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Allowing Discovery Of A Confidential Witness's Identity

Law360, New York (February 15, 2012, 4:01 PM ET) -- Two recent decisions in the Southern District of New York reflect a trend toward allowing discovery of the identities of so-called "confidential witnesses" that are increasingly becoming the backbone of class action securities complaints. In November 2011, U.S. District Judge Paul A. Engelmayer granted a motion to compel discovery of the identities of "confidential witnesses" relied upon in the lead plaintiff's complaint and held that the identities were not protected from discovery by the attorney work product doctrine. See Plumbers and Pipefitters Local Union No. 630 Pension-Annuity Trust Fund v. Arbitron Inc., --- F.R.D. ----, No. 08 Civ. 4063,2011 (S.D.N.Y. Nov. 14, 2011).

In January 2012, U.S. District Judge Robert W. Sweet followed that decision in In re Bear Stearns Companies Inc. Securities, Derivative and ERISA Litigation, 08 MDL No. 1963, No. 08 Civ. 2793, 2012 (S.D.N.Y. Jan. 27, 2012), and similarly granted a defendant's motion to compel discovery over arguments that the identities of confidential witnesses were protected by the attorney work product doctrine.

Arbitron and Bear Stearns both acknowledge that the law is not uniform on the question of whether the identities of confidential witnesses may be discovered, but, together, these two decisions mark a significant step toward a more practical judicial approach to this issue, which appropriately balances the need for discovery in complex lawsuits and policy concerns impacting the attorney work product doctrine.

Background

In securities cases across the country, plaintiffs who have made allegations based on confidential witnesses in their complaints typically argue that those confidential witnesses' identities are not discoverable by defendants even after the motion to dismiss stage of the litigation because those identities constitute attorney work product.

Although plaintiffs raising claims under the federal securities laws are generally not required to identify confidential witnesses in their complaints (see, e.g., Novak v. Kasaks, 216 F.3d 300 (2000)), recent cases since the U.S. Supreme Court's decision in Tellabs Inc. v. Makor Issues & Rights Ltd., 551 U.S. 308, 314 (2007), have either allowed limited discovery of confidential witness information at the motion to dismiss stage of litigation or suggested that such discovery may be necessary to allow courts to weigh the inferences to be drawn from a complaint raising securities fraud allegations, as mandated by Tellabs. See, e.g., Campo v. Sears Holdings Corp., 635 F. Supp. 2d 323 (S.D.N.Y. 2009) (Kaplan, J.), aff'd, No. 09-3589-cv, 2010 (2d Cir. 2010).

Compelling discovery of confidential witnesses' identities, plaintiffs argue, amounts to compelling the production of plaintiffs' counsel's mental impressions and trial strategy, as defendants who discover the witnesses' identities will be alerted to which witnesses plaintiffs' counsel views as particularly important. Moreover, plaintiffs often also note that the confidential witnesses' identities are included in the initial disclosures made pursuant to Rule 26(a)(1)(A) of the Federal Rules of Civil Procedure, albeit in an undifferentiated fashion along with what is frequently a host of other individuals' names.

Defendants seeking disclosure of the confidential witnesses' identities, on the other hand, generally argue that identification of the confidential witnesses does not constitute attorney work product at all and, even if it did, the information is entitled only to minimal protection, and disclosure should be required under Rule 26(b)(3)(A) of the Federal Rules of Civil Procedure where a "substantial need" is shown and the defendant "cannot, without undue hardship, obtain their substantial equivalent by other means." Fed. R. Civ. P. 26(b)(3)(A).

In cases presenting this issue, the complaint's allegations often are based on information from several confidential witnesses, but plaintiffs in initial disclosures will have identified many more individuals believed to possess relevant information. Thus, defendants often argue that requiring them to depose all of the individuals identified in plaintiffs' initial disclosures in order to determine the identity of the handful of confidential witnesses upon whose knowledge the complaint is based — which, in some cases, would require more depositions than would even be permitted under applicable discovery orders in the case — constitutes an "undue hardship" within the meaning of Rule 26(b)(3)(A) entitling defendants to discover the confidential witnesses' identities.

Arbitron and Bear Stearns

In both Arbitron and Bear Stearns, the parties made similar arguments to those outlined above in connection with motions to compel discovery, and both courts concluded that the confidential witnesses' identities could be discovered.

The lead plaintiff in Arbitron alleged that the defendants violated Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder. Discovery commenced after the court denied defendants' motion to dismiss, and, in the course of discovery, lead plaintiff refused to identify the 11 "confidential informants" referenced in the complaint.

Judge Engelmayer granted a defendant's motion to compel the discovery of those identities, concluding that "the names of the persons identified in the [complaint] as confidential informants are not entitled to any work product protection; and if any work product protection does apply to these names, it is minimal." Arbitron, 2011 at *4.

The court explained that requiring lead plaintiff to disclose which of the 83 names listed in lead plaintiff's initial disclosures corresponded with the 11 confidential witnesses in the complaint "would expedite the discovery process, for all parties, by allowing [defendant] ... to focus its depositions immediately on these important 'firsthand' witnesses, rather than having to engage in a costly process of elimination in which it would take numerous depositions simply to smoke out which of the 83 disclosed names are the 11" confidential witnesses. Arbitron, 2011 at *4; see id. at *5 ("Denying the [motion to compel] would thus not permanently keep the 11 [confidential witnesses'] identities under wraps. Instead, it would merely elongate the deposition discovery process, imposing costs and burdens on all parties.").

