

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

LAWRENCE E. JAFFE PENSION PLAN, On)	Lead Case No. 02-C-5893
Behalf of Itself and All Others Similarly)	(Consolidated)
Situated,)	
) <u>CLASS ACTION</u>
Plaintiff,)	
) Judge Ronald A. Guzman
vs.)	Magistrate Judge Nan R. Nolan
)
HOUSEHOLD INTERNATIONAL, INC., et)	
al.,)	
)
Defendants.)	
_____)	

**THE CLASS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS PERTAINING
TO HOUSEHOLD'S CONSULTATIONS WITH ERNST & YOUNG LLP**

Lead Plaintiffs and the Class respectfully move this Court for an order that compels Household International, Inc. (“Household”) to produce all of its documents relating to Household’s consultations with Ernst & Young LLP (“E&Y”).

I. INTRODUCTION

At issue are documents relating to Household’s retention of E&Y to study Household’s compliance with state predatory lending laws during the Class Period (July 30, 1999 through October 11, 2002), refunds owed to consumers based on violations of predatory lending laws during the Class Period, and other related issues. Household has produced documents relating to this study but not all such documents. Instead, Household has asserted that its communications with E&Y are privileged. Likewise, on Household’s instructions, E&Y has refused to produce on the same grounds its documents in response to the Class’ subpoena. The Class therefore brings this motion to compel Household to produce all of its documents relating to the E&Y studies and requests the Court order Household to authorize E&Y to produce its documents.

This motion should be granted. The documents at issue are not privileged, but reflect a third party evaluating Household’s practices. Such third-party studies, even if commissioned by Household’s counsel, are not privileged. Further, assuming *arguendo* an attorney work product privilege, the Class has sufficient need for these documents to overcome the qualified nature of this privilege. Finally, any privilege, even if applicable, has been waived. We discuss these points further below.

II. FACTUAL AND PROCEDURAL BACKGROUND

On July 1, 2002, Household retained E&Y to do a compliance study. *See* Baker Decl., Ex. A at 1.¹ (All exhibits are attached hereto, unless otherwise noted.) Household explained to the Attorneys General that:

The Ernst & Young engagement is designed to monitor the company’s compliance with certain company policies and state regulation. In addition, Ernst & Young shall (i) identify the root causes of noncompliance; and (ii) recommend process improvements to enhance controls over compliance.

¹ “Baker Decl.” refers to the Declaration of D. Cameron Baker in Support of the Class’ Motion to Compel Production of Documents Pertaining to Household’s Consultation with Ernst & Young. Household has not identified Ex. A as privileged or inadvertently produced. On May 6, 2005, in a production of some 2,000 documents, Household produced three separate copies of this document.

Baker Decl., Ex. F at 5;² *see also* Baker Decl., Ex. A at 2. The following areas of overcharges were identified as priorities for E&Y: administrative fees, involuntary unemployment insurance, late fees, prepayment penalties, “points on points” arising from refinancing, and inaccurate/inconsistent information on disclosure documents, especially regarding points and appraisal fees. *See* Baker Decl., Ex. A at 5. This compliance study was to be completed by September 30, 2002. *Id.* at 3.

In preparation for the compliance study, E&Y interviewed a number of Household officers and employees. Internal documents show that there were a series of interviews to support this project. *See* Baker Decl., Ex. B. Additionally, Household had its Technology & Services Department of the Consumer Lending Business Unit prepare special data sets for E&Y. *See* Baker Decl., Ex. C at 5, 13; Baker Decl., Ex. D at 12.

During the project, E&Y authored a number of documents, including Excel spreadsheets. Household withheld some of these documents from its production on March 20, 2006 based on an assertion of privilege. *See* Baker Decl., Ex. E (list of electronic documents authored by E&Y and withheld from March 20, 2006 production); *see also* Baker Decl., Ex. N (spreadsheet including E&Y refund analysis).³ To date, Household has not provided a privilege log supporting this withholding of E&Y documents from production.

On September 4, 2002, Household told the Attorneys General about its retention of E&Y to do its compliance study. *See* Baker Decl., Ex. F. In subsequent correspondence with the Attorneys General, Household stated “As discussed at our September 4 meeting, Ernst & Young has been retained to audit our compliance with laws and policies. The Ernst & Young engagement is designed to monitor the company’s compliance with certain company policies and state regulation. . . . Additionally, Ernst & Young . . . will be retained to audit our ongoing compliance with the commitments incorporated into a Settlement Agreement. We are amenable to sharing these audit results with the parties to the Settlement Agreement.” *Id.* at 5.

