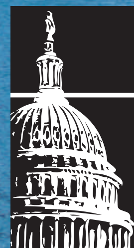
Educational Materials

Friday October 10, 2014 11:30 AM - 12:30 PM

So You Don't Want to File for Chapter 11? Exploring The Pros and Cons of Common Alternatives to Chapter 11 Including ABCs, Foreclosures, Receiverships and Other State Law Remedies

Roundtables Presented By

NCBJ | National Conference of Bankruptcy Judges



American Bankruptcy Institute

So You Don't Want to File Chapter 11?
Exploring the Pros and Cons of Common Alternatives to Chapter 11
including ABCs, Foreclosures, Receiverships and Other State Law Remedies

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AMERICAN BANKRUPTCY INSTITUTE

2014 ABI Annual Spring Meeting

Financial Professional's Role in Out-of-Court Restructuring and Dissolutions Panel

April 24 -27, 2014

Presented by:
Chris Ward, Polsinelli PC – Moderator
Katie Goodman, Grisanti, Galef & Goldress
Joseph M. Geraghty, Conway McKenzie
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Assignment for the Benefit of Creditors

A general assignment provides a means of liquidating the assets of a debtor in an orderly, controlled manner. A general assignment is a vehicle used for the sale or liquidation of a business. It is not used to financially rehabilitate or "turn the business around".

Assignments are either common law or statutory, and the law varies from state to state as to which form of assignment is utilized. Generally, states will follow one of two approaches to the assignment process. One approach requires court supervision of the assignment and the assignee; the other permits the assignments to proceed without court supervision, but require that the assignee follow state laws applicable to and governing the liquidation of a business and its assets.

Assignment for the Benefit of Creditors

- *It is easy to think of a common law assignment as similar to Chapter 7*
- *All assets of the Assignor is transferred to the Assignee*
- *The Assignee liquidates the property*
- *An Assignee may have the power to pursue preferences and fraudulent conveyances depending on state law in which the Assignment takes place*
- *Distributions made to creditors according to statutory priority and based on claims*

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Assignment for the Benefit of Creditors

The Assignee is generally someone who is not related to or directly involved in the management or the day-to-day operations of the debtor (i.e. a disinterested third party).

Assignee is usually individual experienced in the process of liquidating businesses; however an the Assignee may also be a corporate entity with such experience.

An Assignment is consummated when the Assignee accepts the Assignment Trust "contract" from the Assignor.

Upon acceptance of the assignment "contract," all of the contract, Assignor's right, title and interest in its assets is "transferred" to the Assignee for the purposes of liquidation.

The Assignee then becomes a fiduciary on behalf of any and all creditors of the debtor, as well as for the debtor and, ultimately, its owners/ shareholders.

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Assignment for the Benefit of Creditors

- *The Assignee must preserve the assets for the benefit of creditors*
- *The Assignee must liquidate and administer assets fairly*
- *The transfer of assets is subject to any and all existing liens, and the assignee is bound to honor all valid, perfected and enforceable, liens.*
- *General assignments do not typically give a debtor a discharge, as discharge of debts can only be achieved through a bankruptcy case.*

Receivership

- *Equitable proceeding in which a court appoints a disinterested person, the receiver, to receive, preserve and protect designated assets or property*
- *Federal or State*

Receivership: Common Purposes

- *Facilitating injunctive relief*
- *Taking custody of and managing property*
- *Preserving assets and business books and records*
- *Obtaining an accounting of assets, income and use of proceeds*
- *Locating hidden assets*
- *Uncovering fraud and misappropriations*
- *Exposing criminal enterprises*
- *Involuntarily dissolution*
- *Enforcing a judgment*

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Receivership: Factors

- *Probability that fraudulent conduct has occurred or will occur to frustrate opponent*
- *Imminent danger that property will be concealed, lost or diminished in value*
- *Inadequacy of legal remedies*
- *Lack of less drastic equitable remedy*
- *Likelihood that appointment of receiver will do more good than harm*
- *Contractual consent to appointment upon default*

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Receivership: Common Types

- ***Custodial Receiver***
- ***Liquidating Receiver***
- ***Interim Operating Manager, status quo***
- ***Provisional Director***
- ***Fiscal Agent***
- ***Post-Judgment Receiver***

Receivership: For the Benefit Of:

- ***Secured Lender***
- ***Judgment Creditor***
- ***Deadlocked corporate directors, LLC members or partners***
- ***Oppressed minority shareholder, member or partner***
- ***Creditors or equity holders seeking to take custody of:***
  - ***Bring and defend lawsuits; seek injunctive relief; issue subpoenas to obtain documents***
  - ***Compel testimony and the production of documents and things***
  - ***Notify customers and tenants of any change in name of payee or mailing address for payments***
  - ***Change locks and security codes***
  - ***Intercept and redirect mail***
  - ***Evict tenants***
  - ***Obtain permits as needed, such as for managing real estate projects***
  - ***Pay, where permitted, "pre-receivership" expenses***

Receivership

How the Receiver is Selected:

- *By secured lender*
- *By court*
- *By creditor's or debtor's counsel*
- *In all events, court approval is required*

The Receiver's Relationship With Other Parties:

- *Officer of the court*
- *Qualified fiduciary role with respect to debtor/company*
- *Allegiance to secured lender by virtue of authority and purpose*
- *Duty to subordinate creditors and equity interests*

Receivership: The Receiver's Duties

- ***Locate and preserve assets***
- ***Provide accounting to the court***
- ***Fulfill purpose as stated in court order establishing the receivership***

Receivership: Powers of the Receiver

- *Take possession of and mange assets, as specified in court order, including cash in bank accounts, goods, rights and credits*
- *Take possession, custody and control of licenses, documents, books and records, emails in possession of accountants, attorneys and other third parties*
- *Administer business operations as though the receiver were the owner or president*
- *Borrow money similar to bankruptcy's DIP loans, granting a super-priority lien; i.e. "receiver certificates" similar to DIP financing*
- *Manage bank accounts, change signature card, open new accounts*

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Receivership: Powers of the Receiver

- *Utilize receivership entity's tax identification number for all transactions*
- *Hire professionals such as attorneys, accountants, appraisers and auctioneers*
- *Expend funds for the preservations of assets, such as repair, maintenance, insurance, licenses, taxes, utilities and other operating expenses*
- *Buy and sell assets*
- *Enter into contracts obligating receivership assets*
- *Market and sell receivership property; sale usually requires court approval*

