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Client Alert

The Delaware Court of Chancery recently confirmed that Delaware recognizes that the attorney-client privilege is not necessarily waived when a client communicates with its attorneys in the presence of its investment banker, particularly in the context of a pending corporate transaction.

Delaware Court Reaffirms Attorney-Client Privilege for Investment Banker Communications

The Delaware Court of Chancery recently reaffirmed in *3Com v. Diamond II Holdings* that, in corporate transactions under Delaware law, the attorney-client privilege is available to communications between a corporate client and its attorneys involving the corporate client's investment bankers.

The court also found that the communications at issue were privileged, even though many originated from or were received in another state, because the parties selected Delaware law as the governing law of the merger agreement and consented to the exclusive jurisdiction and venue of the Delaware state courts for the resolution of disputes.

Background

In September 2007, 3Com Corporation entered into a merger agreement with Diamond II Holdings, Inc., an entity formed by Bain Capital Partners LLC to acquire 3Com. The parties terminated the merger agreement when they were notified by the Committee on Foreign Investment in the United States that, based on the committee's recommendation, President George W. Bush would not approve the merger. 3Com then filed suit to recover a \$66 million termination fee that it alleged it was owed as a result of the termination.



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Legal Communications with Investment Bankers Are Privileged

In the course of merger negotiations, 3Com, its attorneys and its investment bankers engaged in various communications regarding the merger agreement and other transaction documents. Whether Delaware or Massachusetts law applied to these communications was a key issue to the outcome of the discovery motions in the 3Com litigation because the determination of the applicable governing law would also determine the legal protection to be afforded to the communications.

The Delaware court noted that many of the communications at issue originated from or were received in Massachusetts, but that the parties had selected Delaware as the governing law and forum for dispute resolution under the merger agreement. The Delaware court also noted that Delaware and Massachusetts determine whether attorney-client privilege is waived through certain third-party disclosure differently, with the privilege more easily lost under Massachusetts law if attorney-client communications involve third parties, including investment bankers.

Specifically, in *Commissioner of Revenue v. Comcast*, the Massachusetts Supreme Judicial Court held that disclosures made to a third party preclude the application of attorney-client privilege to such communications unless the third party was "necessary" for "effective consultation" between the client and its legal counsel and were "more than 'just useful and convenient.'" Under Massachusetts law, a third party's role is to "clarify or facilitate" communications between the client and legal counsel. The *Comcast* decision specifically addressed disclosures made to accountants, although the opinion and the cases cited suggest that the holding would apply to disclosures made to other third parties, such as investment bankers.

However, the Delaware court pointed out that Delaware law is more protective of attorney-client privilege and reaffirmed that Delaware law preserves attorney-client privilege to communications between a corporate client and its legal counsel which include an investment banker, particularly in the context of a pending corporate transaction. The Delaware court cited *Jedwab v. MGM Grand Hotels* in support of its decision, explaining that Delaware law should be consistent in the application of attorney-client privilege in corporate transactions, which by their nature require collaboration (including

communications addressing legal matters) among corporate clients, their legal counsel and their investment bankers.

The Delaware court found that Delaware law regarding attorney-client privilege applied to the discovery motions and that, consistent with Delaware precedent, the communications among 3Com, its legal counsel and its investment bankers which concerned legal matters were privileged, regardless of the precise role of the investment bankers in, or the place of origin or receipt of, such communications.

Practical Lesson

The *3Com* decision highlights the differences between jurisdictions to the scope of attorney-client privilege protection and the availability of the privilege depending on the parties' selection of governing law, jurisdiction and venue. Although Delaware law recognizes the applicability of the attorney-client privilege to legal communications involving an investment banker, parties to corporate transactions should continue to take precautions to ensure the availability of the privilege regardless of governing law, jurisdiction and venue provisions in transaction documents.

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Founded in 1970, TroyGould is a Los Angeles law firm with a diverse client base and a practice covering a broad range of business transactions, litigation, and legal counseling, with emphasis in the areas of corporate finance, mergers & acquisitions, real estate, financial services, entertainment, employment, tax, and competitive business practices.

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