Household has also informed the Securities & Exchange Commission (“SEC”) and the Office of Thrift Supervision (“OTS”) of this compliance study. *See* Baker Decl., Ex. G at HHS 02764431; *see also* Baker Decl., Ex. H.

² Baker Decl., Ex. F is a public document having been produced by the Washington Attorney General Office.

³ Baker Decl., Ex. N is one of the disputed documents.

In the course of document production, Household produced documents identifying the E&Y studies, including as part of the earlier SEC production in late 2004 and a May 6, 2005 production. Based on these documents, the Class subpoena'd E&Y on May 23, 2006. E&Y objected to production of any documents on the grounds of privilege. *See Baker Decl., Ex. I.*

On June 29 Household asserted that all its consultations with E&Y were privileged under various privileges, including the attorney-client privilege and the attorney work product doctrine. Via letter dated July 21, 2006 Household requested return of a number of identified documents as "inadvertently" produced. Household did not provide any explanation for its assertion that production of the E&Y documents had been inadvertent. *Baker Decl., Ex. J (July 21, 2006 letter)* In correspondence, the Class requested an explanation and a supporting privilege log. On August 14, 2006, Household stated that it would provide a privilege log supporting its assertions and provide redacted versions of the relevant documents. *See id. (August 14, 2006 letter)*. By letter dated September 29, 2006, Household provided the redacted versions. To date, however, Household has not provided a privilege log supporting its claim of privilege. *See id. (September 29, 2006 letter)*.

In order to resolve this issue and to proceed with related depositions, including E&Y, the Class requests that the Court compel the production of the E&Y documents. They are not privileged. Even if subject to the attorney work product doctrine, there is good cause to override that doctrine given the relevance of the documents at issue and the Class' inability to recreate the E&Y study. Additionally, Household has waived any applicable privilege.

III. ARGUMENT

A. The E&Y Documents Are Not Privileged

Household initially asserted that the E&Y documents were privileged under four separate theories. However, subsequently, Household limited its claims to the attorney-client privilege and the attorney work product doctrine. As shown below, neither privilege is applicable to the E&Y documents.

1. The Attorney-Client Privilege Does Not Apply

a. The E&Y Documents Do Not Reflect Communications Between an Attorney and a Client Necessary to Obtain Legal Advice

In order for the E&Y documents to be privileged under the attorney-client privilege, they must reflect communications between a lawyer and a client for the purpose of obtaining or providing legal assistance to the client. Here, E&Y performed what in essence was an independent factual

evaluation, an audit, of Household's lending practices to determine the extent of non-compliance with internal policies and state regulations and the amount of refunds owed. This evaluation could have been performed internally and thus it was not necessary for E&Y to perform this audit. Moreover, E&Y's reports are factual compilations not legal opinions. Under these facts, Household cannot establish the elements of the attorney-client privilege.

The Seventh Circuit has construed the scope of the attorney-client privilege to be narrow, "as it is in derogation of the search for the truth." *In re Walsh*, 623 F.2d 489, 493 (7th Cir. 1980); *see also United States v. White*, 970 F.2d 328, 334 (7th Cir. 1992) (attorney-client privilege is in derogation of search for truth and must be strictly construed). The burden is on the party claiming the privilege to establish by credible evidence each of the elements of the privilege, which where a third party, such as E&Y, are involved include 1) that the communication was for the purpose of obtaining legal advice, 2) that the involvement of E&Y as a third party was necessary, and 3) that the communication was intended to be confidential.⁴ Household cannot meet this burden.

Household in its letter to the Attorneys General described E&Y's study in these terms: "Ernest & Young has been retained to audit our compliance with laws and policies" and stated the factual findings and recommendations that E&Y would make as part of its study. Baker Decl., Ex. F at 5; *see also* Baker Decl., Ex. L at HHS 00491933. The summary project description prepared by E&Y is similar. These documents show that E&Y was preparing an independent assessment, *i.e.* its own findings and recommendations, as to the refunds owed Household consumers and as Household's engagement in predatory lending practices. *See* Baker Decl., Ex. N. Thus, the purpose of retaining E&Y was to obtain E&Y's opinions, not to assist in obtaining legal advice. E&Y's opinions and work papers are not privileged. *See United States v. Frederick*, 182 F.3d 496, 500-01 (7th Cir. 1999) (no privilege as to accountants or accountants' work papers); *Loctite v. Corp. Fel-Pro, Inc.*, 667 F.2d 577, 582 (7th Cir. 1981) ("Only where the document is primarily concerned with legal assistance does it come within these privileges; technical information is otherwise discoverable.").

