

## Corporate Investigations Group Update: Special Committee Reports Could Jeopardize Attorney-Client Privilege

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Appointing a Special Committee of the board to conduct an internal investigation is a common strategy for uncovering misconduct within a company. Typically, the investigation concludes with a Special Committee reporting its findings to the full board. However, a Delaware Chancery Court opinion issued on November 30th in *Ryan v. Gifford* indicates that such a Special Committee report may constitute a waiver of the attorney client privilege where members of the board who are defendants in the case are present for the report.

The *Ryan* case centers on allegations of stock option backdating by executives of Maxim Integrated Products. In the most significant holding, the Chancellor ruled that a Special Committee created by the Maxim board to investigate concerns about the backdating waived the attorney client privilege as to all of the communications relating to the investigation and report between the Special Committee and its lawyers. The waiver arose because board members who were alleged to have been involved in the option scheme and their counsel were present when the Special Committee gave its report.

According to the Chancellor, the individual director defendants and their counsel were third parties whose interests were not common with those of the Special Committee. Because the Special Committee was formed to investigate wrongdoing in response to litigation in which certain directors were named as individual defendants, the court viewed the relationship between the Special Committee and the board members under investigation as adversarial in nature. Therefore, the common interest exception did not protect the disclosed communications.

The Chancellor also held that in the absence of a waiver, the materials would be ordered produced under the "good cause" exception to the attorney client privilege - also known as the *Garner* doctrine - which can be invoked in stockholder litigation against fiduciaries.

As a result, the Chancellor ordered Maxim to produce all communications between Special Committee counsel and the Special Committee and Special Committee counsel and Maxim. This included all of the communications that occurred during the course of the investigation and during the board presentations.

The Special Committee then asserted work product doctrine as to notes of witness interviews, arguing that they necessarily contained attorney mental impressions. Even though there is support in Delaware law, primarily in the takeover context, for barring discovery into such underlying lawyer communications, the Chancellor ordered these documents provided to the Court for in camera inspection.

There is considerable tension between the ruling in *Ryan* and typical Special Committee practice, where committees frequently render a final report and make a presentation to the full board. Historically such a report and presentation have not resulted in a complete privilege waiver. Instead, there has been case-by-case analysis under *Zapata* as to what materials a plaintiff can obtain, with Special Committees largely maintaining the attorney-client privilege.

In summary, the ruling in *Ryan*, creates significant risk that the attorney client privilege will not be available for a Special Committee and its counsel when conducting an internal investigation, particularly in the area of stock option backdating, if the Special Committee gives a report to the full board with named defendants in attendance. Excluding named defendants and their counsel from the presentation of the report would provide a basis to distinguish *Ryan* and avoid waiver, but such

## Corporate Investigations Group Update: Special Committee Reports Could Jeopardize Attorney-Client Privilege (Continued)

a course may not be practical. Future committees and their counsel may also attempt to document clearly that they are not intending to waive any privilege and to distinguish between the Committee's substantive report and mid-investigation communications.

If you would like to receive additional information regarding this legal update or would like to discuss any corporate investigations issues please contact Mike DeWine or Jim Burke, co-chairs of KMK's Corporate Investigations Group.

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