THE SECRETS OF CORPORATE COURTSHIP AND MARRIAGE: EVALUATING COMMON INTEREST PRIVILEGE WHEN COMPANIES COMBINE IN MERGERS

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I. INTRODUCTION 302

II. THE POSSIBILITIES OF PRIVILEGE AMONGST MULTIPLE CONCERNS 306

III. GOING TO THE ALTAR: THE ACCRETIVE TIMELINE OF PRIVILEGE IN MERGERS 312
A. Independent Operators 313
B. Due Diligence Subject to a Non-Disclosure Agreement 317
C. Negotiation and Execution of a Merger Agreement 322
D. Obtaining Regulatory Approval Pursuant to a Merger Agreement 326
E. Litigation in Defense of the Transaction 331
F. Consummation 336

IV. DOMESTIC QUARRELS: DISAGREEMENTS BETWEEN MERGER PARTIES 341
A. Distinguishing Common from Non-Common Interests 342
B. The Rule Against Unilateral Waiver 347

V. BREAKING OFF THE ENGAGEMENT: PRIVILEGE IN FAILED TRANSACTIONS 351
A. The Subsequent Litigation Exception 353
B. Analyzing Erstwhile Allies in Opposition 357

VI. CORPORATE PRENUPS: COMMON INTEREST AND JOINT DEFENSE AGREEMENTS 360
A. Bolstering the Joint Privilege Against Outsiders 361
B. Protecting the Parties in Subsequent Adversarial Litigation 366

VII. THE CONCEIT OF CORPORATE MARRIAGE 369

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VIII. CONCLUSION 373

> *The background of this case is the classic corporate love story. Company A meets Company B. They are attracted to each other and after a brief courtship, they merge. Investor C, hoping that the two companies will be fruitful and multiply, agrees to pay $50 million for the wedding. Nine months later, however, things begin to fall apart and the combined entity declares bankruptcy. Investor C feels misled. He believes that Company A knew that there were problems with Company B but that it made the oft repeated mistake of thinking that it would be able to change Company B for the better. Investor C files suit in the district court and after his complaint is dismissed, we find ourselves here. It is an old story but it never fails to elicit a tear.*[1]

I. INTRODUCTION

As others have said before, a merger is a marriage.[2] One author added a caveat, true of both companies and couples—"hopefully between complementary parties."[3] Whether a company is sold in whole or in part, two entities that were previously separate unite to become one.[4] In the classic corporate love story, the two companies will indeed complement one another and prosper together, providing returns to their shareholders, efficiencies to consumers, competition to the marketplace, and perhaps even greater peace on earth for all.[5] Of course, as the Third Circuit poignantly limned in the epigram, the combinations of corporations are as oft star-

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1. GSC Partners CDO Fund v. Washington, 368 F.3d 228, 232 (3d Cir. 2004).

2. *See, e.g.*, David T. Scheffman, *Antitrust, Economics, and "Reality," in* THE ECONOMICS OF THE ANTITRUST PROCESS 239, 247–48 (Malcolm B. Coate & Andrew N. Kleit eds., Kluwer Acad. 1996); Martha F. Africa, *Small Firm Mergers*, 13 LEGAL ECON. 50, 52 (1987); David T. Scheffman, *Making Sense of Mergers*, 38 ANTITRUST BULL. 715, 740 (1993); Carol Vogel, *A Museum Merger: The Modern Meets the Ultramodern*, N.Y. TIMES (Feb. 2, 1999), http://www.nytimes.com/1999/02/02/arts/a-museum-merger-the-modern-meets-the-ultramodern.html; *see also, e.g.*, *GSC Partners*, 368 F.3d at 232; Martin Marietta Materials, Inc. v. Vulcan Materials Co., 56 A.3d 1072, 1092 (Del. Ch. 2012).

3. Africa, *supra* note 2, at 52.

4. *See infra* Section III.F.

5. *See GSC Partners*, 368 F.3d at 232; LaPoint v. AmerisourceBergen Corp., No. 327-CC, 2007 WL 2565709, at *1 (Del. Ch. Sept. 4, 2007); Africa, *supra* note 2, at 52, 54, 57; *see also Martin Marietta*, 56 A.3d at 1092.

crossed as the tearful courtships of literature.[6] Whatever the success of companies' attempts at joining, the process will undoubtedly involve considerable exertions and sacrifices in service of an uncertain outcome.[7]

Nigh inevitably, the two companies will have shared certain confidences during the long procession to the altar.[8] Indeed, such secrets are the very predicates that allow the couple to confirm whether their marriage will be a happy one.[9] Some of those secrets may be of the legal variety, subject in the first instance to evidentiary privilege from discovery.[10] Yet prior to the transaction closing, the companies are separate and competing entities, potentially jeopardizing the protected status of legal confidences when they are shared.[11] Such confidences may be precious or harmful to the companies, singly or together, if disclosed more broadly or used outside the context of the transaction.[12]

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6. *Cf.* WILLIAM SHAKESPEARE, THE TRAGEDY OF ROMEO AND JULIET act i, sc. i. (illustrating a classic example of star-crossed courtship).

7. *See* Africa, *supra* note 2, at 57 ("And, as in a marriage, sensitivity and hard work are required to make the unit mature and flourish, even if all the right elements are there at the outset.").

8. *See* Africa, *supra* note 2, at 52; Richard B. Kapnick & Courtney A. Rosen, *Preserving the Attorney-Client Privilege in Corporate Transactions and Review of Board Committee Actions*, 3 BLOOMBERG CORP. L.J. 543, 550 (2008); Anne King, Comment, *The Common Interest Doctrine and Disclosures During Negotiations for Substantial Transactions*, 74 U. CHI. L. REV. 1411, 1411 (2007); Michael C. Naughton, *Gun-Jumping and Premerger Information Exchange: Counseling the Harder Questions*, 20 ANTITRUST 66, 66 (2006).

9. Africa, *supra* note 2, at 52–54; Kapnick & Rosen, *supra* note 8, at 550; King, *supra* note 8, at 1411; Naughton, *supra* note 8, at 66; *see also* Hewlett-Packard Co. v. Bausch & Lomb, Inc., 115 F.R.D. 308, 311 (N.D. Cal. 1987); Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 998 N.Y.S.2d 329, 336–37 (N.Y. App. Div. 2014), *rev'd*, 27 N.Y.3d 616 (N.Y. 2016).

10. *See* Kapnick & Rosen, *supra* note 8, at 550; King, *supra* note 8, at 1411; Joseph B. Crace Jr., Britt K. Latham & Virginia M. Yetter, *Preserving the Attorney-Client Privilege in M&A*, LAW360 (Sept. 16, 2014, 1:28 PM), https://www.law360.com/articles/577785/preserving-the-attorney-client-privilege-in-m-a; *see, e.g.*, United States v. Gulf Oil Corp., 760 F.2d 292, 293–94 (Temp. Emer. Ct. App. 1985); La. Mun. Police Emps. Ret. Sys. v. Sealed Air Corp., 253 F.R.D. 300, 310 (D.N.J. 2008).

11. *See* Kapnick & Rosen, *supra* note 8, at 550–52; King, *supra* note 8, at 1411–12; Crace, Latham & Yetter, *supra* note 10; *see, e.g.*, *In re* Teleglobe Commc'ns Corp., 493 F.3d 345, 366 (3d Cir. 2007); *Gulf Oil*, 760 F.2d at 294–95; Nidec v. Victor Co. of Japan, 249 F.R.D. 575, 579–80 (N.D. Cal. 2007).

12. *See* GSC Partners CDO Fund v. Washington, 368 F.3d 228, 244 (3d Cir. 2004) ("Often this tendency towards secrecy relates to a concern, that if the deal falls through, the acquirer might use the target's secrets to better compete with it, or that the target will be otherwise disadvantaged."); *see, e.g.*, *Gulf Oil*, 760 F.2d at 294–95 (rejecting government regulator seeking a company's internal legal analysis of the regulator's investigation that had been shared with a merger partner).

Happily, many courts have adopted a more expansive view of privilege under the nomenclature of co-clients, common interest, and joint defense, pursuant to which multiple parties can share their secrets without waiving privilege—under appropriate circumstances.[13] But to what extent can combining companies depend on these privileges to maintain their respective secrets during the pendency of a merger? The answer is clearly of considerable import to antitrust attorneys and their clients: "The greatest push to expand the common interest privilege comes from corporate attorneys representing multiple clients in an antitrust context."[14] Or as a recent practitioner's guide set forth, the relevant inquiry is "when, if ever, communications between parties to a potential merger and their counsel are privileged, and when, if ever, parties to a potential merger can share privileged documents without waiving the privilege."[15]

This Article seeks to peruse and reconcile precedent on privilege when companies combine, whether through a merger of equals, strategic acquisition, or the transfer of a subsidiary.[16] In Part II, the Article briefly recapitulates the availability of multi-party privilege and its application to companies as background.[17] Part III commences the focused examination of common interest privilege in corporate transactions, tracing the progress of a merger and accretion of privilege rights from start to finish, distinguishing the considerations at each stage of the process. Part IV addresses difficulties in assessing privilege when merger parties proceed in something less than

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13. *See infra* Part II.

14. EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE 277 (ABA 5th ed. 2007).

15. Crace, Latham & Yetter, *supra* note 10.

16. In light of major differences in privilege analysis, this discussion focuses on corporate combinations, *viz.* transactions involving a change of control in a company, not merely the transfer of limited assets from one to another (though a *de facto* merger in which substantially all assets are transferred would still qualify). *See, e.g.*, King, *supra* note 8, at 1412 n.5. For brevity's sake, such transactions are described generically in the main text as mergers. *See, e.g.*, Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 VAND. L. REV. 1053, 1061 (2013). Similarly, references to corporations should not be taken to exclude LLCs, LPs, LLPs, and other forms under which companies may be organized.

17. Given the focus of this Article, the provided background on privilege is brief indeed. Many other authors have offered admirably detailed examinations of the contours of multi-party privilege, should further depth be desired. *See generally, e.g.*, James M. Fischer, *The Attorney-Client Privilege Meets the Common Interest Arrangement: Protecting Confidences While Exchanging Information for Mutual Gain*, 16 REV. LITIG. 631 (1997); Grace M. Giesel, *End the Experiment: The Attorney-Client Privilege Should Not Protect Communications in the Allied Lawyer Setting*, 95 MARQ. L. REV. 475 (2012); Katharine Traylor Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*, 15 B.U. PUB. INT. L.J. 49, 77–78 (2005).

lockstep, including how to evaluate disagreements and the question of waiver. In Part V, the Article reviews a more unfortunate possibility in mergers: what becomes of joint privilege in the event that the transaction fails, when former allies may become adversaries? Turning to more practical advice for practitioners, Part VI discusses a frequent mechanism for concretizing privilege in corporate combinations, the common interest agreement, and presents cases analyzing such writings' efficacy. Finally, in Part VII, the Article revisits the metaphor of mergers as a marriage and what that isomorphism can reveal about the merits of privilege in corporate combinations, concluding in Part VIII with an appeal to the continuing value of common interest privilege in the realization of mergers.[18]

Pace the straitlaced, the Article's fanciful conceit of comparing interpersonal relations to corporate affiliations may seem flippant. But by comparing the legal process preceding mergers to the lead-up to a marriage, it is to be hoped that sometimes-dry themes can be rendered more readily interpretable and intuitive.[19] Analogy to matrimony is particularly apt in the context of privilege, as the marital evidentiary protections augur some of the difficulties that beset privilege between competing companies when they seek to combine.[20] Indeed, this Article is hardly the first scholarly work to draw the unsurprising parallel between corporate and interpersonal unions.[21] Courts too have found the analogy compelling.[22] Companies seeking to

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18. This Article represents substantial further investigation and expansion of research presented by this author previously in parsing confidentiality amongst competing companies. *See* Jared S. Sunshine, *Seeking Common Sense for the Common Law of Common Interest in the D.C. Circuit*, 65 CATH. U. L. REV. 833 (2016).

19. Besides their rendering dense material more intuitive, broad conceptual isomorphisms, such as that employed here, can often reveal surprising insights, *see infra* Part VII, and have been widely used in other scholarly literature. *See, e.g.*, DOUGLAS R. HOFSTADTER, GÖDEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID (Basic Books ed. 1979).

20. *See infra* Part VII.

21. *See, e.g.*, sources cited *supra* note 2; Andreas Al-Laham, Lars Schweizer & Terry L. Amburgey, *Dating Before Marriage? Analyzing the Influence of Pre-Acquisition Experience and Target Familiarity on Acquisition Success in the "M&A as R&D" Type of Acquisition*, 26 SCAND. J. MGMT. 25, 25 (2010); Christiane Demers, Nicole Geroux & Samia Chreim, *Merger and Acquisition Announcements as Corporate Wedding Narratives*, 16 J. ORG'L CHANGE MGMT. 223, 223 (2003); Kevin J. Dooley & Brenda J. Zimmerman, *Merger as Marriage: Communication Issues in Postmerger Integration*, 28 HEALTH CARE MGMT. REV. 55, 55 (2003); Simon Mezger, *Management: Three Years after the Marriage - What Makes a Successful Merger?*, 60 KEEPING GOOD COMPANIES 501, 501–03 (2008); Joanie E. Sompayrac & D. Michael Costello, *Thinking Merger? A Proper Courtship Can Avert a Nasty Divorce*, 78 CPA J. 63, 63–65 (2008).

22. *See, e.g.*, GSC Partners CDO Fund v. Washington, 368 F.3d 228, 232 (3d Cir. 2004); Martin Marietta Materials, Inc. v. Vulcan Materials Co., 56 A.3d 1072, 1092 (Del. Ch.),

protect their secrets in corporate courtships must navigate obstacles at least as trying as those afflicting the affianced[23]—which, as anyone planning a wedding can attest, are formidable.[24]

II. THE POSSIBILITIES OF PRIVILEGE AMONGST MULTIPLE CONCERNS

The law recognizes certain principal privileges against court-ordered disclosure, but only some apply to corporations.[25] In the lawyerly context, the attorney-client privilege shields confidential communications for the purpose of legal advice,[26] whilst the work product privilege protects documents prepared in connection with litigation from discovery.[27] As for other well-established protections: a corporation cannot avail itself of the physician-patient or priest-penitent privilege, for obvious reasons;[28] longstanding precedent denies it the benefit of the constitutional privilege against self-incrimination;[29] and notwithstanding this Article's conceit, marital privilege applies only between human spouses.[30] The legal privileges

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aff'd, 68 A.3d 1208 (Del. 2012); LaPoint v. AmerisourceBergen Corp., No. 327-CC, 2007 WL 2565709, at *1 (Del. Ch. Sept. 4, 2007).

23. *See infra* Part VII.

24. *See* Áine M. Humble, Anisa M. Zvonkovich & Alexis J. Walker, *"The Royal We": Gender Ideology, Display, and Assessment in Wedding Work*, 29 J. FAM. ISSUES 3, 11 (2008); *cf. GSC Partners*, 368 F.3d at 232.

