

# Attorney-Client Privilege Does Not Pass to the Buyer in Asset Deal

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A recent Delaware Court of Chancery decision confirms that, unlike in statutory mergers, the attorney-client privilege will remain with the target entity in an asset sale unless the attorney-client privilege is explicitly waived or transferred to the buyer in the asset purchase agreement. Specifically, in *DLO Enterprises, Inc. v. Innovative Chemical Products Group, LLC*, the court denied a buyer group's motion to compel the sellers' production of unredacted preclosing deal-related communications between the sellers and their deal counsel following the closing of an asset sale. The court held that, in the absence of language to the contrary in the purchase agreement, the sellers retained the attorney-client privilege over those communications. In so doing, the court distinguished its prior decisions in the merger context but reaffirmed the ability of buyers to contract for a different result.

## Background

In January 2018, Innovative Chemical Products Group, LLC and ICP Construction, Inc. (Buyers) entered into an Asset Purchase and Contribution Agreement (Purchase Agreement) to acquire all of the assets of DLO Enterprises, Inc. (Target) from 301 L&D, LLC, Daniel Owen and Leane Owen (Sellers). Following the closing, the Buyers asserted that the Sellers misrepresented the Target's financial statements and whether the Target's products met certain quality standards. In connection with litigation related to that dispute, the Buyers requested certain documents from the Sellers, including preclosing deal-related communications between the Sellers and their former deal counsel, which the Sellers provided in redacted form based on the attorney-client privilege. The Buyers subsequently sought unredacted versions of the communications, contending that the Sellers' preclosing privilege passed to the Buyers by operation of law, and that the Sellers had purchased the right to waive privilege over the Sellers' deal negotiations pursuant to the Purchase Agreement.

## Court's Analysis

In denying the Buyers' motion, the court held that the Sellers retained the attorney-client privilege over the deal-related preclosing communications with their former deal counsel. In so doing, the court distinguished its prior decisions in the merger context in *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP* and *Shareholder Representative Services LLC v. RSI Holdco*, wherein the court held that, absent an express carve-out, the attorney-client privilege over deal-related preclosing communications passes to the surviving corporation by operation of law. According to the court, in contrast to mergers (which are governed by statute), asset sales

must be analyzed based on the applicable transaction agreement because these transactions are governed by contract. Turning to the Purchase Agreement, the court noted that the Buyers contracted for control of privilege over the acquired assets, but not excluded assets. Because excluded assets included, among other things, “rights under or pursuant to [the Purchase Agreement],” the court held that privilege in respect of preclosing deal-related communications remained with the Sellers.

## **Takeaways**

The court’s decision in *DLO Enterprises, Inc.* emphasizes some of the key differences between mergers and asset sales. As the court highlighted, rather than being governed by statute, asset deals are governed by contract and necessarily involve a buyer’s selection of assets and liabilities to either acquire or leave behind with the target entity. In addition, the target entity in an asset deal survives the closing, whereas in a merger, the target entity merges with or into another entity. It therefore follows that privilege will remain with the sellers (including the target entity) in an asset sale unless the waiver of privilege is included as an acquired asset under the purchase agreement.

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