

December 5, 2013

Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP

Delaware Court of Chancery Rules that Attorney-Client Privilege Passes as a Matter of Law to the Surviving Corporation in a Merger

In a recent opinion, the Delaware Court of Chancery (Strine, C.) found that under the unambiguous language of Section 259 of the Delaware General Corporation Law (“DGCL”), the attorney-client privilege of an acquired corporation passes as a matter of law with all other privileges to the surviving corporation in a merger.

The Court distinguished *Tekni-Plex, Inc. v. Meyner and Landis*,¹ in which the Court of Appeals of New York concluded, in the context of a disqualification of attorney action, that a Delaware corporation’s pre-merger attorney-client communications relating to the deal did not pass to the surviving corporation because of public policy issues relating to New York attorney-client privilege law. It noted that under Delaware law, there is no policy gap for the Court of Chancery to fill because the Delaware legislature unequivocally provided in Section 259 of the DGCL that *all* privileges of the acquired corporation pass to the surviving corporation in a merger and that “privileges” include the attorney-client privilege. The Court also rejected an argument that it had previously adopted the *Tekni-Plex* decision in *Postorivo v. AG Paintball Holdings, Inc.*,² finding that in that case the Court did not consider the validity of *Tekni-Plex* under Delaware law because the case involved a waiver of the attorney-client privilege that had been explicitly retained by the sellers under an asset purchase agreement that was governed by New York law.

The Court indicated that sellers could contractually carve out a transfer of the attorney-client privilege if they wanted to retain it, an approach that the Court noted has been utilized in certain private company mergers. A selling party with concerns about future assertions or the waiver of privilege should keep in mind the need to negotiate for such an express contractual provision. Such a provision might, among other things, provide for an up-front waiver from the buyer of the target to allow the target’s counsel in the

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transaction to continue to represent the sellers thereafter, address which individuals or representatives of the sellers have the right to waive the retained privilege, and ensure that the seller's personnel have the right to have access to written records of legal advice (such as emails) provided to management or the board of the target company prior to the merger.

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ENDNOTES

- ¹ 674 N.E.2d 663 (N.Y. 1996).
- ² 2008 WL 343856 (Del. Ch. Feb. 7, 2008).

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