25. *See* Trammel v. United States, 445 U.S. 40, 51 (1980); David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 107–08 (1956) (listing the "principal confidential communication privileges" as "husband-wife, client-attorney, penitent-clergyman, and perhaps to a lesser extent, patient-physician").

26. Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998); Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Fisher v. United States, 425 U.S. 391, 403 (1976).

27. FED. R. CIV. P. 26(b)(3)(A); *see also* Hickman v. Taylor, 329 U.S. 495, 509–11 (1947); *In re* Subpoenas Duces Tecum, 738 F.2d 1367, 1371 (D.C. Cir. 1984).

28. To wit, a corporation as such can neither obtain medical treatment, nor seek religious expiation. *But cf.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2779 (2014) (holding that the Affordable Care Act's preventative services coverage mandate for employers substantially burdened the exercise of religion).

29. *See* Wilson v. United States, 221 U.S. 361, 380 (1911); Hale v. Henkel, 201 U.S. 43, 69 (1906); Joseph M. Proskauer, *Corporate Privilege Against Self-Incrimination*, 11 COLUM. L. REV. 445 (1911); *see also* Ramzi Abadou, *High Court May Take On Corporate 5th Amendment Privilege*, LAW360 (Mar. 25, 2015, 10:22 AM), https://www.law360.com/articles/634828/high-court-may-take-on-corporate-5th-amendment-privilege ("Since the ratification of the Bill of Rights in 1791, the U.S. Supreme Court has never extended the privilege against self-incrimination to corporate 'persons.'").

30. Indeed, the Fourth Circuit denied even a flesh-and-blood husband and wife the marital privilege because the husband had communicated from his workplace email system,

are therefore the only ones that inure to artificial persons,[31] and they have become well-trodden fixtures of modern corporate practice.[32] Companies are commonly and crucially advised by general counsel and their legal staff as well as by outside counsel as to specific engagements.[33] There is no doubt that qualifying corporate legal documents can enjoy either or both of the attorney-client and work product privileges.[34]

As the name suggests, the archetypal posture of attorney-client privilege involves one client and one lawyer. Attorney-client privilege doctrine has traditionally demanded the confidentiality associated with such a tête-à-tête.[35] Yet long ago attorneys organized themselves into law firms, which undoubtedly can collectively advise and defend a client subject to

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thus involving a nominal third party in the exchange. *See* United States v. Hamilton, 701 F.3d 404, 408–09 (4th Cir. 2012).

31. This is not strictly true, given the advent of modern variations on the attorney-client privilege for other professionals, such as auditor-client or accountant-client privilege, but these have seen relatively little use and their long-term vitality is uncertain at best. *Compare, e.g.*, Thomas J. Molony, *Is the Supreme Court Ready to Recognize Another Privilege? An Examination of the Accountant-Client Privilege in the Aftermath of* Jaffee v. Redmond, 55 WASH. & LEE L. REV. 247 (1998), *with* Ricardo Colon, Comment, *Caution: Disclosures of Attorney Work Product to Independent Auditors May Waive the Privilege*, 52 LOY. L. REV. 115, 146 (2006).

32. *See* Grace M. Giesel, *The Legal Advice Requirement of the Attorney-Client Privilege: A Special Problem for In-House Counsel and Outside Attorneys Representing Corporations*, 48 MERCER L. REV. 1169, 1182–83, 1182 n.49 (1997); 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, 60–62 (1992) (attorney-client); *id.* at 85–86 (work product); King, *supra* note 8, at 1420–21; Jared S. Sunshine, *The Part & Parcel Principle: Applying the Attorney-Client Privilege to Email Attachments*, 8 J. MARSHALL L.J. 47, 56 (2014).

33. Upjohn Co. v. United States, 449 U.S. 383, 398 (1981); *see In re* Sulfuric Acid Antitrust Litig., 235 F.R.D. 407, 417 (N.D. Ill. 2006); SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 513 (D. Conn. 1976).

34. *See* Hundley, *supra* note 32, at 61–62, 85–86; King, *supra* note 8, at 1420–21; *e.g.*, *Upjohn Co.*, 449 U.S. at 383; Union Carbide Corp. v. Dow Chem. Co., 619 F. Supp. 1036, 1050 (D. Del. 1985); *see also Attorney-Client Privilege: Does It Apply to Corporations?*, 12 DEPAUL L. REV. 263, 268 (1963).

35. *See* Giesel, *supra* note 17, at 497; Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853, 853–55 (1998) ("In all formal definitions of the attorney-client privilege, whether employed in state or federal courts, the client or the attorney must communicate with the other in confidence, and subsequently that confidentiality must have been maintained."); *see, e.g.*, United States v. Am. Tel. & Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980) ("Any voluntary disclosure by the holder of such a privilege is inconsistent with the confidential relationship and thus waives the privilege."); United States v. Stepney, 246 F. Supp. 2d 1069, 1074 (N.D. Cal. 2003).

privilege.[36] Generally no less certain was that a group of clients might avail themselves of an attorney to collectively gain advice on a matter in the interests of all.[37] This was particularly so in the case of co-defendants in criminal actions, for whom shared counsel often best served the needs of all in avoiding conviction by presenting a common front.[38] The joint representation of the co-clients overcame the traditional requirement of strict confidentiality between a single client and attorney, forging all clients and their counsel into one unit.[39] The right of such co-clients to rely on privilege is thus of ancient origin and has confronted no serious opposition.[40]

Subsequent evolution in privilege doctrine amongst multiple clients was not far off. Just as with co-clients with a single attorney, the earliest case to allow clients represented by separate counsel to confer confidentially as a group arose in the criminal context.[41] In 1871, the Virginia Supreme Court in *Chahoon v. Commonwealth* recognized for the first time "a right, all the accused and their counsel, to consult together about the case and the defence."[42] The court elaborated:

> They might have employed the same counsel, or they might have employed different counsel as they did. But whether they did the

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36. Cedrone v. Unity Savings Ass'n, 103 F.R.D. 423, 429 (E.D. Pa. 1984) ("[I]t is inconceivable that an internal memorandum between attorneys in the same office concerning the representation of a client, utilizing confidential information provided by that client, could be anything but protected by the privilege."); EPSTEIN, *supra* note 14, at 273; *see* N.Y. Underwriters Ins. Co. v. Union Constr. Co., 285 F. Supp. 868, 869 (D. Kan. 1968).

37. Giesel, *supra* note 17, at 522–23, 525–27 (discussing seventeenth century cases and doctrine); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75 (AM. LAW INST. 2000) (discussing co-client privilege); *e.g.*, Simpson v. Motorists Mut. Ins. Co., 494 F.2d 850, 855 (7th Cir. 1974) ("[W]here the same attorney represents two parties having a common interest, and each party communicates with the attorney, the communications are privileged . . . ."); Grand Trunk W. R.R. Co. v. H.W. Nelson Co., 116 F.2d 823, 835 (6th Cir. 1941).

38. *See* Chahoon v. Commonwealth, 62 Va. (21 Gratt.) 822, 841 (1871).

39. *See* Deborah Stavile Bartel, *Reconceptualizing the Joint Defense Doctrine*, 65 FORDHAM L. REV. 871, 876 (1996); Giesel, *supra* note 17, at 519–20; *cf.* Fischer, *supra* note 17, at 647–49 (examining how common interest privilege represents a similar loosening of confidentiality requirements).

40. Giesel, *supra* note 17, at 479–80, 480 n.13 (citing Rice v. Rice, 53 Ky. (14 B. Mon.) 335, 336 (1854); Root v. Wright, 84 N.Y. (39 Sickels) 72, 76 (1881)); *id.* at 512–13, 512 n.176 (internal citations omitted); *id.* at 522–23.

41. *Chahoon*, 62 Va. (21 Gratt.) at 823; *see* Bartel, *supra* note 39, at 886–88; Greg A. Drumright & W. Rick Griffin, *The Joint Defense Doctrine—Cohesion Among Traditional Adversaries*, *in* EVIDENTIARY PRIVILEGES FOR CORPORATE COUNSEL 35, 37 (Def. Res. Inst. 2008) (recognizing *Chahoon* as originating the privilege); Fischer, *supra* note 17, at 633 n.7 (same); Schaffzin, *supra* note 17, at 58 (same).

42. *Chahoon*, 62 Va. (21 Gratt.) at 841–42.

> one thing or the other, the effect is the same, as to their right of communication to each and all of the counsel, and as to the privilege of such communication. They had the same defence to make, the act of one in furtherance of the conspiracy, being the act of all, and the counsel of each was in effect the counsel of all.[43]

Although initially invoked only sporadically in the ensuing century,[44] the *Chahoon* right to joint defense privilege has seen widespread acceptance, including at the appellate level, beginning about fifty years ago.[45] At the same time, the right increasingly gained approval in civil cases as well, notwithstanding its origin in criminal prosecutions.[46] Today, there is little doubt that impending or actual co-litigants, whether civil or criminal, may employ separate counsel without fear of forfeiting privilege.[47] Indeed, codefendants may even have a constitutional right to coordinate their positions.[48]

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43. *Id.*; *contra* Giesel, *supra* note 17, at 482–83, 504–08 (arguing *Chahoon* erred).

44. *See* Giesel, *supra* note 17, at 483, 489, 508–11.

45. *See* Hundley, *supra* note 32, at 81 ("Although the rule's common law roots go back to the last century, its major development occurred in the last 25 years [before 1992].") (date of article added for context); Bartel, *supra* note 39, at 885–86; Drumright & Griffin, *supra* note 41, at 37; *see, e.g.*, United States v. McPartlin, 595 F.2d 1321, 1336 (7th Cir. 1979); Hunydee v. United States, 355 F.2d 183, 185 (9th Cir. 1965); Continental Oil Co. v. United States, 330 F.2d 347, 350 (9th Cir. 1964). *Compare* Giesel, *supra* note 17, at 508–12 (arguing *Chahoon* has been misinterpreted by adopting courts), *with* Schaffzin, *supra* note 17, at 59 ("[T]he joint defense privilege universally gained easy and early acceptance in the criminal context.").

46. Schaffzin, *supra* note 17, at 60 & n.35 ("[O]ther courts that have considered this issue have similarly applied the joint defense privilege to protect attorney-client privileged communications that civil co-defendants have shared . . . ."). See Giesel, *supra* note 17, at 531 n.247, for a list of cases that illustrate the application of the joint defense privilege in civil cases. *See also* EPSTEIN, *supra* note 14, at 287; *In re* Grand Jury Subpoenas, 89–3 and 89–4, John Doe 89–129, 902 F.2d 244, 249 (4th Cir. 1990); Niagara Mohawk Power Corp. v. Megan-Racine Assocs., Inc. (*In re* Megan-Racine Assocs., Inc.) 189 B.R. 562, 571 (Bankr. N.D.N.Y. 1995); *see, e.g.*, Transmirra Prods. Corp. v. Monsanto Chem. Co., 26 F.R.D. 572, 579 (S.D.N.Y. 1960); Schmitt v. Emery, 2 N.W.2d 413, 417 (Minn. 1942), *overruled in part by* Leer v. Chicago, 308 N.W.2d 305, 309 (Minn. 1981).

47. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76(1) (AM. LAW INST. 2000); Bartel, *supra* note 39; Schaffzin, *supra* note 17, at 58–61; *e.g.*, *In re* LTV Sec. Litig., 89 F.R.D. 595, 603–05 (N.D. Tex. 1981); *In re* Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974, 406 F. Supp. 381, 388 (S.D.N.Y. 1975) ("[The] cooperative program of joint defense is helpful or, *a fortiori*, necessary to form and inform the representation of clients whose attorneys are each separately retained."). *But see* Giesel, *supra* note 17, at 504–12.

48. *See* United States v. Stepney, 246 F. Supp. 2d 1069, 1076 (N.D. Cal. 2003); Bartel, *supra* note 39, at 872–73 (citing United States v. Jones, 44 F.3d 860, 873 (10th Cir. 1995); Wheat v. United States, 486 U.S. 153, 160 (1988)); Bartel, *supra* note 39, at 906–10; Hundley,

The final key advancement was the severance of the right to confidentiality from its original wellspring in litigation.[49] Stripped of the connection to defense or prosecution of a claim, this most modern evolution of multi-party privilege became known as common interest, because it was based on the parties sharing like legal interest in the privileged material.[50] Common interest privilege should then apply to any attorney-client or work product communications shared with another party pursuing the same legal aim, regardless of the presence or absence of litigation.[51] The majority of jurisdictions have adopted this common interest doctrine.[52] Some, however, have refused to recognize common interest privilege outside the litigation context, finding it effectively conterminous with joint defense privilege.[53] This refusal represents a problematic minority position;[54] regimes invoking a litigation requirement may place gainful confidential cooperation in jeopardy, particularly in mergers.[55]

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supra note 32, at 60 n.2. *But see* Giesel, *supra* note 17, at 548–49 (expressing guarded skepticism).

49. *See* Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1172 (D.S.C. 1974), *aff'd*, 540 F.2d 1215 (4th Cir. 1976); EPSTEIN, *supra* note 14, at 289; Fischer, *supra* note 17, at 635–37 (describing *Duplan* as the "seminal decision" in the emergence of the distinct common interest privilege); Hundley, *supra* note 32, at 82–84.

50. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76(1) (AM. LAW INST. 2000) (noting no litigation requirement); EPSTEIN, *supra* note 14, at 289–90 ("Unlike the joint defense privilege, the common interest does not require or imply that an actual suit is or ever will be pending. It does require, however, that a definable common interest exist."); Fischer, *supra* note 17, at 635.

51. *See* Fischer, *supra* note 17, at 656 ("However, the need for legal advice is not limited to litigation settings, and the range of parties who are interested in the resolution of a 'problem' is not limited to those who may be made co-parties or who have the legal right to assume control of the defense or claim."); Schaffzin, *supra* note 17, at 76–78.

52. United States v. BDO Seidman, LLP, 492 F.3d 806, 816 n.6 (7th Cir. 2007); HSH Nordbank AG N.Y. Branch v. Swerdlow, 259 F.R.D. 64, 71 n.9 (S.D.N.Y. 2009) ("Federal case law makes clear that the common interest doctrine applies even where there is no litigation in progress."); Sunshine, *supra* note 18, at 854 & n.42; *see also* King, *supra* note 8, at 1424 & n.73 ("The common interest doctrine is widely accepted in the federal courts, and by state courts and legislatures."). *But see* Schaffzin, *supra* note 17, at 52 (writing in 2005 that "[o]nly a handful of state and federal jurisdictions have affirmatively adopted the common interest doctrine").

53. *See* Schaffzin, *supra* note 17, at 74–75, 74 n.91 (discussing and citing such jurisdictions).

54. *See id.* at 76–78 (arguing against a litigation requirement); Sunshine, *supra* note 18, at 284–85 (same).

