

In re Qwest Communications International, Inc.: The Tenth Circuit Hangs Up the Phone on Qwest’s Petition for Selective Waiver, But the Line Is Not Dead

Seth Spaulding Gomm[†]

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[†] J.D., M.B.A., M.S. Finance Candidate, May 2008, University of Denver Sturm College of Law. I would like to thank Prof. David I. C. Thomson, Lawyering Process Professor, University of Denver College of Law, and N. Patrick Hall, J.D., for their advice, assistance, and inspiration in the development of this Article. I also would like to thank my wife Nicail, my daughter Aeyan, and my son Ryeden for their patience and perseverance during this process.

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I. INTRODUCTION

In 2002, the Securities Exchange Commission (SEC) began investigating concerns regarding Qwest's business accounting practices.¹ Soon thereafter, the Department of Justice (DOJ) began criminal investigations² of the company and its top executives.³ Upon concluding its investigation, the SEC alleged that Qwest was "engaged in massive financial fraud that hid from the investing public the true source of the company's revenue and earnings growth, caused the company to fraudulently report approximately \$3 billion in revenue, and facilitated the company's June 2000 merger with US West."⁴ The SEC claimed that Qwest fraudulently characterized nonrecurring revenue as recurring "data and Internet service revenues" in an attempt to hide the company's declining financial condition.⁵ After inflating the revenue reported on Qwest's financial statements, top executives allegedly committed insider trading when they sold large amounts of stock at a time when the executives knew they would miss Qwest's financial targets.⁶

Following the SEC and DOJ investigations, numerous Qwest stockholders filed civil lawsuits against Qwest.⁷ During the course of these proceedings, Qwest sought to protect documents that it had disclosed to the SEC and DOJ during their investigations, which might otherwise have been protected from discovery under the attorney-client privilege and work product doctrine.⁸ After a district court found that Qwest had waived its attorney-client privilege by its disclosures to the government, Qwest appealed to the Tenth Circuit Court of Appeals on the ground that the selective waiver doctrine should apply to protect these disclosures.⁹

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1. *In re Qwest Commc'ns Int'l, Inc.*, 450 F.3d 1179, 1181 (10th Cir. 2006).
 2. *Id.*
 3. Greg Farrell, *Former Qwest CEO Charged with Insider Trading*, USA TODAY, Dec. 21, 2005, at 1B.
 4. *SEC Sues Former Qwest Officers Alleging Financial Fraud*, 3-9 MEALEY'S EMERGING SEC. LITIG. 13 (2005).
 5. *Id.*
 6. Farrell, *supra* note 3.
 7. *In re Qwest*, 450 F.3d at 1182.
 8. *Id.* at 1181.
 9. *Id.* at 1182.

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The Tenth Circuit did not find an exception to the traditional waiver rule of the attorney-client privilege and work product doctrine.¹⁰ Qwest failed to convince the court to adopt the doctrine of selective waiver,¹¹ and was left to contend with exposure of its otherwise privileged documents to third-party litigants.¹² The Tenth Circuit, in its first decision regarding selective waiver,¹³ concluded that Qwest's attempt to invoke the selective waiver doctrine was not motivated by an interest in justice, but rather a desire to appease the investigating governmental agencies while deflecting discovery from private litigants.¹⁴ The court saw Qwest's petition for selective waiver as an attempt to create a new privilege, rather than as an extension or exception to the existing traditional privileges.¹⁵

Many courts and commentators have made compelling policy arguments both for and against adoption of selective waiver. The issue of selective waiver and the nature of its application or adoption have been disputed in other circuit courts and have resulted in a federal circuit split.¹⁶ Because of the unpredictability created by this circuit split, either Congress or the Supreme Court needs to create a uniform solution.¹⁷ A uniform rule is particularly important in today's world, where many business entities establish a national and international presence. Ultimately, Congress and/or the Supreme Court should adopt the selective waiver doctrine in a manner that would ensure cooperation between corporations and the government, thereby enabling government agencies to secure a fair marketplace for public investors.

Part I of this article introduces and examines the background of traditional legal doctrines and principles that gave rise to the dispute in *In re Qwest Communications International, Inc.* Part II discusses the existing federal circuit court split over the doctrine of selective waiver and its application to both the attorney-client privilege and work product doctrine. Part III examines the facts and reasoning in the Tenth Circuit's *In re Qwest* decision. Part IV analyzes the Tenth Circuit's reasoning, discusses policy arguments both for and against the adoption of selective waiver, and provides an overview of current legislative attempts to create a uniform rule for selective waiver application. This article will argue the following three points: (1) a uniform selective waiver rule is essential in a modern era of increasing globalization and corporate misbehavior; (2) the selective waiver doctrine should be adopted to ensure

10. *Id.* at 1181.

11. *Id.* at 1192.

12. *In re Qwest*, 450 F.3d at 1201.

13. *Id.* at 1186.

14. *Id.* at 1196.

15. *Id.* at 1197.

16. *Id.* at 1184; *see also In re Steinhardt Partners*, 9 F.3d 230, 233 (2d Cir. 1993); *In re Columbia/HCA Healthcare Corp.*, 293 F.3d 289, 308 (6th Cir. 2002).

17. *In re Qwest*, 450 F.3d at 1200-01.

cooperation between governmental agencies and corporations; and (3) corporations and government agencies should be able to enforce confidentiality agreements.

II. BACKGROUND

A. *Selective Waiver*

The doctrine of selective waiver allows corporations to comply with the demands of a government regulatory investigation by waiving its attorney-client and work product privileges to that agency, while still preserving the privileges against subsequent third-party litigants.¹⁸ Traditionally, a majority of courts have not recognized the viability of a voluntary selective waiver of the attorney-client privilege as an exception to the absolute consequences of traditional waiver.¹⁹ However, companies continue to attempt to selectively waive their privilege to investigating agencies by entering into a confidentiality agreement with the agency to keep the disclosed information from reaching third-party litigants.²⁰

Many courts are hesitant to adopt a selective waiver doctrine because they feel that it may undermine the underlying purpose of the attorney-client and work product privileges,²¹ which are the privileges to which the genesis of selective waiver has been attributed.²² Courts and commentators recognize that a selective waiver privilege may in fact be a new privilege,²³ perhaps more appropriately described as a new “corporation-government” privilege rather than an extension or modification of the traditional privileges.²⁴

The SEC has long been an advocate for the selective waiver doctrine because the agency believes it would “significantly enhance the Commission’s ability to conduct expeditious investigations and obtain prompt relief.”²⁵ Courts have claimed that in 1984, Congress rejected an SEC proposed amendment to the Securities and Exchange Act of 1934 that would have created a selective

18. Priscilla L. Walton, *Waiving the Attorney-Client Privilege Goodbye: The Erosion of the Privilege by Federal Financial Regulatory Agencies*, 10 N.C. BANKING INST. 397, 408 (2006).

19. Douglas R. Richmond, *The Attorney-Client Privilege and Associated Confidentiality Concerns in the Post-Enron Era*, 110 PENN. ST. L. REV. 381, 406 (2005).

20. *Id.* at 407.

21. Nancy H. Burke, *The Price of Cooperating with the Government: Possible Waiver of Attorney-Client and Work Product Privileges*, 49 BAYLOR L. REV. 33, 35 (1997).

22. Ashok M. Pinto, *Cooperation and Self-Interest are Strange Bedfellows: Limited Waiver of the Attorney-Client Privilege through Production of Privileged Documents in a Government Investigation*, 106 W. VA. L. REV. 359, 382 (2004).

23. *See id.*; *In re Qwest*, 450 F.3d at 1197.

