

# Court of Chancery Upholds Special Litigation Committee's Privilege against Derivative Plaintiff Tasked with Pursuing Claims

Related People:  
Sarah E. Delia

## Delaware Law Update

07.31.2020

*In re Oracle Corp. Deriv. Litig.*, C.A. No. 2017-0337-SG (Del. Ch. July 9, 2020)

On July 9, 2020, the Court of Chancery issued one of its latest opinions in a long-running derivative litigation filed by Oracle stockholders challenging Oracle's November 2016 \$9.3 billion acquisition of NetSuite Inc.

After the lead plaintiff overcame an initial motion to dismiss, Oracle's board of directors formed a special litigation committee (the "SLC") to consider whether prosecution of the derivative claims was in Oracle's best interests. The SLC reportedly requested documents from seventeen individuals or entities and interviewed forty witnesses. The committee ultimately concluded that it was in Oracle's best interests to allow the lead plaintiff to continue to prosecute the action on Oracle's behalf. In light of the SLC's decision, the plaintiff subpoenaed the SLC and its counsel for the documents and information received through the committee's investigation and the SLC's work product. The SLC, Oracle, and the individual defendant directors and officers objected, arguing that because the SLC members were Oracle directors, the SLC had far greater access to company information than a stockholder-plaintiff normally would obtain through discovery.

The lead plaintiff moved to enforce the subpoenas; Oracle and certain individual defendants moved for a protective order. On December 4, 2019, the court issued a Memorandum Opinion finding that the lead plaintiff was "presumptively entitled to the production of all documents and communications actually reviewed and relied upon by the SLC or its counsel in forming its conclusions that (i) it would not be in Oracle's best interests to seek to dismiss the derivative claims and (ii) it was in Oracle's best interests to allow the Lead Plaintiff (rather than the SLC) to proceed with the litigation on behalf of Oracle." Critically, however, Vice Chancellor Glasscock also held that "[t]his universe of documents to which the Lead Plaintiff is presumptively entitled is subject to, and limited by," certain objections raised by the SLC, its counsel, Oracle, and the individual defendants. Considering those objections, the court ruled that the lead plaintiff "lack[ed] a legally cognizable basis to compel production of the SLC's documents and communications subject to privilege and work

product protection at this time.” The court determined that the lead plaintiff had not made the required showing under court of Chancery Rule 26(b)(3) “that it is unable to obtain the substantial equivalent of the SLC’s work product by other means without undue hardship” so as to warrant the invasion of the SLC’s applicable privileges and protections. Rather than vitiate privilege, the court ordered the SLC to produce a privilege log of all documents within the scope of the court’s ruling that the committee withheld on privilege or immunity grounds.

At issue in the court’s July 9 opinion is the privilege log produced pursuant to the court’s December 4 ruling (the “Privilege Log”) and the lead plaintiff’s related motion to compel. Following production of the Privilege Log, the lead plaintiff moved to compel the production of forty-two of the fifty-seven items on the log. The motion raised two general questions. First, was the SLC entitled to protect the items sought from production and, if so, has the SLC regardless waived any applicable protection? And second, did the SLC’s refusal to share the logged items with the lead plaintiff constitute a breach of fiduciary duty by the members of the SLC?

Analyzing these questions in turn, Vice Chancellor Glasscock upheld the SLC’s assertion of work product protection. The court provided a helpful overview of the origins and purpose of the work product protection doctrine, explaining that “[u]nder Chancery Court Rule 26(b)(3) a party may obtain production of materials protected by the work product doctrine ‘only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.’” The court noted that attorney opinion work product was subject to even more rigorous protection “unless the requesting party can show that it is directed to the pivotal issue in the current litigation and the need for the information is compelling.” For each of the contested items in the Privilege Log, the court concluded that the lead plaintiff failed to make the required showing that it would be unable without undue hardship to obtain the information or the substantial equivalent thereof by other means. Critically, the court rejected the argument that the lead plaintiff shared a common legal interest with the SLC or that principles of efficiency warranted a departure from the foregoing standards.

The lead plaintiff next argued that even if the items sought were protected, the SLC nonetheless waived any such protection through the disclosure of work product in mediation statements exchanged between the SLC and two defendants during the parties’ formal nonbinding mediation. The court rejected this argument, citing long-standing precedent holding that “a finding of waiver of opinion work product protection should only be made in cases of the most egregious conduct by the holder of the privilege.” The court concluded that the SLC had a reasonable expectation of privacy against the lead plaintiff when it exchanged its mediation statement.

Finally, the court addressed the lead plaintiff’s argument that the SLC’s refusal to produce privileged and protected material constituted a breach of fiduciary duty. The court first noted that the SLC’s decision not to turn over the protected materials to the lead plaintiff was not reviewable under the two-step inquiry outlined in *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981) for a committee’s post-investigation recommendation of dismissal. “Instead, the SLC retains the standard presumption of business judgement [sic] in connection with its assertion of work product protection.” The court declined to consider the issue further given that no such claims for breach of fiduciary duty had been formally asserted in the action.

The court’s July 9 opinion sets a helpful marker on issues of first impression regarding the rights and protections afforded to special litigation committees tasked with investigating derivative claims. This ruling affirms that, absent special circumstances meeting the standards for disclosure in Court of Chancery Rule 26, special litigation committee work product will retain applicable privileges and protections despite a decision to permit the stockholder-plaintiff to pursue claims on the company’s behalf.