Disclosure to Certain Directors May Waive Attorney-Client Privilege

Disclosing attorney-client communications in connection with internal investigations and reports to corporations, board of directors and special committees may waive attorney-client privilege. A recent ruling out of the Delaware Court of Chancery provides important guidance to corporate counsel.

Chancellor William B. Chandler’s decision in Ryan v. Gifford, 2007 WL 4259557 (Del. Ch. November 30, 2007), underscores the importance for counsel to identify clearly the client, those parties with interests adverse to the client, and those with common interests, before disclosing attorney-client communications.

In this case, the Delaware Court of Chancery held that a special committee formed to investigate stock option backdating at Maxim Integrated Products, Inc. waived the attorney-client privilege when the committee presented its final oral report to Maxim’s board of directors.

Chancellor Chandler reasoned that the privilege was waived because a number of Maxim’s directors in attendance were potentially liable for the stock option backdating violations, so they had interests potentially adverse to Maxim and the remainder of the board.

The decision was in response to a motion to compel production by plaintiff shareholders of Maxim in the underlying derivative and securities fraud litigation, in which plaintiffs sought disclosure of communications of the special committee’s counsel to both the Maxim board and the special committee. The Court of Chancery ordered production of attorney-client communications between the special committee’s counsel and the special committee.

While the special committee’s presentation to the board of directors may have resulted in only a limited waiver of the privilege as to the presentation of the final report, the Chancellor found that the presentation’s partial waiver operated as a complete waiver for all communications regarding the final report’s subject matter of stock option backdating. The Chancellor concluded that the waiver of attorney-client privilege extended to all communications between the special committee and its counsel regarding the investigation and final report concerning stock option backdating.

A significant factor supporting the court’s ruling that the special committee had waived the attorney-client privilege was the amount of detail communicated by the special committee in its final oral report and the special committee’s communication of these details to third persons not for the purpose of seeking legal advice.
The court concluded that the relationship between the special committee and the individual named director defendants was adversarial in nature, precluding application of the common interest exception, which protects communications among parties who share a common interest from disclosure.

Most recently, Chancellor Chandler’s decision in Ryan v. Gifford, 2008 WL 43699 (Del. Ch. January 2, 2008) denying Maxim’s motion for certification of an interlocutory appeal of the November 30, 2007 decision, amplified the Chancellor’s prior waiver of attorney-client privilege analysis concluding that “disclosure to outsiders has never failed to waive privilege under Delaware law.”

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