Attorney-Client Privilege Waived as a Result of Special Committee Investigation Report to Full Board



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The case of *Ryan v. Gifford* (2007 Del. Ch. WL 4259557, Nov. 30, 2007, and 2008 Del. Ch. WL 43699, Jan. 2, 2008) reminds us that special committees of the board of directors formed for purposes of undertaking investigations by senior management need to be very careful about reporting the findings of the investigation back to the full board in order to avoid losing the benefits of the attorney-client privilege.

Ryan was a shareholder derivative action brought against the directors and Maxim Integrated Products, Inc., a manufacturer of integrated circuits used in microprocessors. The Maxim board formed a special committee comprised of a single director to investigate alleged options backdating. The special committee engaged counsel to carry out the investigation. Special counsel did so and then the special counsel and the committee orally reported the results to the full board of directors. A suit was brought against the company and discovery of the special counsel investigation was sought during discovery. The company refused to produce the special counsel report and the plaintiffs sought to compel discovery.

The Delaware Chancery Court found that certain of the information disclosed to the full board was discoverable and not subject to the attorney-client privilege because certain of the board members had interests adverse to the company because they were the subject of the investigation. The court reasoned in part that they had attended the board meeting in their individual as opposed to fiduciary capacities.

For more information on this topic, please contact **Jonathan D. Gworek**.