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Receivership: Powers of the Receiver

- *Bring and defend lawsuits; seek injunctive relief; issue subpoenas to obtain documents*
- *Compel testimony and the production of documents and things*
- *Notify customers and tenants of any change in name of payee or mailing address for payments*
- *Change locks and security codes*
- *Intercept and redirect mail*
- *Evict tenants*
- *Obtain permits as needed, such as for managing real estate projects*
- *Pay, where permitted, "pre-receivership" expenses*

Receivership: Federal vs. State

- *Advantages of Federal Receiverships over State Receiverships*
  - *National jurisdiction; solves diversity of jurisdiction problem over supervision and control of assets*
  - *"Free and clear" sales*
  - *Incorporation of bankruptcy concepts*
- *Advantages of State Receiverships of Federal Receiverships*
  - *Statutory authority for appointment of a receiver in a variety of contexts; see e.g., California code of Civil Procedure § 564*

Uniform Commercial Code (UCC) – Article 9 Foreclosure

Article 9 of the Uniform Commercial Code (UCC) governs the creation, perfection, priority, and enforcement of security interests in most types of personal property and fixtures. The UCC, which all 50 states and the District of Columbia have adopted, also governs sales of goods, leases, negotiable instruments, bank deposits and collections, letters of credit, documents of title and investment securities.

Usually considered in a "friendly foreclosures" situations where a borrower cooperates with its under-secured lender(s) to facilitate a foreclosure sale.

An Article 9 sale of by a lender that may be over-secured may draw the attention and ire of creditors who might otherwise benefit from a process that better protects their rights to the value of the assets over the amount of the secured creditor.

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Uniform Commercial Code (UCC) – Article 9 Foreclosure

Article 9 sales not have to be "friendly" but process, while still possible, is more difficult and poses a series of other costs and risks to lender.

An article 9 sale is an alternative to other sales/liquidation options, usually considered when Section 363 or other alternatives are too costly or time consuming.

Under UCC-90610 a lender may sell collateral after the borrower's default as long as the transaction is commercially reasonable.

The UCC requires a lender to send reasonable notice of an intended sale to the borrow,

Every aspect of the disposition, including method, manner, time, place and other reasonable commercial practices among dealers in the type of property that is subject to the sale.

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Uniform Commercial Code (UCC) – Article 9 Foreclosure

Article 9 sales may be made more difficult by buyers concerns about risk of successor liability.

Other issues that must be considered:

Calculation of deficiency or surplus when disposition is made to secured party, a person related to he secured party or a secondary obligor.

Complications of foreclosure due to procedural issues related to real estate v. personal assets.

The 2010 amendments to the Official Text of Article 9 of the UCC were approved in 2010 by the UCC's sponsoring organizations, the American Law Institute and the Uniform Law Commission. These 2010 amendments (the "amendments") are expected to be considered by state legislatures as early as 2011 with a view to all states enacting the Amendments by their July 1, 2013, uniform effective date.

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References

Assignments for the Benefit of Creditors:

Berman, G. (2006). General Assignments for the Benefit of Creditors. The ABCs of ABCs Second Edition.

Receiverships:

Brandt, Jr., W., Everett, K., Marino, J., Mikels, R., (2008) Understanding Receiverships. Commercial Law League of America.

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PrintCo, LLC
Assignment for the Benefit of Creditors

Summary

PrintCo, LLC ("PrintCo") based in Atlanta, GA was a single location general commercial printer. In 2009 revenues were $16 million, with a loss of $5.2 million.

PrintCo retained counsel and sought restructuring assistance. The restructuring advisor quickly determined that:

- PrintCo continued operating on a negative cash basis
- Costs could not be cut and revenues could not be improved to change the cash position in the short or medium terms
- PrintCo operated in low margin sectors against competitors who were also operating at a loss
- Owner was not willing to fund continued operating losses

Therefore, the advisor recommended that the business stop incurring additional debt, shut down and liquidate (either selling the 'business' or liquidating piecemeal). After analysis and reaching industry contacts, the advisor determined that selling piecemeal garnered a higher value.

Decision

PrintCo owners met with their advisors for a series of meetings over a 2 to 3 day period. The owner concurred with advisors to shurt down and was concerned how best to mitigate liabilities. The advisors developed a matrix and walked through with the owners the pros and cons of chapter 7, chapter 11, an assignment for the benefit of creditors or just shutting down outside of any process.

For the owner, who had personally guaranteed a significant majority of the debt, a decision was guided by:

1. Maximizing *net* proceeds from a sale / liquidation in order to mitigate personal exposure
2. Choosing the person he trusted to maximize proceeds from a sale / liquidation
3. Minimizing any publicity surrounding his business
4. Speed to "moving on in life"

Based on these factors, the owner determined that a general assignment for the benefit of creditors was the best method for closing the business. Advisors contacted the lead lenders prior to commencing the assignment.

Course of Action

PrintCo filed a general assignment for the benefit of creditors in the State of Georgia. This is a non-judicial process.

All lenders involved agreed on a plan for the sale of assets whereby:

- Customer accounts were transferred to a competitor with associated inventory being sold at cost to the competitor
- Factoring companies continued to collect accounts receivable, remitting additional funds after fees and expenses to the assignee
- Machinery and equipment lenders all agreed for assets to be sold at a single auction, in situ to minimize expenses and maximize recoveries
- Real estate was appraised and represented in a sales with all costs covered by the real property lender

The liquidation went well, but there are some issues that may have been better handled through a different forum:

a) Factoring companies were opaque with regard to the collection of accounts receivable, fees and remitting final amounts to the assignee; if a judicial or more formal process this may have been more transparent
b) Certain liens were disputed between the lenders and there was no clear path to resolution. The assignee had to hold proceeds for longer than initially anticipated working to resolve these issues.
c) Certain creditors, particularly the vendor creditor, were not represented by counsel, which increased the burden on the assignee to ensure that they understood the process (they recovered nothing through the sale).

Filing an ABC likely produced the best return, but at times the lack of structure and inability to enforce any deadline made the process more cumbersome than initially anticipated.