⁴ Household also cannot show as to all E&Y documents that they reflect communications between an attorney and a client. While Household has asserted that E&Y was acting as the agent of in-house counsel, the internal documents indicate that Household's in-house counsel were not signing as counsel, but on behalf of the corporate entities. *See* Baker Decl., Ex. K. Even assuming that E&Y was Mr. Robin's agent for the moment, all communications between in-house counsel on the one hand and E&Y on the other are communications not involving any client.

Additionally, because E&Y is a third party, Household must show E&Y was necessary to its obtaining legal advice.

To protect the privilege, the party claiming a third party as an agent ‘bears the burden of showing that the person in question worked at the direction of the lawyer , and performed tasks relevant to the client’ obtaining legal advice, while responsibility remained with the lawyer. Moreover, when the third party is a professional, such as an accountant, capable of rendering advice independent of the lawyer’s advice to the client, the claimant must show that the third party served some specialized purpose in facilitating the attorney-client communications and was essentially indispensable in that regard.’

Cellco P’ship v. Certain Underwriters at LLOYD’s London, Civil Action No. 05-3158, 2006 U.S. Dist. LEXIS 28877, at **5-6 (D. N.J. May 11, 2006) (quoting 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein’s Evidence* ¶503(a)(3)[01] at 503-31 to 38 (1993)); see also *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1424 (3rd Cir. 1991) (“When disclosure to a third party is necessary for the client to obtain informed legal advice, courts have recognized exceptions to the rule that disclosure waives the attorney-client privilege.”); *DiPalma v. Medical Mavin, Ltd.*, Civil Action No. 95-8094, 1998 U.S. Dist. LEXIS 1747, at **7-8 (E.D. Pa. Feb. 10, 1998) (third party was not “essential or necessary ‘conduit’ for the transmission of communications” between client and attorney and therefore, no privilege attached). E&Y was not necessary for in-house lawyers to understand Household’s business practices or to calculate refunds. Household had its own internal departments that could and did provide these same tasks. See Baker Decl., Ex. N. Thus, Household cannot show that E&Y was necessary to obtain legal advice.

Finally, Household represented to the Attorneys General that it would make the E&Y compliance audit available for their review if they wished. See Baker Decl., Ex. F at 5. By making this offer to an adversary, Household cannot now contend that these documents were intended to be confidential. Courts, including the Seventh Circuit, have held that communications involving attorneys that were prepared with the intent to transmit to a third party lack the requisite confidentiality. *White*, 970 F.2d at 334; see also *In re Syncor ERISA Litig.*, 229 F.R.D. 636, 645 (C.D. Cal. 2005) (documents prepared “with the intent to disclose them to the Government, if necessary, to benefit [the party] in any governmental investigation” are not privileged).

Thus, Household cannot meet its burden of establishing all the elements of the privilege.

b. The Garner Exception Precludes the Assertion of the Attorney-Client Privilege

Under *Garner v. Wolfenbarger*, 430 F.2d 1093 (5th Cir. 1970), and subsequent cases, there is a well-recognized exception to the attorney-client privilege that allows shareholders access to communications between the corporation and its attorneys. *Garner* rests on the “fiduciary relationship between the corporation and its shareholders creat[ing] a commonality of interest which precludes the corporation from asserting the attorney-client privilege against its shareholders.” Jenner & Block, *Practice Series: Protecting Confidential Legal Information, A Handbook Analysing Issues Under the Attorney-Client Privilege and the Word Product Doctrine* at 104-111 (2005) (a relevant excerpt of which is attached as Ex. M to the Baker Decl.). As shown below, there is good cause for the Court to apply the *Garner* exception here.

In *Garner*, the Fifth Circuit considered the question of privilege in a “particularized context: where the client asserting the privilege is an entity which in the performance of its functions acts wholly or partly in the interests of others, and those others, or some of them, seek access to the subject matter of the communications.” 430 F.2d at 1101. After analyzing the relationship between management and shareholders, the court concluded that “where the corporation is in suit against stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance.” *Id.* at 1103-04.

Under *Garner* and its progeny, the Class may show good cause in this case. Indeed, this case is on all fours with *In re General Instrument Corp. Sec. Litig.*, 190 F.R.D. 527 (N.D. Ill. 2000), where this Court found good cause to invoke the *Garner* exception.

