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Patricia M. McCarthy

AN IMPORTER'S ELECTION: WHETHER TO INVOKE ATTORNEY ADVICE IN DEFENSE OR TO PRESERVE PRIVILEGE

PATRICIA M. MCCARTHY*

INTRODUCTION

A little more than a decade ago, Congress revised the Customs civil penalties statute. In doing so, Congress created a source of tension between an importer's ability to defend itself against an alleged violation of Section 592 of the Tariff Act of 1930, and that same importer's continued enjoyment of the traditional privileges that accompany an attorney-client relationship.

I. THE MOD ACT AND THE ROLE OF ATTORNEY ADVICE IN ESTABLISHING REASONABLE CARE

In the legislative history to Title VI of the North American Free Trade Agreement Implementation Act, also known as the Customs Modernization Act or the "Mod Act," the Senate Finance Committee expressed its belief that, "for 'informed compliance' to work, it is essential that the importing community share with the Customs Service the responsibility to ensure that, at a minimum, 'reasonable care' is used in discharging the importers [sic] responsibilities."[1] The Committee further stated that, in order to satisfy the "reasonable care" standard, an importer may use "one or more . . . aids for proper compliance," including, among several other things, "consulting with a customs broker, a Customs consultant, or a public accountant or attorney."[2] The Committee added that, "[w]here an importer chooses to use an outside expert, the importer is responsible for providing the expert with full and complete information to allow the expert to make entry or to provide advice as to how to make entry."[3] The Committee concluded that, "[i]f the above steps are taken, the importer will be presumed to have acted with 'reasonable care' in making entry."[4]

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* Ms. McCarthy is an Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice. The views expressed in this paper are solely those of the author and do not reflect any official position of the Department of Justice.

1. S. REP. NO. 103-189, at 73 (1993).
2. *Id.*
3. *Id.*
4. *Id.*

To illustrate its point, the Committee provided two examples of how it envisioned the "reasonable care" standard would be applied:

> The following are two examples of how the reasonable care standard should be interpreted by the Customs Service: (1) the failure to follow a binding ruling is a lack of reasonable care; and (2) an honest, good faith professional disagreement as to the correct classification of a technical matter shall not be considered to be lack of reasonable care unless such disagreement has no reasonable basis (e.g., snow skis are entered as water skis).
>
> If an importer fails to use reasonable care in classifying and valuing the merchandise and presenting other entry data, the Customs Service may impose a penalty under the appropriate culpability levels of section 592 of the Tariff Act of 1930.[5]

In the years since Congress passed the Mod Act, in the overwhelming majority of cases, an importer has cited its reliance upon the advice of a customs broker to attempt to establish "reasonable care." Communications between importers and customs brokers are not privileged. Thus, in a larger sense, the availability of a "reasonable care" defense during the past decade has not affected any privilege of an importer, much less eroded a privilege enjoyed by an importer.

Nonetheless, to the extent that the legislative history to the Mod Act specifically referred to an "attorney" in the context of a "reasonable care" defense, the Committee's two examples squarely call into question the continued availability of the attorney-client privilege once an importer elects to rely specifically upon the advice of counsel to establish "reasonable care."

Traditionally, "[t]he attorney-client privilege protects the confidentiality of communications between attorney and client made for the purpose of obtaining legal advice."[6] As the Supreme Court recognized, "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."[7] Yet, the Committee's articulation of the importer's "reasonable care" defense includes an almost laser-like focus upon the two specific types of communications that, when applied to the attorney as the source of the expert advice, lie at the very heart of the attorney-client privilege: the "giving of information to the lawyer" and the "giving of professional advice."

In the legislative history to the Mod Act, to the extent the Committee specifically referred to an "attorney" as a possible source of expert advice, the Committee impliedly envisioned that the specific information communicated by that importer to its attorney cannot remain privileged *if* an importer elects to rely upon the advice of counsel to establish "reasonable care." The Committee expressly stated that an importer relying upon an "outside expert" is "responsible for providing the expert with full and

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5. *Id.*

6. Genentech, Inc. v. United States Int'l Trade Comm'n, 122 F.3d 1409, 1415 (Fed. Cir. 1997) (citation omitted).

7. Upjohn Co. v. United States, 449 U.S. 383, 390 (1981) (citation omitted).

complete information to allow the expert to make entry or to provide advice as to how to make entry."[8]

Plainly, if the information an importer provides to counsel is not discoverable, then it would be impossible for either Customs or the Court of International Trade to determine whether the importer, in fact, provided the attorney "with full and complete information to allow [the attorney] . . . to provide advice as to how to make entry."[9] Thus, the Committee must have contemplated that the attorney-client privilege would not attach to information – that is, the specific information provided to the attorney by the client seeking advice – that traditionally lay at the core of the attorney-client privilege.

