THE (UN)AVAILABILITY OF THE COMMON INTEREST DOCTRINE IN CORPORATE TRANSACTIONS

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It’s the high-pressure period between the signing and closing of a multimillion dollar corporate transaction. Purchaser and seller are working together and pushing towards the same general common goal—completing the transaction as soon as possible. The parties are cooperating to resolve any open transaction issues and ensure that there will be a smooth integration post-closing for the target’s employees, customers, and suppliers. Transaction documents are final and waiting to be signed; wire numbers are confirmed; third parties have been notified. With the parties working so closely to fulfill their contractual obligations, surely any observer would agree that the parties share a common legal interest—or would they?

As a general rule, the common interest doctrine is not a privilege separate from the attorney-client privilege. Instead, it’s an exception to the rule that the attorney-client privilege does not apply to communications or materials shared with third parties. When properly employed, the common interest doctrine permits parties that are not represented by the same counsel but have a “matter of common interest” (and are involved in a joint strategy to further that common legal interest) to share information with each other and their respective counsel without jeopardizing the privilege that otherwise protects such information. However, a series of recent Delaware cases have clarified that a “common commercial interest”, where the communication in question is primarily related to achieving business or financial objectives, will not satisfy the common interest doctrine, even where there are tangential legal considerations. While this article focuses on Delaware law, and more specifically the recent decision of the Delaware Superior Court in *The American Bottling Co. v. Mike Repole*, et al discussed below, practitioners should note that the law in different states varies substantially on whether, or under what circumstances, the common interest doctrine will apply (if at all).

So when may the common interest doctrine apply in corporate transactions? One situation in which parties may be able to implicate the common interest doctrine with respect to the sharing of otherwise privileged information is when there is an open litigation matter involving the seller that the purchaser may be assuming in the corporate transaction and it needs to further understand and discuss the details of the litigation with the seller and its attorneys. However, it’s important to note that validly utilizing the common interest doctrine to share privileged information is a fact-based determination that needs to be undertaken under the tenets of the applicable state law before information is disclosed. Just because there is an open litigation matter involving the seller in no way automatically protects conversations between seller and purchaser about that litigation, and indeed it is likely that any such conversations may not be considered privileged in the first place. A common legal interest may also likely exist when the parties are pursuing antitrust approval and need to share competitively-sensitive information. Less clear is the consideration of whether diligence materials created by, and internal communications between, one party and its counsel may be shared or discussed with the other party without waiving privilege. For example, would communications between seller’s counsel and purchaser regarding strategy on how to deal with a third party customer be protected as a result of the parties’ common interest in avoiding breach of contract or litigation from the customer? In the heat of the moment, the parties may not realize that such routine conduct in corporate transactions may, in fact, waive their attorney-client privilege, and it may be advisable to consider the impact of their actions regarding otherwise privileged information.

In January 2018, Dr. Pepper Snapple Group, Inc. (“Dr. Pepper”) entered into a merger agreement with Keurig Green Mountain (“Keurig”). Between signing and closing, the parties continued to finalize due diligence, including the review of a distribution agreement between The American Bottling Company (“ABC”), a subsidiary of Dr. Pepper, and BA Sports Nutrition, LLC (“Body Armor”) that included an anti-assignment clause requiring ABC to obtain Body Armor’s consent to an assignment by merger. A chart prepared by Keurig’s counsel, which identified the Body Armor agreement and the anti-assignment clause, was eventually sent by Keurig’s financial advisor to Dr. Pepper to obtain additional information related to open due diligence questions. The parties’ counsel then exchanged drafts and emails discussing the information on the chart.

Eventually, the parties closed the merger without obtaining Body Armor’s consent, and Body Armor subsequently terminated the distribution agreement due to the failure to obtain its consent and it was able to avoid paying a substantial termination fee as a result of the breach. ABC subsequently filed an action against Body Armor disputing whether the merger resulted in a change of control that triggered the termination clause and waiver of the termination fee. In the ensuing litigation between ABC and Body Armor,[[1]](#footnote-1) the diligence chart and related communications were inadvertently produced during discovery. ABC attempted to “claw-back” the communications, claiming they were privileged, while Body Armor argued that Keurig waived its privilege when it shared the chart and had further communications with Dr. Pepper. The Delaware court held that the chart and the ensuing discussions between the two merger parties were shared primarily as a result of a common interest that was commercial (and not legal) in nature—completing the transaction—and thus were not protected by privilege. [[2]](#footnote-2)