55. *See* Sunshine, *supra* note 18; *infra* notes 77–81, 160–168 and accompanying text; *see also* Schaffzin, *supra* note 17, at 76–78 (discussing problems with an unclear litigation requirement).

In any event, essentially every jurisdiction, state and federal, has adopted some form of multi-party privilege, whether of broad or strict compass.[56] And as a rule, these privileges apply *mutatis mutandis* to work product as well as attorney-client postures.[57] Just as with the underlying attorney-client and work product privileges, companies can benefit from co-client, joint defense, and common interest privileges no less than individuals.[58]

The most obvious vehicle for establishing a corporate common interest (other than alignment in litigation) is the creation of a joint venture, which concretizes multiple companies' congruence of purpose.[59] The joint venture has long been held up as a paradigm of privilege: early in his term of office, Chancellor Allen wrote that Delaware's common interest privilege is a "recognition that a disclosure may be regarded as confidential even when made between lawyers representing different clients if in the circumstances, those clients have interests that are so parallel and non-adverse that, at least with respect to the transaction involved, they may be regarded as acting as joint venturers."[60] Otherwise, companies in the ordinary course of business will share few, if any, legal interests sufficiently common absent litigation.[61] But the advent of a potential corporate marriage—the grandest joint venture

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56. *See* Drumright & Griffin, *supra* note 41, at 41–43 (showing adoption of multi-party privilege by state and circuit courts).

57. Bartel, *supra* note 39, at 912–13; Douglas R. Richmond, *The Attorney-Client Privilege and Associated Confidentiality Concerns in the Post-Enron Era*, 110 PENN ST. L. REV. 381, 414–15 (2005); *e.g.*, Doe v. United States (*In re* Doe), 662 F.2d 1073, 1081 (4th Cir. 1981) ("Disclosure to a person with an interest common to that of the attorney or client normally is not inconsistent with an intent to invoke the work product doctrine's protection and would not amount to such a waiver."); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1172 (D.S.C. 1974), *aff'd*, 540 F.2d 1215 (4th Cir. 1976) ("The sharing of information between counsel for parties having common interests does not destroy the work-product privilege during the course of the litigation."). *See generally* EPSTEIN, *supra* note 14, at 1038–46 (discussing non-waiver of work product privilege when shared with a party in common interest, but noting that interest may be interpreted more broadly in work product postures).

58. King, *supra* note 8, at 1433–34; *e.g.*, *In re* Teleglobe Commc'ns Corp., 493 F.3d 345, 363–68 (3d Cir. 2007); United States v. Gulf Oil Co., 760 F.2d 292, 294–96 (Temp. Emer. Ct. App. 1985); Cont'l Oil Co. v. United States, 330 F.2d 347, 349–50 (9th Cir. 1964); SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 514 (D. Conn. 1976).

59. EPSTEIN, *supra* note 14, at 301 ("It is obvious that the privilege applies when parties are already engaged in litigation or a joint venture where their legal interest coincide."); *see also* United States v. BDO Seidman, LLP, 492 F.3d 806, 817 (7th Cir. 2007) (finding joint venturers "clearly within the scope of the common interest doctrine").

60. Jedwab v. MGM Grand Hotels, Inc., No. 8077, 1986 WL 3426, at *2 (Del. Ch. Mar. 20, 1986).

61. *See infra* Section IV.A.

of all, one might say—gives rise to varying but vital questions of shared privilege.[62]

III. GOING TO THE ALTAR: THE ACCRETIVE TIMELINE OF PRIVILEGE IN MERGERS

> *When this love story started, it was Vulcan who was pursuing Martin Marietta, seeking to entice a nervous wallflower to go to the dance, after years of flirtation, but ultimate rejection . . . .*
>
> *When the original suitor cooled its ardor, the once-reluctant dance date became more enamored. As indicated, Martin Marietta's stock price had risen in comparison to Vulcan's. This made the threat that Martin Marietta would be seen as the low-priced industry target ripe for hostile taking less substantial, and it gave Martin Marietta more power in its dealings with its suitor, Vulcan.*[63]

Chancellor Allen's formulation arose in, and has fittingly been much quoted in, the context of mergers and acquisitions (M&A).[64] Although every merger follows its own track and timeline, the availability of privilege generally tends to accrete over the course of the transaction from the earliest overtures to the final consummation of the transaction.[65] As the parties to the transaction draw nearer to closing, an ever-greater set of their legal interests

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62. This author has previously pled for more precise distinctions amongst the co-client, joint defense, and common interest privileges. *See* Sunshine, *supra* note 18. Given the existing confusion of terminology, to rejoin these arguments here would yield myriad asides that would seriously, if not fatally, distract from the themes of this Article. The main text therefore refers generally to shared privileges between allies as common interest, as it often is in mergers, unless a point is being made anent joint defense or co-client privilege in particular. Nonetheless, in eliding the authorities' sometimes indistinct nomenclature for the variety of privileges under discussion, this author does not intend to endorse such imprecision. *See, e.g.*, King, *supra* note 8, at 1423 n.69; Schaffzin, *supra* note 17, at 55.

63. Martin Marietta Materials, Inc. v. Vulcan Materials Co., 56 A.3d 1072, 1093 (Del. Ch.), *aff'd*, 68 A.3d 1208 (Del. 2012).

64. *E.g.*, Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 998 N.Y.S.2d 329, 335–36 (N.Y. App. Div. 2014), *rev'd*, 27 N.Y.3d 616 (N.Y. 2016); 3Com Corp. v. Diamond II Holdings, Inc., No. 3933-VCN, 2010 WL 2280734, at *3–6 (Del. Ch. May 31, 2010); Saito v. McKesson HBOC, Inc., No. 18553, 2002 WL 31657622, at *4 (Del. Ch. Nov. 13, 2002); Zirn v. VLI Corp., No. 9488, 1990 WL 119865, at *8 (Del. Ch. Aug. 13, 1990), *rev'd on other grounds*, 621 A.2d 773 (Del. 1993).

65. *See* Crace, Latham & Yetter, *supra* note 10; King, *supra* note 8, at 1412–13.

come into alignment, allowing the two to share their confidences under the umbrella of common interest privilege[66]:

> Determinations of whether a "common interest" is adequately "legal" or adequately "shared" by the parties are often highly contextual. When, for example, the parties are still in early stages of negotiations, their interests are less aligned than they would be after a merger agreement has been signed, and closing of the transaction is more certain. Courts have made clear that the timing of the disclosure of the privileged information and the certainty of the transaction will impact a determination of whether the common interest doctrine preserves privilege or not.[67]

Accordingly, it makes some sense for the M&A or antitrust practitioner concerned with privilege to conceive of the procession to the marriage altar as a series of distinct phases, each of which has unique considerations militating for or against the existence of common interest privilege between the merger parties.[68] Given the potential for waiver of valuable secrets, it is essential for counsel to consider the availability of common interest privilege before any confidences are shared.[69] And these are critical considerations: whether privilege is upheld or denied can be the decisive factor in a transaction's ultimate success.[70]

A. Independent Operators

Prior to any formal overtures anent combination, parties to a potential merger are independent operators, and, as such, are unlikely to share any

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66. *See* Crace, Latham & Yetter, *supra* note 10; King, *supra* note 8, at 1412.

67. Crace, Latham & Yetter, *supra* note 10.

68. *See id.*; King, *supra* note 8, at 1412–13 ("The timing of the disclosure is also relevant to the question of waiver. During the course of substantial transactions, potential buyers conduct rigorous due diligence review, scrutinizing the seller corporation's files, records, and financial statements to assess the transaction's risk. Disclosures during due diligence arguably warrant different treatment than disclosures made during the initial stages of negotiations. The parties to the contemplated transaction are less likely to have adverse interests at this late stage of negotiations.").

69. Hundley, *supra* note 32, at 106–07; Kapnick & Rosen, *supra* note 8, at 543, 555.

70. Erik J. Olson, Gregory V. Varallo & Rudolph Koch, *The Wheels Are Falling Off the Privilege Bus: What Deal Lawyers Need to Know to Avoid the Crash*, 66 BUS. LAW. 901, 901 (2011); *see also* Sunshine, *supra* note 32, at 48 (discussing generally "corporate claims of privilege, where a single critical document from a population of millions could be the crux on which a case turns").

common interest giving rise to a privilege.[71] Indeed, if the potential parties operate in the same industry, there are likely serious antitrust problems with their sharing commercially sensitive information or cooperating at all.[72] Courts regularly express concern that competitors may attempt to shield exchanges that may run afoul of antitrust law behind a screen of privilege.[73] Such judicial skepticism may result in courts demanding more compelling proof of commonality before affording industry collaborations immunity from discovery.[74] Or as one privilege hornbook summarized, "[t]he antitrust context is particularly fraught with the danger that co-conspirators, once they become co-defendants, will seek common interest protection for documents that are in fact evidence of antitrust conspiracy."[75]

The Fifth Circuit Court of Appeals has been amongst the most demanding,[76] limiting the application of common interest to exchanges when the parties are aligned in litigation.[77] In the much-cited *In re Santa Fe International Corp.*, the court of appeals confronted several oil companies who had shared counsel's advice regarding labor law.[78] Rejecting privilege, the court worried that the circulation of the legal memorandum might in fact be in service of a price-fixing conspiracy, as the plaintiffs had alleged.[79] Crucially, the companies sought to ground common interest in their mutual desire to *avoid* violations of antitrust law and litigation, which the Fifth

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71. *See supra* note 11 and accompanying text.

72. *See* Jeffrey P. Schomig, *The Ability of Trade Associations to Receive Advice on Antitrust and Other Legal Risks: Are These Communications Protected from Discovery?*, BLOOMBERG LAW REPORTS: ANTITRUST AND TRADE, Vol. 4, No. 6, at 1 (2011).

73. *See, e.g.*, *In re* Santa Fe Int'l Corp., 272 F.3d 705, 711–14 (5th Cir. 2001); Ambac Assur. Co. v. Countrywide Home Loans, Inc., 57 N.Y.3d 30, 38–39 (N.Y. 2016).

74. *See, e.g.*, SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 514 (D. Conn. 1976) (finding that the parties' "individual postures relevant to the antitrust discussions in point are undefined" and directing competitors claiming common interest privilege to provide an affidavit in defense of their claims).

75. EPSTEIN, *supra* note 14, at 302; *see id.* at 277 ("It is precisely in such a context that the potential for abuse is greatest. The 'common interest' privilege may be nothing but a cover for an antitrust conspiracy."); *see* Bartel, *supra* note 39, at 879 (cataloguing others expressing such fears).

76. *See* Michael Pavento, Daniel H. Marti, Tracie Siddiqui & Patrick Eagan, *Applicability of the Common Interest Doctrine for Preservation of Attorney-Client Privileged Materials Disclosed During Intellectual Property Due Diligence Investigations*, *in* INTELLECTUAL PROPERTY DESK REFERENCE 353, 357 (2009).

77. *See In re Santa Fe*, 272 F.3d at 711; *see also* United States v. Newell, 315 F.3d 510, 525 (5th Cir. 2002) (confirming *In re Santa Fe*).

78. *In re Santa Fe*, 272 F.3d at 707–08.

79. *See id.* at 714 ("[T]he record in this case is neither clear nor indisputable with respect to Santa Fe's motive for sending its in-house counsel's memorandum to its horizontal offshore drilling competitors. It is possible that the disclosures were made to facilitate future price fixing in violation of the antitrust laws, as the plaintiffs contend.").

Circuit found dispositive, citing the district court's finding that there was "'no justification within the reasonable bounds of the attorney-client privilege for horizontal competitors to exchange legal information, which allegedly contains confidences, in the absence of an actual, or imminent, or at least directly foreseeable, lawsuit.'"[80] The companies' own admission thus decided privilege against them: "In sharing the communications, therefore, they sought to avoid conduct that might lead to litigation. They were not preparing for future litigation."[81]

Such strict holdings are understandable given courts' chariness of the potential for competitors' collusion but present unenviable quandaries for companies. No less an authority than the Supreme Court has recognized that corporations must resort to counsel to ensure compliance with the law given the complexity of modern statutory regimes.[82] This is particularly so in the antitrust context, where laypersons are not well-equipped to discern the subtle and legally abstruse delineations between acceptable and unacceptable conduct.[83] Public policy militates strongly for affording companies the ability to comply with antitrust law,[84] and other courts have upheld common interest privilege in the context of avoiding antitrust violations.[85] Nonetheless, the shadow of *In re Santa Fe* hangs heavily over companies contemplating whether they can maintain privilege in sharing advice to ensure lawful behavior.[86]

That said—and setting aside the archetypal joint venture[87]—there are enclaves more susceptible of common interest even amongst active competitors. Likely the most frequent occurs in the context of trade

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80. *Id.* at 714 ("[If] the disclosures were perhaps made in the sole interest of preventing future antitrust violations, as the defendants argue in their motion for reconsideration, . . . they hardly could be seen as the commencement of an allied litigation effort.").

81. *Id.* at 713 ("In the present case, Santa Fe admits in the motion for reconsideration it filed in the district court that the communications it claims are protected by the privilege were not made in anticipation of future litigation. Instead, the documents were 'circulated for the purpose of ensuring compliance with the antitrust laws and minimizing any potential risk associated with the exchange of wage and benefit information.'").

82. *See* Upjohn Co. v. United States, 449 U.S. 383, 398 (1981).

83. *See* Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1164 (D.S.C. 1974), *aff'd*, 540 F.2d 1215 (4th Cir. 1976) ("This court recognizes that it is not the federal government that is primarily responsible for enforcement of the federal antitrust laws but rather the lawyers who advise their corporate clients. Unless corporate personnel on a fairly low level can speak to attorneys in confidence, the enforcement of the federal antitrust laws is likely to be adversely affected.").

84. *See In re* Sealed Case, 146 F.3d 881, 886–87 (D.C. Cir. 1998).

85. *See In re* Sulfuric Acid Antitrust Litig., 235 F.R.D. 407, 416–17 (N.D. Ill. 2006).

86. *See, e.g.*, Schomig, *supra* note 72.

87. *See supra* notes 59–60 and accompanying text.

associations to which market participants subscribe for the purpose of jointly developing and pursuing advocacy plans for legislation and administrative policy that affects their industry.[88] Such advocacy often involves legal analysis contributed by or shared with the various members of the trade association.[89] Some authorities have recognized that counsel to the trade group can consult with its members within privilege, though they differ on whether the basis is co-client or true common interest privilege.[90] But the doctrinal uncertainty has also yielded contrary modern cases where a shared privilege is denied in the trade association posture.[91] Perhaps the best conclusion is that "[t]here is no *per se* rule that representation of a trade association creates an attorney-client relationship with each member of the association, but the particular circumstances of the representation may create an attorney-client relationship with one or more of the members."[92]

Judicial recognition of common interest in such circumstances is plausible because antitrust concerns are at their nadir anent public policy advocacy. Under the *Noerr-Pennington* doctrine, market competitors are permitted to collude overtly for this purpose notwithstanding contrary antitrust rules, due to the First Amendment's proscription that Congress make no law abridging the right to petition the government for redress of grievances.[93] Put another way, "[t]he federal antitrust laws . . . do not regulate the conduct of private individuals in seeking anticompetitive action from the government," even if those seeking redress are doing so for their

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88. Schomig, *supra* note 72.

