ARNOLD & PORTER LLP

Lit Alerts

A publication of the Litigation Practice Group

April 2014

In This Issue:

Government Increasingly Using Civil Investigations To Set Up Criminal Prosecutions

Prosecutors are increasingly relying on civil investigations—where unsuspecting witnesses are less likely to be represented by counsel—to further criminal investigations. A recent article in *The New York Times* describes the cautionary tale of a former Dewey & LeBoeuf non-attorney employee who was contacted by an SEC attorney in connection with an investigation into a bond offering. Because the employee was not involved in the bond offering, he did not think he was a target. Accordingly, he agreed to meet with the SEC to provide them with what he believed to be background information related to a civil investigation. Prior to the meeting, the SEC attorney told the employee that a district attorney would also be at the meeting. The district attorney asked the majority of the questions at the meeting, leading the employee to realize that he himself was a target. Four months later, the employee was indicted—along with Dewey's former chairman, executive director, and chief financial officer—on fraud and conspiracy charges for allegedly concocting an accounting scheme that led Dewey to bankruptcy. The employee claims he was never told that he was the target of a criminal investigation and did not hire an attorney until after he was indicted. While the tactic is technically not improper, persons who are contacted by a government agency to be witnesses in a civil matter should proceed cautiously lest they too find themselves unwittingly speaking with a prosecutor who is in fact preparing a criminal case against them.

Federal Jurisdiction: A National Bank Is Not A Citizen Of The State In Which It Has Its Principal Place Of Business

Addressing the existence of diversity jurisdiction, the Ninth Circuit recently held that a national banking association is only a citizen of the state designated as its main office, and not where it has its principal place of business. *Rouse v. Wachovia Mortgage, FSB*, No. 12-55278 (9th Cir. Mar. 27, 2014). Under 28 U.S.C. § 1348, national banks are "citizens of the States in which they are respectively located." The word "located" is not further defined by the statute, so the Court of Appeal looked to the U.S. Supreme Court's decision in *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303 (2006), for guidance.

In *Wachovia Bank*, the Supreme Court held that a national bank was not a citizen of every state in which it operated a branch. The Court also noted that section 1348 omitted any reference to the principal place of business, but that as a practical matter, the principal place of business was likely to be the same as the state in which a bank's main office was located. Based on this acknowledgement, the Ninth Circuit concluded that the Supreme Court did not overlook the issue of whether a national bank is a citizen of the state where it maintains its principal place of business when it made the "clear and unqualified" statement that a national bank "is a citizen of the state in which its main office, as set forth in its articles of incorporation, is located." Thus, in the case before the Ninth Circuit, Wells Fargo was only a citizen of South Dakota, and not California.

Ninth Circuit Narrows Protection Of Testifying Expert Witnesses Under FRCP 26(b)(3)

In *The Republic of Ecuador v. Mackay*, the Ninth Circuit limited the protection afforded to testifying experts' materials under Federal Rule of Civil Procedure 26(b)(3). The case involved claims brought by a group of Ecuadorians for alleged damages caused by drilling-related pollution and contamination. The materials consisted of work from defendant Chevron's experts on the topics of soil and groundwater conditions and epidemiology. Chevron argued that Rule 26(b)(3) "always provides presumptive protection for all testifying expert materials because they are necessarily prepared 'by or for' a party or its representative." The Ninth Circuit's three-judge panel disagreed, however, affirming the district court's opinion and describing Chevron's arguments as "redundant" and "implausible." The court found that the evolution of Rule 26(b)(3) and the related Advisory Committee notes are intended to protect work-product, including draft reports and attorney-expert communications. However, the court concluded that opposing parties have a right to "understand and respond to a testifying expert's analysis" and that the failure to provide trial preparation materials that contain that information "would hamper an adverse party's ability to prepare for cross-examination and rebuttal."

For more information, please contact your Arnold & Porter attorney or one of the following:

Kenneth Chernof, Partner
Washington, DC
tel: +1 202.942.5940
Kenneth.Chernof@aporter.com

Phil Horton, Partner
Washington, DC
tel: +1 202.942.5787
Philip.Horton@aporter.com

John Lombardo, Partner
Los Angeles
tel: +1 213.243.4120
John.Lombardo@aporter.com

Brussels | Denver | Houston | London | Los Angeles
New York | San Francisco | Silicon Valley | Washington DC