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M&A WATCH

June 3, 2019

KEEP YOUR HANDS OFF MY PRIVILEGE! *DELAWARE REVISITS PRIVILEGED COMMUNICATIONS IN PRIVATE M&A TRANSACTIONS*

In *Shareholder Representative Services LLC v. RSI Holdco, LLC*, C.A. No. 2018-0517-KSJM (Del. Ch. May 29, 2019), the Delaware Court of Chancery applied guidance from its earlier ruling in *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 80 A.3d 155 (Del. Ch. 2013) by addressing the contractual preservation of a seller's ability to assert privilege over pre-merger attorney-client communications in post-closing litigation.

BACKGROUND

RSI Holdco, LLC ("Buyer") acquired Radixx Solutions International, Inc. ("Radixx") in September 2016. As a result of the private company merger, Buyer came to possess privileged pre-merger emails between Radixx and its outside counsel. The merger agreement between the parties contained a provision seeking to (1) preserve privilege over pre-merger communications; (2) assign control over such privileged communications to the designated representative of sellers; (3) have the parties take the necessary steps to safeguard the privileges; and (4) prevent Buyer and its affiliates from using privileged communication in post-closing litigation against the sellers.

Despite the explicit contractual language precluding the use of such privileged communications, Buyer sought to use the privileged emails against the sellers in post-closing litigation. Buyer asserted that the privilege-allocation provision was inapplicable for two reasons. First, Buyer argued that the sellers' post-closing conduct effectively

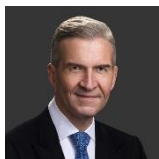
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constituted a waiver of the protection. The *RSI* court found this line of reasoning unpersuasive, as the merger agreement provided that “privileged communications” included “any privileged attorney client communications between [Radixx and its outside counsel] ...prior to the Closing Date.” Thus, even if the privilege had been waived post-closing, the court concluded that the merger agreement prohibition still applied.

Second, Buyer contended that, like the sellers in *Great Hill*, the sellers in *RSI* had failed to take “steps to segregate” or “excise” the privileged communications prior to the merger. In *Great Hill*, the court determined that because the merger agreement lacked a carve-out provision excluding privileged communications and the seller did not take any steps to otherwise exclude such communications from the assets transferred, the privilege over such communications passed to the surviving corporation. In so holding, the court advised future sellers to “use their contractual freedom” to preserve privilege. The *RSI* court found that the sellers here “heeded the *Great Hill* court’s advice” to negotiate for contractual provisions in the merger agreement that not only preserved their right to assert privilege over pre-merger communications, but also prevented Buyer from using those communications against them in post-closing litigation.

OUR VIEW

As illustrated by its holdings in *Great Hill* and *RSI*, the Delaware Chancery Court has adopted a deferential approach to the contractual freedom of parties to allocate among themselves the ownership and use of attorney-client privilege post-closing. As a result, it is critically important that parties are careful in how they negotiate attorney-client privilege allocation provisions in acquisition agreements. Sellers and their counsel should, at the very least, attempt to ensure that provisions related to privileged matters clearly and unambiguously (1) preserve the seller’s right to assert privilege over pre-merger communications between the seller and its counsel, and (2) prevent the buyer from using or relying on such communications in any post-closing litigation against the seller. Buyers will likewise want to ensure that the acquired company retains the ability to control and assert attorney-client privilege with respect to the general operation of its business prior to the closing. Balancing these interests can require careful and experienced drafting and negotiation. We welcome the opportunity to discuss any questions you might have regarding these issues.



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