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This article addresses the issue of how Judge Barzilay's decision in *United States v. Optrex America*,[1] and two subsequent *Optrex* decisions on discovery disputes, interact with the Mod Act's encouragement of importers to utilize the advice of counsel.

I. THE COURT'S OPINION

Optrex America was a case involving alleged negligent misclassification of LCD panels and modules. Customs wanted to continue depositions of two of the importer's employees, Tolbert and Banas, whose depositions had been terminated by the assertion of attorney-client privilege. Customs also sought to obtain certain documents/interrogatory responses from the importer and to depose the importer's attorneys on the subject of the classification of imported LCD products submitted to Customs at the time of entry.

The court first set forth three purposes of discovery procedures: (1) to narrow the issues; (2) to obtain evidence for use at trial; and (3) to secure information as to the existence of evidence that may be used at trial.[2] Judge Barzilay further noted, however, that it was improper to use the discovery rules as a tactical weapon in the litigation process.[3]

The defendant asserted that, among several experts, it consulted counsel when determining the content of entry documents it submitted to Customs. The court found that, because the case turned upon a finding of a negligent act or omission as delineated in 19 U.S.C. §1592, the plaintiff required access to information from defendant's counsel that it relied upon when classifying imports.[4] The court further explained that once the government proves the act or omission, the defendant has the burden of proving that it did not behave negligently. Crucially, the court went on to say:

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1. No. 04-79, 2004 Ct. Int'l Trade LEXIS 74 (Ct. Int'l Trade July 1, 2004).
2. *Id.* at *2.
3. *Id.* (citing FED. R. CIV. P. 26 advisory committee note to 1983 Amendment).
4. *Id.* at *4.

> If Defendant uses the ostensibly privileged information its counsel provided as a defense, this use of information marks the defense as "affirmative."[5]
>
> An affirmative defense, though, obviates attorney-client privilege with respect to the advice that Defendant received from counsel concerning the entry formulation because, when the content of counsel's advice becomes the object of litigation, attorney-client privilege does not apply to that advice. A "'party can waive the attorney client privilege by asserting claims or defenses that put his or her attorney's advice in issue in the litigation,'" or "when a party affirmatively uses privileged communications to defend against or attack the opposing party." Similarly, in cases where a client's state of mind or knowledge, such as whether the client acted negligently, is at issue, "the attorney-client privilege with respect to attorney-client communications that have bearing on that state of mind or knowledge is impliedly waived."[6]
>
> Negligence on the part of Optrex would be disproved if Defendant can show that it reasonably relied on its attorney's advice. The government needs the content of this advice to assess the reasonableness of Defendant's reliance upon it. To unwaveringly maintain attorney-client privilege in this circumstance would effectively allow Defendant to use the privilege as a shield and sword to protect itself against any such alleged misdeed and frustrate the purpose of discovery.[7]
>
> Therefore, the court grants the government's motion to continue depositions of Ms. Tolbert and Ms. Banas. Importantly, Plaintiff may seek only information given by counsel to Defendant about classification determinations submitted between October 12, 1997, and June 29, 1999—the period when Optrex made the entries at issue in this case.[8]

Therefore, the court granted the motion to continue discovery of certain employees regarding advice from counsel, and granted the request for responses to interrogatories, while modifying them to dovetail with the deposition questions by only including information about legal advice regarding the filling out of entry documents during that certain period ("state the advice Optrex obtained", whether it intends to rely on that advice,

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5. *Id.* at *4-8 (citations omitted)(citing Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., 32 F.3d 851, 863 (3d Cir. 1994) (describing various cases in which the attorney-client privilege has been waived because "the client has made the decision and taken the affirmative step. . .to place the advice of the attorney in issue."); Beery v. Thomson Consumer Elecs., 218 F.R.D. 599, 604 (S.D. Ohio 2003) ("An attorney-client communication is placed at issue. . . when a party affirmatively uses privileged communications to defend against or attack the opposing party.")).

6. *Id.* (citations omitted)(citing *Beery*, 218 F.R.D. at 604; Sax v. Sax, 136 F.R.D. 542, 543 (D. Mass. 1991); Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D. Wash. 1975); King-Fisher Co. v. United States, 58 Fed. Cl. 570, 572 (2003)).

7. *Id.* (citations omitted)(citing Sellick Equip. Ltd. v. United States, 18 Ct. Int'l Trade 352, 354 (1994) (describing the vast scope of the discovery process); *Beery*, 218 F.R.D. at 604 (Waiver therefore stops a party from manipulating an essential component of our legal system - the attorney client privilege – so as to release information favorable to it and withhold anything else.)).

8. *Id.* (citations omitted).

whether it was advised that certain Customs rulings were applicable, etc.).[9] The court denied plaintiff's motion to depose the lawyers from Sonnenberg & Anderson. Judge Barzilay noted that the depositions and modified interrogatories she was ordering would fulfill the plaintiff's discovery needs and, therefore, depositions of the attorneys, which could well disqualify them from acting as counsel, were unnecessary.