PrintCo, LLC

Summary Balance Sheet Data (millions)

	2009	
Assets		
Cash	$0.98	
Inventory	$0.76	
Accounts Receivable	$1.48	
Machinery & Equipment	$1.33	Current market value
Real Estate	$3.04	Current market value
Total Assets	$7.59	
Liabilities		
Factoring Company A	$0.77	Lien on A/R and blanket lien
Factoring Company B	$0.52	Lien on A/R and blanket lien
Real Estate Lender	$5.05	Blanket lien on all other assets
Equipment Lender 1	$1.00	Lien on specified equipment
Equipment Lender 2	$0.89	Lien on specified equipment
Equipment Lender 3	$0.18	Lien on specified equipment
Secured Vendor Note	$0.47	Lien on certain inventory & blanket
Taxing Authorities	$0.28	
Unsecured Creditors	$2.46	
	$11.62	

SteelCo, Inc.
Out of Court Restructuring

Summary

SteelCo, Inc. ("SteelCo") based in Atlanta, GA designs, imports and distributes specialty steel parts to various industries. It has offices in Georgia, Texas, South Africa and Hong Kong; it has manufacturing partners in China, Korea and Vietnam.

In 2009, approximately 40% of revenues were associated with one customer. The products were highly technical, high dollar and with long lead times. This means that at any one time there is a significant amount of inventory in production, in port or on the water.

Loss of Large Customer

In the second quarter of 2010 a large customer cancelled substantially all outstanding orders over a 60 – 90 day period. The impact of this event was:

- Significant decline in revenues (from $108 million to $49.8 million)
- No ability to enforce contract with large customer (contractually yes; cost and time of litigation prohibitive)
- Increasing commitments to pay vendors for goods arriving in the U.S.
- Significant cash deficiency
- Blew through every single covenant with senior secured lender

Decision

SteelCo formulated a long term work out plan which could not be implemented overnight: it needed 20 months to reduce the loan balance with its senior secured lender and refinance into an asset based facility. The company reviewed various options, including filing for protection under chapter 11. However, this fit fairly easily into an out of court restructuring:

1. SteelCo needed time and only had to negotiate with one party, the senior secured lender, for this. While the lender never truly understood the company, operations or plan – it did provide a series of 30 to 60 day forebearance agreements over the 20 month period in order for debt reductions to be made.
2. SteelCo was a bizarrely complex small business what required consistent flow of funds between the U.S. and overseas with layers of forward contracts. The time required to explain this to one lender was significant; the company needed the flexibility of an out of court restructuring to conduct its business.
3. The majority of SteelCo's vendors were overseas; these vendors were absolutely against of the company filing for protection under chapter 11. This greatly assisted in negotiating long term payment plans.
4. There were no disputes on priority of payments: all creditors understood that if the senior secured lender didn't get paid, no one got paid.

Course of Action

Over a 20 month period SteelCo reduced senior debt outstanding to the lender from $14.8 million to $6.9 million. This required a plan to immediately return the company to a cash positive and a laser focused management team: in the initial period nothing mattered excepting cash:

- Focus on core customers and products
- Terminate slower paying and / or lower margin customers and liquidate associated inventory
- Shrink that balance sheet by eliminating excess assets
- Terminate any vendor relationship that would not provide extended terms
- Sell through excess inventory created by loss of customer, which was difficult and slow as the particular products could only be shipped into a few ports due to their size
- Froze certain payables associated with the canceled orders and negotiate a payment plan over 5 years ($4.6 million in the payment pool with very little paid years 1 and 2)

At the end of 20 months SteelCo refinanced into a traditional asset based structure and, although still working to repair the damage of 2010 is in a much stronger financial position.

SteelCo, Inc.

2009 Revenues: $108 million
2010 Revenues: $49.8 million

Summary Balance Sheet Data (millions)

	Jul-10	**Jul-12**
Assets		
Cash	$1.20	$0.20
Accounts Receivable	$4.40	$6.20
Inventory	$15.30	$10.20
Prepaids and Other	$0.30	$0.30
Net PPE	$1.80	$1.30
Total Assets	$23.00	$18.20
Liabilities		
Line of Credit	$14.80	$6.90
Accounts Payable	$7.20	$1.40
Accruals	$0.50	$0.50
Total Current Assets	$22.50	$8.80
Long Term Debt	$0.20	$0.50
Long Term Debt: Former Owners	$2.40	$1.20
Long Term Debt: Vendors	$-	$4.60
Total Long Term Debt	$2.60	$6.30
Total Liabilities	$25.10	$15.10

ABI 2014 Annual Spring Meeting
"Financial Professional's Role in Out of Court Restructurings and Dissolutions"
April 24-27, 2014

Overview of In Court Alternatives: Chapter 11, §363 and Chapter 7

In assessing the merits of out of court restructuring and transaction alternatives, it is informative and perhaps essential to analyze the pros and cons of conducting a restructuring or sale utilizing the three primary in court options: reorganization under chapter 11, sale through §363 of chapter 11 or liquidation under chapter 7.

A debtor filing for protection under the U.S. Bankruptcy Code subjects itself to the jurisdiction of the Court and the oversight of the U.S. Trustee Program. Significant decisions and actions of the debtor will require approval of the bankruptcy judge presiding over the case and will be subject to scrutiny and possible objections by the U.S. Trustee or other constituencies in the case. In addition, many of the financial and operational aspects of the debtor are required to be disclosed and therefore will be made public. For these reasons alone as well as the added costs of professionals and advisors are enough to dissuade some from seeking relief under the Bankruptcy Code.

However, in many situations, a distressed company may find certain advantages to filing for bankruptcy protection and utilizing one of the three primary options available to address its particular problems.

Chapter 11 - Advantages

Under chapter 11, a debtor is afforded immediate relief through the establishment of the automatic stay, whereby the debtor is prohibited from paying pre-petition debts without approval from the court. In addition, lawsuits and collection actions, including foreclosure actions and other litigation, are frozen. This provides time for the debtor to address and achieve certain objectives (e.g. restructure debts, improve liquidity, reduce operating expenses, etc.) and to prepare and present a reorganization plan for approval by its creditors. In the meantime, the debtor maintains control of its business and is allowed to operate its normal, ordinary course business activities. Additional financing ("DIP financing") may be available with enhanced protections and collateral for the post-petition lender.

Bankruptcy also provides a debtor with certain leverage in negotiations with creditors and vendors regarding contracts, business terms and other factors. The debtor has the ability to reject or cancel prior agreements, leases and other executory contracts with the creation of an unsecured claim being the only penalty in most circumstances.

Through a chapter 11 plan of reorganization that is accepted by creditors, the debtor can alleviate itself of certain prior debt obligations and other burdens through a designed plan for distributing value and can reposition itself as a healthier company upon emergence from bankruptcy.

