Carrie Huff Discusses Attorney-Client Privilege With Private Equity Law Review

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Haynes Boone Partner Carrie Huff talked with *Private Equity Law Review* about a Delaware Court of Chancery decision that addresses attorney-client privilege issues.

Below is an excerpt:

… the Chancery Court said emails containing legal advice about litigation between SoftBank Group Corp. (SoftBank) and The We Company (WeWork) were not protected by attorney-client privilege because Softbank employees communicated using their email accounts at Sprint, Inc. (where they were also employed).

Loss of privilege in that scenario could potentially apply to outside directors, including sponsor-appointed directors on the boards of portfolio companies. This article summarizes the ruling and provides insights from attorneys about the implications for PE (private equity) sponsors that appoint employees to portfolio company boards.

Takeaways for PE Sponsors

Several experts have commented on the possible ramifications of the *WeWork* decision on privilege for outside directors on company boards. If an outside director uses his or her primary employer's email account to send or receive emails related to the company on whose board he or she serves, those emails may not be covered by attorney-client privilege if the primary employer has access to them.

The potential for a waiver of privilege in day-to-day emails exchanged among persons with multiple roles in affiliated companies is surprising, agreed Haynes Boone Partner Carrie Huff. "People are not necessarily thinking about potentially losing attorney-client privilege when they are sharing information among people they consider colleagues, under the same corporate umbrella."

Common Interest Doctrine

If the relationship is between a parent company and minority-owned subsidiary, however, the analysis may require an additional step. If the parent and the subsidiary share in-house counsel, the joint-client reasoning could apply. If the two entities are represented by separate counsel, however, the common interest doctrine may apply. The common interest doctrine only applies when two companies share a common legal interest; a common business interest is insufficient.

The common legal interest doctrine varies significantly by jurisdiction, however, Huff cautioned. Some jurisdictions may take a narrow scope approach, which requires actual or threatened litigation, versus a broader approach that encompasses common legal interests.

Be Mindful

A more conservative approach may be merited for a portfolio company that is not incorporated in Delaware because Delaware law is less likely to be applied than for companies incorporated in Delaware, Huff counseled.

Those additional measures are worth the effort they require, Huff added, as *WeWork* was somewhat troubling for lawyers who represent companies and businesspeople. “Privilege allows clients and attorneys to talk freely and discuss legal advice. If privilege is uncertain, it has a chilling effect.”

Consider Portfolio Company Email Accounts for Board Designees

If a portfolio company opts to assign a company email account to the PE fund board designee, the designee should use the account only for company-related emails. “They should not commingle it with an email account they use for any other portfolio companies or for personal emails,” Huff advised.

Excerpted from *Private Equity Law Review*. To read the full article, click here.