The battle over discovery in that case did not end. Optrex America made its own discovery motion to overrule the government's special objections and general objections to interrogatories, to overrule the claims of privilege that the government asserted in its answers to interrogatories and requests for production as well as the Government's Privilege Log, and to compel new interrogatory responses (duly correlated). Optrex also wanted to depose Customs' assistant chief counsel, Jeffrey Reim, asserting that he acted outside the scope of his duties as attorney when he assumed the role of special agent during the underlying investigation.[10] Judge Barzilay, in her second opinion, noted that general objections to interrogatory responses were impermissible, the 'specific' objections were not specific enough, and the government's privilege log was too rudimentary to meet the standards required for the assertion of privilege.[11]

Judge Barzilay outlined the standards required.[12] As the privilege log was set out, the court could not determine the nature of the information Mr. Reim provided to the government. The Court ordered that the government provide certain answers to interrogatories, and that the privilege log be revised if plaintiff wished to maintain its privilege claim. The court's order also called for oral argument on the issues of the motion to depose Mr. Reim and why the court should not sanction the government for its discovery-related conduct.[13]

In the third opinion of *United States v. Optrex America*,[14] the court, having examined the revised privilege log, found all but eight of the documents listed therein acceptable and meeting the attorney–client and deliberative process privilege. The court denied the motion for deposition of Mr. Reim, holding that the defendant had not demonstrated that it needed to depose Mr. Reim in order to present a proper defense.[15] Three reasons were given for this: (1) if, as the plaintiff implied, the government did have access to certain former employees through Mr. Reim, defendant would know in advance and could depose/cross-examine; (2) defendant should know the whereabouts of its former and current employees and what information they could reveal; and (3) it was defendant's burden, not the government's, to

9. *Id.* at *7-9.

10. United States v. Optrex Am., Inc., No. 04-80, 2004 Ct. Int'l Trade LEXIS 76, at *1-2 (Ct. Int'l Trade July 1, 2004).

11. *Id.* at *12-13.

12. *Id.*

13. *Id.* at 13.

14. United States v. Optrex Am., Inc., No. 04-92, 2004 Ct. Int'l Trade LEXIS 92 (Ct. Int'l Trade July 27, 2004).

15. *Id.* at *11.

provide evidence that defendant did not behave negligently.[16] The court also considered sanctions and stated:

> Customs may benefit from a better organizational system for its files, yet such poor organization itself does not warrant sanction under USCIT R. 37. On the other hand, the court reiterates to government's counsel that "General Objections are not allowed" in any court in the federal system. The court will look with extreme disfavor upon further government use of such improper objections.[17]

II. THE STATUTORY PROVISION AND LEGISLATIVE INTENT

The Mod Act[18] changed 19 U.S.C. §1592 by prohibiting the electronic transmittal to Customs of false information or data, authorizing Customs to recover underpayment/nonpayment of taxes or fees resulting from a violation, specifying that a non-intentional repetitious error by an electronic system is not a pattern of negligent conduct, and by defining commencement of a formal investigation for prior disclosure purposes.

The legislative history to this section[19] noted, in the "Reasons for Change" discussion, that the amendment would mandate that Customs share responsibility with the importing community and that, at a minimum, reasonable care would be used in discharging the activities for which the importer is responsible. The Committee discussed the use of attorney advice, stating:

> In meeting the "reasonable care" standard, the Committee believes that an importer should consider utilization of one or more of the following aids to establish evidence of proper compliance: seeking guidance from the Customs Service through the pre-importation or formal ruling program; consulting with a Customs broker, a Customs consultant, or a public accountant or an attorney; using in-house employees such as counsel, a Customs administrator, or if valuation is an issue, a corporate controller, who have experience and knowledge of customs laws, regulations, and procedures; or, when appropriate, obtaining analyses from accredited labs and gaugers for determining technical qualities of an imported product.
>
> For example, in seeking advice for a classification issue, the Committee expects an importer to consult with an attorney or an in-house employee having technical expertise about the particular merchandise in question. In seeking advice for a valuation question, the Committee expects an importer to consult with an attorney or public accountant, and as appropriate, personnel within the company knowledgeable regarding the importer's accounting system and how cost elements are booked.
>
> In using a qualified expert, the importer is also responsible for providing such

16. *Id.* at *9-10.

17. *Id.* at *12 (citation omitted)(citing *Optrex*, 2004 Ct. Int'l Trade LEXIS 76).

18. Customs Modernization and Informed Compliance Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (the "Mod Act") (enacted as Title VI of the North American Free Trade Agreement Implementation Act).