24. Andrew J. McNally, *Revitalizing Selective Waiver: Encouraging Voluntary Disclosure of Corporate Wrongdoing by Restricting Third Party Access to Disclosed Materials*, 35 SETON HALL L. REV. 823, 850 (2005).

25. Walton, *supra* note 18, at 409.

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waiver rule.²⁶ However, Congress did not actually reject the proposal, but simply took no action. Therefore, the SEC proposal in fact carried no subsequent legal significance.²⁷ While some commentators have suggested that selective waiver has been subject to a slow death within the federal courts,²⁸ judicial indecision²⁹ and recent congressional action³⁰ have breathed new life into the debate.

Congress returned to the issue of selective waiver in March 2006, when the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security received oral arguments at an oversight hearing on corporate privilege waivers.³¹ The Advisory Committee on Evidence Rules recently voted to recommend a proposed Rule 502 that included recognition of selective waiver to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.³² If it were adopted, Rule 502 would greatly strengthen and legitimize the doctrine of selective waiver.

B. Attorney-Client Privilege

The attorney-client privilege dates back to Elizabethan England, making it one of the oldest common law privileges.³³ The Supreme Court has stated that the "purpose [of the attorney-client privilege] is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice."³⁴ The purpose of the privilege is satisfied when the client is able to obtain informed legal advice from her attorney with the confidence that her communications will remain confidential.³⁵

The right to assert the privilege rests with the client since the privilege exists for the client's benefit.³⁶ The client may invoke the privilege at any time during or after the formal attorney-client relationship, and the privilege extends even after death.³⁷ The form and manner of the client's communication with her attorney is irrelevant as long as the communication is intended to remain confidential.³⁸ Like a human client, a corporation is entitled to assert the

26. *In re Qwest*, 450 F.3d at 1198.

27. McNally, *supra* note 24, at 868.

28. Burke, *supra* note 21, at 59-60.

29. *In re Qwest*, 450 F.3d at 1191.

30. *Id.* at 1200.

31. *Id.*

32. *Id.*

33. McNally, *supra* note 24, at 828.

34. *Upjohn v. United States*, 449 U.S. 383, 389 (1981).

35. Burke, *supra* note 21, at 37.

36. Richmond, *supra* note 19, at 386.

37. *Id.*

38. *Id.*

attorney-client privilege, and this includes communications made with in-house counsel.³⁹

Courts have generally held that the voluntary disclosure of privileged communications to third-parties can effectively waive the attorney-client privilege protection unless it falls under a limited exception.⁴⁰ The Tenth Circuit has found that courts are not bound to honor the attorney-client privilege when a party is attempting to use the privilege in a way that is inconsistent with the purpose of the privilege. In fact, the court broadly stated that “[a]ny voluntary disclosure by the client [to an adversary] is inconsistent with the attorney-client relationship and waives the privilege.”⁴¹

C. Work Product Privilege

The sister doctrine of the attorney-client privilege is the work product doctrine.⁴² The purpose of the work product doctrine is to immunize from discovery specific information and documents that were created and intended to be used in trial preparation.⁴³ The Supreme Court ruled in *Hickman v. Taylor*⁴⁴ that a party who seeks to discover materials that contain the mental impressions of the opposing attorney is barred from discovery of those materials.

After the Court’s ruling in *Hickman*, the doctrine was codified in the Federal Rules of Civil Procedure.⁴⁵ The rule states that “the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney. . . .” A court can only allow disclosure of work product information when “the party seeking discovery has *substantial need* of the materials. . .and the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.”⁴⁶

There are two types of work product: opinion and non-opinion.⁴⁷ Non-opinion work product is primarily the type that falls under the substantial need exception in the Federal Rules of Civil Procedure. Non-opinion work product has been described as a “tangible” item, one that is a document or other

39. *Id.* at 387.

40. Burke, *supra* note 21, at 37; *see also* Note, *Attorney-Client and Work Product Protection in a Utilitarian World: An Argument for Recomparison*, 108 HARV. L. REV. 1697, 1707 n.68 (1995) [hereinafter *Work Product Protection*]; John K. Rabiej, *Civil Practice and Litigation Techniques in Federal and State Courts: Proposed Rule 502*, SL081 A.L.I.–A.B.A. 289, 295-97 (2006) (citing examples of possible exceptions to the attorney-client privilege).

41. *In re Qwest*, 450 F.3d at 1185 (quoting *United States v. Bernard*, 877 F.2d 1463, 1465 (10th Cir. 1989)).

42. Pinto, *supra* note 22, at 365.

43. Richmond, *supra* note 19, at 391.

44. 329 U.S. 495, 510 (1947).

45. FED R. CIV. P. 26(b)(3).

46. *In re Qwest*, 450 F.3d at 1186 (quoting FED R. CIV. P. 26(b)(3)) (emphasis added).

47. *See id.*; Richmond, *supra* note 19, at 391.

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tangible thing prepared by a party in anticipation of litigation.⁴⁸ On the other hand, opinion work product can be described as “intangible” items such as an attorney’s legal theories, mental impressions, opinions and conclusions.⁴⁹ Opinion work product has near absolute immunity and is discoverable under only rare circumstances.⁵⁰

Like the attorney-client privilege, the protection offered by the work product doctrine is not absolute, and can be waived.⁵¹ The Tenth Circuit Court has found that the “production of work-product material during discovery waives a work-product objection.”⁵² Thus, a party seeking to maintain continued protection of previously disclosed documents must overcome a general presumption in favor of waiving their work product privilege.

D. Appropriateness of a Writ of Mandamus in Selective Waiver Cases

Mandamus in a case involving selective waiver could have the effect of a higher court ordering a lower court to allow the moving party to preserve its confidentiality privileges despite previous disclosure to a government adversary. A mandamus action is considered an extraordinary writ that, according to the Supreme Court, is only appropriate in cases where a party has “no other adequate means of relief and [where the party’s] right to the writ is ‘clear and indisputable.’”⁵³

The Tenth Circuit court has held that there are two major factors to consider in allowing a mandamus action: (1) when “disclosure of the allegedly privileged or confidential information renders impossible any meaningful appellate review of the claim of privilege or confidentiality,” and (2) when “disclosure involves questions of substantial importance to the administration of justice.”⁵⁴ In most cases, the act of disclosing documents that may otherwise be privileged renders any appellate review impossible because the original privilege is left worthless. Normal appellate review after effective disclosure cannot return the party to the position the party would have been in before the disclosure occurred.⁵⁵

The issue of selective waiver is one of important public interest.⁵⁶ Ensuring voluntary cooperation between corporations and government is an important

48. Richmond, *supra* note 19, at 391.

49. *Id.*

50. Burke, *supra* note 21, at 39.

51. *In re Qwest*, 450 F.3d at 1186.

52. *Id.*

53. *Id.* at 1182-83 (quoting *Barclaysamerican Corp. v. Kane*, 746 F.2d 653, 654 (10th Cir. 1984)).

54. *Id.* at 1183.

55. *In re Qwest*, 450 F.3d at 1183.