89. *Id.*

90. *See, e.g.*, Broessel v. Triad Guar. Ins. Corp., 238 F.R.D. 215 (W.D. Ky. 2006) (upholding common interest in trade association). *Compare, e.g.*, Schomig, *supra* note 72, at 2 & n.1 ("Several older trial court opinions have, with little analysis, held that all members of a trade association enjoy an attorney-client relationship with the association's legal counsel."), *with* Schomig, *supra* note 72, at 4–5 (analyzing under common interest theory), *and* Bartel, *supra* note 39, at 878 ("Where a trade association is the client, for example in an antitrust matter, the lawyer for the trade association may have direct communication with the constituent members of the trade association to gather necessary information. Because the constituent members comprise the trade association, the fate of the claims against the trade association has a direct impact upon the continued behavior of the constituent members. It is appropriate to extend the attorney-client privilege to govern communications between the lawyer and the members of the trade association.").

91. *See* Schomig, *supra* note 72, at 2–3 (discussing cases declining privilege).

92. United States v. Am. Soc'y of Composers, Authors & Publishers, 129 F. Supp. 2d 327, 338 (S.D.N.Y. 2001) (quoting N.Y.C. Ass'n of the Bar Comm. on Prof'l & Jud. Ethics, Formal Op. 1 (1999)).

93. *See* City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 380 (1991); United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965); E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135–36 (1961).

own mercenary purposes.[94] The topic of *Noerr-Pennington* antitrust immunity is of course far more nuanced[95] but serves as a reminder that independent operators—indeed, business rivals—may still enjoy the benefits of common interest in narrowly bounded circumstances, even before a combination is contemplated.

B. Due Diligence Subject to a Non-Disclosure Agreement

Typically, the first formal step in the merger timeline is the exchange of non-disclosure agreements so that the parties can conduct due diligence.[96] The commencement of due diligence is like a first date: the parties are beginning to get to know one another and assess the other's character and suitability for a longer-term relationship.[97] Unlike a social rendezvous, however, non-disclosure agreements are a basic predicate since the due diligence process necessarily involves the parties providing highly confidential information so their counterparts can evaluate whether a deal is even plausible in the first instance.[98] At this early stage, the parties are broadly adversarial: each has a distinct interest in protecting its trade secrets and confidences, whilst at the same time gaining the greatest possible access

94. *City of Columbia*, 499 U.S. at 379–80.

95. *See generally*, *e.g.*, Earl W. Kintner & Joseph P. Bauer, *Antitrust Exemptions for Private Requests for Governmental Action: A Critical Analysis of the* Noerr-Pennington *Doctrine*, 17 U.C. DAVIS L. REV. 549 (1984); Marina Lao, *Reforming the* Noerr-Pennington *Antitrust Immunity Doctrine*, 55 RUTGERS L. REV. 965 (2003).

96. *See* Kapnick & Rosen, *supra* note 8, at 543, 550; King, *supra* note 8, at 1414; *see also* Pavento, Marti, Siddiqui & Eagan, *supra* note 76, at 353–54.

97. *See* Africa, *supra* note 2, at 52 ("The parties may not perceive themselves to be equal at the outset, but they cannot survive the merger talks through to 'marriage' unless an equality develops."); *cf.* Al-Laham, Schweizer & Amburgey, *supra* note 21; Janet LePage, *The Science and Art of Due Diligence*, REAL ESTATE INSIDER BLOG (July 19, 2016), http://blog.reincanada.com/the-science-art-of-due-diligence ("In the real estate world, due diligence is going to get you from that first date to the point of knowing everything there is to know about this property, including learning what you can live with and identifying those red flags—the things you most certainly cannot live with—in a property purchase.").

98. *See* King, *supra* note 8, at 1414; Pavento, Marti, Siddiqui & Eagan, *supra* note 76, at 365.

to its counterpart's files.[99] As one suitor's interest waxes, the other's may wane, as they evaluate their respective commercial positions.[100]

All things being equal, courts have viewed the execution of a non-disclosure agreement as militating in favor of common interest privilege.[101] Confidentiality between attorney and client is an essential prerequisite of the underlying attorney-client privilege,[102] and sequestration from adverse parties is necessary for maintenance of the work product privilege.[103] As such, a non-disclosure agreement generally bolsters the argument that the parties sharing the ostensibly privileged information took reasonable steps to maintain its confidentiality.[104] Certainly, a foolhardy company providing internal documents absent a clear non-disclosure agreement could have little claim to privilege, given that its interlocutor would be free to disseminate what it received at will.[105]

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99. *See* JA Apparel Corp. v. Abboud, No. 07 Civ. 7787(THK), 2008 WL 111006, at *4 (S.D.N.Y. Jan. 10, 2008); Cheeves v. Southern Clays, Inc., 128 F.R.D. 128, 129 (M.D. Ga. 1989); Africa, *supra* note 2, at 52; *see also* Blau v. Harrison (*In re* JP Morgan Chase & Co. Sec. Litig.), No. 06-C-4674, 2007 WL 2363311, at *5 (N.D. Ill. Aug. 13, 2007). *See generally* King, *supra* note 8, at 1414–16.

100. *See* Martin Marietta Materials, Inc. v. Vulcan Materials Co., 56 A.3d 1072, 1093 (Del. Ch.), *aff'd*, 68 A.3d 1208 (Del. 2012).

101. *See* Pavento, Marti, Siddiqui & Eagan, *supra* note 76, at 353–54; *see, e.g.*, Tenneco Packaging Specialty & Consumer Prods., Inc. v. S.C. Johnson & Son, Inc., No. 98 C 2679, 1999 WL 754748, at *2 (N.D. Ill. Sept. 14, 1999).

102. *See* Schomig, *supra* note 72, at 1–2; *supra* note 35.

103. *See* Schomig, *supra* note 72, at 1–2; *see, e.g.*, United States v. Deloitte LLP, 610 F.3d 129, 139–40 (D.C. Cir. 2010).

104. *See* Dura Global Tech., Inc. v. Magna Donnelly Corp., No. 07-cv-10995, 2008 WL 2217682, at *1 (E.D. Mich. May 27, 2008); *Tenneco*, 1999 WL 754748, at *2; *see also* United States v. Gulf Oil Co., 760 F.2d 292, 294–96 (Temp. Emer. Ct. App. 1985) (relying on strict confidentiality provisions in upholding privilege for documents shared after a merger agreement was signed); Kapnick & Rosen, *supra* note 8, at 552 ("A critical consideration in determining whether privilege is waived is how scrupulous the parties have been in limiting access to privileged information and in offering assurances to maintain confidentiality of the communications.").

105. *See, e.g.*, Brown v. Adams (*In re* Fort Worth Osteopathic Hosp.), No. 07-04015-DML, 2008 WL 2095601, at *2 (Bankr. N.D. Tex. May 15, 2008) ("[C]ertainly at a bare minimum there must be a meeting of the minds that documents subject to attorney-client or work product privilege are being shared in the expectation that the privilege is not being waived by the sharing and that each party will protect the documents from disclosure or loss of the privilege."); Libbey Glass, Inc. v. Oneida, Ltd., 197 F.R.D. 342, 347–49 (N.D. Ohio 1999); *see also Deloitte*, 610 F.3d at 141 ("Nevertheless, a confidentiality agreement must be relatively strong and sufficiently unqualified to avoid waiver. In *Williams*, for example, we concluded that the government's assurance that it would maintain confidentiality 'to the extent possible' was not sufficiently strong or sufficiently unqualified to prevent the government from disclosing the information to a criminal defendant under *Brady v. Maryland*. Likewise, we have determined that a mere promise to give the disclosing party notice before releasing

All things are not equal in due diligence, however. Irrespective of the presence or absence of even an airtight non-disclosure agreement, courts seldom uphold common interest broadly in the due diligence context.[106] Designating documents as confidential cannot protect them from discovery if they are not subject to common interest privilege.[107] As expressed above, the parties are self-evidently in conflict over the breadth and depth of the information exchanged, and are engaged in a business rather than legal decision, namely whether to enter into the merger in the first place.[108] Due diligence still represents an exploratory phase during which the parties have not yet committed to a joint undertaking, but rather are evaluating their distinct commercial interests in a transaction.[109] The regularity of quarrels between lawyers over one party or the other's failure to provide desired documents only serves to illustrate the reality of these distinct rather than aligned interests.[110]

Nevertheless, there are often plausible zones of common interest, usually related to the assessment of potential legal claims or pending

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documents does not support a reasonable expectation of confidentiality.") (internal citations omitted).

106. *See* Kapnick & Rosen, *supra* note 8, at 551–52; King, *supra* note 8, at 1427–28 (discussing the so-called *Corning* approach); Pavento, Marti, Siddiqui & Eagan, *supra* note 76, at 353 (observing that "disclosure of privileged information during a due diligence investigation may involve risks for both parties because it can result in a waiver of the attorney-client privilege regardless of whether the transaction is consummated"); *see, e.g.*, JA Apparel Corp. v. Abboud, No. 07 Civ. 7787(THK), 2008 WL 111006, at *4 (S.D.N.Y. Jan. 10, 2008); Corning Inc. v. SRU Biosystems, LLC, 223 F.R.D. 189 (D. Del. 2004); Katz v. AT&T Corp., 191 F.R.D. 433, 438 (E.D. Pa. 2000); *Libbey Glass*, 197 F.R.D. at 348–49; Cheeves v. Southern Clays, Inc., 128 F.R.D. 128, 129 (M.D. Ga. 1989).

107. *See* Med. Waste Techs., L.L.C. v. Alexian Bros. Med. Ctr., Inc., No. 97 C 3805, 1998 WL 387705, at *3 (N.D. Ill. June 24, 1998); Visual Scene, Inc. v. Pilkington Bros., PLC, 508 So. 2d 437, 441–42 (Fla. Dist. Ct. App. 1987); Schaffzin, *supra* note 17, at 81–82, 82 n.121. Note, however, that documents subject to work product privilege rather than attorney-client privilege may well remain protected given the looser requirements of confidentiality in that context. *See* EPSTEIN, *supra* note 14, at 1038–46.

108. *See JA Apparel*, 2008 WL 111006, at *4; *see also* Blau v. Harrison (*In re* JP Morgan Chase & Co. Sec. Litig.), No. 06 C 4674, 2007 WL 2363311, at *5 (N.D. Ill. Aug. 13, 2007). *But see* King, *supra* note 8, at 1437–41 (proposing presumption in favor of common interest in due diligence because parties are comparatively committed to the transaction).

109. *See, e.g.*, *Katz*, 191 F.R.D. at 438 n.6; *Cheeves*, 128 F.R.D. at 129. *But see* King, *supra* note 8, at 1437–41.

110. *See* GSC Partners CDO Fund v. Washington, 368 F.3d 228, 244 (3d Cir. 2004) ("Although we do not mean to suggest approval of the practice, we note that it is not uncommon for a target to be somewhat uncooperative with respect to due diligence requests from a potential acquirer."); *see also* Africa, *supra* note 2, at 52.

litigation.[111] In many such cases, courts have permitted the protection of common interest to the two sides sharing the views of counsel to coordinate on legal rights or the outcome of claims.[112] This is particularly so in regard of intellectual property, where evaluation of patents can be integral to the deal but relies on legal conclusions as to the validity of a patent claim.[113] In *Dura Global Technology v. Magna Donnelly Corp.*, a Michigan district court endorsed common interest privilege,[114] given the company's careful limitation of shared legal materials regarding patent claims to counsel, strict non-disclosure pacts, and the demonstrated legal rather than commercial motivations for the review.[115] Common interest is not categorically limited to patents, of course. A New Jersey court, for example, held that shared documents legally analyzing future asbestos liabilities were subject to the privilege.[116]

This distinction between legal and commercial is crucial.[117] In *Nidec v. Victor Co. of Japan*, the California district court helpfully clarified that it is joint future collaboration in a combined company's litigation of claims (patent, asbestos, or otherwise) that gives rise to the common interest;

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111. *See* Kapnick & Rosen, *supra* note 8, at 550–51; *see, e.g.*, Morvil Tech., LLC v. Ablation Frontiers, Inc., No. 10-CV-2088-BEN (BGS), 2012 WL 760603, at *3 (S.D. Cal. 2012); La. Mun. Police Emps. Ret. Sys. v. Sealed Air Corp., 253 F.R.D. 300, 310 (D.N.J. 2008); Dura Global Tech., Inc. v. Magna Donnelly Corp., No. 07-cv-10995, 2008 WL 2217682, at *1 (E.D. Mich. May 27, 2008); BriteSmile, Inc. v. Discus Dental Inc., No. C 02-3220 JSW (JL), 2004 WL 2271589, at *1 (N.D. Cal. Aug. 10, 2004); Rayman v. Am. Charter Fed. Sav. & Loan Ass'n, 148 F.R.D. 647, 654 (D. Neb. 1993); Hewlett-Packard Co. v. Bausch & Lomb, Inc., 115 F.R.D. 308, 309 (N.D. Cal. 1987); *see also* Nidec v. Victor Co. of Japan, 249 F.R.D. 575, 579–80 (N.D. Cal. 2007) (recognizing such zones exist).

112. *See, e.g.*, *La. Mun. Police*, 253 F.R.D. at 309–10; *Dura*, 2008 WL 2217682, at *2–3; *BriteSmile*, 2004 WL 2271589, at *1; Tenneco Packaging Specialty & Consumer Prods., Inc. v. S.C. Johnson & Son, Inc., No. 98-C-2679, 1999 WL 754748, at *2 (N.D. Ill. Sept. 14, 1999); *Rayman*, 148 F.R.D. at 654–55; *Hewlett-Packard*, 115 F.R.D. at 309.

113. *See Morvil*, 2012 WL 760603, at *3; Fresenius Med. Care Holdings, Inc. v. Roxane Labs., Inc., No. 2:05-cv-0889, 2007 WL 895059, at *3 (S.D. Ohio Mar. 21, 2007); *Nidec*, 249 F.R.D. at 579–80; *BriteSmile*, 2004 WL 2271589, at *1; *Tenneco*, 1999 WL 754748, at *2; *Rayman*, 148 F.R.D. at 654–55; *Hewlett-Packard*, 115 F.R.D. at 309. *See generally* Pavento, Marti, Siddiqui & Eagan, *supra* note 76 (analyzing privilege in intellectual property due diligence).

114. *Dura*, 2008 WL 2217682, at *3.

115. *Id.*

116. *La. Mun. Police*, 253 F.R.D. at 310 (holding that "the fact that the parties were on adverse sides of a business deal . . . does not compel the conclusion that the parties did not share a common legal interest" when they are contemplating mutual future litigation).

