North Carolina State Court Analyzes Privilege Protection for Communications Among Corporate Affiliates

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In his November 13, 2013 “Privilege Points” release, Tom Spahn discusses privilege protection for communications involving separate corporate affiliates:

One surprisingly open question in corporate privilege law involves the legal basis for corporations to claim privilege protection for their lawyers' communications with their corporate affiliates' employees. Various courts have found that: (1) a corporation's lawyer represents the whole corporate family as a single "client"; (2) the lawyer represents the affiliated corporations as "joint clients"; or (3) the privilege rests on a common legal interest among the corporate affiliates.

In SCR-Tech LLC v. Evonik Energy Services LLC, 2013 NCBC 42 (N.C. Super. Ct. Aug. 13, 2013), a North Carolina court reviewed the very sparse case law on this issue. The court dealt with communications to and from plaintiff SCR-Tech: (1) when the company was partially owned by Ebinger; (2) when the company was then sold to, and wholly owned by, Catalytica, and (3) when the company later entered into a "common interest agreement" with Ebinger, because both faced similar litigation. The court applied a sort of sliding scale, considering both the percentage of ownership and any "shared legal interest." Id. ¶ 18. The court concluded that the privilege protected communications during all three situations, because (1) SCR-Tech's shared legal interest with Ebinger meant that the court did not have to determine whether Ebinger's 37.5% ownership (which gave it control) was "too limited" to assure privilege protection by itself; (2) Catalytica's 100% ownership of, and shared legal interest with, SCR-Tech assured privilege protection; (3) the "common interest" doctrine could protect communications between SCR-Tech and its former controlling shareholder Ebinger even in the absence of any corporate affiliation at that time. Id. ¶¶ 15, 19-26.

The court's most significant contribution to the scant jurisprudence involves the recognition that the privilege can protect corporate affiliates' communications based on control rather than 100% ownership. In nearly every situation, corporate affiliates should be able to satisfy the "shared legal interest" part of the equation.