Chapter 11 – Disadvantages

As mentioned before, there are certain negative aspects of bankruptcy that must be considered. Operating under chapter 11 is expensive due to the involvement of not only the debtor's advisors, but also other constituencies and their advisors, such as the secured lender, the creditors committee and the U.S. Trustee, all of which are paid by the debtor. These constituencies will likely analyze and debate management's decisions and proposed actions. Due to the inherent uncertainty, public scrutiny and frequent litigation involved in bankruptcy, the process can also

be more time consuming and distracting for management due to time spent in court, in meetings with creditors and other constituencies, and in reassuring employees, customers, vendors, lenders and other interested parties. There are also extensive reporting requirements under chapter 11.

§363 Sale under Chapter 11 - Advantages

Chapter 11 affords a debtor the opportunity to sell assets via §363 as opposed to under a plan of reorganization. The main advantage to a §363 sale as opposed to a plan of reorganization is the often much shorter time frame to consummate the transaction. A §363 transaction maintains the benefits of selling assets free and clear of liens, claims and encumbrances and generally gives a buyer greater flexibility in selecting the assets, contracts and other particulars that it wishes to purchase while leaving behind the assets and liabilities that it does not wish to assume. In addition, §363 sale procedures will specify the bidding or auction procedures and requirements, identify a stalking horse bidder and possibly offer break-up fees, expense reimbursements and other protections to a stalking bidder. Going through a public sale process gives the debtor, other constituencies and the court comfort that an open process has occurred and a fair value has been obtained for the assets.

§363 Sale under Chapter 11 - Disadvantages

Because the sale process is conducted publicly, certain acquirers can be deterred by the potential competitive bidding process and public disclosure of all transaction terms. In addition, a debtor selling assets may be uneasy about opening itself to the widespread due diligence of interested parties and perhaps competitors. At the end of the process, the debtor is expected to accept the highest and best offer for its assets, which may not necessarily be its desired acquirer.

Chapter 7 – Advantages

Filing for protection under chapter 7 requires the appointment of a Trustee who is charged with liquidating the assets of the debtor and distributing the proceeds in strict adherence to the absolute priority rule (i.e. §507 of the Bankruptcy Code). Consequently, the debtor is no longer in control of its business or operations. The Trustee is generally not allowed to operate the business under chapter 7. This usually results in the immediate shut down of the business and the elimination of many operating expenses. A Trustee will investigate any potential causes of action, avoidance actions and recoveries under section 5 that may result in additional recoveries to estate.

Chapter 7 – Disadvantages

It is widely accepted that liquidations under chapter 7 do not achieve the highest and best values for assets, primarily due to the cessation of operations and the often extended time frames for the liquidations. As a result, creditor recoveries are often lower under chapter 7 than otherwise under chapter 11. In addition, the distribution of proceeds to creditors is often completed at the very end of the case, which is usually a much longer time frame than other alternatives. Moreover, since the operations are shut down during chapter 7 proceedings, there are the accompanying losses of employment, supply, payment of obligations and going concern value, among other things.

In Court versus Out of Court – Advantages and Disadvantages

The primary advantages of conducting a reorganization or sale through an in court proceeding is the cleansing of debts and the transfer of assets free and clear of liens and claims. Such a transfer and the public nature of the proceedings may give additional comfort to a purchaser as well as to

the seller that the process was fair and approved by a federal court. Out of court sales may not provide the same level of protections from claims or subsequent scrutiny.

Out of court reorganizations and sales have the benefit of generally being more private and under the radar. With a bankruptcy filing, there is the potential for a stigma to be attached to the business, and the inherent uncertainty of bankruptcy may cause distractions and disruptions to the employees, customers, suppliers and vendors. In addition, out of court workouts are generally less expensive because bankruptcy requires the formality of court proceedings and approvals, the formation of official committees and additional professional fees.

In summary, there is no one-size-fits-all solution to selecting the best alternative for a distressed company's issues. Rather, the facts and circumstances of each situation and the impact on the company and its key constituencies should be carefully weighed when assessing the various in court and out of court options and the ultimate desired outcome.

COMPARISON OF OPTIONS

Topic	Chapter 11	Chapter 7	Receiver	Assignment
Procedures	*Detailed Code, rules and US Trustee involvement*		*No formal court rules*	*Streamlined; with or without court (State specific)*
Company Involvement	*May still operate as DIP and attend 341 hearing*	*Must attend 341 hearing*	*None or TBD*	*Debtor consensual conveyance of the property; ongoing role limited/TBD*
Publicity	*Public forum with all pleadings and financial results available to the media and public*		*Fewer reporting requirements but pleadings available*	*Publicity minimized; public filings are limited (subject to specific State laws)*
Court	*Federal*	*Federal*	*Federal or State*	*State (if applicable)*
Oversight	*US Trustee Judge, UCC*	*US Trustee Judge*	*Judge*	*Depends on State, Judge or creditors*
Financing the Process	*DIP Lending provisions attracts capital, process to use cash collateral*	*Asset Sale Proceeds*	*Potentially financed by Senior Creditor; no process to secure use of cash*	*Asset Sale Proceeds, use of secured creditor's collateral*

COMPARISON OF OPTIONS

Topic	Chapter 11	Chapter 7	Receiver	Assignment
Control	*DIP, CRO, Trustee*	*Trustee*	*Receiver appointed by Judge*	*Assignee selected by Debtor (and typically with the consent of any secured creditors)*
Process Costs	*Expensive; cost benefit analysis should be undertaken*	*Could be less expensive; but asset values could = liquidation value or less*	*Less Expensive*	*Potentially least Expensive*
Cost Drivers	*Committee Counsel and FA* *US Trustee* *Rigorous Court Process*	*No Committee* *No US Trustee*	*No Committee* *No US Trustee Fewer reporting requirements*	*No Committee* *No US Trustee* *Potentially no supervision. Speed of ability to liquidate assets*
Time	*Detailed Code, rules and US Trustee involvement=slow with statutory delays*		*Federal or State; no formal court rules=fast*	*State; streamlined with no court process=fast*
Flexibility of the Process	*Specific Law; Federal Jurisdiction*		*Vague and Open; State laws vary, could be Federal*	*Vague and Open; dependent on State law*