Similarly, the Committee implied that the advice counsel provides to the importer cannot remain privileged if the importer relies upon that advice to establish "reasonable care." To the extent they may be applied in the attorney-client context, the two examples the Committee provided for application of the "reasonable care" standard imply that the advice counsel provides will ultimately be examined by either Customs or a court.

In the attorney-client context, under the Committee's first example, if the attorney unreasonably advises the importer not to follow a binding ruling, the importer cannot establish reasonable care. Thus, the importer who seeks to rely upon the "advice of counsel" could not establish reasonable care under these circumstances, regardless of the importer's diligence in consulting with counsel.

Under the Committee's second example, the importer must demonstrate an "honest, good faith professional disagreement as to the correct classification of a technical matter" that also has a "reasonable basis" to establish "reasonable care."[10] Accordingly, an importer who receives unreasonable advice from its attorney cannot establish "reasonable care" by relying upon the advice of that attorney. The Committee impliedly envisioned that the attorney's advice would be subject to outside scrutiny.

II. WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE WHEN ATTORNEY CONSULTATION AND ADVICE IS USED AS A SHIELD AND A SWORD

Although the Mod Act seemingly placed an importer's "reasonable care" defense at odds with the attorney-client privilege, this tension is hardly unprecedented. The attorney-client privilege has long been, unquestionably, subject to waiver. In the United States Court of Appeals for the Federal Circuit, it is settled that a client may not simultaneously use the attorney-client privilege as both a shield and a sword.[11] Accordingly, a client who

8. S. REP. NO. 103-189, at 73.

9. *Id.*

10. *Id.*

11. *See* Zenith Radio Corp. v. United States, 764 F.2d 1577, 1579 (Fed. Cir. 1985) ("[I]t has been held that a plaintiff may not hide behind the shield of a privilege and withhold testimony that may materially aid the defense while invoking the aid of the court in prosecuting a claim." (citing Indep. Prod. Corp. v. Loew's Inc., 22 F.R.D. 266, 277 (S.D.N.Y. 1958))).

chooses to put his or her attorney's advice at issue can waive the attorney-client privilege.[12]

Notions of fairness dictate waiver of the attorney-client privilege when the client places the advice in issue. "Waiver . . . 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.'"[13]

In *Zenith Radio Corp. v. United States*,[14] the Federal Circuit favorably discussed the Court of International Trade's articulation of a three-prong test for waiver of the attorney-client privilege.[15] Under this test, a party waives the privilege if:

> (1) assertion of the privilege was a result of some affirmative act, . . . by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.[16]

In the context of the Mod Act, the government would be unable to overcome an importer's reliance upon the advice of counsel to establish "reasonable care" if the importer were able to continue to shield that advice, and the facts communicated to counsel as the basis for that advice, by assertion of the attorney-client privilege.

III. THE *OPTREX* DECISION IS CONSISTENT WITH PRECEDENT

In *United States v. Optrex Am. Inc.*,[17] which discusses a Section 592 civil penalty action, the Court of International Trade held that Optrex could not use the advice of counsel as both a shield and a sword.[18] This holding is fully consistent with precedent. The court reasoned that Optrex could establish that it exercised "reasonable care" if it reasonably relied upon its attorney's advice.[19] The court recognized that "[t]he government needs the content of this advice to assess the reasonableness of Defendant's reliance upon it."[20] Otherwise, the court observed, "[t]o 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."[21]

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12. *See, e.g.*, Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., 32 F.3d 851, 863 (3d Cir. 1994); Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1162 (9th Cir. 1992).

13. Beery v. Thomson Consumer Elec., Inc., 218 F.R.D. 599, 604 (S.D. Ohio 2003) (quoting Kelsey-Hayes Co. v. Motor Wheel Corp., 155 F.R.D. 170, 171 (W.D. Mich. 1991)).

14. 764 F.2d at 1577.

15. *Id.* at 1579.

16. *Id.* (quoting Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D. Wash. 1975)).

17. United States v. Optrex Am., Inc., 26 I.T.R.D. (BNA) 1969 (Ct. Int'l Trade 2004).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* (citing Sellick Equip. Ltd. v. United States, 18 Ct. Int'l Trade 352, 354 (1994); *Beery*, 218 F.R.D. at 604).

Ultimately, therefore, the court's holding in *Optrex* is fully consistent with the three-part test for waiver set forth in *Zenith*, as well as the clear implications of the legislative history to the Mod Act.