117. *See* Kapnick & Rosen, *supra* note 8, at 551–52 (discussing cases). Again, this distinction may be less stark in the work product posture. *See* EPSTEIN, *supra* note 14, at 1038–46.

commercial appraisal does not suffice.[118] By this logic, the oft-cited[119] *Hewlett-Packard Co. v. Bausch & Lomb, Inc.* could find sharing of patent analysis protected because it was "'quite likely' that both parties would be sued by the plaintiff and that the defendant would defend the marketing of the product in the years preceding the sale to the third party while the third party would defend the same product for the years following the sale."[120] By contrast, *Nidec* found the sharing of patent analysis *sub judice* only "to further a commercial transaction in which the parties, if anything, have opposing interests."[121] *Nidec*, as had other cases before it,[122] rejected a broad reading of *Hewlett-Packard* to suggest that "common interest privilege extends generally to disclosures made in connection with the prospective purchase of a business" absent some nexus to a common legal matter.[123]

Whether *Hewlett-Packard* actually goes so far is debatable on its language, though some commentators have read it so.[124] Indeed, one went so far as to propose a presumption in favor of common interest during transactional due diligence, based in part on *Hewlett-Packard*'s purportedly lax standard.[125] The best policy, nonetheless, seems to be in following *Nidec* to reconcile the various decisions on due diligence privilege under a single principle.[126] Other scholars have proposed similar rationales for common interest where the parties are transferring assets like trade secrets or technology subject to litigation because "[t]he seller's interest in defending those rights with respect to pre-sale production or occurrences is virtually identical to the buyer's position with respect to post-sale production and occurrences."[127]

There are disadvantages to *Nidec*'s attempt at harmonization, however. Deciding whether legal material is shared in due diligence for commercial

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118. Nidec v. Victor Co. of Japan, 249 F.R.D. 575, 579–80 (N.D. Cal. 2007); *see also* Schaffzin, *supra* note 17, at 73–74 (emphasizing distinction).

119. *See* Pavento, Marti, Siddiqui & Eagan, *supra* note 76, at 362.

120. *Nidec*, 249 F.R.D. at 579 (describing and quoting Hewlett-Packard Co. v. Bausch & Lomb, Inc., 115 F.R.D. 308, 310 (N.D. Cal. 1987)).

121. *Id.* at 580.

122. *E.g.*, Oak Indus. v. Zenith Indus., 1988 WL 79614, at *4 (N.D. Ill. 1988) (discussing, distinguishing, and rejecting *Hewlett-Packard*).

123. *Nidec*, 249 F.R.D. at 579.

124. *See, e.g.*, King, *supra* note 8, at 1428–30 (detailing the "*Hewlett-Packard* approach"); Kapnick & Rosen, *supra* note 8, at 551–52 (same).

125. *See* King, *supra* note 8, at 1440–42.

126. *Nidec*, 249 F.R.D. at 578–80; *see* Kapnick & Rosen, *supra* note 8, at 551–52, 552 n.40 (discussing *Nidec* and attempting to harmonize the *Hewlett-Packard* standard); Pavento, Marti, Siddiqui & Eagan, *supra* note 76, at 362–63 (harmonizing *Nidec* and *Hewlett-Packard*).

127. Hundley, *supra* note 32, at 110; *see* Kapnick & Rosen, *supra* note 8, at 552 (noting the importance of documenting prospectively the "joint litigation interest").

valuation or to assess joint defense of a claim is likely to be an exercise in hair-splitting,[128] and context will matter critically.[129] For example, even a disclosure regarding threatened litigation did not enjoy common interest privilege because its motivation was found "purely financial," as evidenced by its provision to investment bankers.[130] Such ad-hockery creates business dilemmas as well: poised between *Hewlett-Packard*'s apparently permissive stance on privilege and the cases rejecting it, "corporate buyers and sellers are placed in the precarious situation of having to choose between a potential waiver of privilege and a potential lost business opportunity."[131] Diligence counsel should thus take note of how they couch requests and pursue discussions with their counterparts to maximize the arguments for privilege, at least so long as the courts remain arguably split on the question.[132]

C. Negotiation and Execution of a Merger Agreement

Whether prior to, simultaneously with, or following due diligence, the parties to a potential merger or acquisition must also negotiate the terms of the agreement itself.[133] Such negotiations are transparently done in a stance of adversity: each side is attempting to gain the greatest advantage for its shareholders and other stakeholders.[134] As a court in the Northern District of

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128. *See* King, *supra* note 8, at 1430–42 (criticizing case-by-case judgments on privilege as lacking in predictability).

129. *See* Crace, Latham & Yetter, *supra* note 10 ("Determinations of whether a 'common interest' is adequately 'legal' or adequately 'shared' by the parties are often highly contextual."); *see* EPSTEIN, *supra* note 14, at 293 ("As beauty is in the eye of the beholder, so too this legal as opposed to business interests is in the eye of this particular magistrate judge."); *see also e.g.*, *Nidec*, 249 F.R.D. at 579–80; Oak Indus. v. Zenith Indus., 1988 WL 79614, at *4 (N.D. Ill. 1988) (no privilege for shared patent opinions because process and interest were fundamentally commercial).

130. Blanchard v. Edgemark Fin. Corp., 192 F.R.D. 233, 237 (N.D. Ill. 2000).

131. Kapnick & Rosen, *supra* note 8, at 551–52.

132. *See id.*; *see also* Pavento, Marti, Siddiqui & Eagan, *supra* note 76, at 354 (advocating care in due diligence given differential results).

133. Anne King argues persuasively that regardless of the timing of due diligence vis-à-vis negotiations, the former evinces a higher degree of commitment and intimacy between the parties, which ought to bolster the arguments for privilege. *See* King, *supra* note 8. This is reflected in the cases, where common interest is fairly often upheld in circumscribed zones in due diligence, but only with great rarity in negotiations. *Compare supra* Section III.B, *with infra* Section III.C.

134. *See* Blau v. Harrison (*In re* JP Morgan Chase & Co. Sec. Litig.), No. 06 C 4674, 2007 WL 2363311, at *5 (N.D. Ill. Aug. 13, 2007); Nidec v. Victor Co. of Japan, 249 F.R.D. 575, 579 (N.D. Cal. 2007); Pavento, Marti, Siddiqui & Eagan, *supra* note 76, at 365 ("As a starting point, it is prudent to assume that disclosure of privileged information to a third party will result in a privilege waiver . . . . This guiding principle is particularly true in the context of any arms-length negotiation.").

Illinois explained: "Prior to the merger, these organizations stood on opposite sides of a business transaction. From a business standpoint and from a legal standpoint, the merger parties' interests stood opposed to each other. They had no common interest, and indeed, their interests were in conflict."[135] Although merger agreements are hardly a zero-sum game, generally what is conceded by one party accrues in some degree to the benefit of the other.[136] With scant exception, therefore, courts have held that the parties' lawyers' discussions of terms and negotiation of the deal itself cannot be subject to common interest privilege[137]: "of the cases addressing a party's disclosure of confidential information during negotiations, almost all have held that such disclosure waives the privilege. These cases have held that whatever the common interest shared by parties at the negotiating table, it is insufficient."[138]

This will remain so even after a merger agreement is executed, because the "common interest rule is concerned with the relationship between the transferor and the transferee at the time that the confidential information is

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135. *Blau*, 2007 WL 2363311, at *5; *accord Nidec*, 249 F.R.D. at 580.

136. *See Blau*, 2007 WL 2363311, at *5; Pavento, Marti, Siddiqui & Eagan, *supra* note 76, at 360 ("The court reasoned that prior to the merger, the organizations stood on opposite sides of the business transaction, and their interests were in conflict because if one gained a better deal, the other suffered.") (describing the court's reasoning in *Blau*).

137. *See* King, *supra* note 8, at 1412–13, 1413 n.8 ("Most courts conclude that disclosures made during transaction negotiations work a waiver of the attorney-client privilege, and thus courts decline to allow common interest protection."); *id.* at 1426–27; Olson, Varallo & Koch, *supra* note 70, at 904–05; Pavento, Marti, Siddiqui & Eagan, *supra* note 76, at 365 (noting "natural assumption that the parties' interests are adverse when a corporate transaction is being negotiated"); *e.g.*, *Blau*, 2007 WL 2363311, at *5; Oak Indus. v. Zenith Indus., 1988 WL 79614, at *4 (N.D. Ill. 1988); 3Com Corp. v. Diamond II Holdings, Inc., No. 3933-VCN, 2010 WL 2280734, at *7–8 (Del. Ch. May 31, 2010) ("The two companies, however, had adverse interests both in negotiating the Side Letter and in determining, if necessary, responsibility for the Merger Agreement's termination."); *see also* Nidec v. Victor Co. of Japan, 249 F.R.D. 575, 579–80 (N.D. Cal. 2007) (clarifying no common interest in negotiation of commercial terms); Zirn v. VLI Corp., No. 9488, 1990 WL 119865, at *8 (Del. Ch. Aug. 13, 1990), *rev'd on other grounds*, 621 A.2d 773 (Del. 1993); Jedwab v. MGM Grand Hotels, Inc., No. 8077, 1986 WL 3426, at *2 (Del. Ch. Mar. 20, 1986) ("I cannot conclude that communications between its attorneys and attorneys for MGM Grand with respect to the negotiation and documentation of the proposed merger possessed the requisite confidentiality in these circumstances. With respect to the functions they were performing when the documents sought were prepared, these lawyers obviously represented clients with adverse interests.").

138. *Oak Indus*., 1988 WL 79614, at *4 (citing Res. Inst. for Med. & Chemistry v. Wis. Alumni Res. Found., 114 F.R.D. 672, 676–77 (W.D. Wis. 1987)); *see also* Union Carbide Co. v. Dow Chem. Co., 619 F. Supp. 1036, 1050 (D. Del. 1985); SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 512–13 (D. Conn. 1976).

disclosed."[139] The parties to an executed merger agreement may well *then* have a powerful interest in preventing outsiders seeking to question or challenge the deal from gaining insight into their lawyers' quondam views of pain points and troublesome issues attendant to the transaction; if the merger parties are sued, this interest may be even greater.[140] But the accretive timeline of privilege runs only one way, and the merger parties' newfound synchrony cannot retroactively draw the veil of privilege over their previous adversarial negotiations.[141] As a result, lawyers engaging in deal negotiations must be mindful of how any unguarded or "colorful" comments at the time may affect the ultimate success of the merger if divulged.[142]

There may nonetheless be narrow exceptions—far narrower than the recurrent exceptions seen in due diligence—for elements of a merger agreement of identical import to both parties even at the time.[143] At least a few courts have suggested common interest might apply to parties' assessments of the antitrust and regulatory prospects of the potential combination in negotiations, reasoning they shared a common legal interest in prospectively structuring a deal that will satisfy the regulatory scrutiny to which both parties will be subject.[144] Such an allowance, if it exists at all,

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139. *In re* United Mine Workers of Am. Emp. Benefit Plans Litig., 159 F.R.D. 307, 314 (D.D.C. 1994); *accord* Kingsway Fin. Servs., Inc. v. Pricewaterhouse-Coopers LLP, 2008 WL 5423316, at *12 (S.D.N.Y. Dec. 31, 2008).

140. *See, e.g.*, *Jedwab*, 1986 WL 3426, at *2.

141. *See id.* ("The fact that both Bally and MGM Grand are defendants in this lawsuit does not render documents relating to the negotiation of the transaction itself confidential. If there is no basis for a finding of confidentiality, there is no basis for the lawyer-client privilege."); *see also* Cohen v. Berkshire Hathaway, Inc., No. CL 81833, 2002 WL 34217931, at *3 (Iowa Dist. Ct. Apr. 15, 2002) (conceding merger negotiations not privileged despite later lawsuit). *Contra* King, *supra* note 8, at 1431 ("In addition, hindsight bias might influence courts in the common interest inquiry. That is, if litigation emerges, and the parties formerly involved in business negotiations are aligned, a court may be more likely to find that the parties shared a common interest at the time of disclosure.").

142. *See* Olson, Varallo & Koch, *supra* note 70, at 901–02.

143. *See In re* Leslie Controls, 437 B.R. 493, 501–02 (Bankr. D. Del. 2010) ("The Insurers argue, in effect, for establishment of a *per se* rule that parties engaged in negotiations can never share a common interest. While there are cases that support this argument, they are not universal. For example, the Third Circuit has held that parties engaged in merger negotiations may share a common interest. This Court believes that the imposition of a blackline rule is inappropriate. Rather, commonality must be measured on a case by case basis.") (citing *In re* Teleglobe Commc'ns Corp., 493 F.3d 345, 364 (3d Cir. 2007)). The bankruptcy court's reading of *In re Teleglobe* is probably too blithe, depending on a generic comment that common interest privilege can arise even in a transactional context. *Id.*

144. *See, e.g.*, SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 512–13 (D. Conn. 1976) (suggesting that whilst antitrust consideration in "negotiating the price for relinquishing voting and managerial control" is not subject to common interest, an "interest in the negotiations [as] that of a potential co-defendant in a possible antitrust action" would be); 3Com Corp. v.

would likely be limited to this unique joint regulatory concern, for as a rule, "common interest doctrine does not extend to communications about a joint business or financial transaction, merely because the parties share an interest in seeing the transaction is legally appropriate."[145] Both sides undoubtedly want to craft a viable and enforceable agreement, but they differ in wanting one that advantages them over their counterpart to the extent the law allows.[146]

On rare occasion, courts have viewed the interval between a letter of intent or similar instrument[147] and the definitive agreement as subject to greater privilege protection, reasoning that "[d]ocuments exchanged by parties who have already committed in writing to negotiate a more detailed formal agreement are protected under the 'common interest' theory, as reasonably necessary to further the interests of both parties in finalizing negotiations."[148] Judges confronting such postures may well demand heightened showings or review in camera to ensure the privilege is narrowly

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Diamond II Holdings, Inc., No. 3933-VCN, 2010 WL 2280734, at *7–8 (Del. Ch. May 31, 2010) (observing that the parties had a common interest in obtaining regulatory approval even whilst they were adverse as to negotiation of a side letter and termination clauses, and reviewing in camera to separate the former from the latter).

145. FSP Stallion 1, LLC v. Luce, No. 08-cv-01155, 2010 WL 3895914, at *21 (D. Nev. Sept. 30, 2010) ("Additionally, the common interest doctrine does not apply simply because the parties are interested in developing a business deal that complies with the law, and a common goal to avoid litigation. A desire to comply with applicable laws and to avoid litigation does not transform their common interest and enterprise into a legal, as opposed to a commercial, matter.").

146. *See SCM Corp.*, 70 F.R.D. at 513 (stating that interest in complying with antitrust laws does not outweigh the differing interests of parties to a negotiation).

147. *Cf.* Harvey L. Temkin, *When Does the "Fat Lady" Sing?: An Analysis of "Agreements in Principle" in Corporate Acquisitions*, 55 FORDHAM L. REV. 125, 132–33 (1986) (determining when such instruments may be found binding on the parties).