COMPARISON OF OPTIONS

Topic	Chapter 11	Chapter 7	Receiver	Assignment
Effectuating an Asset Sale (Debtor insolvent)	*363 Sale; best option for Buyer for "free and clear" title, particularly demanded by sophisticated parties*		*Buyer Risk; potentially not free and clear of liens.*	*Sales are "as-is, where-is" so up to buyer to be clear as to liens on purchased assets*
Assignment or Rejection of Contracts/ Leases	*Yes - landlord claim limited pursuant to 502 (b) (6)*		*No (opportunity with Receiver Order and Court approval)*	*No*
Ability to Position Operating Asset for Best Value	*Use Code to restructure operations*	*NA*	*Operating Receiver; limited ability*	*Limited*
Creditor Composition? Impact on Forum	*Best Option for complex capital structure/multi state*	*NA*	*Best Option for creditor concentration; single State*	*TBD; the less other interested parties the better*
Other Considerations	*Ability to pursue claims and causes of actions or other Code based creditor recovery strategies*		*No Federal; State Law may have basis*	*State law specific*

80 A.3d 155
Court of Chancery of Delaware.

GREAT HILL EQUITY PARTNERS IV, LP, Great Hill Investors LLC, Fremont Holdco, Inc., and BlueSnap, Inc. (f/k/a Plimus), Plaintiffs,
v.
SIG GROWTH EQUITY FUND I, LLLP, SIG Growth Equity Management, LLC, Amir Goldman, Jonathan Klahr, Hagai Tal, Tomer Herzog, Daniel Kleinberg, Irit Segal Itshayek, Donors Capital Fund, Inc., and Kids Connect Charitable Fund, Defendants.

Civil Action No. 7906–CS. | Submitted: Oct. 15, 2013. | Decided: Nov. 15, 2013.

Synopsis

Background: Surviving corporation brought action against absorbed corporation, alleging that absorbed corporation fraudulently induced surviving corporation to acquire absorbed corporation. Surviving corporation moved to resolve privilege dispute, arguing that surviving corporation owned any pre-merger attorney-client privilege of absorbed corporation.

[Holding:] The Court of Chancery, Strine, Chancellor, held that privilege over absorbed corporation's communications with its counsel, including those relating to acquisition by surviving corporation, passed to surviving corporation.

Motion granted.

West Headnotes (2)

[1] **Corporations and Business Organizations**
Succession to rights of original corporations
Privileged Communications and Confidentiality
Persons entitled to assert privilege

Privilege over absorbed corporation's communications with its counsel, including those relating to absorbed corporation's acquisition by surviving corporation, passed to surviving corporation under statute stating that following 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." 8 West's Del.C. § 259.

[2] **Statutes**
Superfluousness
Statutes
Language

There is a presumption that the General Assembly carefully chose particular language when writing a statute, and an appellate court will not construe the statute to render that language mere surplusage if another interpretation is reasonably possible.

Attorneys and Law Firms

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Opinion

OPINION

STRINE, Chancellor.

The plaintiffs, Great Hill Equity Partners IV, LP, Great Hill Investors LLC, ***156** Fremont Holdco, Inc., and BlueSnap, Inc. (for clarity, collectively the "Buyer"), have filed this suit alleging that the defendants, former shareholders and representatives of Plimus, Inc. (for clarity, collectively the "Seller"), fraudulently induced the Buyer to acquire Plimus, Inc. ("Plimus") in September 2011. Plimus was the surviving corporation in the merger.

After the Buyer brought this suit in September 2012—a full year after the merger—it notified the Seller that, among the files on the Plimus computer systems that the Buyer acquired in the merger, it had discovered certain communications between the Seller and Plimus's then-legal counsel at Perkins Coie regarding the transaction. During that year, the Seller had done nothing to get these computer records back, and there is no evidence that the Seller took any steps to segregate these communications before the merger or excise them from the Plimus computer systems, the control over which was passing to the Buyer in the merger. It is also undisputed that the merger agreement lacked any provision excluding pre-merger attorney-client communications from the assets of Plimus that were transferred to the Buyer as a matter of law in the merger, and the merger was intended to have the effects set forth in the Delaware General Corporation Law ("DGCL").[1] Nonetheless, when the Seller was notified that the Buyer had found pre-merger communications on the Plimus computer system, the Seller asserted the attorney-client privilege over those communications on the ground that it, and not the surviving corporation, retained control of the attorney-client privilege that belonged to Plimus for communications regarding the negotiation of the merger agreement. Before the court is a motion by the Buyer seeking to resolve this privilege dispute and determine, among other things, that the surviving corporation owns and controls any pre-merger privilege of Plimus or, alternatively, that the Seller has waived any privilege otherwise attaching to those pre-merger communications.[2]

1 Plimus was a California corporation, and the Buyer was a Delaware corporation. Thus, the Merger Agreement provided that "[t]he Merger shall have the effects set forth in this Agreement and in the applicable provisions of the DGCL and the [California General Corporation Law ("CGCL")]."). Merger Agreement § 2.02, Effects of the Merger. The Buyer has represented that the CGCL "effectively follows" the DGCL on this point, *see* Oral Arg. Tr. 6:13–15, and the Seller has not argued that the result would be different under the CGCL. Section 12.07 of the Merger Agreement also provided that "[a]ll disputes, controversies, issues and questions concerning the construction, validity, interpretation and enforceability of this Agreement ... shall be governed by and construed in accordance with the Laws of the State of Delaware...."

2 The Buyer also argued that the Seller's privilege log was inadequate, and that the documents in dispute should be reviewed by a Master to determine whether the crime-fraud exception to attorney-client privilege would apply.

[1] **[2]** The question before the court is thus an issue of statutory interpretation in the first instance. Section 259 of the DGCL 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...."[3] Nonetheless, the Seller contends that the statutory term "all ... privileges" does not include the attorney-client privilege, and claims that the Seller still retains control over that particular subset of Plimus's privileges, or, as shall be seen, at least the portion of that subset consisting of attorney-client communications regarding the merger negotiations. ***157** At oral argument, the Seller suggested without citation that the General Assembly actually intended the "privilege" referred to in § 259 of the DGCL to include only certain property rights, and that it did not extend to privileges established by a rule of evidence.[4] But, when asked, the Seller was not able to cite any legislative history that supported its narrow reading of the statute,[5] and the court has not been able to find any evidence for its suggested interpretation in the leading treatises.[6] Most importantly, the Seller's reading is not a plausible interpretation of the plain statutory language. That language uses the broadest possible terms to make sure that "all" assets of any kind belong to the surviving corporation after a merger. The Seller's attempt to interpret the word "privileges" to mean "property rights" ignores the reality that the word "property" is already specifically used in the statute, as is the term "rights"—and then these terms are expanded still further to include ***158** "all and every other interest." The definition of "all" is well known, and means "the whole amount, quantity, or extent of."[7] There is a presumption that the General Assembly carefully chose particular language when writing a statute, and this court will not construe the statute to render that language mere surplusage if another interpretation is reasonably possible.[8] The term "privilege" is commonly defined as "a right or immunity granted as a peculiar benefit, advantage, or favor,"[9] and one of the

most obvious examples is the attorney-client privilege.[10] To indulge the Seller's argument would conflict with the only reasonable interpretation of the statute, which is that *all* means *all* as to the enumerated categories, and that this includes *all* privileges, including the attorney-client privilege.