56. *Id.*

interest of law enforcement agencies.⁵⁷ The rules and processes of discovery affect the claims and defenses made by corporations, government agencies, and private civil litigants alike.⁵⁸ The result of a court's decision regarding selective waiver not only affects issues of privilege, but is also of "substantial importance to the administration of justice."⁵⁹

Other circuit courts have found that a writ of mandamus is an appropriate action when deciding the validity of a selective waiver claim.⁶⁰ The issuance of a writ rests within the court's discretion.⁶¹ The Second Circuit indicated that deciding the issue of selective waiver was one of the very rare circumstances that may permit a writ of mandamus upon a district court.⁶²

E. Government Cooperation

In the post-Enron era of aggressive regulatory investigations and strong public awareness of corporate misbehavior, corporations are faced with difficult decisions in dealing with problems such as accounting oversights or even outright criminal acts.⁶³ In an attempt to minimize public attention and in hopes of lenient treatment, corporations are attracted to the act of disclosing privileged information to government agencies, which can result in the waiver of the corporation's attorney-client privilege.⁶⁴

a. Voluntary Disclosure Programs

The Environmental Protection Agency, Office of Inspector General, Department of Defense, SEC, and DOJ are among the government agencies that offer voluntary disclosure programs.⁶⁵ The nature of the government agency's programs, especially in the case of the SEC and DOJ, has been criticized for eroding the attorney-client privilege.⁶⁶ However, these agencies have limited resources available to effectively investigate and enforce the requisite rules and laws within their broad jurisdictions.⁶⁷ The agencies use voluntary disclosure programs as an alternative method to encourage

57. *Id.*

58. *Id.*

59. *In re Qwest*, 450 F.3d at 1184; *see also* Pinto, *supra* note 22, at 388.

60. *In re Qwest*, 450 F.3d at 1184.

61. *Id.*

62. *Id.* (citing *In re Steinhardt Partners*, 9 F.3d 230 (2d Cir. 1993)).

63. Walton, *supra* note 18, at 398; *see also* Pinto, *supra* note 22, at 388; Jonathon C. Dickey, *Current Trends in Federal Securities Litigation*, SL020 A.L.I.-A.B.A. 1, 1 (2006).

64. *Id.*

65. Stephen R. Geisler, *Voluntary Disclosure of Corporate Violations of Federal Law*, 51 ALA. L. REV. 375, 377-78 (1999).

66. Walton, *supra* note 18, at 400-01.

67. Pinto, *supra* note 22, at 367.

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compliance with its regulations.⁶⁸

The SEC originally instituted a corporate self-investigatory program that induced corporations to conduct their own internal investigations and give the SEC only a “generic disclosure,” though complete disclosure of attorney-client information was encouraged.⁶⁹ The SEC now “regards the production of attorney-client privileged information . . . as a necessary element of cooperation.”⁷⁰ In order to encourage corporations to voluntarily disclose information that the SEC did not directly request or may not have otherwise uncovered, the agency could promise to consider discontinuing further action against the corporation.⁷¹

In 2003, the DOJ issued the “Thompson Memo” which outlined factors that federal prosecutors could consider in making decisions with respect to prosecuting businesses.⁷² One such factor was “the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work-product protection.”⁷³ The Thompson Memo factors provide corporations with an incentive to take “remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace [culpable] management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies.”⁷⁴

New Federal Sentencing Guidelines were adopted in 2004 for corporations.⁷⁵ The Guidelines provide a scoring system that can be used in assessing culpability and the severity of any consequential punishment.⁷⁶ For example, if a business “fully cooperated in the investigation,” two points could be subtracted from the organization’s culpability score.⁷⁷ The final culpability score is then multiplied by the base fine amount.⁷⁸ Because a common final score usually ranges from 5 to 10 points, a reduction of two points could easily

68. *Id.*

69. Beth S. Dorris, *The Limited Waiver Rule: Creation of an SEC-Corporation Privilege*, 36 STAN. L. REV. 789, 795 (1984).

70. Walton, *supra* note 18, at 402.

71. *Id.* at 401-02.

72. *Id.* at 402.

73. *Id.*

74. Christopher J. Christie & Robert M. Hanna, *A Push Down the Road of Good Corporate Citizenship: The Deferred Prosecution Agreement Between the U.S. Attorney for the District of New Jersey and Bristol-Myers Squibb Co.*, 43 AM. CRIM. L. REV. 1043, 1045 (2006) (quoting factor number three from the Thompson Memo).

75. Walton, *supra* note 18, at 403.

76. Geisler, *supra* note 65, at 380.

77. Walton, *supra* note 18, at 403.

78. Gary R. Spratling, Deputy Assistant Attorney Gen., Antitrust Div., U.S. Dep’t of Justice, *The Trend Towards Higher Corporate Fines: It’s a Whole New Ball Game*, Address Before the National Institute of White Collar Crime (Mar. 7, 1997), available at <http://www.usdoj.gov/atr/public/speeches/4011.htm>.

equate to a significant reduction in fines.⁷⁹

Recently, however, the Sentencing Commission promulgated an amendment to the Guidelines that deleted certain language because “the sentence at issue could be misinterpreted to encourage waivers.”⁸⁰ The amendment took effect on November 1, 2006.⁸¹ Because of the new amendment, current pressures facing corporations to waive their privileged documents may decrease,⁸² while government agencies’ difficulties in obtaining privileged corporate information may increase.

III. CIRCUIT SPLIT

The absence of a Supreme Court ruling on the issue of selective waiver⁸³ has resulted in a split between the various federal circuit courts.

A. *Diversified and Permian: The Contrary Foundations of Selective Waiver Case Law.*

The Eighth Circuit in *Diversified Industries v. Meredith*⁸⁴ was the first appellate court to embrace the idea that a corporation may voluntarily disclose privileged information to a government agency without waiving the attorney-client privilege.⁸⁵ In that case, Diversified became involved in litigation over a proxy fight.⁸⁶ During the course of the litigation, allegations arose that Diversified had maintained a “slush fund” for bribing purchasing agents of business entities and for engaging in other improper business practices.⁸⁷

Diversified retained an outside law firm to conduct an internal investigation regarding the allegations, and this investigation included sensitive information protected by the attorney-client privilege.⁸⁸ The conflict attracted the attention of the SEC, which conducted its own investigation.⁸⁹ In response to a subsequent SEC subpoena, Diversified voluntarily disclosed the privileged report of the internal investigation conducted by outside counsel.⁹⁰ Weatherhead, another corporation that was allegedly affected by the slush fund, filed suit and made a discovery request for the information disclosed to the

79. *Id.*

80. *In re Qwest*, 450 F.3d at 1200.

81. *Id.* See generally FEDERAL SENTENCING GUIDELINE MANUAL (2006), available at <http://www.ussc.gov/>.

82. *In re Qwest*, 450 F.3d at 1200.

83. Walton, *supra* note 18, at 409.

84. 572 F.2d 596 (8th Cir. 1978) (en banc).

85. Pinto, *supra* note 22, at 368; *In re Qwest*, 450 F.3d at 1186-87.

86. Burke, *supra* note 21, at 39-40.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

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SEC.⁹¹ After the district court and court of appeals held that the disclosure had waived Diversified's privilege, upon reconsideration en banc, the Eighth Circuit found that Diversified had not waived its privilege and Weatherhead was not entitled to discovery of the report.⁹²

The Eighth Circuit explained that only a limited waiver had occurred with respect to the SEC investigation because the disclosure was made in a privileged "separate and non-public" setting.⁹³ The court noted the public policy importance of internal investigations, which encouraged corporations "to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders, and customers."⁹⁴ The court also reminded Weatherhead that the corporation was still entitled to conduct its own investigation of non-privileged sources through discovery.⁹⁵

The Eighth Circuit's creation of selective waiver appears to have its limitations, however; the Eighth Circuit in *In re Chrysler Motors Corporation*⁹⁶ did not allow selective waiver when the discovery request was for non-opinion work product.⁹⁷ In *Chrysler Motors*, after entering into a confidentiality agreement with its adversaries in a civil suit, the company disclosed an otherwise privileged computer tape to the adversary.⁹⁸ The United States Attorney General subsequently sought production of the tape, but the company protested.⁹⁹ The Eighth Circuit found that despite the prior confidentiality agreement, the company had waived any applicable work product privilege by producing the tape because it had not actually kept the tape confidential.¹⁰⁰

The District of Columbia Circuit in *Permian Corp v. United States*¹⁰¹ addressed the issue of selective waiver for the first time just three years after the Eighth Circuit's *Diversified* decision.¹⁰² In *Permian*, Occidental Petroleum Corporation (Occidental) and its subsidiary, Permian, came under SEC investigation, and the SEC subsequently asked Occidental to provide documentation that was protected under attorney-client and work product privileges.¹⁰³ Occidental sent a series of letters to the SEC. Occidental claimed these letters had created an agreement with the SEC with regard to how the privileged documents would be handled. However, the nature of the agreement

91. Burke, *supra* note 21, at 39-40.

92. *Id.*

93. *Id.* at 40.