19. H.R. REP NO. 103-361(I), at 120 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 2670.

> expert with full and complete information sufficient for the expert to make entry or to provide advice as to how to make entry. If the above steps are taken, the importer will be presumed to have acted with "reasonable care" in making the entry.
>
> The following are two examples of how the reasonable care standard should be interpreted by Customs: (a) the failure to follow a binding ruling is a lack of reasonable care; and (b) an honest, good faith professional disagreement as to correct classification of a technical matter shall not be lack of reasonable care unless such disagreement has no reasonable basis (e.g. snow skis are entered as water skis).[20]

It seems apparent that the congressional intent was to put the attorney's advice at issue but, at the same time, to go no further than establishing that the advice was provided in good faith and was not utterly lacking in foundation.[21] One reason for this might be that the client, not normally having legal training, would not be in a position to judge the correctness of the attorney's advice. There is no indication in the legislative history that Congress considered seeking legal advice in this context to be unprotected by the attorney-client privilege.

III. MAY *OPTREX* BE RECONCILED WITH THE LEGISLATIVE INTENT BEHIND 19 U.S.C. §1592?

Clearly, the state of mind of the importer is central to the establishment of a violation of 19 U.S.C. §1592. Therefore, it is consistent with the statutory intent to allow disclosure of the fact that advice was given to the importer, and of the nature of the advice. However, a more difficult question is whether *Optrex America* goes further than Congress intended. The legislative history specifies only three requirements seemingly necessary to defend on the basis of the attorney advice: (1) the advice the importer relied upon was given; (2) the advice was given in good faith; and (3) the advice was not patently unreasonable.

Although *Optrex America* does not discuss in detail when that line may be drawn, Judge Barzilay tries to limit the damage to attorney-client privilege by not allowing the attorneys to be deposed, by tailoring the interrogatories, and by specifying that the "plaintiff may seek only information given by counsel to Defendant about classification determination submitted between October 12, 1997, and June 29, 1999 — the period when Optrex made the entries at issue in this case."[22]

Perhaps, however, Judge Barzilay's attempt to salvage the attorney-client privilege by limiting the questions to a certain time period and by directing them to the importer's employees rather than the attorneys begs the real question — whether those questions should be limited in *scope*. The legislative history seems clear that it does not want to put the legal

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20. *Id.*

21. During the breakout session, John Pellegrini described the attorney's advice as "colorable."

22. *Optrex Am. Inc.*, 2004 Ct. Int'l Trade LEXIS 74, at *7-8.

correctness of the attorney's opinion on the table in terms of identifying a deciding point for establishing reasonable care under 19 U.S.C. §1592. An honest, good faith, professional disagreement as to correct classification is *not* to be construed as lack of reasonable care. Rather, the importer need only establish that the advice was given, and that fact itself controls, giving rise to the presumption of reasonable care, except in exceptional circumstances — where the attorney acted in bad faith, or where no reasonable attorney could have given such advice. Therefore, any implied waiver of attorney-client privilege by the client by relying on such advice should be limited to matters where the legislative history states are relevant, i.e., whether the attorney's advice was colorable.

How could a court tackle this problem without encroaching on the attorney-client privilege? The only information that should be required at deposition is what facts were presented to the attorney on which to base the determination, and the advice that was given. The third prong discussed by the legislative history, whether the advice was such that no reasonable attorney could have given such advice, is a determination that should be made by the court. Therefore, we propose that the subject matter of potential deposition questions be limited to the facts that were presented to the attorney[23] and the classification/valuation advice that was given. The justification for discovery of attorney-client advice does not merit any more intrusive inquiry, unless Customs comes forth with some evidence of the attorney's *male fides* that merits further fact-finding. Anything more would be abuse of discovery as a tactical weapon, which as Judge Barzilay notes, is improper.

CONCLUSION

Although Judge Barzilay's decision in *Optrex America* did not allow direct deposition of the attorneys on the subject of their classification advice, it still raised a shudder among Customs counsel who feared that the case would be used to erode the sanctity of the attorney-client privilege. Many also feared that the possibility that their discussions with counsel could become the subject of discovery might inhibit clients from being honest and forthright with their own attorney when seeking advice on Customs matters.

Judge Barzilay's decision certainly did not find that depositions of importers' attorneys would *never* be permissible, nor did it seek to define in what exigent (or other) circumstances it might be required. The opinion also left open the question of just how far the government can go in seeking discovery on the advice given to the client. This deviates a great deal from the legislative intent, which seems to favor a bare-bones inquiry. The permissible scope of the inquiry made into classification advice has been left undefined, and there is no indication on the level of detail that might be

23. To ensure that the importer has fulfilled the requirement set forth in the legislative history of 19 U.S.C. § 1592 that it has provided "full and complete information sufficient for the expert to make entry or to provide advice as to how to make entry." H.R. REP. NO. 103-361(I), at 120.

subject to discovery. Further judicial clarification, both on the scope of the disclosure of attorney advice and the circumstances under which the attorneys themselves might be deposed, is therefore mandated.