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# Chancery Explores Corporate Applications of Privilege

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Last month, the Delaware Court of Chancery issued four noteworthy decisions regarding the attorney-client privilege and work-product doctrine in the corporate context. These cases are important for Court of Chancery practitioners and for corporations interested in asserting that certain of their documents and communications are protected by privilege. The opinions address the application of the attorney-client privilege and work-product doctrine in connection with communications reflecting both business and legal advice, litigation reserves, the "at issue" waiver and a corporation's assertion of privilege against one of its directors.

Each of these opinions provides both M&A practitioners and in-house attorneys with useful guidance in various corporate applications of the attorney-client privilege and work-product doctrine.

### *In re Comverge Shareholders Litigation*

Chancery Court Vice Chancellor Donald F. Parsons Jr. addressed several important aspects of the attorney-client privilege in *In re Comverge Shareholders Litigation*, C.A. No. 7368-VCP (Del. Ch. Apr. 10, 2013). In a motion to compel, the plaintiffs argued that the director defendants had waived privilege by raising their reliance on the advice of counsel as a defense to the plaintiffs' breach of fiduciary duty claims, and had improperly redacted nonprivileged statements from the company's board minutes.

The court rejected the plaintiffs' arguments. First, regarding the privileged communications, the court found that the at-issue exception to attorney-client privilege was not implicated by the board's defense that it had relied on the advice of counsel. The first prong of the at-issue exception — whether the party injected the privileged communication into the litigation — did not apply because the defendants had not placed any specific privileged communications at issue. The second prong of the at-issue exception — whether the party injected an issue into the litigation that requires an examination of confidential communications for its truthful resolution — was also inapplicable because the defendants had raised the existence, not substance, of the advice.

Second, the court found that the defendants had appropriately redacted statements in their board minutes that contained mixed business and legal advice. However, statements that were in no way made for the purpose of rendering legal advice could not properly be redacted.

### *JPMorgan Chase & Co. v. American Century Companies and Litigation Reserves*

Chancery Court Vice Chancellor John W. Noble also analyzed the at-issue exception to attorney-client privilege in *JPMorgan Chase & Co. v. American Century Companies*, C.A. No. 6875-VCN (Del. Ch. Apr. 18, 2013), but reached a different conclusion based on the facts presented. Specifically, Noble held that discovery of documents regarding the plaintiff's litigation reserve number should be allowed because the plaintiff had placed the reserve number at issue in the litigation.

American Century filed a motion to compel after plaintiff JPMorgan invoked the work-product doctrine regarding its litigation reserve numbers for a separate arbitration that had occurred between the parties. According to American Century, JPMorgan had placed its litigation reserve number at issue by bringing claims directly involving the value of the arbitration claims. JPMorgan had alleged that American Century breached its implied covenant of good faith and fair dealing in connection with an option agreement when it failed to provide an outside valuation adviser with information regarding American Century's value for the then-pending arbitration claims.

The court noted that, under Delaware law, the application of the work-product doctrine depends on "why the document was produced," because if a document was created "because of litigation," it is likely privileged. Noble explained that

litigation reserve numbers are "prepared in anticipation of litigation" and "reveal ... the mental impressions, thoughts and conclusions of an attorney in evaluating a claim." Therefore, documents setting or revealing litigation reserves should be treated as "opinion work product," which is subject to a more stringent "undue hardship" standard. The court also explained that the protections are not precluded because the document may also have served a business function (such as financial reporting).

Applying this reasoning, the court found that JPMorgan's litigation reserves were protected by both the work-product doctrine and attorney-client privilege. JPMorgan had worked closely with its counsel to set the numbers and had not shared them with a third-party accountant or regulator. However, even if JPMorgan had disclosed the reserve numbers to a third party, the disclosure would not necessarily preclude work-product protection.

Despite finding that JPMorgan's litigation reserves were privileged, the court granted American Century's motion to compel. Noble held that the litigation reserve numbers were subject to the at-issue exception to the attorney-client privilege, because JPMorgan had injected the valuation issue into the litigation and could have reasonably foreseen that American Century would seek to expose its own value of the arbitration as a defense. The court also held that the protections of the work-product doctrine were overcome, despite the "stringent" test for discovery of "opinion work product," because the litigation reserves were "directed to the pivotal issues" of the case.

### *AM General Holdings v. Renco Group*

Noble once again addressed important issues of the attorney-client and work-product privileges in a pair of consolidated cases captioned *AM General Holdings v. Renco Group*, C.A. No. 7639-VCN (Del. Ch. Apr. 18, 2013).

The Renco Group moved to compel after MacAndrews AMG Holdings LLC claimed that its valuations of certain capital accounts were privileged. As in *Converge*, the court drew a line between privileged materials created by lawyers for a legal purpose and nonprivileged materials created by lawyers for a business function. Noble found that the valuations at issue fit within the latter category, but went on to explain that certain of the materials prepared for the purpose of assessing legal options were still subject to the work-product doctrine.

Noble also addressed how attachments to privileged emails should be designated, explaining that "if emails are privileged, but the attachments to the emails do not independently earn that protection, then the attachments may not be withheld on the ground of privilege emanating from the email which they accompanied."

### *Kalisman v. Friedman*

Chancery Court Vice Chancellor J. Travis Laster took on the issue of whether a corporation can invoke the attorney-client privilege or work-product doctrine against a director in *Kalisman v. Friedman*, C.A. No. 8447-VCL (Del. Ch. Apr. 17, 2013). The plaintiff, Jason Kalisman, a director of Morgans Hotel Group Co. and co-founder of Morgans' largest stockholder, OTK Associates LLC, alleged that the Morgans board secretly undertook a recapitalization and stock buyback after learning that OTK planned to nominate a slate of new directors. Kalisman claimed that he was not informed of the proposed transaction until just before the board was scheduled to vote.

Kalisman served document requests on the defendants seeking information about the board's plan and also subpoenaed the board's legal adviser and the legal adviser to the special committee (of which Kalisman was a member). To address any waiver of attorney-client privilege, Kalisman proposed a three-tiered confidentiality stipulation that would include a "Kalisman-only" category of documents. After the defendants responded that they would assert privilege despite Kalisman's status as a director, Kalisman filed a motion to compel.

Laster explained that under Delaware law, a director's right to information is "essentially unfettered in nature," subject to three primary restrictions: (1) an ex ante agreement among the contracting parties; (2) communications between a special committee, acting with the knowledge of the excluded director, and its counsel; and (3) if such adversity existed between the director and the corporation that the director could no longer reasonably expect that he or she was a client of the board's counsel. In addition, the court recognized that a corporation may be able to withhold privileged information from a director if it had "concrete evidence" that the director would use the information improperly.

Notably, the court was not persuaded by the plaintiff's concerns that Kalisman might share information with OTK, explaining that "when a director serves as the designee of a stockholder on the board, and when it is understood that the director acts as the stockholder's representative, then the stockholder is generally entitled to the same information as the director."

The court ultimately concluded that the defendants could not assert privilege against Kalisman (unless the information was the subject of the present litigation), and ordered the production of the material pursuant to a three-tiered confidentiality order.

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