94. *Id.* at 41; *In re Qwest*, 450 F.3d at 1197.

95. Burke, *supra* note 21, at 41.

96. 860 F.2d 844 (8th Cir. 1988).

97. *In re Qwest*, 450 F.3d at 1190.

98. *Id.*

99. *Id.*

100. *Id.*

101. 665 F.2d 1214 (D.C. Cir. 1981).

102. *In re Qwest*, 450 F.3d at 1190.

103. Burke, *supra* note 21, at 41.

turned out to be in dispute, especially with regard to the SEC's obligation to maintain confidentiality.¹⁰⁴

Meanwhile, the U.S. Department of Energy, in an investigation to determine whether Occidental had complied with petroleum pricing regulations, sought access to the documents from the SEC.¹⁰⁵ After the SEC announced its intention to disclose the documents to the Department of Energy, Occidental filed suit to bar the disclosure.¹⁰⁶ The district court issued a permanent injunction barring SEC disclosure, but on appeal, the D.C. Circuit found that the district court had applied a "clearly erroneous" standard and that Occidental had indeed "clearly and intentionally waived" its attorney-client privilege.¹⁰⁷ However, the circuit court upheld the continued protection of Occidental's documents that qualified as work product.¹⁰⁸ The D.C. Circuit's reasoning for not adopting selective waiver included the notion that voluntary disclosure is outside the purpose of the attorney-client privilege; that ultimately the client has a choice whether to disclose in favor of or contrary to his benefit; and that the client should not be allowed to pick and choose which of his opponents can and cannot be privy to disclosure.¹⁰⁹

It is important to note that the terms of the confidentiality agreement Occidental had allegedly entered into with the government were in dispute, which likely contributed to the court's decision not to adopt selective waiver.¹¹⁰ In subsequent D.C. Circuit cases that considered selective waiver of work product, the court recognized that a confidentiality agreement with a government agency could be a compelling factual circumstance sufficient to consider the further application of selective waiver.¹¹¹

B. Other Circuits Weigh In on the Topic of Selective Waiver

Most of the remaining circuit courts have heard cases that submitted issues regarding the selective waiver doctrine, and in their reasoning, have reflected on the foundational decisions of the Eighth and D.C. Circuits.¹¹² Absent from the various selective waiver decisions and opinions of the remaining circuit courts are the Fifth, Ninth,¹¹³ and Eleventh Circuits.

104. *Id.* at 42.

105. *Id.*

106. *Id.*

107. Pinto, *supra* note 22, at 377.

108. *Id.*

109. *Id.* at 377-78.

110. See Burke, *supra* note 21, at 42.

111. *In re Qwest*, 450 F.3d at 1191 (citing *In re Sealed Case*, 676 F.2d 793, 824 (D.C. Cir. 1982), and *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1371-72 (D.C. Cir. 1984)).

112. See generally *In re Qwest*, 450 F.3d at 1179.

113. Though courts within the Ninth Circuit's jurisdiction have rejected the selective waiver doctrine as in *In re Syncor Erisa Litigation*, 229 F.R.D. 636, 646-47 (C.D. Cal. 2005), the Ninth Circuit made it clear in *Bittaker v. Woodford*, 331 F.3d 715, 720 n.5 (9th Cir. 2003), that "[a]lthough we do not

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The First Circuit, in its primary decision regarding selective waiver, noted that it could find no applicable constitutional or statutory provision that addressed the issue, so it was forced to consider the available divergent circuit opinions.¹¹⁴ After reviewing the other court's opinions, the First Circuit found a waiver in both the attorney-client and work product privileges.¹¹⁵ It reasoned that "with rare exceptions, courts have been unwilling to start down this path which has no logical terminus – and we join in this reluctance."¹¹⁶ It should be noted that the lower district court found that the records in dispute were not actually privileged because they were discoverable as ordinary business records.¹¹⁷

The Second Circuit continued to breathe new life into the selective waiver doctrine. The court in *In re Steinhardt Partners, L.P.*¹¹⁸ focused its attention on the work product doctrine. Though the court rejected application of selective waiver in that case, it explicitly stated that it was not adopting a per se rule against adoption of selective waiver.¹¹⁹ The court explained that "crafting rules relating to privilege in matters of governmental investigations must be done on a case-by-case basis."¹²⁰ Further, the court offered two factual elements that, if present, it believes may merit selective waiver protection: (1) if the parties have a common interest and (2) if the parties have entered into a confidentiality agreement.¹²¹

The Second Circuit was also careful to point out that generally the selective waiver doctrine is inconsistent with the element of voluntariness in traditional waiver rules.¹²² The court held that when a corporation voluntarily cooperates with a government agency, it gives up some of the benefits derived from the privileges in order to obtain other benefits that may come from voluntary cooperation with the government entity.¹²³ The *Steinhardt* court further explained that when the government agency stands in an adversarial position (such as when a corporation is a subject of an SEC investigation), cooperation with the agency does not necessarily change the relationship from an adversarial to a friendly one.¹²⁴

decide this case under the express waiver doctrine, we note that the law in this area is not as settled as the state would have us believe."

114. Pinto, *supra* note 22, at 372.

115. *Id.* at 373.

116. *In re Qwest*, 450 F.3d at 1187-88 (citing *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 686 (1st Cir. 1997)).

117. Pinto, *supra* note 22, at 372.

118. 9 F.3d 230 (2d Cir. 1993).

119. Burke, *supra* note 21, at 59.

120. *Id.*

121. *Id.*

122. *Id.* at 58.

123. Burke, *supra* note 21, at 58.

124. *Id.*

In *Westinghouse Electric Corporation v. Republic of Philippines*,¹²⁵ the Third Circuit heard a selective waiver case involving a company that did not obtain a confidentiality agreement when it disclosed privileged information to the SEC, but did obtain one before it disclosed the same information to the DOJ.¹²⁶ Despite the existence of at least a secondary confidentiality agreement, the court rejected the selective waiver doctrine because the rule did not “serve the purpose of disclosing to one’s attorney” and the selective waiver doctrine was not an extension of the traditional privileges, but in fact a new privilege.¹²⁷

The Fourth Circuit’s selective waiver case was unique because it involved a subsequent criminal case rather than a civil case, as has been common in many other circuit-level selective waiver cases.¹²⁸ Under these circumstances, the court focused its attention on the adversarial nature of the relationship with a government agency, and thereby disqualified the waiving party of continued protection under the privilege.¹²⁹ The court established an adversarial relationship by factually determining that the waiving party’s interests were “decidedly adverse” to the government; the party “made an express assurance of complete disclosure” to the government; and disclosed the documents “in a direct attempt to settle active controversies between [the party]” and the government.¹³⁰ Though the court would not recognize selective waiver of attorney-client and non-opinion work product in that case, it did apply selective waiver to opinion work product.¹³¹

The majority Sixth Circuit opinion in *In re Columbia/HCA Healthcare Corp.*¹³² stated that it “reject[s] the concept of selective waiver in any of its various forms,” and that selective waiver has “little, if any, relation to fostering frank communication between a client and his or her attorney.”¹³³ The majority explained that “any form of selective waiver, even that which stems from a confidentiality agreement, transforms the attorney-client privilege into ‘merely a brush on an attorney’s palette, utilized and manipulated to gain tactical or strategic advantage.’”¹³⁴

The dissenting opinion, however, focused its attention on the public policy reasons for adopting the selective waiver doctrine when it noted that the majority decision “unnecessarily raises the costs of cooperating with a

125. 951 F.2d 1414 (3d Cir. 1991).