The court further held that "[e]ven assuming some minimal work product protection applies" to the confidential witnesses' identities, that protection "would be overcome" because "Arbitron has shown both a 'substantial need' for these names, and that it would entail 'undue hardship'" to obtain equivalent information by other means. Id. at *6.

The court noted that Arbitron's size was "[r]elevant in this regard." Id. ("Arbitron is a mid-size company (between 1,200 and 1,500 employees during the events at issue) and its counsel has represented that the cost of preparing for and taking dozens of additional depositions of former employees would impose a substantial expense on the company.").

"[B]alancing the relevant considerations," Judge Engelmayer concluded that the work product doctrine did not compel "Arbitron (or, derivatively, its shareholders) to bear these costs," and the efficient "goals" of the Federal Rules of Civil Procedure "are disserved by forcing a party, in the name of an opponent's evanescent work product interest, to play a high-cost game of 'Where's Waldo?'." Id.

In Bear Stearns, a defendant likewise moved to compel the identities of the confidential witnesses relied upon in the complaint after lead plaintiff refused to identify them in the course of discovery. Lead plaintiff alleged violations of Section 10(b) and Rule 10b-5, among other claims, and the complaint — and the court's denial of defendants' motion to dismiss — relied in part on the allegations of seven confidential witnesses.

Lead plaintiff provided in its initial disclosures a list of 148 individuals whom it believed may have information relevant to the litigation, but, on attorney work product grounds, lead plaintiff refused to identify which of those 148 individuals were the seven confidential witnesses. Lead plaintiff also refused to confirm whether any or all of the seven individuals were included on the list of 148 individuals and stated that it had no intention of calling any of the confidential witnesses at trial.

In granting defendant's motion to compel discovery of the seven confidential witnesses' identities, Judge Sweet relied heavily on Arbitron. Judge Sweet was persuaded by Judge Engelmayer's reasoning that the confidential witness identities are not attorney work product, and agreed that it is "'difficult to see how syncing up the [confidential witnesses] with [those] already disclosed names would reveal Plaintiff's counsel's mental impressions, opinions, or trial strategy,'" particularly given that the confidential witnesses' identities "'will almost certainly eventually become known during this litigation.'" Bear Stearns, 2012 at *2 (quoting Arbitron, 2011 at *5).

Judge Sweet further explained that while the "use of confidential witnesses to support a complaint [is] entirely proper," once the discovery phase of a case begins, the focus must turn to "'reciprocal and robust fact-gathering as the parties seek to discover relevant evidence.'" Id. at *3 (quoting Arbitron, 2011 WL at *5).

Judge Sweet also rejected lead plaintiff's attempt to distinguish Arbitron on the ground that the defendant there was substantially smaller than the defendant in Bear Stearns. Bear Stearns, 2012 at *3 ("While the Lead Plaintiff is correct in noting that Judge Engelmayer's opinion noted Arbitron's small size, the Court's discussion of Arbitron's size was raised in evaluating whether Arbitron would suffer undue hardship in the event that the work product doctrine was found to apply. The Court, as described above, had already held that the work product doctrine did not apply and, as a supplemental basis for its ruling, delved into the undue hardship issue.").

Arbitron and Bear Stearns Mark A Significant Step Forward

To be sure, the "case law regarding the application of the work product doctrine to motions to compel the names of a witness referenced but not named in a complaint is not uniform." Id.[1] But Arbitron and Bear Stearns bring a much-needed practical approach to this threshold and important issue.

First, as Judges Engelmayer and Sweet noted, it is far from clear that the identities of confidential witnesses are attorney work product at all. But even if confidential witnesses' identities are attorney work product, as the Arbitron and Bear Stearns courts also found, the fact is that the identities of the confidential witnesses eventually will be discovered.

In light of this reality, and given the goal of the Federal Rules of Civil Procedure to promote efficiency, forcing the parties to engage in costly discovery to protect that which inevitably will be discovered is an unjustifiable result. Arbitron and Bear Stearns thus mark a significant step toward a more common-sense approach to discovery of the identities of confidential witnesses.

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Sidley Austin represents The Bear Stearns Companies Inc. in matters unrelated to the decision discussed above.

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[1] See, e.g., In re SLM Corp. Sec. Litig., No. 08 Civ. 1029, 2011, at *1 (S.D.N.Y. Feb. 15, 2011) (holding that "identities of the sixteen (16) confidential witnesses cited in Plaintiff's [complaint], among the seventy-three (73) former employees already identified in Plaintiffs' 26(a) disclosures, are protected work product"); In re Marsh & McLennan Companies Inc. Sec. Litig., No. 04 Civ. 8144, 2008, at *3 (S.D.N.Y. July 30, 2008) (noting that with "no binding authority on the question of whether the identities of the [confidential witnesses] in a securities class action are discoverable, ... district courts that have addressed the issue have ... reached varying, and frequently fact-specific, outcomes") (internal quotation marks omitted) (collecting cases).