

In Mergers, Common Interest Doctrine Applies Only When Parties Share Primarily Legal, Not Commercial, Interests

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The Delaware Superior Court recently elaborated on the common interest doctrine in the context of a merger. In *American Bottling Co. v. Repole*, C.A. No. N19C-03-048 AML CCLD, Judge LeGrow held that privileged communications shared with a third party during the final stages of a merger were not subject to the common interest doctrine. Under the common interest doctrine, the attorney-client privilege will not be waived, despite disclosure to a third party, when the communication at issue was between a client or his lawyer and another lawyer who is representing another person in a matter of common interest. This doctrine will only apply, however, when the parties' shared interest involves primarily legal issues, not a commercial common interest. This commercial versus legal distinction was at the heart of the court's conclusion in *American Bottling Co.*

Background

The subject litigation arose from defendant BA Sports, Nutrition, LLC's (Body Armor) termination of its distribution agreement with plaintiff the American Bottling Company (ABC) after ABC's parent company, Dr. Pepper Snapple Group (DPSG), merged with one of Body Armor's competitors, Keurig Green Mountain. As part of its due diligence process, Keurig and its advisers shared some otherwise privileged communications with DPSG regarding the distribution agreement's termination clause and any associated fee, and sought DPSG's input. The disclosure at issue took place after the merger agreement had been signed, but before the transaction closed.

Body Armor sought to compel the production of the allegedly privileged material. The materials in question included a chart that Keurig's parent company's counsel prepared during due diligence to identify additional information needed, as well as various emails between Ernst & Young, the accounting firm involved in due diligence, and DPSG executives and in-house counsel. According to Body Armor, Keurig waived its privilege when it shared the communications and materials with DPSG. In response, ABC asserted that the common interest doctrine applied based on the parties' shared legal interest in protecting the merged company's rights under the distribution agreement. Body Armor, on the other hand, argued that ABC's identified common interest was commercial, not legal, and ABC had not carried its burden of proving privilege.

Analysis

The court began its analysis by recognizing that parties to a merger may share common interests between the time when a merger agreement is signed and the transaction closes. *3Com Corp. v. Diamond II Holdings, Inc.*, 2010 Del. Ch. LEXIS 126, at *32 (Del. Ch. May 31, 2010). The court pointed out, however, that this does not mean that in these situations the parties' interests are 100 percent aligned, and certainly does not mean that the parties' interests are legal in nature, as required to be protected by the common interest doctrine. In order to rule on the application of the common interest doctrine in the case at hand, the court had to determine whether Keurig's interests were aligned with DPSG's, and whether those interests were primarily legal. It concluded that, although the parties' interests may have been aligned for some purposes, the common interests were not primarily legal in nature. Therefore, the doctrine did not apply.

The court described a line of cases relevant to this analysis, observing that both the Delaware Superior Court and the Delaware Court of Chancery have held that negotiations regarding the terms of a business relationship or discussions regarding the execution of business goals are commercial in nature and not sufficient to provide protection under the common interest doctrine. For instance, in *Glassman v. Crossfit, Inc.*, the Court of Chancery held that the plaintiff and the private equity firm to which she intended to sell her 50 percent ownership interest in Crossfit, Inc. did not share a common legal interest because the plaintiff could not establish that the communications had been shared in order to coordinate a joint litigation strategy regarding the approval of her divorce settlement and related sale of her Crossfit ownership interest. 2012 Del. Ch. LEXIS 248, at *9-11 (Del. Ch. Oct. 12, 2012). By contrast, the cases in which courts have found that a common legal interest exists typically involve coordinated action with an eye toward potential litigation. For example, in *In re Lululemon Athletica Inc. 220 Litigation*, the Court of Chancery held that Lululemon and its founder shared a common interest in communications coordinating a response to allegations of impropriety related to the founder's stock trades, especially in light of the reasonable anticipation that litigation might ensue. 2015 Del. Ch. LEXIS 127, at *31-32 (Del. Ch. Apr. 2015). When applying these lines of cases to the case at hand, the court explained, "[t]he parties may well have 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 was plainly commercial." The fact that one component of the parties' communication may have touched on the desire to avoid litigation was of no consequence. As a result, ABC's motion to compel was granted.

Takeaways

It appears that the Delaware courts, most recently the Superior Court, are taking a narrow view of what constitutes a legal interest sufficient to invoke the common interest doctrine, at least in the context of late-stage merger communications. In order to ensure that communications to a third party sharing a common interest are protected, parties asserting the privilege must be able to clearly articulate the precise legal ties connecting the parties. The Delaware Superior Court's latest decision on the issue seems to suggest that litigation avoidance or preparation should be an integral part of the communication. Therefore, parties before the Delaware courts should proceed with caution when seeking to invoke the common interest doctrine for communications not directly related to litigation or made in anticipation of litigation or, when branching away from strictly litigation-related communications, should ensure that a clearly legal interest can be articulated.

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