126. Pinto, *supra* note 22, at 374-75.

127. *Id.* at 375.

128. Burke, *supra* note 21, at 49 (citing *In re Martin Marietta Corp.*, 876 F.2d 619, 622 (4th Cir. 1988)).

129. *Id.* at 50.

130. *Id.*

131. *In re Qwest*, 450 F.3d at 1190.

132. 293 F.3d 289.

133. *In re Qwest*, 450 F.3d at 1188 (quoting *In re Columbia/HCA*, 293 F.3d at 302).

134. *Id.*

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government investigation.”¹³⁵ The dissent explained that “[a]s the harms of selective disclosure are not altogether clear, the benefits of the increased information to the government should prevail” and that there should be “a government investigation exception to the third-party waiver rule.”¹³⁶ Finally, the dissent noted the difficulty of the circuit split and recommended that the issue of uniformity be left to the Supreme Court to answer.¹³⁷

The Seventh Circuit did not rule out selective waiver when it was faced with a case that involved an asserted waiver of law enforcement privilege.¹³⁸ The court adopted the government’s selective waiver theory under the circumstances of the case “[s]ince there is no indication either that the government was acting in bad faith or that the plaintiffs in the present suit were hurt”¹³⁹

Finally, the Federal Circuit heard a case in which it did not allow selective waiver in the context of an inadvertent waiver (which occurs when there is a careless or accidental disclosure of materials directly to the adversary).¹⁴⁰ The court noted that the waiving party had not made “best efforts to maintain the confidentiality of the documents,” so the court treated the waiver as a general waiver rather than a limited or selective waiver.¹⁴¹

It was against this varied backdrop of fellow circuit court precedent that the Tenth Circuit Court took the opportunity to add its own opinion and reasoning regarding the viability and justification of the doctrine of selective waiver.

IV. IN RE QWEST COMMUNICATIONS INT’L., INC.

A. Facts

In 2002, the SEC and the DOJ began investigating alleged questionable business practices of Qwest Communications.¹⁴² During the agencies’ investigations, Qwest produced over 220,000 pages of documents (the “Waiver Documents”) that were protected by the attorney-client privilege and the work product doctrine.¹⁴³ Qwest did not produce the Waiver Documents until after subpoenas were issued and both agencies had entered into confidentiality agreements with Qwest.¹⁴⁴ However, Qwest did not make a complete

135. Pinto, *supra* note 22, at 379.

136. *In re Qwest*, 450 F.3d at 1188.

137. Pinto, *supra* note 22, at 379.

138. *In re Qwest*, 450 F.3d at 1189 (citing *Dellwood Farms, Inc. v. Cargill, Inc.* 128 F.3d 1122 (7th Cir. 1997)).

139. *Id.*

140. *Id.* (citing *Genentech, Inc. v. U.S. Int’l Trade Comm’n*, 122 F.3d 1409 (Fed. Cir. 1997)).

141. Pinto, *supra* note 22, at 374.

142. *In re Qwest*, 450 F.3d at 1181.

143. *Id.*

144. *Id.*

disclosure, since it retained an additional 390,000 pages of privileged documents undisclosed to the agencies.¹⁴⁵

The agreements stipulated that Qwest did not intend to waive its attorney-client or work product protection and limited the exposure to which the Waiver Documents could be subject.¹⁴⁶ The agreements stipulated that the agencies would maintain the confidentiality of the documents and not disclose them to any third party except as otherwise required by law or in discharge of the agencies' duties and responsibilities.¹⁴⁷ However, Qwest diluted the terms of its agreement with the DOJ by allowing the agency to share the Waiver Documents with other state, local, and federal agencies that could "make direct or derivative use of the [Waiver Documents] in any proceeding and its investigation."¹⁴⁸ The DOJ's contractual right to disclosure even extended to its use in "consultations with experts or potential experts, and the selection and/or retention of testifying experts."¹⁴⁹

Before and after the federal investigations, multiple plaintiffs filed civil suits against Qwest that involved many of the same issues as the SEC and DOJ investigations.¹⁵⁰ Many of the cases were consolidated into a single federal securities action (the "Securities Case").¹⁵¹ The plaintiffs in the Securities Case were the same parties as in the present case.¹⁵² In the Securities Case, Qwest produced millions of pages of documents that did not include the Waiver Documents which Qwest claimed were still privileged, despite disclosure to government agencies.¹⁵³

The Plaintiffs moved to compel disclosure of the Waiver Documents, and the magistrate judge ordered Qwest to disclose the Documents, reasoning that Qwest had waived its confidentiality privileges when it disclosed the Documents to the government.¹⁵⁴ The district court upheld the magistrate's order to produce the Waiver Documents, and also ordered the production of certain work product materials that were prepared by Qwest's outside counsel.¹⁵⁵ However, upon an interlocutory appeal, the district court clarified its order specifying that Qwest could redact certain opinion work product documents and the report prepared by Qwest's outside counsel.¹⁵⁶ Finally, Qwest filed a petition for a writ of mandamus with the Tenth Circuit to decide

145. *Id.*
146. *Id.*
147. *In re Qwest*, 450 F.3d at 1181.
148. *Id.*
149. *Id.* at 1182.
150. *Id.*
151. *Id.*
152. *In re Qwest*, 450 F.3d at 1182.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*

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the issue of Qwest's potential waiver of privilege.¹⁵⁷

B. Decision

Qwest's petition requesting that it be given a privilege of selective waiver was a case of first impression for the Tenth Circuit Court.¹⁵⁸ In its decision, the court found that the case did not present issues "concerning opinion work product," issues of "inadvertent disclosure," or "disclosure under a confidentiality agreement that prohibits further disclosures without the express agreement of the privilege holder."¹⁵⁹

The court first addressed the issue of whether selective waiver is an appropriate issue for a writ of mandamus action.¹⁶⁰ After consideration of cases within its own jurisdiction,¹⁶¹ and decisions of other circuits regarding selective waiver, the court found that a writ of mandamus was permissible.¹⁶² Specifically, the court ruled that Qwest's claim of selective waiver satisfied the requirements that the issue be a question of substantial importance to the administration of justice,¹⁶³ and concluded that Qwest's disclosure of the documents in question would make a meaningful appellate review impossible.¹⁶⁴

The Tenth Circuit considered the Federal Rule of Evidence 501, Federal Rule of Civil Procedure 26(b)(3), and Supreme Court decisions in its analysis of the background and purpose of the attorney-client privilege and the work product doctrine.¹⁶⁵ The court reaffirmed its conclusion that confidentiality is key to the attorney-client privilege, and the privilege is lost if the client discloses the otherwise privileged information to a third-party.¹⁶⁶ The court distinguished the attorney-client privilege from the work product doctrine and further noted the more significant degree of protection given to opinion versus non-opinion work product.¹⁶⁷ Finally, the court noted that "the protection provided by the work product is not absolute, and it may be waived."¹⁶⁸

In specific consideration of the selective waiver issue, the Tenth Circuit looked to an analysis of similar decisions from its fellow circuit courts. The

157. *In re Qwest*, 450 F.3d at 1182.