3 8 *Del. C.* § 259.

4 Oral Arg. Tr. 64:8–17 ("I think we have to look at whether [§] 259(a) is really talking about the same kind of privilege that we're talking about here. It talks about property rights.... I don't think it's talking about a rule of evidence, which is what the attorney-client privilege is."); Oral Arg. Tr. 66:5–12 ("An easement ... A privilege to use land, for example, is something that belongs and can be sold, belongs to the property rights. That is a—that has often been defined as a privilege. A use of a copyright has often been defined as a privilege. And, therefore, what I think the statute might be talking about is those kind of privileges.").

5 Oral Arg. Tr. 65:15–20.

6 *See, e.g.,* R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS § 9.26, *Effects of Merger* (2013) ("Section 259(a) further provides for the transfer, as a matter of law, to the surviving or resulting corporation of *all* of the 'rights, *privileges,* powers and franchises as well of a public as of a private nature' ...") (emphasis added); DAVID A. DREXLER, LEWIS S. BLACK, JR. & A. GILCHRIST SPARKS, III, DELAWARE CORPORATION LAW AND PRACTICE § 35.07, *Effect of Merger on Rights and Liabilities of Constituent Corporations* (2009) (noting that "[t]he property passing to the surviving corporation also includes contractual rights and other choses in action, as well as *any* '*privileges,* powers and franchises as well a public as of a private nature' ") (emphasis added); EDWARD P. WELCH, ET AL., FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 259.2 (5th ed. 2008), *Survival of rights of a constituent corporation* ("The concept of continuing the life, but not the separate identity, of the merged corporation finds statutory expression in the provision that the new or surviving corporation 'possess[es] *all* the rights, *privileges,* powers and franchises as well of a public as of a private nature' previously belonging to or enjoyed by the constituent corporation. In a merger or consolidation, *all* rights of the constituent corporation are transferred to the surviving corporation by operation of law ...") (emphasis added); *see also* 19 C.J.S. CORPORATIONS § 909, *Succession to rights, privileges, and property* (2013) ("The usual effect of a consolidation or merger is that the new corporation succeeds to the rights, powers, *privileges* and immunities of each of the original corporations, except as provided by the limitations of the new corporation's charter.... The new corporation takes the rights, powers, *privileges,* and immunities of the constituent corporations.") (emphasis added); 15 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 7095, *Exemptions and immunities passing to new company* (2013) (noting that "[t]he modern corporation statutes in a number of jurisdictions expressly provide that, upon a statutory merger or consolidation, the surviving or new corporation shall thereupon and thereafter possess *all* the rights, *privileges,* immunities and franchises, both of a public as well as of a private nature, of each of the merging or consolidating corporations" and citing 8 *Del. C.* § 259 as an example) (emphasis added).

> One treatise expressly declares that "[u]nder a provision giving a consolidated corporation the rights, franchises, privileges and property of the consolidating corporations, or without such a provision, and in the absence of provision to the contrary, the consolidated corporation acquires ... the absorbed corporation's attorney-client privilege." 15 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 7089, *Powers and rights acquired* (2013).

7 Merriam–Webster Online Dictionary, http://www.merriam-webster. com/dictionary/all (last visited Nov. 14, 2013).

8 *Taylor v. Diamond State Port Corp.,* 14 A.3d 536, 538 (Del.2011); *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.,* 636 A.2d 892, 900 (Del.1994).

9 Merriam–Webster Online Dictionary, http://www.merriam-webster. com/dictionary/privilege (last visited Nov. 14, 2013); *see also* BLACK'S LAW DICTIONARY 1234–35 (8th ed. 2004) (defining "privilege" as "[a] special legal right, exemption, or immunity granted to a person or class of persons, an exception to a duty," or "[a]n evidentiary rule that gives a witness the option to not disclose the fact asked for, even though it might be relevant; the right to prevent disclosure of certain information in court, esp. when the information was originally communicated in a professional or confidential relationship" and listing the "attorney-client privilege" as an example).

10 *See* *Upjohn Co. v. United States,* 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) (stating that

"[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law"); *Union Carbide Corp. v. Dow Chem. Co.,* 619 F.Supp. 1036, 1046 (D.Del.1985) (noting that the attorney-client privilege "dates back to the 16th century").

In the face of the statutory language, the Seller cites to two cases in support of its argument, which it claims stand for the proposition that the former stockholders of a selling corporation retain the selling corporation's privileges as to any attorney-client communications regarding the negotiation of the merger.[11] In particular, the Seller relies on a decision of the New York Court of Appeals, *Tekni–Plex, Inc. v. Meyner & Landis,* which dissected the privileges belonging to a Delaware corporation that was sold in a merger into two categories, and held that only one category, *i.e., less than all,* passed to the surviving corporation in the merger.[12] *Tekni–Plex* held that the privilege over attorney-client communications regarding general business operations did pass to the surviving corporation in the merger.[13] But then the Court of Appeals innovated and, without citing § 259 of the DGCL, concluded that the pre-merger attorney-client communications regarding the merger negotiations did not pass to the surviving corporation for policy reasons related to its analysis of New York attorney-client privilege law.[14] The Seller also cites *Postorivo* ***159** *v. AG Paintball Holdings, Inc.,* a decision of this court that applied *Tekni–Plex.*[15] But in *Postorivo,* the court did not take a stand on whether *Tekni–Plex* would be correct *under Delaware law,* because it was not necessary to do so under the facts of that case. There, the court was applying New York law to an asset purchase agreement that excluded certain assets,[16] rather than a merger that included all assets, and the parties had agreed that under the specific contractual terms of their transaction, the seller retained the attorney-client privilege over communications relating to the negotiation of the transaction.[17] Thus, as was the case in *Tekni–Plex, Postorivo* did not even cite § 259 of the DGCL.

