Email Users Beware: Companies and Corporate Officers Should Evaluate Email Practices in Light of Delaware Chancery Court Decision

On September 5, 2013, the Delaware Chancery Court ruled that the attorney-client privilege does not protect from disclosure emails sent by corporate officers to their personal attorneys using the company's email account. *In re Info. Mgmt. Servs., Inc. Derivative Litig.*, No. 8168-VCL (Del. Ch. Sept. 5, 2013), available **here**. Although the Chancery Court cautioned that its ruling was limited to the facts of the case before it, this decision is consistent with an increased level of scrutiny by the courts to emails arising in the corporate environment. *See, e.g., In re Vioxx Products Liab. Litig.*, 501 F.Supp.2d 789 (E.D. La. 2007). The decision highlights the danger to companies and corporate officials of haphazard email use.

In re Info. was a consolidated case involving two derivative actions brought by two families against each other. *Info. Mgmt.* at 2-4. Through trusts, each family owned 50 percent of the company, Information Management Services, Inc. (the "Company"), which was privately held. *Id*. Each of the family trusts filed a derivative action on the Company's behalf against members of the other family alleging breach of fiduciary duty. *Id*. The two actions were consolidated. *Id*. at 4.

During discovery, the Company learned that certain senior corporate officers (family members of one of the two feuding families) had sent emails to their individual lawyers using the Company's email account. *Id*. at 5-6. The other family moved to compel production of those emails, arguing that because the corporate officers used the Company's email account, "their emails were not 'confidential communications'" protected by the attorney-client privilege. *Id*. at 6-7.

Vice Chancellor Laster first observed that "Delaware Courts have not addressed whether an employee has a reasonable expectation of privacy in a work email account." *Id*. at 7-8. In deciding that the corporate officers' emails were not privileged, he applied the Southern District of New York's four-part test announced in *In re Asia Global Crossing, Ltd.*, 322 B.R. 247 (Bankr. S.D.N.Y. 2005): "(1) does the corporation maintain a policy banning personal or other objectionable use, (2) does the company monitor the use of the employee's computer or e-mail, (3) do third parties have a right of access to the computer or e-mails; and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?" *Id*. at 9 (quoting *Asia Global*, 322 B.R. at 257). Affirmative answers to some or all of these questions militate against a finding that the employee's intent to communicate in confidence was "objectively reasonable." *Id*. (quoting *Asia Global*, 322 B.R. at 258). The Court concluded that three of the four factors favored a finding that the documents were not privileged and one factor was neutral. *Id*. at 10-19. Accordingly, the Chancery Court granted the motion to compel and ordered the corporate officers to produce their email communications with their counsel. *Id*. at 31. In this regard, we note that our firm's employment lawyers routinely advise clients to establish policies and procedures to try to eliminate the expectation of privacy in emails sent from company email accounts.

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There are many examples of litigation where corporate officers have retained counsel separate from the company's counsel. The derivative case in *In re Info.* is one example. A second example involves a situation where a company and its officers are sued as co-defendants, and the company retains counsel and the officers are represented by one or more separate attorneys. In this scenario it would not be unusual if the officers utilized a company email account to communicate with his or her counsel. Setting aside the case where the company and its officers may have entered into a joint defense or common interest agreement, the developing case law, including *In re Info.*, suggests that such practices should be reevaluated and likely stopped.

The Chancery Court reached its decision on the admittedly unusual facts of the case before it. Nevertheless, courts increasingly scrutinize the assertion of the attorney-client privilege and work-product immunity in the corporate environment. Experienced trial attorneys know that emails rarely help, and often hurt, their clients. *In re Info.* is another reminder that companies and their officers must be diligent in their use of electronic communications.

This document is intended to provide you with general information regarding email practices. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact one of the attorneys listed or your regular ***Brownstein Hyatt Farber Schreck, LLP*** *attorney. This communication may be considered advertising in some jurisdictions.*

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