158. *Id.* at 1186.

159. *Id.* at 1182.

160. *Id.* at 1182.

161. *Id.* at 1183.

162. *In re Qwest*, 450 F.3d at 1183 (considering, specifically, *Barclaysamerican*, 746 F.2d 653, and *Boughton v. Cotter Corp.*, 10 F.3d 746 (10th Cir. 1993)).

163. *Id.* at 1184.

164. *Id.* at 1183.

165. *See generally id.* at 1184-86.

166. *Id.* at 1185.

167. *In re Qwest*, 450 F.3d at 1184 n.3, 1186.

168. *Id.* at 1186.

Tenth concluded that the only circuit that has really adopted selective waiver in regard to attorney-client privilege was the Eighth Circuit.¹⁶⁹ The court then interpreted the opinions of the First, Second, Third, Fourth, Sixth, and D.C. Circuits as rejections of the selective waiver doctrine in regard to attorney-client privilege. The Tenth Circuit concluded that the Seventh and Federal Circuits were noncommittal.¹⁷⁰ In regard to work product, the court determined that only the Fourth Circuit had accepted selective waiver, while the First, Third, Sixth, and Eighth Circuits had rejected the doctrine. The court concluded that the Second and D.C. Circuits were noncommittal.¹⁷¹

The Tenth Circuit concluded that the record in the Qwest case did not “justify adoption of a selective waiver doctrine as an exception to the general rules of waiver upon disclosure of protected material.”¹⁷² In reaching its conclusion, the court found that the record did “not establish a need for a rule of selective waiver to assure cooperation with law enforcement,” and that the government may have been able to gain access to the Waiver Documents by invoking an otherwise available crime or fraud exception to the attorney-client privilege.¹⁷³ The court explained that the selective waiver doctrine is outside of the purposes of the attorney-client privilege and work product doctrine, and that the only intended exception would be in circumstances where disclosure is necessary in order to assist an interpreter or translator, or when parties share a legitimate common interest.¹⁷⁴

Although the court recognized that other courts considered the existence of a confidentiality agreement as an important element for consideration of selective waiver, the court rejected Qwest’s agreement as inadequate to justify adoption of selective waiver.¹⁷⁵ The court noted that Qwest’s agreement permitted the agencies to use the Waiver Documents with broad discretion that did not realistically limit further dissemination, and therefore became public information.¹⁷⁶ The court did not specifically indicate what, if any, adequate confidentiality agreements Qwest should have had to justify recognition of selective waiver.

Addressing some of the public policy arguments raised by Qwest and other proponents of selective waiver, the court explained that allowing Qwest to pick and choose who can have access to the Waiver Documents is “far from a universally accepted perspective of fairness.”¹⁷⁷ The court suggested that Qwest

169. *Id.* at 1187.

170. *See generally id.* at 1187-89.

171. *See generally id.* at 1190-92.

172. *In re Qwest*, 450 F.3d at 1192.

173. *Id.* at 1192-93.

174. *Id.* at 1195.

175. *Id.* at 1194.

176. *Id.* at 1194, 1196.

177. *In re Qwest*, 450 F.3d at 1196.

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“hedged its bets” by choosing to release some of its privileged documents while retaining the rest, and that “Qwest perceived an obvious benefit from its disclosures but did so while weighing the risk of waiver.”¹⁷⁸

The Tenth Circuit saw Qwest’s petition as a request that would require the court to recognize a new privilege because the nature of the proposed privilege did not harmonize with the attorney-client privilege or the work product doctrine.¹⁷⁹ Finally, in response to other public policy arguments and pressure from interested groups and committees, the court suggested that the common law is and should be a slow-moving process,¹⁸⁰ and that the creation of new privileges such as selective waiver should be undertaken by legislatures and other rule-making bodies.¹⁸¹ The court thus denied Qwest’s petition for a writ of mandamus, concluding that the lower district court did not abuse its discretion in ordering Qwest to produce the Waiver Documents.¹⁸²

V. ANALYSIS

The Tenth Circuit’s decision in *In re Qwest* only adds to the inconsistency between the various circuit courts with regard to the selective waiver doctrine. For obvious reasons, uniformity is necessary to create predictability and continuity in the laws enforced in the federal courts. Either the Supreme Court or the legislature must finally address and solve the dispute regarding the issue of selective waiver as it affects corporations and their potential cooperation with government agencies. Congress has already taken positive steps toward the adoption of selective waiver as a correct and affirmative solution.¹⁸³ But whether selective waiver is simply another exception to the traditional privileges or a new privilege is inconsequential when compared to the utility of the doctrine with regard to corporate-government cooperation.¹⁸⁴

Because the issue of selective waiver was one of first impression for the Tenth Circuit,¹⁸⁵ the court was forced into precarious circumstances that required the court to take a stand on an issue that it found had been a topic of debate and significant public interest.¹⁸⁶ The court sought refuge with the

178. *Id.*

179. *Id.* at 1197.

180. *Id.* at 1192.

181. *Id.* at 1200-01.

182. *In re Qwest*, 450 F.3d at 1201.

183. *See supra*, notes 31-32, 80-82 (including amendments to the Federal Rule of Evidence 502 and Federal Sentencing Guidelines); *see infra* notes 217-20 (including amendments to the Federal Rules of Civil Procedure).

184. *See supra*, notes 67-68.

185. *In re Qwest*, 450 F.3d at 1186.

186. *Id.* at 1183; Walton, *supra* note 18, at 417-18. *See generally* John Gibeaut, *Hearings Target Thompson Memo: Former Prosecutors, Defenders Criticize Policy on Waiver of Attorney-Client Privilege*, ABA J. EREPORT, Sept. 15, 2006, <http://www.abanet.org/journal/ereport/s15talk.html>.

majority opinions of the other federal circuit courts.¹⁸⁷

The Tenth Circuit has interpreted the majority of the other circuit courts as having rejected the adoption of selective waiver.¹⁸⁸ However, only three other circuit courts (the First, Third, and Sixth Circuits) of the ten circuits analyzed by the court were consistent in their holding regarding both attorney-client and work product doctrines.¹⁸⁹ In other words, the majority of the reported circuits is inconsistent in its application of selective waiver to both attorney-client and work product privileges. This inconsistency implies that the courts are not quite as one-sided as the Tenth Circuit suggested when it said, “[o]ur review of the opinions of other circuits, however, indicates there is almost unanimous rejection of selective waiver.”¹⁹⁰

A. Selective Waiver as Another Exception to the Traditional Privileges

The confidentiality element inherent in the attorney-client privilege advances the primary purpose of the privilege, which is to enable the client to obtain informed legal advice without fear of subsequent compelled disclosure.¹⁹¹ The work product doctrine’s purpose is to immunize lawyers’ work made in preparation of trial from disclosure in discovery.¹⁹² However, the selective waiver doctrine purports to actually perpetuate the traditional privilege’s purposes of client confidentiality and attorney preparation despite prior disclosure. The Tenth Circuit found in *In re Qwest* that the attorney-client and work product privileges are not harmonious in purpose with the doctrine of selective waiver because Qwest voluntarily disclosed the Waiver Documents to third-party adversaries.¹⁹³

Though the waiver rule may initially seem straightforward, many questions arise as courts struggle with defining what actually constitutes a “voluntary” waiver and a “third-party.” There are several common exceptions to the attorney-client and work product doctrine.¹⁹⁴ A corporate client, by the nature of its organizational structure, may need to consult parties that are not technically legal counsel. This is particularly true when a corporation is being investigated by a government body and negative media exposure becomes a serious threat.¹⁹⁵ In these circumstances, corporations often turn to public

187. *In re Qwest*, 450 F.3d at 1192.

