



Commercial Litigation Alert

Recent developments in commercial litigation law

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Can a company director always obtain access to the advice of counsel that was provided to the company?

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The Massachusetts Supreme Judicial Court (“SJC” or the “Court”) issued a recent decision that clarifies the circumstances in which members of a board of directors can access the company’s attorney-client privileged communications. In *Chambers v. Gold Medal Bakery, Inc.*, SJC Docket No. 11231, a pair of directors in a close corporation, Gold Medal Bakery, Inc. (“Gold Medal”), sought privileged materials on the basis that, as directors and shareholders, they are entitled to view the advice of the company’s counsel. However, the directors seeking the information were embroiled in a lawsuit with the company over a buyout of the directors’ shares. The Court held that a general rule exists that gives directors access to the advice of the company’s counsel, however, that rule assumes that the interests of the directors are not adverse to the interests of the corporation on a given issue. In this set of circumstances, because the directors’ interests were adverse to the company’s interests on the issues in the litigation, the SJC said the privilege must be preserved in favor of the company, and vacated a lower court order that had compelled production of the privileged materials to the directors.

The SJC’s ruling provides some comfort to a corporation hoping to invoke the attorney-client privilege or work product doctrine against a director who has interests adverse to the company. Of course, the difficult remaining question for clients will be the determination of what constitutes an “adverse interest” for these purposes—a matter that must be decided on a case-by-case analysis.

Background

The two plaintiffs, Georgette LeComte and Michele LeComte Chambers, members of the four person board of directors and collectively owners of fifty percent of the company’s stock, sought a buyout of their shares from Gold Medal for several years. In 2006, plaintiffs sent a request for various corporate and financial records to Gold Medal’s counsel. When this request did not result in the production of certain requested information, the plaintiffs filed a direct lawsuit against Gold Medal seeking access to the same information. The suit settled in 2008, pursuant to an agreement that included a covenant that plaintiffs would have access to certain information (the “2008

Settlement Agreement”).

The instant lawsuit arose out of an alleged violation of the 2008 Settlement Agreement. The plaintiffs brought direct and derivative claims, alleging that Gold Medal and the individual defendants improperly refused to turn over information in hopes of achieving a buyout on unfavorable terms to the plaintiffs, and that the individual defendants had violated their fiduciary duties.

Plaintiffs pursued document discovery and served a subpoena duces tecum on Gold Medal’s counsel as keeper of the company’s corporate records. Counsel objected to every request on the ground that it implicated documents protected as attorney-client privilege or attorney work product. A discovery master assigned to the case ultimately denied a motion for a protective order filed by Gold Medal, and ordered that the material be provided, reasoning that the plaintiffs as directors were an integral and essential part of Gold Medal’s management, and that as part of that control group the plaintiffs had the power to invoke and waive Gold Medal’s attorney-client privilege in accordance with their fiduciary obligations. Furthermore, the discovery master held that the plaintiffs were entitled to the documents as 50% shareholders, since the plaintiffs made a showing of good cause that the attorney-client privilege should not be invoked to preclude their access to privileged communications. A superior court judge upheld the decisions of the discovery master.

The SJC’s decision

The SJC acknowledged that directors must have access to basic information about the company in order to meet their fiduciary responsibilities, and that when that information includes legal advice, a director is generally entitled to such information. Further, the Court reiterated that all directors, not just a select few, are entitled to advice of corporate counsel, as they have joint responsibility to the company. After setting out those basic guideposts, however, the Court went on to say that the principle that directors have a right to equal access to advice of corporate counsel “is based on the assumption that the interests of the directors are not adverse to the interests of the corporation on a given issue.” Here, plaintiffs’ interests in obtaining the materials were adverse to the corporation’s interests. The privileged information must remain protected from disclosure.

The Court made very clear that no single factor should be dispositive in determining when a director has interests that are “adverse” for attorney-client privilege purposes. That analysis, the Court opined, is “fact specific and necessarily depends upon the circumstances of each case.” In this case, however, the Court found that the facts weighed in favor of finding that the plaintiffs’ interests were adverse to Gold Medal. The SJC noted that the plaintiffs brought multiple suits against Gold Medal, and that the plaintiffs had a self-interested motive in pursuing these suits. Plaintiffs argued that the purpose of their suit, at least in part, was to maximize the best interests of the company, exemplified by the fact that a portion of their claim was brought derivatively, on behalf of the company. Moreover, plaintiffs argued that they are entitled to company books and records and therefore their request for such information was not improper or adverse. The SJC did not buy that line of thinking. Particularly, the Court found it compelling that the plaintiffs had been pursuing a global buyout of their shares since 2006, and had sought records from Gold Medal solely to value their corporate shares, something the Court viewed as a self-interested motive. Indeed, as the lower court had said in a separate issue in the case, “the ultimate goal of the litigation” was “valuation of the corporation so that the various family members can obtain their due.”

Analysis

While the *Chambers-Gold Medal* decision illustrates an exception to the general rule that directors have access to privileged material, the SJC went to great lengths to note that the decision rested “on the narrow facts of this case.” The Court also left open some ambiguity on the issue, stating that in complex cases it is often unavoidable that some portion of the parties’ interests will be adverse. It appears that the Court strives to achieve a balance with this decision—recognizing that directors must have access to advice of counsel in their role as fiduciaries, yet shouldn’t be able to disadvantage the company when adverse situations arise.

The continuing challenge in such demands for access to privileged information of the company will be a thorough analysis of whether the requesting director is “adverse”—driven largely by an analysis into that director’s purpose in obtaining the information. Where there is a strong indication of self-interest involved, the company can argue with some confidence that it will not disclose the information to the director and will invoke its attorney-client privilege or attorney work product protections.

As an aside, and the SJC touched on this point, this ruling in no way undermines the basic principle that the underlying facts are not made immune from discovery simply because they are sent to an attorney. A business record, e-mail discussion, or financial plan does not become privileged when it is sent to an attorney. Only where the communication is seeking or receiving legal advice from an attorney will the attorney-client privilege apply.

Going forward, expect to see litigation over the extent of this ruling, over the meaning of who is “adverse,” and whether lower courts limit the extent of this decision to the close corporation context or apply it more broadly.

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