
Hughes Hubbard & Reed

Hughes Hubbard Wins Work Product Dispute for MF Global Trustee

News & Events | Deals & Matters

Hughes Hubbard & Reed LLP • A New York Limited Liability Partnership
One Battery Park Plaza • New York, New York 10004-1482 • +1 (212) 837-6000

Attorney advertising. Readers are advised that prior results do not guarantee a similar outcome. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. For information regarding the selection process of awards, please visit <https://www.hugheshubbard.com/legal-notice-methodologies>.

On Feb. 9, 2015 Hughes Hubbard achieved a significant victory for MF Global Trustee Jim Giddens when U.S. Magistrate Judge James C. Francis, IV, rejected an attempt by the defendants in the multi-district litigation against former officers and directors of MF Global, including Jon Corzine, to obtain the work product created by the Trustee's accounting professionals, Ernst & Young, as part of his investigation into the collapse of MF Global.

This investigation had culminated in the Trustee's 275-page report that detailed the events that led to the collapse of MF Global, identified the parties responsible for historic failure in customer assets, and recommended safeguards and reforms (many of which have since been adopted) to prevent future defalcations of customer funds. The Investigation Report was prepared under emergency conditions with regulators, former customers and the general public demanding immediate answers as to how a \$1.6 billion shortfall in customer assets could arise at a futures commodity merchant. Despite these pressures, the Trustee's team proceeded in a careful, thoughtful and thorough manner in order to protect the integrity of the investigation and the confidentiality of the analysis and work papers created in connection with that investigation. The Investigation Report and its findings were widely reported on in both print and television media, including The Wall Street Journal, The New York Times and The Financial Times among others, leading to the Trustee's testimony before Congress as well as multiple other congressional hearings.

As part of the multi-district litigation arising out of the failure of MF Global, the former officers and directors of MF Global argued that the Trustee was required to produce the work papers of his forensic accountants created as part of the investigation. In a 27-page opinion, the Court rejected the defendants' arguments, affirming the Trustee's position that work papers were privileged, noting that there was no indication that the documents were intended to be made public, and that the confidentiality of the "work product was always carefully maintained." The Court also agreed that the documents were protected as work product, noting that it was "flummoxed" by the defendants' position to the contrary. The Court also rejected arguments that either the Trustee or the customer representatives, who are the assignee of certain of the Trustee's claims, had waived either privilege, ruling that:

1. The Trustee's discussions with government agencies with respect to the report did not waive any privilege because "the Trustee has adequately established that there was no disclosure of privileged information to adverse government bodies"
2. References to the Investigation Report in the separate Securities Investor Protection Act proceeding in the Bankruptcy Court did not waive any kind of privilege in the multi-district litigation ruling, among other things, that the "fairness doctrine" did not require disclosure of the documents.

The Court's opinion was reported in Law360.

The Court's ruling is important for Trustees generally, as well as the Securities Investor Protection Corporation and the Commodity Future Trading Commission, as it confirms the sanctity of the difficult and complex legal work required following collapse of a broker dealer or futures commodities merchant. The ruling is also beneficial to forensic accounting firms who have an interest in avoiding the time and expense of inappropriate discovery requests, and in protecting their work product in the context of investigations undertaken with counsel.

The Trustee's brief was prepared by Jeff Coleman along with Dustin Smith and Thom Sisson, with assistance from Charlie Cohen drawing from his experience defending against similar discovery requests. Jim Kobak provided oversight for the preparation of papers and made modest editing and stylistic revisions. The Trustee's investigation was led by Jeff Coleman, Sarah Cave and Vilia Hayes.

Related People



James W. Giddens



Dustin P. Smith



Charles W. Cohen



James B. Kobak, Jr.



Vilia B. Hayes

Related Areas of Focus

Corporate Reorganization & Bankruptcy.