



Preserving Privilege Post-Merger

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Background

RSI arose out of RSI Holdco, LLC's (Buyer) acquisition of Radixx Solutions International, Inc. (Seller). As part of the merger, the Buyer took possession of the target's computer systems and email servers, which contained approximately 1,200 premerger emails between the Seller's owners, representatives and counsel. The Buyer subsequently sought to use these emails, including those concerning merger negotiations, in post-closing litigation against the designated representative for the Seller's shareholders (Representative). However, the Seller had protected itself with a provision in the merger agreement that contained four important elements.

First, the provision expressly preserved privilege attaching to premerger communications between the Seller and its attorneys. Second, it assigned control over privileges to the Seller's Representative. Third, it required the Buyer and the Seller to "take the steps necessary to ensure that any privilege ... shall survive the Closing, remain in effect and be assigned to and controlled by [the Seller's Representative]." Finally, the provision included a "no-use clause," meaning an express agreement by the Buyer not to use privileged communications in post-closing litigation against the Seller. These communications included "any privileged attorney client communication" between the Seller and its attorneys "prior to the Closing Date." To circumvent this provision, the Buyer argued that the Seller had waived any claim of privilege by failing to separate out privileged emails when transferring its computers.

Court's Analysis

The court rejected the Buyer's arguments and ruled that it could not use or rely on the emails. Relying on its previous decision in *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP* (Del. Ch. 2013), the court reasoned that although privilege over premerger communications generally passes to the surviving corporation under Section 259 of the Delaware General Corporation Law, parties can "use their contractual freedom" to exclude attorney-client communications.

In this case, the Seller had negotiated the inclusion of such a provision in the merger agreement to preserve its ability to assert privilege over its premerger communications. Moreover, the provision had a no-use clause constituting a promise by the buyer not to use or rely on anything considered a privileged communication under the merger agreement. Because the no-use clause clearly defined privileged communications to encompass any communications between the Seller and its attorneys "prior to the Closing Date," whether the Seller had waived privilege **after** the closing date was irrelevant; the Buyer had still expressly agreed not to use these communications in litigation.

The court also noted that the Buyer's argument for waiver would undermine the logic of *Great Hill*, rendering contractual provisions intended to prevent the use of privileged communications in post-closing litigation meaningless. Additionally, the court pointed out that privilege could only be waived if the Buyer neglected its own promise to "take the steps necessary" to preserve it, and the court stated that Buyer could not be allowed to benefit from its own failure to ensure that privilege remained in effect. Thus, multiple clauses in the merger provision worked in concert to keep the Sellers' privileged emails out of post-closing litigation.

Takeaways

RSI is the first Delaware case since *Great Hill* to explain how to prevent premerger privileged communications from being used in subsequent litigation in a private company merger agreement. Sellers and their attorneys are advised to negotiate provisions similar to the one at issue in *RSI*. In particular, such provisions should usually contain the following elements: (1) preserve pre-closing privileged communications; (2) assign privilege to a shareholder representative; (3) the parties agree to take necessary steps to ensure that privilege remains in effect and is vested in the shareholder representative; and (4) the buyer agrees not to use pre-closing communications between the seller and its attorneys that are privileged as of the closing date in post-closing litigation.

However, sellers should also be aware that element four—the no-use clause—serves a unique purpose. A no-use clause prevents the buyer from using or relying on privileged communications in post-closing litigation, but it does not specify to whom privileges are assigned after the merger: they could pass to the seller’s shareholders, a shareholder representative, both the shareholders and their representative, or perhaps even the buyer. Thus, parties have the flexibility to draft agreements in which the buyer controls the right to assert attorney-client privilege over documents, but still cannot use or rely on these documents in a post-closing lawsuit against the seller.

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