11 *Postorivo v. AG Paintball Holdings, Inc.,* 2008 WL 343856 (Del.Ch. Feb. 7, 2008); *Tekni–Plex, Inc. v. Meyner & Landis,* 89 N.Y.2d 123, 651 N.Y.S.2d 954, 674 N.E.2d 663 (1996).

12 89 N.Y.2d 123, 651 N.Y.S.2d 954, 674 N.E.2d 663, 670 (1996).

13 *Id.* 651 N.Y.S.2d 954, 674 N.E.2d at 670–71.

14 *Id.* 651 N.Y.S.2d 954, 674 N.E.2d at 671–72 (noting that the decision was made "[i]n light of the facts of this particular transaction and the structure of the underlying agreement").

15 2008 WL 343856 (Del.Ch. Feb. 7, 2008).

16 *Id.* at *2 (describing the terms of the asset purchase agreement and noting that " § 12.8 of the [asset purchase agreement] provides that [it] is governed by New York law.").

17 *Id.* at *1 (noting the parties' agreement).

The Buyer answers the Seller's arguments about these cases with a dispositive response: it points out that the General Assembly's statutory determination leaves no room for judicial improvisation.[18] The Buyer contends that under the plain terms of § 259 of the DGCL, the attorney-client privilege—like all other privileges—passes to the surviving corporation in the merger as a matter of law.[19] Thus, the Buyer argues, this court must enforce the statute. The court agrees. If the General Assembly had intended to exclude the attorney-client privilege, it could easily have said so.[20] Instead, the statute uses the broadest possible language to set a clear and unambiguous default rule: *all privileges* of the constituent corporations pass to the surviving corporation in a merger. Tellingly, the Seller admits that the attorney-client privilege has transferred to the surviving corporation for at least some purposes, and the Seller conceded at oral argument that the surviving corporation would, in fact, be able to access and use these same documents if it was necessary ***160** to defend itself against a third party.[21] But this concession means that the Seller, like the Court of Appeals in *Tekni–Plex,* is not allowing the surviving corporation to receive "all" of the "privileges" of Plimus in the merger, but only the subset that the judiciary has deemed acceptable to transfer. Thus, "all ... privileges" in § 259 of the DGCL would become "all ... privileges, minus judicially-created exceptions." Whatever the case may be in other states, members of the Delaware judiciary have no authority to invent a judicially-created exception to the plain words "all ... privileges" and usurp the General Assembly's statutory authority.[22]

18 *Ross v. State,* 990 A.2d 424, 428 (Del.2010) ("The role of the judiciary in interpreting a statute is to determine and give effect to the legislature's intent. When the intent is reflected by unambiguous language in the statute, the language itself controls. In that instance, a court must apply the statutory language to the facts of the

case before it.") (internal citations omitted); *Rubick v. Sec. Instrument Corp.,* 766 A.2d 15, 18 (Del.2000) ("If the statute is unambiguous, there is no room for interpretation, and the plain meaning of the words controls."); *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.,* 492 A.2d 1242, 1246 (Del.1985) (noting that where a statute is unambiguous, "the Court's role is then limited to an application of the literal meaning of the words.").

19 *See* Oral Arg. Tr. 112:14–18 ("The statute clearly is intended to say that the entirety of the ball of rights, everything that the law recognizes is a right [was sold], period, full stop; and you would have to be putting an asterisk on the statute to get there."). The Buyer also points to Delaware Rule of Evidence 502, which explicitly contemplates that the attorney-client privilege may pass to a corporation's successor, for additional support of this interpretation, because no evidence of a carve out appears there either. *See* Del. R. Evid. 502(c) ("The privilege under this rule may be claimed by ... the successor, trustee or similar representative of the corporation.").

20 *See Fid. & Deposit Co. of Md. v. State Dep't of Admin. Servs.,* 830 A.2d 1224, 1228–29 (Del.Ch.2003) (refusing to "impos[e] an additional term upon the statute that was not put in place by the legislature" because "[t]he legislature was clearly capable of articulating exacting requirements" if it wanted to do so); *see also State v. Cooper,* 575 A.2d 1074, 1075–76 (Del.1990) (noting that "the language of the statute must be regarded as conclusive of the General Assembly's intent.").

21 *See* Oral Arg. Tr. 71:22–72:5; Oral Arg. Tr. 72:13–15.

22 *See, e.g., In re Adoption of Swanson,* 623 A.2d 1095, 1096–97 (Del.1993) ("[O]ur role as judges is limited to applying the statute objectively and not revising it."); *Giuricich v. Emtrol Corp.,* 449 A.2d 232, 238 (Del.1982) ("The courts may not engraft upon a statute language which has been clearly excluded therefrom by the Legislature.").

The Seller claims that giving effect to § 259 of the DGCL will create serious public policy issues. [23] But, as has long been recognized by the Delaware Courts, when the General Assembly has addressed an issue within its authority with clarity, there is no policy gap for the court to fill. [24] If a valid statute is not ambiguous, the court will apply the plain meaning of the statutory language to the facts before it. [25] It would usurp the authority of our elected branches for this court to create a judicial exception to the words "all ... privileges" for pre-merger attorney-client communications regarding the merger negotiations. That sort of micro-surgery on a clear statute is not an appropriate act for a court to take.

23 Def's. Opp'n. Br. at *18–19 (citing *Tekni–Plex* to argue that this outcome "would significantly chill attorney-client communication during the transaction" and would therefore defeat the purpose of the attorney-client privilege).

24 *See, e.g., In re Adoption of Swanson,* 623 A.2d 1095, 1099 (Del.1993) ("It is beyond the province of courts to question the policy or wisdom of an otherwise valid law. Instead, each judge must take and apply the law as they find it, leaving any changes to the duly elected representatives of the people.") (internal citations omitted); *Pub. Serv. Comm'n of State of Del. v. Wilmington Suburban Water Corp.,* 467 A.2d 446, 451 (Del.1983) (recognizing "the well-established principle that if an otherwise valid statute causes or leads to an inequitable result, then it is the sole province of the legislature to correct it."); *In re Vandyke's Estate,* 136 A. 147, 148 (Del.Orph.1927) ("If the policy of the statute is wrong, the Legislature is the only place where relief against it may be obtained.").

