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BANK RESPONSE TO DISCOVERY REQUESTS FOR PRIVILEGED MATERIALS

Banks often receive discovery requests or third-party subpoenas seeking production of information subject to privileges uniquely applicable in the banking industry and which the bank has no power to waive. The author discusses the scope, rationale, ownership, and response to abusive requests for the bank examination privilege, the SAR privilege, and the non-US bank secrecy privileges. He includes practice tips on spotting and dealing with abusive requests.

By Alex C. Lakatos *

Much ink has been spilled to address the persistent problem of discovery abuse and how best to prevent it. Discovery abuse includes misuse of the discovery process by making unnecessary overbroad requests for information, conducting discovery for an improper purpose, or engaging in gamesmanship to avoid honoring obligations. One example of discovery abuse that many scholars and commentators have discussed occurs when parties assert overbroad and unsubstantiated claims of privilege.[1] But a reciprocal and equally pernicious problem that has garnered less attention is overreaching attempts by litigants to obtain privileged material.

Unwarranted attempts to pierce privilege are particularly of concern for banks, because banks often possess information subject to one or more privileges specific to the banking industry, and as to which banks do not themselves have authority to waive the applicable privilege. For example, banks may have confidential supervisory information from their regulators — such as the Office of the Comptroller of the Currency ("OCC"), the Federal Reserve Board ("FRB"), or Federal Deposit Insurance Corporation ("FDIC") — that is subject to the bank examination privilege that only the regulators may waive. Similarly, banks may have suspicious activity reports ("SARs") and related documents that are subject to the SAR privilege that banks cannot waive, and indeed that banks are criminally prohibited from disclosing. In some instances, international banks may have customer data maintained in non-US jurisdictions, such as Switzerland or Hong Kong, that is subject to non-US bank secrecy laws that afford the banks' customers, not the banks, ownership of the privilege. In

[1] *See*, e.g., Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a) – 'Much Ado About Nothing?'*, 46 Hastings L.J. 679, 699 (1995) ("Among the more commonly mentioned activities used to resist legitimate discovery are . . . raising frivolous privilege claims.").

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