

Are Financial Institutions' Consultants and Vendors Compromising Their Privileges?

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A recent decision from the United States District Court for the Eastern District of Texas should trigger alarm bells for financial institutions' in-house counsel. The court held that the bank involved had waived any privilege that may have existed over documents it contended were protected from disclosure by the attorney-client and work product privileges. As financial institutions' reliance on consultants and vendors increases, the *U.S. Ex. Rel Mitchell v. CIT Bank* decision should motivate in-house counsel to re-examine their protocols for sharing documents with consultants and/or vendors in order to preserve privileges.

In *U.S. Ex Rel. Mitchell v. CIT Bank*, issued on September 28, 2021, the court held that the bank waived the attorney-client and work product privileges by making disclosures to a third party pursuant to a Consent Order with the Office of Thrift Supervision. The bank made those disclosures assuming the vendor was assisting the OCC by performing a quasi-regulatory function. Essentially, it treated the vendor as the OCC.

In *Mitchell*, the plaintiff asserted a False Claims Act claim alleging CIT submitted false claims to the government to obtain payment under three different loan modification programs. Plaintiff claimed CIT certified that it was in substantial compliance with those programs when CIT knew it was not.

In discovery, the plaintiff sought production of CIT's communications with Navigant, a consultant it had engaged to comply with a Consent Order it entered into with the Office of Thrift Supervision. The Consent Order obligated CIT to "retain an independent consultant acceptable to the Regional Director to conduct an independent review of certain residential foreclosure actions regarding individual borrowers with respect to the Association's mortgage servicing portfolio." During that engagement, CIT shared documents with Navigant that it believed were protected by the attorney-client and/or work product privileges. Unfortunately, the court held that, even if the documents were privileged, CIT waived the privilege by sharing them with Navigant pursuant to the Consent Order. The decision contains an extensive discussion of the privileges and various ways they can be waived.

Of particular interest to insured depository institutions is the portion of the opinion in which the court specifically held that §1828(x) only protects disclosures directly to federal banking agencies, state bank supervisors, and foreign banking authorities. It expressly rejected CIT's argument that Navigant was acting as the OCC's representative. As a result, the plaintiff received a treasure trove of documents CIT did not create for public consumption.

If in-house counsel isn't confident their team has sufficient, institution-wide protocols in place to protect their client's privileges, *Mitchell* is proof that now is the time to act. McGlinchey's [Commercial Litigation](#), [Government and Internal Investigations](#), and [Financial Services Compliance](#) teams are available to help.

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