Other Delaware cases have made similar fact-based determinations on what is a commercial interest and what is a protected common legal interest. Negotiations between two prospective parties on the terms of a partnership have been held to be commercial in nature[[3]](#footnote-3), as have communications between a 50% equityholder and a prospective purchaser to obtain court approval of the transaction and defend against potential legal action by the target company’s other equityholder (with the court stating that the seller failed to demonstrate the communications were shared to facilitate a joint legal strategy with the purchaser).[[4]](#footnote-4) Additionally, where the parties are adverse because of continuing negotiations (such as negotiating amendments to the original purchase agreement), Delaware courts may not find a common interest, even on legal matters that are separate from the negotiations.[[5]](#footnote-5) On the other hand, examples of common interests that have been determined to be legal in nature include: (i) communications between two companies party to a merger agreement seeking regulatory approval in order to close the transaction,[[6]](#footnote-6) (ii) parties to a partnership exploiting and enforcing a patent (including through legal action),[[7]](#footnote-7) and (iii) communications regarding how to respond to a press inquiry about potential wrongdoing between a founder and the company, where the communications sought the advice of counsel as to whether the response was “legally accurate.”[[8]](#footnote-8)

However, even if the shared interest is partially legal in nature or ancillary to a legal proceeding, the common interest doctrine still may not apply. Delaware courts have maintained that it is the *primary* interest that determines if the common interest exception applies. In *The American Bottling Company*, the court stated that “[t]he parties may well have shared an interest in positioning the post-merger entity so as to capitalize on the distribution agreements. But even if one aspect of that interest was avoiding litigation, the primary focus of the interest plainly was commercial.”[[9]](#footnote-9) The court determined that, while the business deal may have included an aspect in avoiding litigation, this did not make the interest primarily legal in nature and therefore was not a protected common legal interest.

As a result of these holdings, parties involved in a corporate transaction such as a merger or other acquisition or divestiture must be vigilant when sharing information among parties that are separately represented by counsel. If the parties would like to share information, a fact-specific inquiry is necessary to determine whether an interest is sufficiently and primarily legal to qualify for protection under the common interest doctrine. In Delaware, “as a general rule, application of the common interest doctrine is appropriate where it is clear that the parties were collaborating and sharing information in furtherance of a joint legal strategy or objective.”[[10]](#footnote-10) While Delaware courts do not appear to require pending litigation for the common interest exception to apply,[[11]](#footnote-11) the parties’ “interests must be substantially similar, not adverse.”[[12]](#footnote-12)

Certain best practices may maximize the likelihood that documents and communications will remain privileged and dictate which party may control the seller’s privilege after the corporate transaction closes. As an initial threshold matter, the underlying materials and communications must actually be protected under the attorney-client privilege in the first place, and remain privileged. In claiming privilege, the burden falls on the party claiming privilege to establish that the communications were made “(1) for the purpose of seeking, obtaining or delivering legal advice, (2) between privileged persons, and (3) [with the intention of] confidentiality.”[[13]](#footnote-13) Attorneys should remind their clients of the general rules concerning the attorney-client privilege and what types of actions or conduct may adversely affect the underlying privilege.

Second, it may be advisable to evidence the common interest in a written agreement between the parties before any information or communications are shared, with the agreement noting the nature of the common interest and that the parties intend to maintain the privileged nature of the related communications or documents. Written agreements evidencing a common interest may apply to different scenarios in the context of a corporate transaction, such as a joint defense agreement between the purchaser and seller relating to specific third party litigation, or possibly a joint defense agreement concerning the sharing of competitively-sensitive information in the course of an antitrust review of the transaction. Although Delaware courts are not required to uphold privilege merely because the parties have a common interest or joint defense agreement in place, an agreement of this kind can be strong evidence of the parties intention of confidentiality and continued privileged treatment.

After executing a joint defense or common interest agreement, the parties and their attorneys should also ensure that all documents and information that the parties intend to keep privileged are conspicuously marked with “PRIVILEGED INFORMATION; SUBJECT TO JOINT DEFENSE AGREEMENT” or a similarly worded annotation. Sensitive information should be shared by and delivered to the parties’ counsel, rather than between the parties directly or through their non-legal advisors. Finally, before sharing particularly sensitive information that could be exploited by an adverse third party, each party and their deal counsel (consulting with litigation counsel where appropriate) should consider whether they can identify a primary legal, rather than commercial, interest in sharing the information, particularly where there is no pending or threatened legal proceeding.

