Preserving a Seller's Attorney-Client Privilege After *Great Hill*

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In *Great Hill Equity Partners IV v. SIG Growth Equity Fund I*, Del. Ch., C.A. No. 7906-CS (Nov. 15, 2013), a lawsuit arising from a private-company merger, the buyer discovered certain of the seller's privileged communications, including privileged communications concerning the merger negotiation, in computer files that had been delivered to the buyer in the merger. The Delaware Court of Chancery held that under Section 259 of the Delaware General Corporation Law, the seller's attorney-client privilege, including the seller's privileged communications concerning the merger negotiation, vested in the surviving corporation, which, following the merger, was a wholly owned and controlled subsidiary of the buyer. In this article, we identify several issues that emerge from the decision for practitioners' consideration.

First, the *Great Hill* court made clear that parties can negotiate to prevent certain aspects of the privilege from vesting in the surviving corporation in a merger. Thus, parties seeking to avoid the default rule under Section 259 can exercise their contractual freedom to exclude expressly identified categories of privileged communications from the assets that would otherwise vest in the surviving corporation in a merger.

If a seller contracts to retain privileged communications, it nevertheless must take (and should document) reasonable steps to segregate that information from the files delivered to the buyer. Because the *Great Hill* court held that "the attorney-client privilege for the documents passed as a matter of law to the surviving corporation in the merger," it did not reach "the substantial issue of whether the seller waived the privilege through its lengthy failure to take any reasonable steps to ensure the buyer did not have access to the allegedly privileged communications."

How, then, should a seller segregate privileged information, particularly with respect to electronic data? One potential method (among many other potential alternatives), at least with respect to email, is to create a "privilege" email account (e.g., privilege@company.com) and include that email address on all privileged emails concerning the merger negotiation. In theory, the seller would create a comprehensive set of privileged emails and then be able to remove all copies of those emails from its servers. Of course, this method is subject to error, as it requires the sender of every email to adhere to the approach. But the standard for protecting the privilege is not perfection; rather, it is reasonableness.

Second, practitioners should assume that the default rule under Section 259 applies to public-company as well as private-company mergers. Section 259 doesn't differentiate between the two, and we find no basis to distinguish them for purposes of the default rule. While more private-company mergers may be affected by the holding in *Great Hill* (given that, unlike in the public-company context, the representations and warranties frequently survive the closing and that various types of post-merger claims may arise between buyers and sellers, including claims involving escrows, holdbacks and earnouts), public-company mergers

are not immune from this issue. A buyer, for example, could bring post-closing fraud claims arising from a public-company merger. In such a case, the defendants, presumably the former officers and directors of the acquired company, may seek to invoke the acquired company's attorney-client privilege with respect to pre-merger communications with the acquired company's counsel.

Third, substantial stockholders of companies that might be acquired would be well advised to retain their own counsel, separate from the company's counsel. Without separate counsel, if the default rule under Section 259 applies, any privileged communications between the stockholder and company counsel (under the common-interest privilege or otherwise) could vest in the buyer. With separate, independent counsel, a substantial stockholder can better protect its privileged communications with counsel. As an aside, a substantial stockholder should never assume that the common-interest privilege will protect any and all confidential communications between it and company counsel. Under Delaware law, the common-interest privilege is narrowly applied and warrants thorough examination under the facts and circumstances of each case.

Fourth, and finally, the default rule from *Great Hill* will not necessarily apply to acquisitions effected through means other than a merger. For example, whether the default rule applies to an asset sale remains an open question because such a transaction is not governed by Section 259. Although in 2008, in *Postorivo v. AG Paintball Holdings*, Del. Ch., C.A. Nos. 2991-VCP & 3111-VCP (Feb. 7, 2008), the Court of Chancery discussed the transfer of attorney-client privilege in an asset sale (concluding that under the contract at issue, the seller retained the attorney-client privilege concerning the sale negotiation), that case was decided under New York, not Delaware, law.

Each of these issues will undoubtedly be explored further by commentators and, at some point, the Delaware judiciary. Until then, practitioners should not read *Great Hill* too narrowly (by limiting it to private-company mergers) or too broadly (by assuming that the default rule applies to non-merger transactions), should rely on parties' contractual freedom to devise an appropriate disposition of the sellers' attorney-client privilege, and should ensure that reasonable steps are taken to preserve the privilege.

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