

Protecting Internal Investigations: The Indiana Supreme Court Weighs In

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As we wrote on [August 22, 2014](#), corporate internal investigations may be harder to protect following the Delaware Supreme Court's decision in *Wal-Mart Stores, Inc. v. Indiana Electrical Workers Pension Trust Fund IBEW*. A recent ruling from the Indiana Supreme Court, however, provides corporations a bit more certainty and suggests the state may be more business-friendly than Delaware. The Indiana decision, *TP Orthodontics, Inc. v. Kesling*, hints at an expansion of what a corporation must disclose in their Special Litigation Committee (SLC) reports when shareholders contest the good-faith nature of the SLC's investigation. At the same time, though, the Supreme Court refused to limit the application of the attorney-client privilege to such documents. In *TP Orthodontics*, the Indiana Supreme Court reversed a Court of Appeals decision that upheld the trial court's decision to compel production of the full, un-redacted report issued by TP's SLC. Shareholders, believing that the SLC did not make a good-faith investigation into a derivative claim levied against the corporation, requested the report in discovery. But, claiming attorney-client and work-product privileges, TP refused to hand over the full report—instead redacting 120 out of 140 pages. The shareholders argued that access to the full report was necessary to determine whether the SLC's investigation was, in fact, conducted in good faith. The trial court, and subsequently the Indiana Court of Appeals, agreed with the shareholders. The Supreme Court overturned the lower court decisions, but ruled that TP may have to disclose more than just the portions of the SLC report describing the methodology of the investigation. The Court noted that shareholders challenging the good-faith nature of a SLC investigation are entitled to information regarding the quality of the investigation, not merely the procedures used. Accordingly, the Court held that it was not enough for TP to disclose only the *quantity* of interviews conducted, ordering the company to further produce those portions of the report related to the *quality* of the interviews. Still, the Court ruled favorably for the corporation in that both the work-product and attorney-client privileges applied to the SLC report under these circumstances. The Court thus rejected the Court of Appeals' conclusion that the attorney-client privilege was "waived because the [SLC] report is necessary to the litigation and requiring its production comports with fairness." Importantly, though, the privileges were not available to shield the entire SLC report from disclosure. The Court ordered TP to specifically identify the privileged portions of the report and remanded the issue to the trial court to conduct an in-camera review. This decision presents both good news and bad news for corporations defending the conclusions of their SLCs against aggrieved shareholders. The Indiana Supreme Court has both developed rules regarding what should be disclosed in SLC reports and bolstered the attorney-client and work-product privileges as they apply to such reports. As mentioned above, *TP Orthodontics* comes in the wake of a groundbreaking Delaware Supreme Court case that expanded shareholder access to a corporation's privileged internal documents. In *Wal-Mart*, the Delaware Supreme Court affirmed the "fiduciary exception" to the attorney-client privilege, reinforcing shareholder access to

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privileged internal documents in certain circumstances. While the holding in *TP Orthodontics* is somewhat narrow, it indicates that Indiana is more corporate-friendly than Delaware when it comes to protecting internal investigations.