

BB REVIEW

Business Litigation News
Spring 2009

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(con't) Federal Rule of Evidence 502 Creates New Waiver Rules

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BALCH & BINGHAM LLP

ANNOUNCES NEW BUSINESS LITIGATION NEWSLETTER

WELCOME!

This is the first edition of our quarterly newsletter tailored to our business litigation clients and guests. Our goal is to provide updates and information you may find interesting or useful. We welcome your feedback to Matthew B. Ames at mames@balch.com or (404) 962-3531.

MAGUIRE OBTAINS INJUNCTIVE RELIEF FOR CLIENT

Our firm's client, a national tax preparation firm, learned that a former employee was working for a competitor and that the competitor was using our client's customer database to solicit our client's customers. Atlanta Partner Matt Maguire filed a lawsuit in Hall County Superior Court against the competitor firm and the former employee alleging theft of trade secrets and violations of the employee's non-competition and non-solicitation covenants. After a daylong hearing, the court enjoined until further notice the competitor firm from providing tax preparation services to any individual who had their returns prepared by our client the previous year. Since every one of the competitor's twenty plus tax preparers were employed by our client the year before, and since the customers frequently follow the preparer from firm to firm, the injunction has proven extremely valuable to our client. The client's claims for damages

and attorneys' fees and expenses are still pending.

MEADOWS AND AMES SUCCESSFULLY DEFEND CLIENT IN EMPLOYMENT DISPUTE

Atlanta Partners Dart Meadows and Matthew Ames recently obtained two favorable rulings on behalf of a Firm client sued by a former employee for an alleged breach of an employment contract. The former employee sued in May 2008, claiming that he was owed \$145,000 in unpaid sales commissions and additionally entitled to monetary distributions as a *de facto* owner of the company. In a pair of rulings, the court dismissed the claims, concluding that they were trumped by the company's Operating Agreement and the at-will employment doctrine. No claims against the Firm's client remain pending.

DYAL AND ALEXANDER WIN JURY VERDICT OVER \$889,000

On April 14, 2009, Jonathan Dyal and Mark Alexander, Partners in our Gulfport, MS office, won a jury verdict of approximately \$889,000 plus 8% interest from July of 2008 through the date of Judgment against the Mississippi Department of Transportation on behalf of two landowners in an eminent domain proceeding. Our clients sought

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\$1,001,000. The Mississippi Department of Transportation offered \$113,000 at the time of suit and \$176,000 at trial. The jury returned the verdict for \$889,000 within 50 minutes of closing arguments. Our clients were extremely pleased with the outcome.

BALCH & BINGHAM HOSTS MCKAY MANAGEMENT COMPANY

April 16, 2009, Jeremy Retherford, Jennifer Clark, Ranelle Johnson & Steve Casey hosted Joe McKay of McKay Management Co. and 8 of his managers for a four hour, in-house clinic on legal issues involved in the representation of homeowner associations. McKay Management is a Birmingham company that manages approximately 60 homeowner associations. Jeremy, with Ranelle's help, spoke on issues particularly relevant to the process of collecting unpaid assessments, and also addressed the question of what effect both foreclosures and bankruptcy filings have on that process. Jennifer, also with input from Ranelle, talked to the group about enforcement of restrictive covenants.

BALCH & BINGHAM PRESENTS AT CAI'S NATIONAL CONFERENCE IN NEW ORLEANS

David Marmins and Natalie Christensen will be speaking at the Annual National Conference of the Community Association Institute on Saturday, April 25, 2009 in New Orleans, LA. They will be joined on a panel by Randi Anderson, the Vice President of Community Management Associates, the largest residential property management company in Georgia. The panel will address legal problems stemming from the rash of unfinished developments, developer bankruptcies and related issues.

FEDERAL RULE OF EVIDENCE 502 CREATES NEW WAIVER RULES

With the new paperless world, even a minor suit can result in thousands of dollars in production costs and open the Pandora's Box of subject matter waivers. Newly drafted Rule 502 resolves many disputes about the "subject matter waiver" resulting from inadvertent disclosures of communications or information protected by the attorney-client privilege or the work product doctrine. It also responds to the prohibitive litigation costs necessary to protect against such waiver which arise from concerns that even innocent or minimal disclosures will waive the protection.

The rule applies to federal question and diversity actions as well as federally mandated arbitration and even certain subsequent state court actions. However, Rule 502 also has real limitations. It does not define "attorney-client privilege" or "work product," and does not apply to other types of protected or privileged information. Further, Rule 502 covers only certain types of waiver: those by disclosure (rather than, for example, pleading advice of counsel).

502(a) deals with intentional disclosures of protected information made in federal proceedings or to federal officers or agencies, and limits the resulting waiver to the actual information or documents disclosed unless the waiver was intentional and unfair (e.g., the disclosing party put the information into the litigation in a selective, misleading, or unfair manner). Importantly, the sub-section's protection extends to all other federal and state proceedings.

502(b) deals with the more contested area of inadvertent disclosures. In federal proceedings, these disclosures do not constitute a waiver if the holder of the privilege or protection took reasonable steps to "prevent disclosure" and "rectify the error." The term "reasonable" is filled-out by prior case law and the "claw-back" provision of FRCP 26(b)(5)(B).



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For questions or additional information about items appearing in this Update, please contact your Balch & Bingham attorney.

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502(c) resolves confusion surrounding disclosures made in state courts. Unless the state court has issued a dispositive order, the federal court will not treat a disclosure as a waiver if 1) it would not have constituted a waiver in federal court or 2) it was not a waiver in the state court in which it was made. If the state court issued a confidentiality order, statutory or other state law controls.

Are confidentiality orders entered in one case enforceable in other cases? 502(d) answers definitively that if a federal court orders that “the privilege or protection is not waived by disclosure connected with the litigation pending before the court . . . the disclosure is also not a waiver in any other Federal or State proceeding.” The rule is not limited to orders which involve agreements between the parties. This provision should provide confidence in “claw-back” and “quick peek” agreements, as well as computerized privilege reviews, and thus drastically reduce production costs. 502(e), working in conjunction with 502(d), adds that party agreements are universally binding if incorporated into a court’s order.

Rule 502 provides tools for litigants to protect themselves from the consequences of some types of accidental and incidental disclosures of information. It is a positive step towards the goal of providing “just, speedy and inexpensive” resolution of litigation and relief to litigants.