148. OXY Res. Cal. LLC v. Superior Court, 9 Cal. Rptr. 3d 621, 631–32 (Cal. Ct. App. 2004) (quoting a trial court and noting that "the preacquisition documents are dated between the time OXY and EOG signed a letter of intent and the time they finalized the negotiations and entered into formal contracts"); *see also* STI Outdoor LLC v. Superior Court, 109 Cal. Rptr. 2d 865, 869 (Cal. Ct. App. 2001) ("Here, the declarations and papers submitted by the MTA and STI establish that Items C and R were documents prepared by counsel, which were circulated between two parties bound by an offer and acceptance in contemplation of a binding, detailed License Agreement . . . . The evidence supports the contention that the disclosure of such documents was reasonably necessary to further the interests of both parties in finalizing negotiations for the License Agreement. Accordingly, the trial court erred in finding that the attorney-client privilege was waived."). *See generally* Richmond, *supra* note 57, at 423–27 (discussing *Oxy Resources* at length and calling it a "very practical decision").

constrained, if they are even willing to entertain the notion.[149] Others have been yet more skeptical, finding that the period between early versions of a merger agreement and the final is insusceptible to common interest privilege.[150] In the mine run of cases, companies sharing information at any stage of contractual negotiations are seeking to further the commercial and at least semi-adversarial goal of a final agreement, not to co-litigate an underlying legal issue.[151] The bargaining table makes a Procrustean bed for common interests: proponents may try to wedge their negotiations into the rubric, but courts are apt to reject such contortions.[152]

D. Obtaining Regulatory Approval Pursuant to a Merger Agreement

If the delicate dance of due diligence and contentious contract negotiations analogize to the dating history between the future corporate spouses, then execution of the merger agreement is the marriage proposal. Before the agreement, the parties are flirting with a potential union; afterwards, they have definitively agreed to pursue that goal, generally right down to setting an outside date for the consummation (subject to customary closing conditions and regulatory approvals, of course).[153] A signed merger

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149. *See OXY Res.*, 9 Cal. Rptr. 3d at 638–39 (reversing denial of a motion to compel for documents insufficiently defended in privilege log); *id.* at 640 (finding in camera review necessary for the remainder).

150. *See, e.g.*, Zirn v. VLI Corp., No. 9488, 1990 WL 119685, at *8 (Del. Ch. Aug. 13, 1990), *rev'd on other grounds*, 621 A.2d 773 (Del. 1993) (finding no common interest during a period between an initial merger agreement and the revision of that agreement).

151. *See* Nidec Corp. v. Victor Co. of Japan, 249 F.R.D. 575, 579–80 (N.D. Cal. 2007) (discussing cases).

152. As the *OXY Resources* court observed:

> Here, by contrast, the Joint Defense Agreement also purports to protect communications made during the course of the transaction that gives rise to this lawsuit. According to Calpine, this type of agreement "amounts to a premeditated and intentional plan to shield conspiratorial communications involving a transaction that directly and adversely affected Calpine's contractual rights." We agree there is a potential for abuse when parties rely on common interest agreements to protect prelawsuit communications that may be highly relevant to issues presented in a lawsuit.

OXY Res., 9 Cal. Rptr. 3d at 638. *But see* EPSTEIN, *supra* note 14, at 293 ("Like Cinderella's stepsisters, this judge is shoe horning the facts of this case into the requisite legal category of legal as opposed to mere business interests.").

153. *E.g.*, SEC v. Nat'l Student Mktg. Corp., 457 F. Supp. 682, 690 (D.D.C. 1978) (citing the merger agreement) ("[T]he transactions contemplated herein shall have been consummated on or before November 28, 1969."); *see* Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1147 (Del. 1989); Richard Steuer, Jodi Simala & John Roberti, *Competition Law in Merger Transactions: Managing and Allocating Risk in the New Normal*, 9 COMPETITION L. INT'L 31, 43 (2013).

agreement thus represents a turning point in the relationship between parties seeking to combine for purposes of privilege.[154] The Illinois court cited *ante* that rejected privilege prior to an agreement went on to hold that:

> After the parties to the merger signed the merger agreement, they shared a common interest in ensuring that the newly agreed merger met any regulatory conditions and achieved shareholder approval. Both parties had reached an agreement on the terms of the deal, and both parties at that point shared the goal of ensuring that the merger was approved.[155]

Viewing the merger agreement as the watershed for common interest privilege is also the prevailing approach of courts that have confronted the question.[156] One observed that the "weight of the case law suggests that, as a general matter, privileged information disclosed during a merger between

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154. *E.g.*, cases cited *infra* note 156; *see* Crace, Latham & Yetter, *supra* note 10 ("[P]arties should probably assume—to be safe—that any communications made prior to the signing of a merger agreement . . . will not be covered by the attorney-client privilege as extended by the common-interest doctrine. Parties should also delay as long as practicable the exchange of any sensitive legal materials, preferably until after the merger agreement has been signed and there is a reasonable certainty of the transaction closing."); Pavento, Marti, Siddiqui & Eagan, *supra* note 76, at 365. *See generally* Steuer, Simala & Roberti, *supra* note 153, at 35–45 (discussing various provisions found in merger agreements specifying allocation of antitrust litigation risk).

155. Blau v. Harrison (*In re* JP Morgan Chase & Co. Sec. Litig.), No. 06 C 4674, 2007 WL 2363311, at *5 (N.D. Ill. Aug. 13, 2007).

156. *E.g.*, *id.*; United States v. Gulf Oil Co., 760 F.2d 292, 296 (Temp. Emer. Ct. App. 1985) ("Cities did not waive the work product privilege attached to these documents by disclosing the documents to Gulf pursuant to the merger agreement. Gulf and Cities were obviously not adversaries at the time of the disclosure. To the contrary, they were in the initial stages of becoming parent and subsidiary."); Cohen v. Berkshire Hathaway, Inc., No. CL 81833, 2002 WL 34217931, at *6–7 (Iowa Dist. Ct. Apr. 15, 2002) ("The Purchaser and Director Defendants' common interest began with the execution of the merger agreement. From this point forward, . . . they had a common interest—legal strategies for seeking regulatory approval and discussions relating to the joint defense of this lawsuit—in effectuating the merger agreement . . . . communications prepared in reference to regulatory approval after the merger agreement was executed are protected . . . ."); Zirn v. VLI Corp., No. 9488, 1990 WL 119685, at *8 (Del. Ch. Aug. 13, 1990), *rev'd on other grounds*, 621 A.2d 773 (Del. 1993) (finding that the parties "still had adverse interests, at least until the revised merger agreement was executed on November 3, 1987, and therefore documents generated between August 30, 1987 and November 3, 1987 could not be of common interest to them"); *see also* Ambac Assur. Co. v. Countrywide Home Loans, Inc., 57 N.E.3d 30, 44 (N.Y. 2016) (Rivera, J., dissenting) ("[W]here parties to a merger agreement have a common legal interest in the successful completion of the merger, the privilege should apply to communications exchanged to comply with legal and regulatory requirements related to consummation of the merger."). *But see In re* Leslie Controls Inc., 437 B.R. 493, 501–02, 501 n.32 (Bankr. D. Del. 2010).

two unaffiliated businesses would fall within the common-interest doctrine."[157] After all, with the agreement finalized, the parties now face together the mutual legal challenges of shareholder votes and regulatory filings, review, and approval.[158] Cooperation in these matters is often required by the merger agreement itself, giving force to the joint legal undertaking.[159]

For larger transactions, these regulatory challenges are not trivial and necessitate the active involvement of both companies' counsel.[160] Many courts would find such cooperation privileged absent extraordinary circumstances.[161] For example, in *Cohen v. Berkshire Hathaway, Inc.*, the merger parties conceded that the negotiation of their merger agreement was discoverable, but argued that "communications prepared in reference to regulatory approval after the merger agreement was executed are protected, including preliminary drafts of documents later versions of which were submitted to regulatory agencies,"[162] in their case the Iowa Utilities Board and the Nuclear Regulatory Commission.[163] The court agreed, finding that the parties "were beyond negotiating the agreement and the communications were made in confidence. A common interest existed in effectuating the agreement."[164] Such holdings ensure counsel in complex transactions can navigate the regulatory hurdles efficiently.[165]

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157. Cavallaro v. United States, 153 F. Supp. 2d 53, 62 (D. Mass. 2001) (*n.b.*, a number of the cases cited were in a pre-agreement posture); *see also* Gelman v. W2 Ltd., No. 14-6548, 2016 U.S. Dist. LEXIS 14787, at *12 (E.D. Pa. Feb. 5, 2016) (noting common interest has been successfully asserted outside litigation in the merger context).

158. *See, e.g.*, 3Com Corp. v. Diamond II Holdings, Inc., No. 3933-VCN, 2010 WL 2280734, at *7–8 (Del. Ch. May 31, 2010) ("Newco and Huawei appear to have had a common interest in obtaining CFIUS approval and seeing the merger to its completion."); *supra* note 156.

159. *See, e.g.*, cases cited *infra* note 312.

160. *See* Naughton, *supra* note 8, at 66 (discussing necessity of information sharing and strategic coordination); Steuer, Simala & Roberti, *supra* note 153, at 44.

161. *See, e.g.*, *Gulf Oil*, 760 F.2d at 295–96 (quoting United States v. Am. Tel. & Tel. Co. (AT&T), 642 F.2d 1285, 1299 (D.C. Cir. 1980)); *3Com*, 2010 WL 2280734, at *8; Blau v. Harrison (*In re* JP Morgan Chase & Co. Sec. Litig.), No. 06 C 4674, 2007 WL 2363311, at *5 (N.D. Ill. Aug. 13, 2007); *Cohen*, 2002 WL 34217931, at *7.

162. *Cohen*, 2002 WL 34217931, at *7.

163. *Id.*

164. *Id.*

165. *See* Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 998 N.Y.S.2d 329, 335 (N.Y. App. Div. 2014), *rev'd*, 57 N.E.3d 30 (N.Y. 2016); *Ambac*, 57 N.E.3d at 45 (Rivera, J., dissenting); Hewlett-Packard Co. v. Bausch & Lomb, Inc., 115 F.R.D. 308, 311 (N.D. Cal. 1987); *see also* Am. Auto. Ins. Co. v. J.P. Noonan Transp., No. 970325, 2000 WL 33171004 (Mass. Super. Ct. Nov. 16, 2000) ("At a time and in an age where transactions and the litigation they produce are increasingly complex, I am of the opinion that the joint defense or common interest components of the attorney-client privilege are necessary to ensure, as a

Contemporaneously with seeking regulatory approval, merging companies usually engage in extensive or plenary sharing of business records—including legal matters[166]—in an effort to acquaint themselves with the other's business to best frame their arguments and prepare for the day they are combined as one.[167] To this end, merger agreements often require such information sharing.[168] Courts have held that such exchanges are protected by common interest privilege no less than regulatory strategy itself.[169] In so holding, the court of appeals reasoned in *United States v. Gulf Oil Co.* that the merger parties "were obviously not adversaries at the time of the disclosure. To the contrary, they were in the initial stages of becoming parent and subsidiary. Consequently, [one] had a legitimate, nonadversarial, interest in reviewing [the other's] attorneys' work product . . . ."[170] Information sharing after the merger agreement is thus in a quite different posture than that conducted in due diligence beforehand.[171]

Not all jurisdictions are in accord. The most prominent nonconformist, New York, has long applied a strict form of common interest privilege requiring that the parties be aligned in litigation, not merely navigating

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practical matter, that clients receive the fully informed advice the attorney-client privilege is designed to produce. Individuals or entities with joint or common interests simply cannot obtain such advice if their attorneys must proceed in splendid isolation and are prohibited from interacting with others for the purpose of determining whether and to what extent common measures for preservation of common interests are available, feasible and agreeable to all who may have such interests."); *cf.* Sunshine, *supra* note 18, at 852, 869–70 (arguing such regimes are necessary for sound legal advice in the modern regulatory landscape).

166. *See In re* Santa Fe Int'l Corp., 272 F.3d 705, 707–08 (5th Cir. 2001).

167. *See, e.g.*, Naughton, *supra* note 8, at 66; United States v. Gulf Oil Corp., 760 F.2d 292, 296 (Temp. Emer. Ct. App. 1985); Cooper Tire & Rubber Co. v. Apollo (Mauritius) Holdings Pvt. Ltd., No. 8980-VCG, 2013 WL 5787958, at *6 (Del. Ch. Oct. 25, 2013).

168. *See, e.g.*, *Gulf Oil*, 760 F.2d at 293 ("Under the terms of the agreement each company was permitted full access to the business records of the other."); *Cooper Tire*, 2013 WL 5787958, at *4 & n.24.

169. *E.g.*, Blau v. Harrison (*In re* JP Morgan Chase & Co. Sec. Litig.), No. 06 C 4674, 2007 WL 2363311, at *5 (N.D. Ill. Aug. 13, 2007); *Gulf Oil*, 760 F.2d at 296.

170. *Gulf Oil*, 760 F.2d at 296.

171. *Compare* sources cited *supra* note 154, *infra* notes 172–175 and accompanying text, *with supra* Section III.A. *But cf.* Naughton, *supra* note 8, at 69 ("Finally, the extent of information exchange that is allowable pre-signing during the due diligence process may be greater than that allowed in connection with post-signing integration planning. This point is often surprising to the merging parties, who believe anything that is in the due diligence data room should be available as the starting point for integration planning because the parties have by then shown a greater commitment to carrying out the transaction by signing the agreement. Viewed through the lens of a Section I rule of reason analysis, however, the assessment is different.").

regulatory hurdles.[172] In 2014, an appellate panel in the First Department made a gesture to harmonizing New York law with that of most other states and federal jurisdictions, explaining persuasively why documents shared between lawyers for merging companies seeking regulatory approval should retain privilege:

> We find, however, that this line of cases does not adequately address the specific situation presented here: two business entities, having signed a merger agreement without contemplating litigation, and having signed a confidentiality agreement, required the shared advice of counsel in order to accurately navigate the complex legal and regulatory process involved in completing the transaction. As BAC aptly asserts, imposing a litigation requirement in this scenario discourages parties with a shared legal interest, such as the signed merger agreement here, from seeking and sharing that advice, and would inevitably result instead in the onset of regulatory or private litigation because of the parties' lack of sound guidance from counsel. This outcome would make poor legal as well as poor business policy.[173]

A divided court of appeals, however, quashed the foray towards reform and reconfirmed New York's idiosyncratic approach and litigation requirement, alluding to concerns about abuse of the privilege and the fact that companies had not been dissuaded from merging in New York by the stricter doctrine.[174] The appellate panel was reversed, and the parties shared

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172. *See, e.g.*, Allied Irish Banks, P.L.C. v. Bank of Am., N.A., 252 F.R.D 163, 171 (S.D.N.Y. 2008) (quoting Aetna Cas. & Surety Co. v. Certain Underwriters at Lloyd's London, 676 N.Y.S.2d 727, 732 (N.Y. Sup. Ct. 1998)) ("New York [limits common interest] 'to communications with respect to legal advice in pending or reasonably anticipated litigation . . . .'"); Ambac Assur. Co. v. Countrywide Home Loans, Inc., 57 N.Y.S.3d 30, 36 (N.Y. 2016) (citing Hyatt v. State of Cal. Franchise Tax Bd., 962 N.Y.S.2d 282 (N.Y. App. Div. 2013)); Hudson Val. Mar., Inc. v. Town of Cortlandt, 816 N.Y.S.2d 183, 184 (N.Y. App. Div. 2006); Yemini v. Goldberg, 821 N.Y.S.2d 384, 386 (N.Y. Sup. Ct. 2006) (quoting People v. Osorio, 549 N.E.2d 1183 (N.Y. 1989)); Aetna Cas. & Surety Co. v. Certain Underwriters at Lloyd's London, 676 N.Y.S.2d 727, 733 (N.Y. Sup. Ct. 1998). *But see, e.g.*, Cavallaro v. United States, 153 F. Supp. 2d 53, 62 (D. Mass. 2001) (holding in the merger context that "the 'interest' required by the common-interest doctrine need not be construed so narrowly as to exclude communications involving a common legal interest even where no litigation is on the horizon").