188. *See generally id.* at 1187-92.

189. *Id.*

190. *Id.* at 1186.

191. Burke, *supra* note 21, at 37.

192. Richmond, *supra* note 19, at 391.

193. *See In re Qwest*, 450 F.3d at 1195.

194. Burke, *supra* note 21, at 37; *see also Work Product Protection*, *supra* note 40, at 1707 n.68 (1995); Rabiej, *supra* note 40, at 295-97 (citing examples of possible exceptions to the attorney-client privilege).

195. Richmond, *supra* note 19, at 396.

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relations consultants for advice.¹⁹⁶ In some cases, courts have found that attorney communications with public relations consultants are privileged as an extension of the attorney-client privilege.¹⁹⁷

The SEC requires that all publicly traded companies submit an annual 10-K report that includes a financial statement that is certified by a third-party independent auditor.¹⁹⁸ Attorneys are called upon to disclose details regarding active or potential legal claims against the company.¹⁹⁹ Attorneys must be cautious about what they disclose to the auditor because there is a delicate balance of what information may or may not be continually protected by attorney-client privilege despite disclosure to the outside auditor.²⁰⁰

The public relations consultant and independent auditor are examples of the “common interest doctrine” which effectively expands the circle of people that a client may confidentially consult regarding a legal matter.²⁰¹ The doctrine is typically used by co-defendants, who are joint-targets of government inquiry in an adversarial proceeding and who share the common interest of defeating a plaintiff’s claim.²⁰² To decide when a waiver has taken place, courts look to the degree of commonality of interest in determining whether or not a disclosure to a government agency fulfills the “adversarial” element required to qualify as a “third-party.”²⁰³ A narrow scope of application of selective waiver may not, in reality, be too divergent from existing exceptions to the attorney-client and work product privileges.

Though an investigating governmental agency could be seen as an adversarial third party, a corporation is made up of a unique structure of numerous shareholders and other interested parties. In a derivative lawsuit, some shareholders still maintain their ownership interest in the suspect corporation while possibly temporarily aligning their interests with the government agency. It is inequitable that all shareholders (who are the true owners of the company) may then be grouped together as adversaries by default. Furthermore, many of the SEC’s policies are intended to encourage corporations to report possible infractions, oversights, and criminal activity to the SEC upon discovery by the corporation’s management. When a corporation has voluntarily initiated cooperation with the agency, it is unfair that an agency could technically be considered an adversary because the company could nonetheless be subject to governmental disciplinary measures.

The Tenth Circuit admitted that other circuit courts and even a Colorado

196. *Id.*

197. *Id.* at 398.

198. *Id.* at 400.

199. *Id.* See generally Testimonial Privileges, SL081 A.L.I.–A.B.A. 1, 21 (2006).

200. Richmond, *supra* note 19, at 401-02.

201. *Id.* at 414.

202. *Id.* at 414-15.

203. Walton, *supra* note 18, at 406.

district court²⁰⁴ recognized that the existence of a confidentiality agreement might justify adopting selective waiver.²⁰⁵ In analysis of Qwest's confidentiality agreement with the SEC and DOJ, the Tenth Circuit noted that Qwest's agreement was overly broad and gave too much control to the government agencies.²⁰⁶ The court stated that "Qwest disclosed to adversaries under agreements that did not realistically control further dissemination."²⁰⁷ Therefore, agreements that do realistically control dissemination may justify adoption of selective waiver in the Tenth Circuit.

B. Selective Waiver as a New Corporate-Government Privilege

Alternatively, the selective waiver doctrine may function best in its intended purpose by not possibly compromising the fundamental purposes of attorney-client and work product privileges. Courts have found that the privileges themselves "obstruct the truth-finding process," and therefore courts construe the existing privileges narrowly, generally declining to "create an entirely new privilege."²⁰⁸ The Tenth Circuit followed this reasoning, concluding that Qwest struggled to base its justification in the purposes underlying the attorney-client privilege, and that Qwest was actually asking for the equivalent of a new privilege that would act as an incentive for companies to fully disclose to investigating government agencies.²⁰⁹ Qwest likely couched its argument in the attorney-client doctrine in an attempt to follow the path of least resistance in its efforts to convince the court to recognize selective waiver. Perhaps selective waiver should be considered as a new and specific privilege or exception tailored to satisfy the public policy need of corporations to fully cooperate with investigating government agencies.²¹⁰

The Tenth Circuit appropriately suggested that with the exception of the slow-moving common law finally coming to a consensus, the resolution of the selective waiver issue now effectively rests with the Supreme Court, legislatures, and other rule-making bodies.²¹¹ The court noted the recent proposal for a revised Federal Rule of Evidence 502,²¹² an indication that affirmative steps are being taken to whittle away at the common law problem of selective waiver.²¹³ The new Rule would allow corporations to exercise

204. See *In re Qwest*, 450 F.3d at 1189 (discussing *In re M & L Bus. Machs. Co.*, 161 B.R. 689 (D. Colo. 1993)).

205. *Id.* at 1194.

206. *Id.*

207. *Id.* at 1196.

208. Burke, *supra* note 21, at 36.

209. *In re Qwest*, 450 F.3d at 1197.

210. See *supra*, notes 135-36.

211. *In re Qwest*, 450 F.3d at 1200.

212. *Id.*

213. Lauren Rosenblatt, *Will Selective Waiver Become a Reality Under Proposed Rule 502?*,

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selective waiver in its disclosure to investigating government agencies while not waiving its privileged status to discovery by private litigants.²¹⁴ The proposed Rule also allows for more lenient enforcement with regard to inadvertent disclosure.²¹⁵ Inadvertent disclosure is an important consideration, especially in an age of electronic discovery where disclosed documents could contain “metadata” information that is imbedded in the electronic file and not intentionally disclosed.²¹⁶

The Supreme Court and Congress approved amendments to the Federal Rules of Civil Procedure that became effective December 1, 2006.²¹⁷ The amendments specifically addressed modern issues of electronic discovery and metadata.²¹⁸ For example, Rule 34 provides litigants with procedural avenues to address inadvertent disclosure and discovery of files that may contain imbedded metadata.²¹⁹ The amendment to Rule 26 provides that a party does not have to produce in discovery electronically stored information if the information is not reasonably accessible.²²⁰ These amendments reflect Congress’ interest in creating rules that, like selective waiver, address and resolve modern day problems and issues that may have been outside the original scope of application that rule-makers could have conceived and considered at the time of the original adoption of the Federal Rule of Civil Procedure.

Nonetheless, the rule-making bodies must work to clearly define the scope and application of the privilege to avoid unresolved issues. For example, proposed Rule 502 does not address application to individual executives who find themselves as a defendant, nor, as previously discussed, to the case of a shareholder derivative litigation, where the individual defendant is technically an adversary to the corporation.²²¹ The legislature must balance and define the privilege of the corporate entity with that of the corporate officer acting under the auspices of an agent of the corporation.

C. Other Considerations in Adoption of Selective Waiver

The Tenth Circuit disregards some of the policy arguments raised by Qwest

BUSINESS CRIMES BULLETIN (2006), available at
<http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1155732412262>.

214. *Id.*

215. *Id.*

216. Richmond, *supra* note 19, at 436.

217. Stephen M. Prignano, *Modern Discovery Practice: The Hidden World of Metadata in Electronic Discovery*, 3-10 MEALEY’S LITIG. REP. DISC. 17 (2006) (for additional information on the rules, see <http://www.uscourts.gov/rules>).

