

Delaware Protects Attorney-Client Privilege for Investment Banker Communications

By Herbert Wachtell, Peter Hein, David Gruenstein and David Katz, Partners of Wachtell Lipton Rosen & Katz

A recent Delaware Court of Chancery decision explicitly acknowledges that Delaware employs a “broader rule” of attorney-client privilege protection for communications between a corporate client and its lawyers that involve an investment banker, particularly in the context of a corporate transaction. This decision also held that Delaware law, with its broader application of privilege, should be applied even to communications between a corporate client and its counsel in another jurisdiction where the parties to the ultimate transaction had selected Delaware law as the governing law and chose Delaware as the exclusive forum for resolving any dispute and the dispute in fact was litigated in Delaware. *3Com Corporation v. Diamond II Holdings, Inc.*, C.A. No. 3933 - VCN (Del. Ct. Ch. May 31, 2010) (Noble, V.C.).

The *3Com* case arose out of a dispute over application of the termination provision of a merger agreement. The Court noted that the communications at issue took place largely in Massachusetts and that Massachusetts courts have taken a more limited approach than Delaware courts when assessing whether communications made to, or in the presence of, third parties (such as investment bankers) are protectable under the attorney-client privilege.

Specifically, the Court noted that a recent Massachusetts Supreme Judicial Court decision (in the context of communications involving a tax accountant) had ruled that disclosure to a third party would result in the loss of attorney-client privilege unless the third party's involvement was “necessary” for “effective consultation” between client and attorney (such as when the third party acts in effect as an interpreter or translator), and that, in the view of the Massachusetts Court, it would *not* suffice that the involvement of the third party was simply “useful and convenient” and improved the attorney's ability to represent the client.

By contrast, Delaware Vice Chancellor Noble harkened back to the leading Delaware decision by Chancellor Allen in *Jedwab v. MGM Grand Hotels, Inc.* as support for Delaware's “broader rule,” which reflects Delaware's recognition of the practical necessity of involving non-legal advisors, such as investment bankers, in meetings and written communications relating to the provision of legal advice in what are often fast-paced corporate transactions.

The *3Com* decision highlights both differences between jurisdictions in approach to the scope of the protections of the attorney-client privilege and the potential impact on the availability of privilege of the parties' selection of governing law and forum provisions. Although counsel should continue to take appropriate precautions to protect privilege even in corporate transactions for which Delaware law is expected to govern, *3Com* shows that, at least in Delaware courts, privilege should not be lost simply because an investment banker was included in the communications.