

Preserving a Seller's Attorney-Client Privilege Post-Closing

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As is the case in most merger transactions, both the buyer and seller retain their own counsel. Generally speaking, pre-closing communications between the buyer or seller and their counsel are subject to the attorney-client privilege. Upon closing of a merger transaction, all assets, including all privileges, of the buyer and seller vest in the surviving entity as a matter of law. As such, a buyer will likely come into possession of many privileged pre-closing communications between the seller and its counsel as a result of acquiring computer servers, email accounts, and other documents. Such communications may provide the buyer with useful evidence in the event of post-closing litigation which may not otherwise be admissible as a result of the attorney-client privilege. Can a seller do anything proactively to protect itself?

Recently, the Delaware Court of Chancery addressed a buyer's attempt to use attorney-client privileged communications in post-closing litigation. There, the merger agreement included a provision which, among others, preserved any attorney-client privilege which attached to pre-closing communications and prevented a buyer from using or relying on any attorney-client privileged communications in post-closing litigation against sellers. The Court of Chancery enforced the provision in the merger agreement and, as a result, rejected the buyer's attempt to use attorney-client privileged communications in post-closing litigation against sellers. Notably, the Court of Chancery also rejected the buyer's argument that sellers were required to segregate the privileged communications from the computer servers prior to them being transferred to the surviving corporation.

This case illustrates a few points. First, the attorney-client privilege is not immune from being waived. Second, although a transaction may close, post-closing litigation may arise, especially if the definitive agreement contemplates, for example, a consideration holdback, an earn-out, indemnification rights, or another post-closing obligation. Lastly, the case is a reminder that sellers should attempt to negotiate post-closing protection for pre-closing privileged communications regardless of the form of the transaction.

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