218. *Id.*

219. *Id.*

220. *Supreme Court Approves Amended Rule 26(b)(2), New Rule 37(f)*, FEDERAL DISCOVERY NEWS (2006) (for additional information on the rules, see <http://www.uscourts.gov/rules>).

221. Rosenblatt, *supra* note 213.

as proponents of selective waiver. The court reasoned that allowing Qwest to use selective waiver as a tactical tool is unfair to other civil litigants who would remain limited to traditional discovery in their abilities to discover the privileged information.²²² The court argues that corporations have enough pre-existing incentive to cooperate and disclose to government agencies without the selective waiver doctrine.²²³

Finally, some argue that after disclosure to the government, otherwise privileged documents may have already become public information.²²⁴ Commentators have suggested that selective waiver may conflict with the Freedom of Information Act (FOIA).²²⁵ When information is in the possession of the government, the FOIA may demand that the information be accessible to the public, and shareholders may be entitled to the information in pursuit of a shareholder's derivative suit.²²⁶

This argument fails under the inherent facial purpose and limitations of the FOIA, and also under at least three exemptions in the Act.²²⁷ The FOIA is not intended to be used as a discovery tool, and specifically, civil litigants cannot obtain information through the Act that would normally be privileged.²²⁸ Corporations and government agencies, like those in the case of *In re Qwest*, may easily fall under at least three of the nine exemptions provided by the FOIA. Exemption number four includes "trade secrets and commercial or financial information" which is released to the government for investigatory purposes.²²⁹ Exemption number five exempts "inter-agency or intra-agency memorandums or letters," which includes attorney work-product.²³⁰ And finally, exemption number seven exempts "records or information compiled for law enforcement purposes."²³¹ Thus, the FOIA is not a viable discovery alternative for third-party civil litigants.

Another concern is that adoption of selective waiver may not address other issues such as *qui tam* suits under the False Claims Act (FCA).²³² Internal investigations conducted in preparation of voluntary disclosure may make a corporation vulnerable to *qui tam* suits under the FCA since employees participating in the investigation and disclosure process could become potential

222. *In re Qwest*, 450 F.3d at 1196.

223. *Id.* at 1193.

224. *Id.* at 1194.

225. Pinto, *supra* note 22, at 385.

226. *Id.* at 385-86.

227. Freedom of Information Act, 5 U.S.C. § 552(b)1-9 (2002).

228. 5 U.S.C.S. § 552, interpretive notes and decisions, note 18.

229. 5 U.S.C.S. § 552(b)1-9; 5 U.S.C.S. § 552, interpretive notes and decisions, note 424, 500, 569.

230. *Id.*

231. *Id.*

232. Geisler, *supra* note 65, at 385-86.

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qui tam informants.²³³ However, because the FCA applies specifically to corporations that deal with government contracts, the possible overall harm is inherently narrowed in scope.²³⁴ The legislature is able to consider the possible exposure of those companies and may in fact prefer a heightened standard for companies dealing with government contracts.

Many compelling policy arguments have been presented by commentators that both directly address the Tenth Circuit's arguments and raise additional issues that should be considered by courts and legislatures alike. Commentators argue that selective waiver does not actually fail under a "fairness" analysis because the doctrine does not prevent third parties from bringing suit, and does not place private litigants in any worse position than they would be without application of selective waiver.²³⁵ Third-party litigants would not likely be subject to the "undue hardship" required under the exception of Rule 26(b)(3) in the Federal Rules of Civil Procedure.²³⁶

The Tenth Circuit's argument that the traditional privileges should only evolve through slow-moving progression²³⁷ has been criticized by one commentator who suggests that "refusing to consider viable alternatives entailing substantial societal gains, makes the law stagnant and unresponsive to the nature of the modern world."²³⁸ Some suggest that the doctrine would actually further the interests of justice as a matter of general public policy.²³⁹ In fact, selective waiver may fulfill the other underlying purpose of the attorney-client privilege found by the Supreme Court of "promot[ing] broader public interests in the observance of law and the administration of justice."²⁴⁰ Selective waiver would promote efficiency²⁴¹ by increasing the likelihood that perpetrators of corporate malfeasance will be brought to justice and discouraging potential white-collar criminals from committing crimes.²⁴²

In a recent amicus curiae brief, the SEC inferred that the public benefits from the adoption of selective waiver because the voluntary disclosure by corporations saved the agency many associated costs and "approximately 29,000 hours of work."²⁴³ The time and cost savings permitted the SEC to resolve "a higher volume of investigations," thereby allowing further enforcement of the laws and decreasing potential criminal activity.²⁴⁴ The

233. *Id.*

234. *Id.*

235. McNally, *supra* note 24, at 849-50.

236. *See supra*, note 46.

237. *In re Qwest*, 450 F.3d at 1192.

238. McNally, *supra* note 24, at 830-31.

239. *See id.*; *see also* Pinto, *supra* note 22, at 379.

240. *See supra* notes 31-32.

241. Pinto, *supra* note 22, at 361.

242. McNally, *supra* note 24, at 850.

243. *Id.* at 851.

244. *Id.*

recent total settlement amounts that investors and the SEC have obtained²⁴⁵ with disclosure programs and tactics are staggering. In 2004-2005, figures spanned from \$100 million from AT&T and Honeywell to \$6 billion from WorldCom.²⁴⁶

Considering that the SEC's primary mission is to "protect investors,"²⁴⁷ the SEC and other government agencies have limited public tax-dollar resources and need alternative tools to protect public investors and regulate corporate misbehavior. In the case of *In re Qwest*, the shareholders who filed the derivative suit would not have been unfairly disadvantaged had selective waiver been adopted because they would have had the same opportunity to discover the documents through traditional discovery processes. But because selective waiver was not adopted in *In re Qwest*, the non-suing shareholders not only likely lost market value of their stock, but they also had to pay for the \$250 million "Fair Fund" that resulted from the SEC dispute,²⁴⁸ along with \$400 million in the shareholder derivative class action settlement, and \$60 million in attorney's fees.²⁴⁹ Though shareholders will now receive possibly otherwise unrealized compensation, it seems that the funds may only be going from one shareholder's pocket to another shareholder's pocket.

VI. CONCLUSION

Because of the split among federal circuit courts regarding the issue of selective waiver and its application to a corporation's voluntary disclosure of privileged information to investigating governmental agencies,²⁵⁰ the Supreme Court and legislature are left with the responsibility of forming a uniform rule of law on whether the information can be further protected from disclosure to third-party litigants.²⁵¹ Although the Tenth Circuit held that selective waiver did not apply in *In re Qwest*, the legislative powers may give rise to a quicker solution than the slow-moving common law.²⁵²

Modern challenges and needs²⁵³ of both corporate entities and public stakeholders must be considered in the formulation of a privilege that could have great impact upon all the interested parties. In the wake of numerous corporate scandals like those of Enron and Worldcom, investigating

245. Dickey, *supra* note 63.

246. *Id.*

247. Walton, *supra* note 18, at 416.

248. Qwest Communications International Inc.: Proposed Distribution of Fair Fund and Appointment of Distribution Agent (2006), <http://www.sec.gov/divisions/enforce/claims/qwest.htm> (last visited April 8, 2007).

249. Andy Vuong, *Settlement in Qwest Suit OK'd*, DENVER POST, Oct. 2, 2006, at E4.

250. *In re Qwest*, 450 F.3d at 1179.

251. *Id.* at 1200-01.

252. *Id.*

253. See McNally, *supra* note 24, at 830-31.

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governmental agencies need all the tools and resources available to them in order to adequately enforce the law and encourage corporations to conduct their own internal investigations to discover possible illegal activity²⁵⁴ before shareholders and other public stakeholders are adversely affected.

254. Burke, *supra* note 21, at 59-60.