25 *See Sussex Cnty. Dep't of Elections v. Sussex Cnty. Republican Comm.,* 58 A.3d 418, 422 (Del.2013) ("If we determine that a statute is unambiguous, we give the statutory language its plain meaning."); *see also Moore v. Chrysler Corp.,* 233 A.2d 53, 55 (Del.1967) ("Words in statutes must be given their common and ordinary meanings.").

Of course, parties in commerce can—and have—negotiated special contractual agreements to protect themselves and prevent certain aspects of the privilege from transferring to the surviving corporation in the merger. The Buyer submitted several excerpts from private company merger transactions that contained provisions excluding pre-merger attorney-client communications regarding the negotiation of the transaction from the assets to be transferred to the surviving corporation and explicitly acknowledging that the attorney-client privilege for those documents would belong solely to the seller after the merger. [26] Furthermore, one of the cases cited ***161** by the Seller demonstrates that parties already know how to protect themselves from this situation. In *Postorivo,* the transactional agreements specifically retained the attorney-client privilege for communications regarding the negotiation of the transaction, so that particular element of the privilege did not pass to the surviving corporation as an incident of the sale. [27] The question in that case, rather,

was whether a selling party that *had* contractually negotiated to retain the privilege waived the rights it had preserved by contract through its failure to take steps to ensure that the privileged information did not actually pass into the possession of the buyer. [28]

26 Letter from Counsel for the Buyer to the Court of Chancery (Sept. 27, 2013) (enclosing excerpts from three private company transactions).

27 *Postorivo,* 2008 WL 343856, at *6 n. 25 ("Section 1.2(h) [of the asset purchase agreement] provides that 'Excluded Assets' from the sale include 'all rights of the Sellers under this Agreement and all agreements and other documentation relating to the transactions contemplated hereby.' ").

28 *Id.* at *4 n. 13.

Notably, in the immediate wake of *Postorivo* and *Tekni–Plex*—and before the parties began negotiating this transaction—several articles were written encouraging practitioners to take privilege issues into account when negotiating a merger agreement. [29] Well before *Tekni–Plex,* the United States Supreme Court had uttered these plain words:

29 *See* Henry Sill Bryans, *Business Successors and the Transpositional Attorney–Client Relationship,* 64 BUS. LAW. 1039, 1046 (2009) (noting that "*Tekni–Plex* was a wake-up call for transactional lawyers" and concluding that "drafting against a contrary result may be prudent"); M & A Jurisprudence Subcommittee, Mergers and Acquisitions Committee, ABA Section of Business Law, *Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions,* 64 Bus. Law. 433, 463 (2009) ("The *Postorivo* decision highlights the importance of addressing attorney-client privilege ownership issues in an acquisition agreement, regardless of whether the acquisition is structured as an asset transaction, a merger, or a sale of stock."); Russell C. Silberglied, *Who Owns Privileged E–Mails in A S363 Sale Case? Is Ownership Waived When the Debtor's Computer Servers Are Sold?,* 28–Feb AM. BANKR.INST. J., 46, 77 (2009) ("While *Postorivo* is one of the first cases addressing who owns the privilege in these scenarios, it will not be the last.... [C]ounsel should strongly consider addressing these points in the asset-purchase agreement. Indeed, who will retain the privilege ... should be a part of most "checklists" in negotiating an asset purchase agreement.").

> "[W]hen control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well. New managers installed as a result of a takeover, *merger,* loss of confidence by shareholders, or simply normal succession, may waive the attorney-client privilege with respect to communications made by former officers and directors. Displaced managers may not assert the privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties." [30]

30 *Commodity Futures Trading Comm'n v. Weintraub,* 471 U.S. 343, 349, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985) (emphasis added).

Thus, the answer to any parties worried about facing this predicament in the future is to use their contractual freedom in the manner shown in prior deals to exclude from the transferred assets the attorney-client communications they wish to retain as their own. [31] Here, by contrast, the ***162** Seller did not carve out from the assets transferred to the surviving corporation any pre-merger attorney-client communications, and this court will not unilaterally read such a carve out into the parties' contract. [32] Absent such an express carve out, 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.

31 *See, e.g.,* John T. Hundley, *White Knights, Pre–Nuptial Confidences, and the Morning After: The Effect of Transaction–Related Disclosures on the Attorney–Client and Related Privileges,* 5 DEPAUL BUS. L.J. 59 (1993) (exploring the "tensions that can arise in the attorney-client privilege when corporate transactions occur or are contemplated" and concluding that "forethought and planning can reduce ... uncertainty and properly provide for improved protection in many instances").

32 To do so would "create a new contract with rights, liabilities and duties to which the parties had not assented." *Rhone–Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.,* 616 A.2d 1192, 1196 (Del.1992).

The Seller also argues that waivers of the attorney-client privilege are not lightly inferred, [33] and that irrespective of the fact that the Seller in this case did nothing to preserve the privilege—either in terms of i) negotiating a provision in the merger agreement that pre-merger attorney-client

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communications made in connection with the negotiations did not pass to the surviving corporation in the merger and would remain privileged except as waived by the surviving corporation, or ii) by taking any action to ensure that those attorney-client communications did not pass to the surviving corporation in bulk and remain in the surviving corporation's full possession and control *for an entire year*—that the Seller has nonetheless not waived the privilege. But having decided that the attorney-client privilege for the documents passed as a matter of law to the surviving corporation in the merger, these waiver-related arguments need not be addressed, including the substantial issue of whether the Seller waived the privilege through its lengthy failure to take any reasonable steps to ensure the Buyer did not have access to the allegedly privileged communications.

33 *See* *Davenport Grp. v. Strategic Inv.*, 1995 WL 523591 (Del.Ch. Aug. 24, 1995) ("Public policy encourages courts to protect attorney client privilege."); *Hollingsworth v. Essence Comm'ns, Inc.*, 1977 WL 2585 (Del.Ch. July 15, 1977) (noting that "[t]he attorney-client privilege is too basic to our law to permit it to be disregarded lightly or under uncontrolled conditions").

For all these reasons, the Buyer's motion for disposition of privilege dispute is granted.[34] IT IS SO ORDERED.

34 The Buyer and the Seller also filed cross-motions regarding the Entry of a Protective Order. As a result of my ruling that all privileges pass to the surviving corporation in the merger as a matter of law under § 259 of the DGCL, this issue has been rendered moot, which the Seller acknowledged could occur. Thus, the Seller's Motion for Entry of a Protective Order is DENIED, and the Buyer's Motion for Entry of Proposed Amended Protective Order is GRANTED.

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