Court Applies the "At Issue" Doctrine

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In his October 23, 2013 “Privilege Points” release, Tom Spahn discusses waiver by placing privileged communications “at issue.”

The "at issue" doctrine represents the most frightening type of implied waiver. Litigants can trigger such a waiver without disclosing, referring to, or relying on privileged communications. Instead, an "at issue" waiver can occur if litigants assert some position that necessarily places "at issue" such privileged communications.

In Gefre v. Davis Wright Tremaine, LLP, 306 P.3d 1264 (Alaska 2013), shareholders filed a derivative action against a company's director and former law firm. The shareholders alleged that defendants engaged in fraudulent conduct of which the shareholders were unaware – although they were represented at the time by their own lawyer. The court found an "at issue" waiver – explaining that the shareholders "cannot be permitted to thrust their lack of knowledge into the litigation while simultaneously retaining the attorney-client privilege to frustrate proof of knowledge that negates the very foundation necessary to their positions." Id. at 1280. The court ordered the shareholders to produce communications with their lawyer during the time they claimed ignorance of defendants’ alleged wrongdoing.

Corporations and their lawyers should be wary of assertions that might trigger a stealthy "at issue" doctrine waiver.