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WHO OWNS THE SELLER'S PRIVILEGED COMMUNICATIONS FOLLOWING A MERGER?



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Who controls a seller's privileged communications following a merger or acquisition? That is an important—and sometimes thorny—question that may arise when the buyer and seller end up in litigation after the deal closes. Buyers may try to gain access to pre-closing communications, arguing that they acquired those communications in the merger. Sellers, on the other hand, typically want to maintain control over their privileged communications and resist any argument that they waived that privilege when transferring email data to the buyer's management.

As a general rule, the United States Supreme Court has held that the attorney-client privilege transfers from seller to buyer in a corporate transaction. See *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 349 (1985). But different jurisdictions have taken different approaches to this issue depending on the structure of the transaction and the nature of the communications at issue.

In a 2013 decision involving a post-merger dispute between a buyer and seller, the Delaware Court of Chancery held that privilege over the target company's pre-closing communications, including communications with the target company's deal counsel concerning the merger itself, transferred to the buyer at closing. *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 80 A.3d 155, 162 (Del. Ch. 2013). The Court's decision was based largely on the statutory language of Section 259 of the Delaware General Corporation Law, which generally provides that "all of the [target's] property, rights, privileges, powers . . . and all and every other interest" becomes the property of the surviving corporation. This decision is often cited as establishing the default rule under Delaware law.

Other jurisdictions have taken a different approach to communications relating to the transaction itself. In a post-closing dispute between the selling shareholder and target company, the New York Court of Appeals held that while control over the target company's general business communications passed to the buyer, control over privileged communications relating to the merger were retained by the target company and the selling shareholder. *Teki-Plex, Inc. v. Meyner & Landis*, 674 N.E.2d 663, 671-72 (N.Y. 1996). The Court reasoned that granting buyer control over the seller's privileged deal-related communications would "thwart, rather than promote, the purposes underlying the privilege." *Id.* at 671.

While few Minnesota cases have addressed these privilege transfer issues, the Minnesota District Court adopted the *Tekni-Plex* court's reasoning in *Lawrence v. Rihm Family Companies*, 2020 WL 958726 (Minn. Dist. Ct. Jan. 13, 2020), ruling that the sellers retained control over their pre-closing privileged communications concerning the acquisition at issue.

Lawrence involved a post-closing dispute between the former shareholders of a truck and trailer leasing business and the buyer. After the sellers sued the buyers for nonpayment, the buyers learned that data systems provided to them after closing included potentially privileged communications between the sellers, the target company, and their deal counsel. After a dispute arose over the buyer's authority to view those communications, the court, citing *Tekni-Plex*, concluded that the seller retained control over its pre-closing privileged communications concerning the transaction. *See id.* at *4. It noted that "at the time [sellers] engaged in communications with [seller's deal counsel] regarding the Stock Purchase Agreement, [seller and buyer] were adverse parties," and buyer should not be allowed to control those communications solely through the acquisition. *Id.*

The court further concluded, however, that because managers of the target corporation authorized the transfer of privileged deal communications to the buyer's server at closing, there was a "knowing and voluntary waiver" of the privilege by the target corporation. *See id.* at *7.

The selling shareholders then sought a writ of prohibition in the Court of Appeals to prevent the district court from enforcing its discovery order. The Court of Appeals reversed the district court's waiver ruling, holding that the target corporation and the shareholders were co-clients of the same law firm, and that when an attorney represents more than one client, "those clients are considered joint clients of the attorney and any co-client may invoke attorney-client privilege." *In re Lawrence*, 954 N.W.2d 597, 602-03 (Minn. Ct. App. 2020). The end result was that the buyer could not view the seller's pre-closing privileged communications.

Ultimately, the lesson from cases like *Great Hill, Tekni-Plex*, and *Lawrence* is that different jurisdictions take different approaches to post-closing privilege transfer issues, and that while certain general rules may be gleaned from the cases, the outcome may depend on the particular transaction and the privileged communications at issue. Practitioners representing parties in mergers and acquisitions should take note of the relevant jurisdiction's post-merger privilege transfer law and take steps to address control over the seller's pre-closing communications in the merger agreement where possible.

Michael helps clients resolve high-stakes commercial disputes and complex tax controversies at Anthony Ostlund Louwagie Dressen & Boylan P.A. A former auditor for Deloitte, Mike, brings a business acumen and strategic perspective to his clients on a broad range of matters in state and federal courts and international arbitration forums involving complex business matters and disputes stemming from merger and acquisition transactions. Mike has deep experience working with consultants and testifying experts in forensic accounting, financial valuation, and economic damages analyses.

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