

## *Delaware Court of Chancery Holds That Pre-Merger Attorney-Client Privilege Passes to the Surviving Corporation in a Merger*

BY [THADDEUS J. MALIK](#), [EVE M. CODDON](#) & [JILL R. SHEIMAN](#)

The Delaware Court of Chancery (the “Court”) recently ruled that, absent express contractual provisions to the contrary, control of a target company’s pre-merger attorney-client communications transfers to the surviving corporation in a merger pursuant to Section 259 of the Delaware General Corporation Law (the “DGCL”). As a result, we recommend that parties to a merger discuss the intended treatment of the attorney-client privilege with respect to pre-merger communications and, if necessary, reflect their desired arrangements in the transaction documentation.

### **Background**

In *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, C.A. No. 7906-CS (Del. Ch. Nov. 15, 2013), the plaintiffs, Great Hill Equity Partners IV, LP, Great Hill Investors LLC, Fremont Holdco, Inc., and Bluesnap, Inc. (collectively, “Buyer”) acquired Plimus, Inc. (“Plimus”) in a merger pursuant to Section 259 of the DGCL. Plimus was the surviving corporation in the merger. Following the closing, Buyer discovered on Plimus’ computer system pre-merger communications between the former shareholders and representatives of Plimus (collectively, “Seller”) and Plimus’ then-counsel. Following this discovery, Buyer alleged that Seller fraudulently induced it to acquire the company. However, Seller contended that it retained the attorney-client privilege applicable to the merger and therefore asserted privilege over such communications.

### **Court’s Analysis of DGCL Section 259**

Noting that this case is an issue of “statutory interpretation in the first instance,” the Court focused on the language of Section 259 of the DGCL and deferred to the legislative intent with respect to this statute. Section 259 provides that following a merger, “all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the surviving or resulting corporation as they were of the several and respective constituent corporations.” The Court found the statute to be unambiguous reasoning that “*all* means *all* as to the enumerated categories ... [which] includes *all* privileges, including the attorney-client privilege.” The Court reasoned that the legislature would have drafted an exception into the statute if it intended the Court to carve out the attorney-client privilege for different treatment. However, the Court noted that parties are free to exercise “contractual freedom” and negotiate another outcome. Accordingly, the Court ruled that absent an express contractual provision to the contrary, “the privilege over all pre-merger communications – including those relating to the negotiation of the merger itself – passed to

the surviving corporation in the merger, by plain operation of clear Delaware statutory law under § 259 of the DGCL.”

## Practice Tip

Although treatment of the attorney-client privilege has not traditionally been a focus of merger negotiations, in light of the Court’s recent ruling in *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, consideration should be given as to the intended treatment of the attorney-client privilege with respect to pre-merger communications. In mergers governed by Delaware law, if the intent is for the surviving corporation to succeed to such privilege, then the parties may be silent in the documentation and rely on what the Court has called the “default rule.” However, if a selling party in a Delaware merger desires to retain such privilege, then this outcome should be explicitly documented. Merger agreements frequently include an acknowledgement permitting seller’s counsel to continue representing seller following the closing, including with respect to matters that may be adverse to buyer or the company surviving the merger. Treatment of the attorney-client privilege with respect to pre-merger communications could be incorporated into this provision. For example, for a selling party in a Delaware merger to retain pre-closing attorney-client privilege relating to the merger transaction, a statement could be included in the merger agreement providing that “Pre-merger attorney-client communications and attorney work-product documentation (“Privileged Property”) between Seller and [Law Firm], including those related to the transactions contemplated by this Agreement, will not pass to the surviving corporation in the merger but will remain Seller’s Privileged Property.” If the parties desire to deviate from Delaware’s default rule, we also recommend that their actions are consistent with such outcome. By way of example, the selling party should consider segregating privileged pre-merger communications from those transferring to the surviving corporation. Similarly, such communications should be deleted from the computer systems and other assets subject to the merger. However, as a security measure to protect against an inadvertent transfer of privileged materials, consideration should also be given to including a provision in the merger agreement providing that “Privileged Property inadvertently transferred from Seller to the surviving corporation will remain the Privileged Property of Seller and the surviving corporation agrees to immediately return such property to Seller.”

Notably, *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP* was determined based on Delaware law and the Court explicitly relies on Section 259 of the DGCL. Although many merger statutes are similar, there can be no assurances that another state’s merger statute, its laws applicable to privilege, and its judiciary’s interpretation thereof, will result in the same outcome. In fact, in the Court’s ruling, the Delaware Court of Chancery declined to follow a 1996 decision from the New York Court of Appeals, *Tekni-Plex, Inc. v. Meyner & Landis*, 674 N.E.2d 663 (N.Y. 1996), holding that pre-merger attorney-client communications regarding merger negotiations are retained by the seller and do not pass to the surviving corporation. Accordingly, in mergers governed by the laws of a state other than Delaware, absent clear judicial guidance to the contrary, we recommend that the parties review the applicable laws and specifically describe the intended treatment of pre-merger attorney-client communications in their transaction documentation.

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*If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:*

## Chicago

Thaddeus J. Malik  
1.312.499.6020

[thaddeusmalik@paulhastings.com](mailto:thaddeusmalik@paulhastings.com)

Jill R. Sheiman  
1.312.499.6035

[jillsheiman@paulhastings.com](mailto:jillsheiman@paulhastings.com)

## Los Angeles

Eve M. Coddon  
1.213.683.6150

[evocoddon@paulhastings.com](mailto:evocoddon@paulhastings.com)

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Paul Hastings LLP

[www.paulhastings.com](http://www.paulhastings.com)

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