

Recent Delaware Decision Orders Production of Communications Among Independent Counsel, Special Committee, and Full Board of Directors in Stock Options Investigation

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In a recent decision that may have significant implications for corporate internal investigations and for special committee practice, a Delaware court ordered the production to civil plaintiffs of all communications between a special committee and its independent counsel in an internal investigation. The court reasoned that any applicable attorney-client privilege was waived when counsel for the special committee presented its final investigative report to the company's full board of directors, including some board members who were defendants in related civil litigation and outside counsel who jointly represented the company and the board members. The decision, *Ryan v. Gifford*, C.A. No. 2213 (Del. Ch. Nov. 30, 2007), arose from an investigation by a special committee of the board of directors of Maxim Integrated Products, Inc. of the company's stock options practices. In a further significant ruling, the court also ordered Maxim to produce electronic documents in native file format with original metadata.

Production of Materials from Special Committee's Investigation

In its most recent opinion in the Maxim stock options litigation, the Court of Chancery addressed various discovery disputes, most notably the plaintiffs' motion to compel the production of all communications between counsel for the special committee (Counsel) and the special committee itself that occurred throughout the course of the special committee's investigation. Plaintiffs also sought to compel production of materials relating to Counsel's final presentation to Maxim's full board of directors regarding its investigation.

The court first concluded that even if a joint attorney-client privilege existed between the company and the special committee, it would be overcome in light of the plaintiffs' showing under the "good cause" exception to the privilege recognized in shareholder litigation. Next, in a potentially far-reaching ruling, the court held that any privilege applicable to the entire special committee investigation was waived when the special committee and its counsel presented the results of their internal investigation to Maxim's full board of directors. This was because in attendance at the presentation were individual board members who were alleged by plaintiffs to have been involved in the conduct under investigation, as well as outside counsel who jointly represented the company and the board members in the shareholder litigation.

According to the court:

The presentation of the report constitutes a waiver of the privilege because the client, the Special Committee, disclosed its communications concerning the investigation and the final report to third parties [attending the meeting]—the individual [board member] defendants and [their counsel]—whose interests are not common with the client, precluding application of the common interest exception to protect the disclosed communications. . . . The Special Committee was formed to investigate wrongdoing and in response to litigation in which certain directors were named as individual defendants. This describes a relationship more akin to one adversarial in nature.

Ryan, at 7.

The court further found that the board members' subsequent reliance on the special committee's findings to exculpate themselves in the civil litigation was additional proof that there was no common interest among the parties at the board meeting:

[Although] the presence of counsel that seemingly acts in a dual capacity [for both the Company and the individual board member] may confuse the issue of whether the director defendants attended [the meeting] in a fiduciary—not individual—capacity, any apparent confusion may now be dismissed because the individual director defendants now rely on the findings of the report for exculpation as individual defendants. Thus there can be no doubt that the common interest exception is inapplicable to extend the protection of attorney-client privilege to the communications disclosed [at the board meeting].

Id. at 7-8.

While the court agreed that the plaintiffs had demonstrated a waiver of the privilege only with respect to the final investigative report presented at the board meeting, it ruled that “this partial waiver operates as a complete waiver for all communications regarding [the] subject matter,” allowing the plaintiffs access to all communications between [Counsel] and the special committee “related to the investigation and final report.” *Id.* at 6-7. The company was therefore ordered to produce all communications (i) between counsel for the special committee and the special committee and (ii) between counsel for the special committee and the company.

Production of Metadata

In what appears to be the first Delaware Chancery decision to require the production of electronic documents with original metadata, the court also ordered the company to produce documents “in a format that will permit review of metadata, as plaintiffs have clearly shown a particularized need for the native format of electronic documents with original metadata.” *Id.* at 3. The court noted that metadata may be especially relevant in stock options cases “where the integrity of dates entered facially on documents authorizing the award of stock options is at the heart of the dispute.” *Id.* at 2-3. The court noted that because the company's auditors as well as the special committee “undoubtedly” reviewed metadata as part of the investigation, a review of metadata was highly relevant and its production would not be unduly burdensome.

Conclusions

It remains to be seen to what extent other courts will follow the expansive scope of the Delaware court's waiver rulings in *Ryan*. Still, *Ryan* plainly poses a significant risk that internal investigations conducted by special committees may not enjoy the protection of the attorney-client privilege when information is shared with a full board, including members who have been named as individual defendants in civil litigation relating to the subject matter under investigation. Likewise, sharing information with company counsel who also represents board members may pose new risks. Although excluding individual board members and their counsel from board meetings, or retaining separate counsel for board members, may avoid waiver under *Ryan*, this approach will typically be impractical. At a minimum, special committees and their counsel reporting the results of their investigation to corporate boards should document that no waiver is intended, and individual board members should document that they are attending the meeting in their corporate, not individual, capacity.

For further information about any of the issues raised in this Morgan Lewis LawFlash, please contact either of the following Morgan Lewis attorneys:

New York

Leslie R. Caldwell

212.309.6260

lcaldwell@morganlewis.com

San Francisco

William H. Kimball

415.442.1277

wkimball@morganlewis.com

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