

Wachtell discusses Delaware Chancery Court's Holding that Control over All Privileged Communications Passes to the Surviving Corporation in a Merger

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Last week, the Delaware Court of Chancery ruled that an acquiring merger party obtains legal control of all of a target's attorney-client communications, absent an express provision in a merger agreement to the contrary. [Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP, C.A. No. 7906-CS \(Del. Ch. Nov. 15, 2013\)](#). In so ordering, the Delaware court declined to follow a decision of the New York Court of Appeals, [Tekni-Plex, Inc. v. Meyner & Landis](#), 89 N.Y.2d 123 (1996), which held that a selling party retains control of those privileged pre-merger communications that related to the merger negotiations.

The dispute in *Great Hill* arose after the buyers brought suit alleging they had been fraudulently induced to enter into the merger transaction. The buyers notified the sellers that among the computer files acquired in the transaction were communications between the sellers and the then-legal counsel for the acquired company regarding the merger transaction—communications which were not expressly excluded from the assets transferred to the buyers in the merger agreement. Even though the sellers had made no effort to prevent disclosure to the buyers of these communications or to retrieve them, they asserted continuing control of the attorney-client privilege as to the communications. The Court of Chancery disagreed, basing its decision on Delaware General Corporation Law § 259, which provides that, in a merger, “all . . . privileges” become the property of the surviving corporation. As Chancellor Strine put it, “*all means all.*”

The Court of Chancery emphasized, however, that merging parties can modify the statutory default rule by contract—including in the merger agreement—by specifying who retains control over privileges, including privileges pertaining to the negotiation of the transaction itself. *Great Hill* also highlights the need to take effective practical steps to ensure that the parties' agreements over who maintains control over privilege are given effect, such as by taking steps to remove communications as to which the seller will continue to control privilege from the computer systems transferred to the buyer. The ruling points up the need for careful drafting to ensure the intended control of privileges post-closing, and disciplined efforts to effectuate the agreed provisions, in mergers, sales of subsidiaries, sales of assets, and other corporate transactions.