Fox Rothschild LLP
ATTORNEYS AT LAW

DECEMBER 2013

CORPORATE
ALERT

FOLLOWING A MERGER, WHO GETS TO CLAIM THE ATTORNEY-CLIENT PRIVILEGE AS TO PRE-MERGER COMMUNICATIONS?

By Michael P. Weiner

As corporate/transactional practitioners, we hold fast to the belief that our deals will never result in litigation. Unfortunately, despite our very best effort, that is not always the case, and when that occurs, an issue is presented as to the application of the attorney-client privilege to pre-closing communications with counsel. The Delaware Court of Chancery recently ruled in *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP* (Del. Ch. No. 7906-CS, 11/15/13) that in the absence of specific contractual provisions to the contrary, the surviving corporation in a merger retained control of the attorney-client privilege as to communications relating to a merger transaction.

In the *Great Hill* matter, the plaintiffs claimed that the defendants (comprised of former stockholders and representatives of Plimus, Inc.) fraudulently induced the plaintiffs/buyers to acquire Plimus in a merger transaction in which Plimus was the surviving entity. After initiating litigation, the plaintiffs notified the defendants/sellers that they had located certain pre-merger communications among the sellers and their counsel on the Plimus computer system. The sellers then asserted attorney-client privilege over those communications on the theory that the sellers retained control over the privilege notwithstanding the merger.

Chancellor Strine, applying a strict statutory analysis, held that under Section 259 of the Delaware General Corporation Law, "all privileges of the constituent corporations pass to the surviving corporation in a merger." Consequently, the defendants/former stockholders of the target company, which was the surviving entity in the transaction, could not claim that communications between Plimus and its transaction counsel that remained on Plimus' computer systems following the merger were subject to the attorney-client privilege. A contrary result, said Chancellor Strine, would violate the overriding presumption that the Delaware legislature chose precise language in drafting Section 259. The court further stated that if the Delaware General Assembly had intended to exclude the attorney-client privilege from the spectrum of "privileges" contemplated by Section 259, it could have easily done so.

As a practical matter, the court noted that parties concerned about potentially privileged communications can agree to exclude from the assets transferred to the surviving corporation in a merger transaction any pre-merger attorney-client communications. In this regard, sellers and counsel in private company mergers or other sell-side transactions should carefully consider including provisions in the definitive transaction documentation that specifically exclude from the assets being conveyed at closing any attorney-client privilege of the seller pertaining to the transaction as well as all emails, correspondence, invoices and other documents reflecting communications between the seller and its counsel relating to the transaction. In order to further enhance the desired effect of the contractual provision, sellers should take steps in advance of closing to remove from computer systems being transferred to the buyer any communications that may properly be retained by the sellers under the terms of the definitive agreement. Buyers may want to evaluate the benefit of acquiring the seller's transaction-related communications and controlling the related attorney-client privilege, but this may prove to be a difficult concession for the seller to make in the absence of a positive purchase price adjustment to address the theoretical risk to the seller.

For more information about this alert or if you have any questions or concerns, please contact Michael P. Weiner at 609.844.3032 or mweiner@foxrothschild.com or any member of Fox Rothschild's Corporate Practice.