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

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In his January 1, 2014 “Privilege Points” release, Tom Spahn discusses survival of the privilege following a merger or sale.

Last week’s Privilege Point described a Delaware decision holding that a company's buyer acquired ownership of "all" of the seller's property, privileges, etc. – including even privileged communications between the seller's executives and its outside counsel Perkins Coie about the transaction itself. Great Hill Equity Partners IV, L.P v. SIG Growth Equity Fund I, LLLP, Civ. A. No. 7906-CS, 2013 Del. Ch. LEXIS 280, at *4 (Del. Ch. Nov. 15, 2013) (not released for publication) (citation omitted).

The Delaware court noted that sellers can "negotiate[] special contractual agreements to protect themselves and prevent certain aspects of the privilege from transferring to the surviving corporation in the merger." Id. at *17. The court pointed to a 2008 Delaware decision approving a purchase transaction provision specifically excluding from a sale "all rights of the Sellers under this Agreement and all agreements and other documentation relating to the transactions contemplated hereby." Id. at *18 n.27 (citing Postorivo v. AG Paintball Holdings, Inc., Consol. Civ. A. Nos. 2911- & 3111-VCP, 2008 Del. Ch. LEXIS 17, at *6 n.5 (Del. Ch. Feb. 7, 2008) (unpublished opinion)). The court then reiterated that "the answer to any parties worried about facing this predicament in the future" is to "exclude from the transferred assets the attorney-client communications they wish to retain as their own." Id. at *20.

Transactional lawyers should remember the potentially disastrous default rule, and how to avoid it.