

BUSINESS LITIGATION ALERT

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The Attorney-Client Privilege And Independent Contractors: Conflict Within The Third Circuit?

The Third Circuit has yet to address the standard for determining whether the attorney-client privilege attaches to communications between a company's counsel and the company's independent consultant. District Courts within the Third Circuit have applied the “functional equivalent” test, but have disagreed on how broadly the test should be interpreted. Most recently, the Eastern District of Pennsylvania decided the attorney-client privilege issue by applying a “broad approach” with a focus on whether the disputed communications were made for the purpose of giving or receiving legal advice and were kept confidential. *In re Flonase Antitrust Litig.*, Nos. 08-cv-3149, 08-cv-3301, 2012 U.S. Dist. LEXIS 91155 (E.D. Pa. July 2, 2012).

A dispute arose between purchasers of a steroid nasal spray and the manufacturer GlaxoSmithKline PLC (“GSK”) as to whether the attorney-client privilege protected communications between GSK and its independent consultant Swiftwater Group, LLC. The purchasers and GSK agreed that the proper test was whether Swiftwater was a “functional equivalent” of a GSK employee, but disagreed as to whether the test should be narrowly or broadly construed. The court sided with GSK, applying the “broad approach” to the “functional equivalent” test, and found that Swiftwater was a functional equivalent of

a GSK employee. The court reasoned that Swiftwater played a crucial role on GSK's brand maturation team; was intimately involved in the creation, development and implementation of a brand maturation plan; assisted GSK on legal and regulatory tasks; and documents produced as part of this work were treated as confidential and as if the attorney-client privilege applied. The court, however, stopped short in attaching the attorney-client privilege until each document could be reviewed by the court to see whether it was created for the purpose of providing or obtaining legal advice.¹

In reaching its holding, the Court in *In re Flonase Antitrust Litig.*, rejected what it characterized as a “very narrow view of which independent consultants may qualify as the functional equivalent of employees” embraced by the District of New Jersey and the Southern District of New York. In particular, the court declined to follow four factors highlighted in *In re Bristol Myers Squibb Sec. Litig.*, No. 00-1990, 2003 U.S. Dist. LEXIS 26985* at 12-14 (D. N.J. 2003). Interestingly, the *In re Bristol Myers Squibb Sec. Litig.* court did not confine itself to an analysis of only four factors. Rather, it recognized courts consider “many factors

¹ A later Report and Recommendation issued by the Magistrate Judge found most of the documents sought were covered by the attorney-client privilege. *In re Flonase Antitrust Litig.*, Nos. 08-cv-3149, 08-cv-3301, 2012 U.S. Dist. LEXIS 105174 (E.D. Pa. July 26, 2012).

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to reach an appropriate determination,” including those four factors; that the “key” is whether an independent contractor “acts for the corporation and possesses the information needed by attorneys in rendering legal advice”; and, recognized that the Special Master delegated with the task of determining privilege did not base her decision on “any single factor.” Indeed, both courts support their respective decisions with reliance upon the contours of the attorney-client privilege as espoused in *Upjohn Company v. United States*, 449 U.S. 383 (1981).

While a dispute may exist between District Courts within the Third Circuit as to the breadth of the “functional equivalent” test, businesses can take solace in the Eastern District of Pennsylvania’s explicit broad application of the privilege to independent consultants. Nevertheless, businesses should make efforts to ensure that communications concerning legal advice fall within the parameters identified by both *In re Flonase Antitrust Litig.* and *In re Bristol Myers Squibb Sec. Litig.* Otherwise, until the Third Circuit has an opportunity to decide the issue, they run the risk that legal exchanges with independent consultants may be disclosed.

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