1. As in *General Instrument*, the Class’ claims against Household are colorable and have been upheld in response to a motion to dismiss under the Private Securities Litigation Reform Act of 1995. *See id.* at 529.

2. The information sought pertains to past acts that are the subject of this lawsuit. *See id.* Indeed, the E&Y audit of Household’s predatory lending activity during 1999 to 2002 as a third-party evaluation is directly probative on the Class’ predatory lending claims.

3. The requested communications do not involve trade secret information. In any event, the current Protective Order will preserve the confidentiality of these communications from outsiders. *See id.*

These considerations were sufficient for the *General Instrument* court to invoke the *Garner* exception.⁵ This Court should do likewise and preclude Household's assertion of attorney-client privilege as to the E&Y documents.

2. E&Y Documents Are Not Privileged as Attorney Work Product

As with the attorney-client privilege, the burden is on the party asserting the attorney work product doctrine to establish each of the necessary elements, including that the E&Y report was prepared in anticipation of litigation. Because the E&Y documents do not reflect the mental impressions of counsel and are not "opinion" work product, the Class can rebut a showing on these points by demonstrating substantial need and undue hardship given these documents' relevance on falsity, scienter and materiality and the Class' inability to obtain equally probative evidence. Accordingly, the Court should overrule Household's assertion of the work product doctrine.

As noted above, both Household and E&Y prepared documents outlining its compliance study and its objectives. *See Baker Decl., Ex. A.* Neither document states that this study was intended for use in any anticipated or pending litigation. To the contrary, Household both internally and externally referred to the E&Y compliance study as an "audit" or "review" without any reference to litigation. *See Baker Decl., Ex. L.* Moreover, Household has yet to identify the litigation for which this study was allegedly prepared. In these circumstances, including that the E&Y study was prepared with the intention of possibly sharing it with the Attorneys General, Household cannot establish the elements of the attorney work product doctrine.

Further, the E&Y study and related documents were prepared by non-lawyers and do not reflect any attorney opinions. These documents are thus not "opinion" work product and are discoverable upon a showing of substantial need and undue hardship. The Class can make this showing.

These documents go to the heart of the substantive claims in this case – they establish the falsity of Household's statements respecting its predatory lending practices, scienter in that

⁵ Consideration of the other *Garner* factors not discussed in *General Instrument* further supports this conclusion: 1) this case, a class action brought on behalf of Household's shareholders, involves a sufficiently large percentage of shareholders; 2) the Class has accused Household and its officers of illegal acts, including violations of the securities laws and violations of the various predatory lending statutes and regulations; and 3) the Class' request for these documents is specific.

Household knew the statements to be false and materiality in the sense that Household derived material revenues from its predatory lending practices. The Class has substantial need for these documents.

Further, the Class cannot obtain the substantial equivalent of the E&Y compliance audit and related workpapers without undue hardship, if at all. To create this study and related workpapers, E&Y conducted interviews of Household employees and obtained specific data from the Technology & Services department. *See Baker Decl., Ex. B.* The Class does not have the same unfettered ability to interview Household employees nor does the Class have access to the specific data provided to E&Y. *See Federal Election Comm'n v. Christian Coalition*, 178 F.R.D. 456, 466 (E.D. Va. 1998) (deposition limit relevant to finding of undue hardship). Accordingly, the Class cannot recreate the E&Y study and related workpapers.

Additionally, the E&Y study and related workpapers have probative value with respect to scienter and materiality, the equivalent of which is not available from other sources. As this Court is aware, in interrogatory responses Household has stated that it did not track specific information, including financial information, pertaining to its predatory lending practices. From this and the testimony at depositions, the Class is aware of no similar contemporaneous internal study of these practices or their financial impact. Even if there were such an internal study, an audit by E&Y implies a heightened standard of scrutiny and impartiality of judgment. The Class cannot obtain the substantial equivalent of the E&Y materials without undue hardship, if at all.

The Class has adequately rebutted the qualified work product privilege, if any, that attaches to the E&Y documents.

B. Household Has Waived Any Applicable Privilege

As an additional independent basis to compel the production of the E&Y documents, Household has waived any applicable privilege. Household has voluntarily revealed the subject matter of the E&Y study to the Attorneys General, the SEC and the OTS. Moreover, Household cannot support its claim of “inadvertent” production as to these documents, many of which are labeled “attorney-client privilege” or the like and others were produced in redacted form. Further, Household has waived any privilege by failing to provide a privilege log as to most of the documents at issue. Further, under the theory of subject matter waiver, all communications on the same issue must be produced. *Vardon Golf Co. v. Karsten Mfg. Corp.*, 213 F.R.D. 528, 533 (N.D. Ill. 2003). Accordingly, Household must now produce all documents pertaining to the E&Y study in its possession, custody or control.