173. *Ambac*, 998 N.Y.S.2d at 335 (N.Y. App. Div. 2014), *rev'd*, 57 N.E.3d 30 (N.Y. 2016).

174. *Ambac*, 57 N.E.3d at 38.

documents ordered produced.[175] Counsel for companies merging under New York choice of law can expect little solicitude for shared privilege outside litigation and must therefore consider carefully what they discuss with their counterparts.[176] Similarly perilous legal regimes can be found in a minority of states and, as discussed earlier, the Fifth Circuit.[177] Even in states without strict litigation requirements, the application of common interest absent a nexus to some litigation interest cannot be wholly assured.[178] Nonetheless, as another court of appeals summarized, the "weight of authority favors our conclusion that litigation need not be actual or imminent for communications to be within the common interest doctrine."[179]

E. Litigation in Defense of the Transaction

To the dismay of many businesspersons (though key to the livelihood of many attorneys), it is rare that any proposed transaction of substantial size does not occasion at least the risk of litigation.[180] Whether the potentially

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175. *Id.* at 40.

176. *See, e.g.*, Daniel J. Buzzetta, *Merger Partners: Beware of Effect of Ambac Ruling on Privilege*, N.Y.L.J. (July 11, 2016), https://www.law.com/newyorklawjournal/almID/1202762164404/?slreturn=20171006125947.

177. The New York Court of Appeals could cite eleven states (Arkansas, Hawaii, Kentucky, Maine, Mississippi, New Hampshire, North Dakota, Oklahoma, South Dakota, Texas, and Vermont) with statutes saddling the common interest privilege with a litigation requirement, and five states (New Jersey, Tennessee, Maryland, Virginia, and Florida) that had imposed the same judicially. *Ambac*, 57 N.E.3d at 36–37, 36 n.2, 37 n.3.

178. *See, e.g.*, Integrated Glob. Concepts, Inc. v. j2 Glob., Inc., No. 5:12-cv-03434-RMW (PSG), 2014 U.S. Dist. LEXIS 7294, at *5–6 (N.D. Cal. Jan. 21, 2014) (finding common interest inapplicable between parties to a signed merger agreement for lack of impending litigation).

179. United States v. BDO Seidman, LLP, 492 F.3d 806, 816 n.6 (7th Cir. 2007); *accord* Crace, Latham & Yetter, *supra* note 10 ("There is a large body of federal case law from various jurisdictions in which courts have applied the common-interest doctrine to communications exchanged between parties to a pending merger transaction. Most courts apply the common-interest doctrine somewhat broadly, consistent with the Delaware position that there does not need to be pending litigation involving both parties in order for a 'common interest' to exist.").

180. *See* Olson, Varallo & Koch, *supra* note 70, at 901 ("When parties execute a merger agreement involving a public company, there is a good chance of attracting litigation."); Griffith & Lahav, *supra* note 16, at 1063 & n.41 (citing Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 101, 112 (2014)). *See generally* M. Sean Royall & Adam J. Di Vincenzo, *When Mergers Become a Private Matter: An Updated Antitrust Primer*, ANTITRUST, Spring 2012, at 41 ("Private merger actions filed on behalf of consumers . . . have become increasingly common in the past several years."); Steuer, Simala & Roberti, *supra* note 153 (examining increased governmental enforcement and regulation of mergers).

aggrieved parties are customers, business affiliates, shareholders, state regulators, or antitrust boffins at the Department of Justice, Federal Trade Commission, or a foreign competition agency, there are simply too many interested and watchful eyes for major mergers to pass untouched.[181] Whilst navigating such hurdles without undue delay is the laudable goal, some transactions will inevitably fall short, and litigation will ensue seeking to block or rescind the merger.[182] (In the vocabulary of interpersonal relations, litigation is perhaps best analogized to objections to the newly-announced fiancé lodged by family and friends.)

Even parsimonious jurisdictions like New York and the Fifth Circuit would concede that parties to a merger would share a common interest in litigation, and accordingly may share privileged communications.[183] *A fortiori*, the more permissive majority view litigation as *ipso facto* a zone of common interest.[184] Indeed, once the specter or reality of a lawsuit appears, the impending or actual codefendants may avail themselves of the older joint defense privilege rather than the more recent common interest privilege necessary in the pre-litigation stance.[185] As discussed earlier, since the

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181. *See, e.g.*, FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1032 (D.C. Cir. 2008) (government antitrust suit); FTC v. Heinz, 246 F.3d 708, 711 (D.C. Cir. 2001) (government antitrust suit); United States v. Oracle, Corp., 331 F. Supp. 2d 1098, 1100 (N.D. Cal. 2004) (government antitrust suit); Cohen v. Berkshire Hathaway, Inc., No. CL 81833, 2002 WL 34217931, at *1 (Iowa Dist. Ct. Apr. 15, 2002) (shareholder derivative suit); California v. Sutter Health Sys., 130 F. Supp. 2d 1109, 1111 (N.D. Cal. 2001) (state-initiated suit seeking preliminary merger injunction); Zirn v. VLI Corp., No. 9488, 1990 WL 119685, at *1 (Del. Ch. Aug. 13, 1990), *rev'd on other grounds*, 621 A.2d 773 (Del. 1993) (minority shareholder rescissory suit); Jedwab v. MGM Grand Hotels, Inc., No. 8077, 1986 WL 3426, at *2 (Del. Ch. Mar. 20, 1986) (same); *see generally* Griffith & Lahav, *supra* note 16 (discussing private antitrust cases generally); Royall & Di Vincenzo, *supra* note 180 (same).

182. *See* sources cited *supra* note 181.

183. *See In re* Santa Fe Int'l Corp., 272 F.3d 705, 710 (5th Cir. 2001) ("According to our circuit precedents, the two types of communications protected under the [common legal interest] privilege are: (1) communications between co-defendants in actual litigation and their counsel; and (2) communications between *potential* co-defendants and their counsel.") (citations omitted); Ambac Assur. Co. v. Countrywide Home Loans, Inc., 57 N.E.3d 30, 37 (N.Y. 2016) ("Disclosure is privileged between codefendants, coplaintiffs or persons who reasonably anticipate that they will become colitigants . . . .").

184. *See, e.g.*, *In re* Grand Jury Subpoenas, 89–3 and 89–4, John Doe 89–129, 902 F.2d 244, 249 (4th Cir. 1990) (affirming "common interest in litigation"); United States v. Am. Tel. & Tel. Co. (AT&T), 642 F.2d 1285, 1299 (D.C. Cir. 1980) (same).

185. *In re* Grand Jury Subpoena: Under Seal, 415 F.3d 333, 341 (4th Cir. 2005) (citing United States v. Schwimmer, 892 F.2d 237, 243–44 (2d Cir. 1989) ("The joint defense privilege, an extension of the attorney-client privilege, protects communications between parties who share a common interest in litigation."); *see, e.g.*, John Morrell & Co. v. Local Union 304A of the United Food & Commercial Workers, 913 F.2d 544, 555–56 (8th Cir. 1990); *In re Grand Jury Subpoenas, 89–3 and 89–4*, 902 F.2d at 248; Wilson P. Abraham

seminal *Chahoon v. Commonwealth* in 1871, codefendants have been entitled to coordinate their defenses subject to privilege as of right.[186] (Of course, it is cold comfort to codefendants that they may now cooperate more fully with their bedfellows.[187]) Merger agreements often obligate the parties to defend the proposed transaction in the event of litigation, setting forth the commonality expressly.[188]

So well established is shared privilege as between codefendants that few courts have had cause to review it squarely in the merger context, for lack of any challenges.[189] Those confronting such challenges have upheld the application of joint defense or common interest, though often in idiosyncratic or tangential postures.[190] In *FTC v. Exxon*, for example, the FTC had challenged Exxon's transaction with Reliance but was denied a

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Constr. Corp. v. Armco Steel Corp., 559 F.2d 250, 253 (5th Cir. 1977) ("The defendants persuasively argue that in a joint defense of a conspiracy charge, the counsel of each defendant is, in effect, the counsel of all for the purposes of invoking the attorney-client privilege in order to shield mutually shared confidences. We agree . . . ."); Cont'l Oil Co. v. United States, 330 F.2d 347, 348–49 (9th Cir. 1964); *see also* Sunshine, *supra* note 18, at 841–48 (distinguishing theory underlying joint defense and common interest privileges).

186. *See* Chahoon v. Commonwealth, 62 Va. (21 Gratt.) 822, 841–42 (1871); *supra* notes 41–47 and accompanying text.

187. *Cf.* Buzzetta, *supra* note 176 ("Threatened or actual litigation may not be desirable, but it is now essential for litigants invoking the common interest doctrine in New York.").

188. *E.g.*, ABA Antitrust Section Committees, *Litigation Commitments*, AM. BAR ASS'N, https://www.americanbar.org/groups/antitrust_law/committees/mergers_contract_provisions_database/mergers_topic/litigation_commitments.html (last visited Nov. 10, 2017); *see* Steuer, Simala & Roberti, *supra* note 153, at 42.

189. *See* Trs. of Elec. Workers Local No. 26 Pension Tr. Fund v. Tr. Fund Advisors, Inc., 266 F.R.D. 1, 15 (D.D.C. 2010) ("There is no clearer example of when the privilege is protected than in this case, where the transferor and transferee are engaged in related litigation against a common adversary on the same issue or issues."); EPSTEIN, *supra* note 14, at 301 ("It is obvious that the privilege applies when parties are already engaged in litigation or a joint venture where their legal interests coincide."); *cf.* Raytheon Co. v. Superior Court, 256 Cal. Rptr. 425, 428 (Cal. Ct. App. 1989) ("The author of the most recent law review article on the subject of 'allied party exchange of information' notes the paucity of precedent. What little law there is, is federal. The issue of waiver in the federal courts turns on a determination of whether there is commonality of interest among the parties as to whom disclosure occurred. Most of the cases involve either joint defense of criminal cases, albeit by separate counsel, or related prosecutions of antitrust or similar lawsuits by plaintiffs with interests in common. In those factual contexts, the federal courts do not treat joint disclosure as waiver.") (citations omitted).

190. *See* FTC v. Exxon Corp., 636 F.2d 1336, 1345 (D.C. Cir. 1980) ("We agree that Exxon, Reliance, and the Drives Group share a common interest in obtaining approval of the acquisition [in litigation]."); Cohen v. Berkshire Hathaway, Inc., No. CL 81833, 2002 WL 34217931, at *9 (Iowa Dist. Ct. Apr. 15, 2002) ("[D]ocuments prepared by counsel relating to the filing and defense of this lawsuit are protected."); Ambac Assur. Co. v. Countrywide Home Loans, Inc., 57 N.E.3d 30, 37 (N.Y. 2016).

preliminary injunction.[191] Instead, Exxon was ordered to maintain separately a particular business unit at issue to facilitate potential divestiture,[192] and Exxon and Reliance closed the deal.[193] At trial on the FTC's claims, the district court ordered that the business unit obtain its own counsel because it had both common and distinct interests;[194] Exxon, its new owner, appealed.[195] The D.C. Circuit Court of Appeals affirmed, agreeing that the parties to the merger had a common legal interest in vindicating the transaction in the instant lawsuit, but that the business unit also had a distinct commercial interest in ensuring its viability, were it to be divested, an interest Exxon did not share.[196]

A bit more ticklish is the situation where only one of the merging parties is targeted by a lawsuit, as in a derivative or direct action by aggrieved shareholders.[197] Although the merging parties are not then technically codefendants, favorable resolution of an action assailing the merger from any quarter is manifestly in the common legal interest of all parties attempting to combine.[198] (Indeed, given that shareholder suits often continue after a merger closes for lack of a preliminary injunction, the allies may soon enough be united in form as well as interest.[199]) Such logic has persuaded courts generally to uphold common interest for like-minded corporations even when only one of them is actually a party to litigation.[200]

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191. *Exxon*, 636 F.2d at 1337–38, 1339.

192. *Id.* at 1339.

193. *Id.*

194. *Id.* at 1341 (quoting FTC v. Exxon Corp., No. 79-1975, 1980 WL 1879, at *2 (D.D.C. June 25, 1980)).

195. *Id.*

196. *Id.* at 1345–46, 1347; *see also infra* Section IV.A (discussing how coexistence of common and non-common interests does not foreclose privilege).

197. *See, e.g.*, *In re* Schmitz, 285 S.W.3d 451, 458 (Tex. 2009); *In re* Syncor Int'l Corp. S'holders Litig., 857 A.2d 994, 997 (Del. Ch. 2004); Marcoux v. Prim, No. 04-cvs-920, 2004 WL 830393, at *12 (N.C. Super. Apr. 16, 2004); Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1034 (Del. 2004).

198. *See* Griffith & Lahav, *supra* note 16, at 1064 ("All of these demands put significant pressure on the transaction. A deal that is enjoined, even temporarily, may fall apart. Extensive discovery will likely slow down the deal, adding cost and increasing the risk of nonconsummation. In order to minimize contingent liabilities and be assured of a legally valid transaction, both parties to the merger typically insist that such litigation be concluded before the transaction can close.").

199. *See In re Schmitz*, 285 S.W.3d at 452–53; Zirn v. VLI Corp., No. 9488, 1990 WL 119685, at *8 (Del. Ch. Aug. 13, 1990), *rev'd on other grounds*, 621 A.2d 773 (Del. 1993); Jedwab v. MGM Grand Hotels, Inc., No. 8077, 1986 WL 3426, at *2 (Del. Ch. Mar. 20, 1986).

