

New York Commercial Division Round-Up

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[Failure To Specify Attorney's Role In Internal Investigation Could Cost You The Attorney-Client and Attorney Work-Product Privileges](#)

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Recently, in *HSBC Guyerzeller Bank AG v. Chascona N.V. et al.*, Index No. 114705/2003 (Sup. Ct., NY County, June 23, 2010) (“*Guyerzeller*”), Justice Bernard J. Fried held that the attorney-client and attorney work product privileges did not shield from discovery documents created and maintained by an attorney acting as an investigator.

Seeking to foreclose on Manhattan’s Gorham Hotel, Plaintiff HSBC Guyerzeller Bank AG (“*Guyerzeller*”) initiated the action in 2003. The Hotel was owned by defendants Chascona N.V. (“*Chascona*”) and Mora Hotel Corp. N. V. (“*Mora*”).

Defendants CIBC Mellon Trust Company and Chrysler Canada Inc. (together, “*Chrysler*”) were judgment creditors of Chascona and Mora, and claimed that the mortgage fraudulently and inequitably encumbered the Gorham Hotel, in that it concealed the fruits of an earlier fraud (the “*Castor Fraud*”) committed by Chascona and Mora, shielding their ill-gotten assets from creditors. Chrysler based its contentions on the results of an investigation of the Castor Fraud conducted by Herbert Schectman. Schectman was a vice president at Chrysler, but also an attorney. Claiming attorney-client privilege and attorney work-product, Chrysler refused to produce some 40 boxes of documents Schectman had retained over the course of his investigation (the “*Investigation Documents*”), and would not permit Schectman to testify in response to questions regarding the investigation.

Guyerzeller, Chascona, Mora, and other related parties sought an order to compel, pursuant to CPLR 3124, arguing that (1) no privilege existed because, whether or not Schectman previously served Chrysler in a legal capacity, during the Castor Fraud investigation, he acted as an investigator; and (2) Chrysler waived any privilege by placing the subject matter of the investigation at issue. Movants also sought sanctions against Chrysler, pursuant to CPLR 3126, based on its refusal to produce responsive documents, obstruction of questioning of Schectman during two depositions, and untenable claims of attorney client privilege.

Justice Fried found that the Investigation Documents were not protected by the attorney-client privilege. Relying on *Spectrum Sys. Intl. Corp. v. Chemical Bank*, 78 N.Y.2d 371, 379 (1991)

(“*Spectrum*”), Justice Fried found “Schectman’s work for Chrysler was in an investigative, rather than a legal, capacity” and “an investigative report does not become privileged merely because it was conducted by an attorney.”

As evidence of Schectman’s non-legal role at Chrysler, Justice Fried pointed to two employment agreements between Schectman and Chrysler, neither of which mentioned performance of legal services by Schectman. Rather, the agreements stated that Schectman’s work for Chrysler was “for the sole purpose of managing the business of CFC and the Company,” and that his duties would consist of “consulting, planning, coordination, management and related services and advice.”

Justice Fried further observed that Schectman’s business letterhead on correspondence he had conducted prior to the investigation identified him only as “Senior Vice President – Special Projects.” Chrysler claimed the content of Schectman’s letters, including statements that Chrysler “intends now to proceed diligently with its plans to achieve the maximum recovery possible and full legal redress against all persons associated with Castor for any improper or illegal activity,” demonstrated Schectman was working for Chrysler in a legal capacity. Justice Fried disagreed, finding that this statement was “not inconsistent with what a business person might assert on behalf of the company for whom the business person works. Indeed, one need not be an attorney to make this statement; the intention to assert legal remedies is a business decision.” Justice Fried also relied on the fact that no explicit agreement to render legal services existed between Schectman and Chrysler until March 1996.

In lieu of withholding the documents, Chrysler also sought in camera review, submitting an affidavit in which Schectman stated that, “as would become apparent to anyone who might review my files in their entirety, my work for Chrysler included exactly what one would expect a lawyer’s work to include in connection with the legal morass known as the Castor Fraud,” and “would see that the services that I rendered to Chrysler in connection with the massive multijurisdictional Castor [F]raud recovery effort were predominately, if not exclusively, legal and were rendered in anticipation of or in connection with litigation and other legal recovery routes and strategies short of litigation, such as negotiated resolutions or workout transactions.” Again relying on *Spectrum*, Justice Fried denied Chrysler’s request, finding Schectman’s “conclusory” assertions of privilege did “not convey the information necessary to decide whether the documents are privileged and the offer to deliver the remaining documents for in camera review obviously does not fill this gap.”

Notably, the Commercial Division’s ruling in *Guyertzeller* stands in contrast to a recent Seventh Circuit ruling in *Sandra T.E. v. South Berwyn School Dist.*, 600 F.3d 612 (7th Cir. 2010). In *Sandra*, the Court found that an attorney conducting an internal investigation for a school district was in fact rendering privileged and confidential legal advice, and ruled that the attorney’s handwritten interview notes, memos, and executive summary of his investigation marked “Privileged and Confidential,” “Attorney-Client Communication,” and “Attorney Work Product,” were all privileged, confidential, and exempt from discovery. The Court based its ruling on the language of the engagement letter—the “most important piece of evidence”—which explained that the attorney had been hired to “investigate the response of the school administration to allegations of sexual abuse of students” and “provide legal services in

connection with the specific representation.”

In light of Justice Fried’s ruling, in order to maintain attorney-client privilege, corporations conducting investigations—internal or external—must ensure that there is a record demonstrating that any attorney conducting the investigation is doing so as part of the legal services he or she is providing to the corporation *prior* to the onset of the investigation.

Moreover, in order to ensure application of attorney work product privilege, such corporations should make efforts to document that investigations are being done in anticipation of litigation.

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