By disclosing the E&Y study to the Attorneys General and the SEC at a time when both were adversaries, Household waived all privileges applicable. “[O]nce, a party has disclosed work product to an adversary, it has waived work product protection as to all other adversaries.” *Syncor*, 229 F.R.D. at 646 & n.8.

Additionally, Household cannot as the party asserting “inadvertent” production meet its burden on demonstrating that it could not have prevented the production despite its reasonable efforts and that it made reasonable efforts to timely recover the documents. As a review of the documents shows, many on their face include legends indicating a potential privilege while others have been redacted for other reasons.⁶ Additionally, in March of this year, Household withheld from production E&Y documents. Thus, despite this March awareness of the potentially privileged nature of the E&Y documents and the legends stated on the documents themselves, it was not until June 29, after the Class had subpoena’d E&Y, that Household asserted a privilege and July 13 when Household claimed inadvertent production. To date, Household has not moved to recover the inadvertently produced E&Y documents from the Class. Baker Decl., Ex. J (July 13, 2006 letter). These points warrant a finding of waiver by Household.

Finally, Household has yet to provide a privilege log to support its assertion of privilege, even as to the documents withheld in March of this year.. This failure comes despite the Class specifically requesting a log twice in August. *See id.* (August 7, 2006 email; August 10, 2006 letter). The Ninth Circuit recently addressed this issue in *Burlington N. & Santa Fe Ry. v. U.S. Dist. Court*, 408 F.3d 1142 (9th Cir. 2005), formulating a standard using the 30-day limit of Rule 34 as a guideline in conjunction with other factors particular to the litigation. *Id.* at 1148-49. In discussing this standard, the Ninth Circuit noted that filing a privilege log five months later was “alone sufficient” to support a Court’s finding of waiver. *Id.* at 1149. In *Universal City Dev. Partners, Ltd. v. Ride & Show Eng’g, Inc.*, 230 F.R.D. 688, 696 (M.D. Fla. 2005), the court found waiver under the Ninth Circuit test where, *inter alia*, no privilege log was provided nearly three and a half months after the disclosure of a privileged document.

Household has not provided a privilege log pertaining to many of the E&Y documents despite the passage of at least nearly three and a half months (June 29 to the present). Indeed, as to

⁶ It should go without saying that “[m]erely placing a stamp that reads ‘attorney work product’ on a document prepared in the ordinary course of business is not sufficient to turn it into work product.” 6 James Wm. Moore et al., *Moore’s Federal Practice* §26.70(3)(b) (Matthew Bender 3d ed.).

the documents withheld in March, the time period is now over nine months. This failure to provide the privilege log comes despite the Class' two explicit requests for a privilege log and Household's promise on August 14 to promptly provide one. Baker Decl., Ex. J (August 14, 2006 letter). Household's failure to timely provide a privilege log supporting its assertion of privilege constitutes waiver.

IV. CONCLUSION

For the foregoing reasons, this Court should grant this motion and compel Household to produce the E&Y documents.

DATED: October 16, 2006

Respectfully submitted,

LERACH COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
PATRICK J. COUGHLIN (90785466)
AZRA Z. MEHDI (90785467)
D. CAMERON BAKER (154452)
MONIQUE C. WINKLER (90786006)
LUKE O. BROOKS (90785469)
MARIA V. MORRIS (223903)
BING Z. RYAN (228641)

s/ D. Cameron Baker

D. CAMERON BAKER

100 Pine Street, Suite 2600
San Francisco, CA 94111
Telephone: 415/288-4545
415/288-4534 (fax)

LERACH COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
WILLIAM S. LERACH
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

Lead Counsel for Plaintiffs

MILLER FAUCHER AND CAFFERTY LLP
MARVIN A. MILLER
30 North LaSalle Street, Suite 3200
Chicago, IL 60602
Telephone: 312/782-4880
312/782-4485 (fax)

Liaison Counsel

LAW OFFICES OF LAWRENCE G.
SOICHER
LAWRENCE G. SOICHER
110 East 59th Street, 25th Floor
New York, NY 10022
Telephone: 212/883-8000
212/355-6900 (fax)

Attorneys for Plaintiff

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