

A woman brought a products liability action against a drug manufacturer in federal court under state law, claiming that the manufacturer had failed to warn that an arthritis drug caused severe hair loss in female patients. In discovery, the manufacturer inadvertently turned over to the woman two documents reflecting communications between the manufacturer's president and its counsel regarding the drug's possible side effects. There were 23 other, similar documents reflecting such communications that were not turned over in discovery.

Although the manufacturer learned of the disclosure during the discovery period, it did not seek the return of the two documents until the day before trial. In response, the woman claimed that the manufacturer had waived the attorney-client privilege as to all 25 documents, including the 23 that had not been turned over.

How should the court rule on the woman's claim of waiver of privilege?

- A. There was no waiver of the attorney-client privilege, because the disclosure to the woman was inadvertent. (14%)
- B. There was a waiver of the attorney-client privilege regarding only the two disclosed documents. (75%)
- C. There was a waiver of the attorney-client privilege regarding the disclosed documents as well as the other 23 documents, because they all relate to the same subject matter. (3%)
- D. There was a waiver of the attorney-client privilege for all 25 documents if the state law that supplies the rule of decision would support such a result. (5%)

Correct

75% Answered correctly

01 min, 48 secs Time Spent

2023 Version

Explanation:

Limitations on waiver of attorney-client privilege & work-product doctrine

(FRE 502)

Waiver of privilege

Disclosure does *not* waive privilege in federal or state proceeding if:

disclosure was made in federal proceeding or to federal agency

disclosure was inadvertent

privilege holder took reasonable steps to prevent disclosure *and*

privilege holder promptly took reasonable steps to rectify error

Extension of waiver

Waiver does *not* extend to undisclosed communication or information *unless*:

waiver was intentional

disclosed & undisclosed communications or information concern same subject matter *and*

communications or information ought, in fairness, to be considered together

FRE = Federal Rule of Evidence.

The **federal inadvertent-waiver rule** applies to (1) communications covered by the **attorney-client privilege** and (2) information protected under the **attorney work-product doctrine**. Under this rule, the **disclosure** of such communications or information does ***not*** **waive** the attorney-client privilege or work-product protection in a federal or state proceeding if:

the disclosure was made in a **federal proceeding** or to a federal agency

the disclosure was **inadvertent**

the privilege holder took **reasonable steps** to **prevent disclosure** *and*

the privilege holder promptly took **reasonable steps to rectify** the error.

Here, the manufacturer inadvertently turned over two documents reflecting attorney-client communications between the manufacturer's president and its counsel. That disclosure was made in a federal action, and the manufacturer had presumably taken reasonable steps to prevent it. However, the manufacturer learned of the disclosure during discovery and waited until the day before trial to seek return of the documents. This failure to promptly take reasonable steps to rectify the error waived the attorney-client privilege as to the two documents (**Choice A**).

However, such a **waiver does not extend** to an **undisclosed communication or information** (eg, the other 23 documents) *unless*:

the **waiver** was **intentional**

the disclosed and undisclosed **communications or information** concern the **same subject matter** *and*

the communications or information ought, in fairness, to be **considered together**.

Since the manufacturer's disclosure of the two documents was *inadvertent*, the waiver of the attorney-client privilege as to those documents does not extend to the other 23 documents—even though they all relate to the same subject matter **(Choice C)**. Therefore, the court should deny the woman's claim.

(Choice D) Under FRE 501, state law governs privilege regarding a claim or defense for which state law provides the rule of decision (ie, in diversity cases). But notwithstanding FRE 501, the federal inadvertent-waiver rule applies even in cases based on diversity jurisdiction.

Educational objective:

A waiver does not extend to undisclosed communications or information unless (1) the waiver was intentional, (2) the disclosed and undisclosed communications or information concern the same subject matter, and (3) the communications or information should be considered together.

References

Fed. R. Evid. 502 (setting forth the federal inadvertent-waiver rule).

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