2. A decision from the U.S. District Court for the Middle District of Florida declining to impose on the Internal Revenue Service a nonwaiver and clawback order under Federal Rule of Evidence 502, where the IRS opposed entry of the order.

In *United States v. Captive Alternatives, LLC*, No. 22-CV-406-TPB-CPT, 2023 WL 5573954 (M.D. Fla. Aug. 29, 2023), U.S. Magistrate Judge Christopher P. Tuite discussed the standards for imposing a clawback order, under Federal Rule of Evidence 502, over the objections of one of the parties.

Captive Alternatives concerned an action by the Internal Revenue Service (IRS) to enforce an administrative summons seeking documents and information from Defendant. *Id.* at *1. In 2020, the IRS civil examination team served Defendant with information document requests, and an administrative summons to enforce those requests, seeking several categories of documents. Defendant refused to provide many of those documents and sought protection from the federal courts.

In a prior opinion, Magistrate Judge Tuite had recommended that the court order Defendant to comply with the administrative summons, and the parties proposed an amended version of Magistrate Judge Tuite's order, which provided additionally that "[t]he parties are discussing whether an order pursuant to Federal Rule of Evidence 502 may be appropriate. Therefore, the parties will negotiate, in good faith, proposed language for such an order, and, if successful, jointly petition the court for the entry of such an order." *Id.* at *2. Negotiations of the clawback order ultimately proved unsuccessful, and Defendant sought court approval to enter a clawback order, under Federal Rule of Evidence 502, over the IRS's objection. Defendant argued that, because it had to deliver over a million responsive documents to the IRS, it should not have to review each document for privilege in the first instance. Instead, Defendant argued that it should be able to produce the materials and then later assert privilege claims for particular documents rather than designate sets of documents as privileged in advance. *Id.* at *5.

Magistrate Judge Tuite rejected Defendant's request. He noted that, consistent with the commentary to Rule 502, a clawback order may be entered over a party's objection. *Id.* at *3. Traditionally, courts have discretion to enter clawback orders over the objection of the opposing party for "good cause." *Id.* at *4. But Magistrate Judge Tuite declined to enter such an order. He noted that the "good cause" standard did not apply to the context of an IRS summary proceeding because such proceedings do not "involve discovery as that term is understood in civil litigation." And he noted that while the IRS had consented to the entry of clawback orders in two previous summons enforcement proceedings, such situations were "the exception rather than the rule" for the IRS and that it was generally improper to "force the IRS to enter into such an agreement."

Magistrate Judge Tuite identified a few specific reasons to reject nonconsented clawback orders in the IRS enforcement context. First, shifting the burden to the IRS to make the

initial privilege determination, as the proposed clawback order at issue in *Captive Alternatives* proposed, would give the entity targeted by the IRS improper "insight into the particulars of the IRS's Inquiry." *Id.* at *5. Second, IRS enforcement agents "are not trained to evaluate whether a communication is subject to the attorney client privilege," and such information may be solely within the target's possession. Magistrate Judge Tuite also noted two particularly problematic aspects of Defendant's proposed order: that the order allowed the assertion of privilege by Defendant years after production and that it improperly prohibited the use of materials in separate proceedings by the IRS. Finally, he rejected the argument that the IRS's refusal to enter into a clawback agreement violated the terms of their previous agreement to "negotiate[] in good faith" concerning such an agreement, noting that the initial agreement merely provided that the parties were "discussing" such an arrangement and finding that the IRS's ultimate rejection after negotiations with Defendant did not constitute bad faith.