Can Companies Rely on a Special Litigation Committee Report to Dismiss Derivative Cases — Without Disclosing the Report?

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In his October 29, 2014 “Privilege Points” release, Tom Spahn discusses privilege issues unique to shareholder derivative cases.

When shareholders file a derivative case, companies often form a special litigation committee to investigate the alleged wrongdoing. If the report exonerates management, the company then relies on the report to seek the derivative case's dismissal. If the plaintiffs seek access to the report, can the company withhold privileged or work product-protected portions?

In *TP Orthodontics, Inc. v. Kesling*, the company redacted 120 pages of a special litigation committee's 140-page report before producing it to the derivative plaintiffs. The trial court granted plaintiffs' motion to compel production of the entire report. The appellate court affirmed — but the Supreme Court reversed. 15 N.E.3d 985 (Ind. 2014). The Court upheld the company's redaction of any opinion work product, which deserves absolute protection under Indiana law. The Court also rejected the derivative plaintiffs’ argument that the company had put the special litigation committee's good faith "at issue" and thus impliedly waived its attorney-client privilege. The Court noted that "it is the . . . shareholders who put the [special litigation committee's] good faith, or lack thereof, at issue by filing a derivative suit." *Id.* at 966. The Court ultimately ordered an *in camera* review to gauge the company's protection claims.

Although litigants' reliance on privileged communications to gain an advantage in litigation normally creates a recipe for an implied waiver, most courts conduct a different analysis in the derivative context.