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Are Your Pre-Merger Communications With Your Client Protected? Not Necessarily

The purchaser in a corporate merger owns the seller's pre-merger communications with its lawyer, according to a recent Delaware decision. In [*Great Hill Equity Partners Iv, LP v. SIG Growth Equity Fund I, LLP*](#), the buyer sued former shareholders of the seller alleging they fraudulently induced the buyer to enter into the transaction. After acquiring the company, the buyer discovered communications between the seller and its counsel concerning the transaction in the company's computer system. When the buyer attempted to use these records in the litigation, however, the seller asserted the attorney-client privilege (even though it had done nothing during the year since the merger to segregate or protect the communications). The seller relied, in part, on a landmark New York case, [*Tekni-Plex, Inc. v. Meyner & Landis*](#), which held that (absent an agreement to the contrary) the privilege concerning general business matters transfers to the buyer after a merger. For policy reasons, however, *Tekni-Plex* carved out an exception for communications concerning the subject matter of the merger. The seller in *Great Hill* argued that, for those same policy reasons, its communications with its attorneys about the merger should be privileged.

The Delaware court rejected the seller's argument, relying on the plain language of a Delaware statute, which states 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." DGCL, § 259 (emphasis added). Unlike in *Tekni-Plex*, the Delaware court declined to create a judicial exception for privileged communications relating to the merger. Nevertheless, the court noted, the parties can contract around this statutory provision. As the court observed: "the answer to any parties worried about facing this predicament in the future is to use their contractual freedom . . . to exclude from the transferred assets the attorney-client communications they wish to retain as their own."

There is an important lesson to be learned from this decision. If a seller wishes to protect its pre-merger communications with its lawyer, it should take two precautions. First, it should include a provision in the merger agreement that expressly excludes such communications from the assets being transferred to the buyer and acknowledges that the privilege for those communications belongs to the seller after the merger. Second, it should continue to protect the privilege by carefully segregating the privileged communications from the records that are transferred to the buyer.