

Chancery Discusses Privilege Waiver in Context of Asset Purchase

Alert

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There are recent examples of litigated disputes surrounding privilege waiver in the statutory merger context. Now, in its recent June 1, 2020 letter ruling in *DLO Enterprises, Inc. v. Innovative Chemical Products Group, LLC*, the Delaware Court of Chancery has analyzed privilege waiver issues in a dispute between parties to an asset purchase agreement.

The overarching dispute centered around which party was financially responsible for defective products that were sold pre-signing of the purchase agreement, but that were returned post-closing of the purchase agreement. Litigation was commenced and a dispute arose regarding the privilege associated with various documents responsive to discovery requests, as well as emails between the sellers and counsel on email accounts buyers acquired through the asset purchase.

Buyers sought to compel the production of two categories of responsive privileged documents:

- Documents reflecting communications between the sellers and their former attorneys who represented them in the acquisition (Category One Documents)
- Documents reflecting communications between the sellers and their former attorneys which were currently in possession of buyers because these documents were left in the acquired email accounts formerly used by the sellers (Category Two Documents)

As to the Category One documents, the court held in the asset purchase context, the seller retains pre-closing privilege regarding the agreement and negotiations unless the buyer clearly bargains for waiver or a waiver right. Here, the purchase agreement gave buyers waiver rights over the privilege relating to assets and assumed liabilities transferred to buyers. However, communications regarding the agreement and negotiations were in fact carved out as excluded assets under the purchase agreement. Therefore, the

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buyers failed to explicitly secure pre-closing privilege waiver rights.

The Category Two documents consisted of 48 pre-closing documents and 28 post-closing documents. In regards to the post-closing documents, the court found that the appropriate lens was an employee's reasonable expectation of privacy in work email. Relying on the four factor test established in the U.S. Bankruptcy Court for the Southern District of New York's ruling in *Asia Global*, the court considered whether there was a reasonable expectation of privacy in work related email. The court found that three of the four *Asia Global* factors pointed towards production and one was neutral. The court also stated that this test could be overridden. If a controlling jurisdiction has a statute on the confidentiality of work emails, that statute may alter the common law results of the *Asia Global* analysis. The court's decision on the post-closing Category Two documents remains under advisement pending supplemental briefing by the parties on the issue of statutory override.

As to the pre-closing communications in buyers' possession, the court noted the proper test may be one of inadvertent production and that the proper analysis should also consider who holds the privilege over the communications. Sellers may hold the privilege over the pre-closing emails of the target entity, such that sellers' access to the those emails would not destroy any relevant confidentiality. The court therefore requested supplemental briefing on the proper test to assess whether sellers waived privilege as to the pre-closing deal communications that remain on email accounts transferred to buyers under the purchase agreement.

In addition, the court stated the buyers' counsel's review of the content of the potentially privileged Category Two documents in their possession was inappropriate. Upon realizing buyers possessed potentially privileged documents, counsel should have abstained from reviewing their content, and instead segregated the documents, perhaps by using metadata, pending resolution of the privilege dispute. Sellers have been permitted to file a letter outlining the relief they deem appropriate to rectify this wrong if any of the Category Two documents are found to be privileged.

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