Delaware Court Describes a Frightening Post-Transaction Situation, but Offers a Solution:
Part I

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In his December 25, 2013 “Privilege Points” release, Tom Spahn discusses the privilege in the corporate acquisition context:

When one company buys another company's stock, it normally acquires all of the seller's assets, including documents in the seller's computer system, file cabinets, etc. Does the buyer also acquire privileged communications between the seller's executives and the seller's lawyers about the just-completed transaction? That outcome seems counterintuitive, because it would give the buyer immediate access to the seller's (the transactional adversary) privileged communications about strategy, possible post-closing disputes or liabilities, etc.

A Delaware court dealt with this issue in Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP, Civ. A. No. 7906-CS, 2013 Del. Ch. LEXIS 280 (Del. Ch. Nov. 15, 2013) (not released for publication). The buyer claimed that the seller had defrauded it in the purchase transaction. The buyer discovered privileged communications between the seller and its outside counsel Perkins Coie in the company's computer system. The seller had not removed those documents from its computer system before the closing, and had "done nothing to get these computer records back" since the closing a year earlier. Id. at *2. The seller claimed that the attorney-client privilege nevertheless protected those communications "on the ground that it, and not the surviving corporation [buyer], retained control of the attorney-client privilege." Id. at *3. The court rejected seller's privilege claim – relying on the Delaware General Corporation Law's clear statement that after a merger the surviving company (the buyer here) owns "all" property, privileges, etc. Id. at *4. Thus, the buyer could read and use the intimate privileged communication between the seller's executives and Perkins Coie about the transaction.

In a refreshing example of judicial helpfulness, the Delaware court then explained how future sellers could avoid this nightmarish situation. Next week's Privilege Point will describe the solution.