One other important consideration in mergers or stock acquisitions in which the purchaser is acquiring the seller entity (as opposed to just acquiring certain assets from the seller) is which party will control the seller’s pre-closing privileged materials and communications after the transaction closes. Absent a contractual provision in the definitive transaction documents to the contrary and as a general rule in such transactions, the surviving entity in the transaction (*i.e*., the purchaser) will likely control the seller’s privilege after the closing of the transaction with respect to the company and its operations that are being sold. The existence of a common legal interest, standing alone, does not address the risk of a purchaser controlling such seller privilege and being able to unilaterally waive seller’s privilege over common interest materials post-transaction. Control over the seller’s privilege post-closing is an important consideration in this context and should be considered by the parties with consultation from their respective attorneys.

As noted above, this article focuses on certain aspects of Delaware law with regard to the common interest doctrine and practitioners should consider the law of the applicable state when determining when, and/or if, the common interest doctrine may apply. For example, Texas applies the “allied litigant doctrine” rather than the common interest doctrine because any protected conversations must take place in the context of a “pending action” under the Texas rules of evidence in order to continue to be protected,[[14]](#footnote-14) and in New York, litigation must be pending or anticipated.[[15]](#footnote-15) In these states, parties operating in a purely commercial transaction may not be able to take advantage of the common interest doctrine in a similar way that may be available under Delaware law. Federal courts are also split on the issue, with some requiring pending litigation and others following Delaware’s lead. If there is a likelihood that litigation from a third party could arise outside of Delaware state courts, the parties and their counsel should understand applicable local law on this topic and take special care in guarding their privilege and limiting the sharing of sensitive information.

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1. The American Bottling Co. v. Mike Repole, et al., No. CVN19C03048AMLCCLD, 2020 WL 2394906 (Del. Super. Ct. May 12, 2020). [↑](#footnote-ref-1)
2. *Id.* at \*1. [↑](#footnote-ref-2)
3. Titan Inv. Fund II, LP v. Freedom Mortg. Corp., 2011 WL 532011, at \*4-5 (Del. Super. Feb. 2, 2011). Note that it was also relevant in this case that the parties were adverse to each other in the negotiations, thus defeating a “common interest” in the outcome of the negotiations. *See also* Jedwab v. MGM Grand Hotels, Inc., No. CIV.A. 8077, 1986 WL 3426, at \*2 (Del. Ch. Mar. 20, 1986) (holding that parties to a merger agreement were adverse in their negotiations, and therefore could not share a privilege). [↑](#footnote-ref-3)
4. Glassman v. Crossfit, Inc., No. CIV.A. 7717-VCG, 2012 WL 4859125, at \*3-4 (Del. Ch. Oct. 12, 2012) [↑](#footnote-ref-4)
5. Zirn v. VLI Corp., No. CIV. A. 9488, 1990 WL 119685, at \*8 (Del. Ch. Aug. 13, 1990) (holding that communications related to reinstatement of a patent could not fall under the common interest doctrine because the parties were renegotiating and restructuring the executed purchase agreement). [↑](#footnote-ref-5)
6. 3Com Corp. v. Diamond II Holdings, Inc., No. 3933-VCN, 2010 WL 2280734, at \*8 (Del. Ch. May 31, 2010). [↑](#footnote-ref-6)
7. Rembrandt Technologies, L.P. v. Harris Corp., 2009 WL 402332, at \*7. [↑](#footnote-ref-7)
8. In re Lululemon Athletica Inc. 220 Litig., 2015 WL 1957196, at \*9 (Del. Ch. Apr. 30, 2015). [↑](#footnote-ref-8)
9. *The American Bottle Co.,* 2020 WL 2394906 at \*5 [↑](#footnote-ref-9)
10. RCS Creditor Tr. v. Schorsch, No. 2017-0178-SG, 2020 WL 1320919, at \*2 (Del. Ch. Mar. 20, 2020) (quotation omitted). [↑](#footnote-ref-10)
11. *See, e.g.,* 3Com Corp. v. Diamond II Holdings, Inc., No. 3933-VCN, 2010 WL 2280734, at \*7-8 (Del. Ch. May 31, 2010) (applying the common interest doctrine to the negotiation of a side letter in connection with a merger agreement); *see also Glassman*, 2012 WL 4859125, at \*3 (noting that plaintiffs “would have shared a common interest if they had discussed the threat of” a potential lawsuit). [↑](#footnote-ref-11)
12. *RCS Creditor*, 2020 WL 1320919, at \*2 (quotation omitted); *see also Glassman*, 2012 WL 4859125, at \*3 (Del. Ch. Oct. 12, 2012). [↑](#footnote-ref-12)
13. *Rembrandt Techs.,* 2009 WL 402332, at \*5. [↑](#footnote-ref-13)
14. In re XL Specialty Ins. Co., 373 S.W.3d 46, 51 (Tex. 2012). [↑](#footnote-ref-14)
15. Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 57 N.E.3d 30 (N.Y. 2016). [↑](#footnote-ref-15)