200. *E.g.*, *In re* Grand Jury Subpoenas, 89–3 and 89–4, John Doe 89–129, 902 F.2d 244, 249 (4th Cir. 1990); Roberts v. Carrier Corp., 107 F.R.D. 678, 687–88 (N.D. Ind. 1985) (citing Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1172 (D.S.C. 1974)) ("The third party corporation need not be a party to any anticipated or pending litigation; it may share a

By like reasoning, parties allied in antitrust litigation positions, but not technically co-litigants, can share information to advance their suits within the protection of common interest. In *United States v. AT&T*, the D.C. Circuit held that privilege was not waived in work product shared between the government and MCI, both of whom were pursuing antitrust claims against AT&T in separate cases.[201] Under *AT&T*'s logic, "what is sauce for the goose is sauce for the gander,"[202] and antitrust defendants should be able to enjoy such no less ambit than plaintiffs.[203]

The question does arise—critically in jurisdictions imposing a litigation requirement upon common interest—of when litigation is sufficiently likely to implicate the right to privilege.[204] Courts give the standard variously as "reasonably anticipated,"[205] "foreseeable," or "imminent."[206] What is clear in the merger context is that a generic assertion that "highly regulated . . . institutions constantly face a threat of litigation and that the protection of their shared communications is necessary"[207] will not suffice; a more particularized showing is necessary.[208] Intuitively, the imminence that forms the dividing line between mere common interest and litigation-dependent joint defense privilege should be informed by the availability of

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community of interest (so as to keep communications privileged) if it shares an identical, and not merely similar, legal interest as the client with respect to the subject matter of the communication between the client and its attorney. The court finds that Carrier and Hamilton do share an identical legal interest: defense of a claim based upon a malfunction of valve # 242. While Hamilton is not a party to the Texas lawsuit, and thus technically is not defending a claim against it, it nevertheless has a significant interest in the outcome of Roberts' case . . . .") (footnote and citation omitted); *see* Fischer, *supra* note 17, at 640–42.

201. United States v. Am. Tel. & Tel. Co. (AT&T), 642 F.2d 1285, 1301 (D.C. Cir. 1980); *see also* Schachar v. Am. Acad. of Ophthalmology, Inc., 106 F.R.D. 187, 192 (N.D. Ill. 1985) (like posture).

202. OXFORD DICTIONARY OF ENGLISH IDIOMS 152 (John Ayto ed., Oxford Univ. Press, 3d ed. 2009).

203. *See AT&T*, 642 F.2d at 1299 ("But 'common interests' should not be construed as narrowly limited to co-parties. So long as transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts."); *see also* Trs. of Elec. Workers Local No. 26 Pension Tr. Fund v. Tr. Fund Advisors, Inc., 266 F.R.D. 1, 15 (D.D.C. 2010) ("There is no clearer example of when the privilege is protected than in this case, where the transferor and transferee are engaged in related litigation against a common adversary on the same issue or issues.").

204. *See, e.g.*, Schomig, *supra* note 72, at 5.

205. Ambac Assur. Co. v. Countrywide Home Loans, Inc., 57 N.E.3d 30, 39 (N.Y. 2016).

206. *In re* Santa Fe Int'l Corp., 272 F.3d 705, 714 (5th Cir. 2001) (quoting the district court's opinion).

207. *Ambac*, 57 N.E.3d at 38.

208. *See id.*

work product privilege.[209] The latter, after all, applies only to documents prepared "because of" litigation, which should satisfy any formulation of a litigation requirement.[210] The wisdom of the D.C. Circuit Court of Appeals is then informative:

> [A]sked by a client to evaluate the antitrust implications of a proposed merger and advised that no specific claim had yet surfaced, a lawyer knowing that work product is unprotected would not likely risk preparing an internal legal memorandum assessing the merger's weaknesses, jotting down on a yellow legal pad possible areas of vulnerability, or sending a note to a partner—"After reviewing the proposed merger, I think it's O.K., although I'm a little worried about . . . What are your views?" Nor would the partner respond in writing, "I disagree. This merger is vulnerable because . . . " Discouraging lawyers from engaging in the writing, note-taking, and communications so critical to effective legal thinking would, in *Hickman*'s words, "demoraliz[e]" the legal profession, and "the interests of the clients and the cause of justice would be poorly served."[211]

Such reasoning in the work product context suggests that counsel to merger parties coordinating their antitrust strategy in light of opposition from regulatory authorities or other adversaries may well be able to argue that litigation is foreseeable, and thus a joint defense privilege applies, even in the strictest jurisdictions.[212]

F. Consummation

The long path to the altar ends with the vows, or in corporate marriages, with consummation of the transaction.[213] Once the merger or acquisition

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209. *See* Schomig, *supra* note 72, at 5; Sunshine, *supra* note 18, at 857–58 ("Common interest in the work product context is inherently and unobjectionably tethered to the lawsuit that animates the work product privilege itself.").

210. *See* United States v. Deloitte LLP, 610 F.3d 129, 136–37 (D.C. Cir. 2010) (collecting cases applying "because of" standard); Sunshine, *supra* note 18, at 855–56.

211. *In re* Sealed Case, 146 F.3d 881, 886–87 (D.C. Cir. 1998) (quoting Hickman v. Taylor, 329 U.S. 495, 511 (1947)) (second alteration and ellipses in original).

212. *See id.*

213. Traditionally, of course, marriage calls for consummation in either case. *See generally* J. Edward Hudson, Marital Consummation According to Ecclesiastical Legislation (1977) (J.C.D. dissertation, Saint Paul University of Ottawa), https://www.ruor.uottawa.ca/handle/10393/21828. *But see* Franklin G. Fessenden, *Nullity of Marriage*, 13 HARV. L. REV.

closes, the two former independent operators are unified under the same corporate ownership.[214] In the case of many mergers, the two companies cease to have independent existence, and the assets and personnel of one are absorbed into the other; the taxonomy of the various structural vehicles for the absorption is ultimately irrelevant to the assessment of privilege.[215] What matters, is that there is no longer any way to formally distinguish the two, and thus, the corporate attorney-client privilege fully covers all persons and affairs formerly within the wheelhouse of distinct companies.[216] As the Supreme Court announced in *CFTC v. Weintraub*, in acquiring a company lock, stock, and barrel, the new ownership also obtains the full measure of any privilege interests the target company held:

> [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.[217]

110, 121 (1899) ("Non-consummation is not a ground for dissolution of marriage. *Consensus, non concubitus, facit matrimonium*.").

214. *See generally* Mandavi Jayakar & Aditya Parolia, *Triangular Mergers, How to View Them*, 3 BOCCONI LEGAL PAPERS 77 (2014) (discussing merger structures); *see also* Martin Marietta Materials, Inc. v. Vulcan Materials Co., 56 A.3d 1072, 1106–11 (Del. Ch.), *aff'd*, 68 A.3d 1208 (Del. 2012) (discussing various forms of merger in light of an NDA and JDA).

215. *See, e.g.*, DEL. CODE ANN. TIT. 8, § 259(a) ("When any merger or consolidation shall have become effective under this chapter, for all purposes of the laws of this State the separate existence of all the constituent corporations, or of all such constituent corporations except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into 1 of such corporations, as the case may be, possessing all the rights, privileges, powers and franchises as well of a public as of a private nature, and being subject to all the restrictions, disabilities and duties of each of such corporations so merged or consolidated.").

216. *See id.*; Hundley, *supra* note 32, at 91 ("After a statutory merger or consolidation, the new or surviving corporation controls the privileges of its predecessors.").

217. CFTC v. Weintraub, 471 U.S. 343, 349 (1985); *see also* Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLP, 80 A.3d 155, 162 (Del. Ch. 2013) (interpreting the term "privileges" in § 259 to include all evidentiary privileges); Girl Scouts of W. Okla., Inc., v. Barringer-Thompson, 252 P.3d 844, 848 (Okla. 2011).

Though *Weintraub* seemingly dictates that all of the absorbed company's secrets now belong to its acquirer, some lower courts have split on the awkward potential for the acquisition target's internal legal advice anent the transaction itself being bought as well.[218] The New York Court of Appeals, for example, carved out a judicial exception for the target company's legal analysis of the merger, reasoning (consistent with its meager view of common interest between merger partners[219]) that the rights to such privilege analysis should not be imputed to the new but formerly adversarial owner.[220] Delaware, in *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLP*, though likewise concerned about awkward revelations, predictably adopted a view more deferential to contract, observing that the merger agreement might exclude such documents from the purchase.[221] Although the parties in *Great Hill* had not done so, chancery has respected the reservations of those that did bargain for such carve-outs.[222] Most courts, however, have followed *Weintraub* without cavil in averring that where an entire company has transferred to new ownership, so too go all the prerogatives of privilege.[223]

In some transactions, the parties do not relinquish their independent corporate identities, as when the acquirer maintains the acquisition target as a wholly-owned subsidiary.[224] Where the parties remain discrete under a unified ownership structure, courts have adopted multiple approaches in analyzing issues of privilege.[225] Some have viewed the parent company and

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218. *Compare* cases cited *infra* notes 220–222.

219. *See supra* notes 172–177 and accompanying text.

220. TekniPlex Inc. v. Meyner & Landis, 89 N.Y.2d 123, 127 (N.Y. 1996).

221. *Great Hill*, 80 A.3d at 160–61; *see also* Postorivo v. AG Paintball Holdings, Inc., No. 2991-VCP, 2008 Del. Ch. LEXIS 17, at *29 (Del. Ch. Feb. 7, 2008).

222. *Postorivo*, 2008 Del. Ch. LEXIS 17.

223. *See, e.g.*, UStarcom, Inc. v. Starent Networks Corp., No. 07 C 2582, 2009 WL 4908579, at *5 (N.D. Ill. Feb. 20, 2009); Am. Intern. Specialty Lines, Inc. v. NWI-I Corp., 240 F.R.D. 401 (N.D. Ill. 2007); Coffin v. Bowater Inc., No. CIV-03-227-PC, 2005 WL 5885367, at *2 (D. Me. 2005); Soverain Software LLV v. Gap, Inc., 340 F. Supp. 2d 760, 763 (E.D. Tex. 2004); Girl Scouts of W. Okla., Inc., v. Barringer-Thompson, 252 P.3d 844, 848–49 (Okla. 2011); Novack v. Raytheon Co., No. SUCV201302852BLS1, 2014 WL 7506205, at *2 (Mass. Super. Ct. Oct. 24, 2014) (acquirer gained premerger discussion with counsel regarding the acquisition).

224. *E.g.*, Medcom Holding Co. v. Baxter Travenol Labs., Inc., 689 F. Supp. 841, 843 (N.D. Ill. 1988).

225. *In re* Teleglobe Commc'ns Corp., 493 F.3d 345, 369–70 (3d Cir. 2007) ("Because parent companies often centralize the provision of legal services to the entire corporate group in one in-house legal department, it is important to consider how the disclosure rule affects the sharing of information among corporate affiliates. Recognizing that any other result would wreak havoc on corporate counsel offices, courts almost universally hold that intra-group information sharing does not implicate the disclosure rule. This result is unquestionably

its subsidiary as being almost wholly aligned in common interest, such that privilege can be shared in the mine run of business operations without fear of waiver.[226] This approach has the benefit of allowing for some small subset of disputes that may render the two overtly adversarial and thus abrogate privilege.[227] On rare occasion, a judge has gone further, insisting that affiliates under the same corporate umbrella carry an affirmative burden to show they shared a common legal interest, reasoning that the corporate family is free to organize itself as it chooses, but must accept the consequences should it operate as multiple legal entities.[228]

Such meticulousness, however, is the exception rather than the rule. Most courts more practically view subsidiaries like any other subdivision of a unitary entity, an appendage of the ultimate corporate owner.[229] One factor notable in protecting privilege is that the same counsel represent the multiple

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correct. The cases, however, vary in how they reach the result."); Hundley, *supra* note 32, at 78–80; *see also* cases cited *infra* notes 226–229.

226. *See*, *e.g.*, *In re Teleglobe*, 493 F.3d 345, 369–79 (3d Cir. 2007); Cary Oil Co., Inc. v. MG Ref. Mktg., Inc., No. 99 Civ. 1725VMDFE, 2000 WL 1800750, at *6 (S.D.N.Y. Dec. 7, 2000); Music Sales Corp. v. Morris, No. 98CIV.9002(SAS)(FM), 1999 WL 974025, at *7 (S.D.N.Y. Oct. 26, 1999); Glidden Co. v. Jandernoa, 173 F.R.D. 459, 472–73 (W.D. Mich. 1997); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1185 (D.S.C. 1974), *aff'd*, 540 F.2d 1215 (4th Cir. 1976).

227. *See, e.g.*, Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 32 (N.D. Ill. 1980); *In re* Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974, 406 F. Supp. 381, 393–94 (S.D.N.Y. 1975); Fogel v. Zell (*In re* Madison Mgmt. Grp.), 212 B.R. 894, 896 (Bankr. N.D. Ill. 1997) (parent and subsidiary); Yorke v. Santa Fe Indus., Inc. (*In re* Santa Fe Trail Transp. Co.), 121 B.R. 794, 796–97 (Bankr. N.D. Ill. 1990). *See generally infra* Part V (discussing privilege in suits between parties to failed mergers).

228. *E.g.*, Gulf Islands Leasing v. Bombardier Capital, Inc., 215 F.R.D. 466, 473–74 (S.D.N.Y. 2003) ("The mere existence of an affiliate relationship does not excuse a party from demonstrating the applicability of the common interest rule. Having chosen to operate as separate entities—and to obtain whatever advantages inure from so operating—Bombardier Capital and Bombardier Aerospace must be held to their burden of proving the applicability of any privilege in the same manner as two unrelated entities. That burden has not been met in this case.") (internal citations omitted); *see also In re Teleglobe*, 493 F.3d at 371–72 ("[A]bsent some compelling reason to disregard entity separateness, in the typical case courts should treat the various members of the corporate group as the separate corporations they are and not as one client.").

229. *See, e.g.*, *In re Teleglobe*, 493 F.3d at 369–72; Crabb v. KFC Nat'l Mgmt. Co., No. 91-5474, 1992 WL 1321, at *3 (6th Cir. 1992) ("It is well settled that attorney-client privilege is not waived merely because the communications involved extend across corporate structures to encompass parent corporations, subsidiary corporations, and affiliated corporations."); Glidden v. Jandernoa, 173 F.R.D. 459, 472 (W.D. Mich. 1997); United States v. Am. Tel. & Tel. Co., 86 F.R.D. 603, 616 (D.D.C. 1979) ("The cases clearly hold that a corporate 'client' includes not only the corporation by whom the attorney is employed or retained, but also parent, subsidiary and affiliate corporations."); *see also* cases cited *supra* note 226 (applying common interest absent searching inquiry).

companies in the corporate family; judges evaluating privilege are more likely to look askance if the ostensibly aligned companies feel the need to retain separate outside counsel, suggesting potential divergence in the entities' interests.[230] At most companies, ordinary course-of-business legal work by lawyers for both parent and child, comingling the affairs of both, militates in favor of a shared privilege.[231] At any rate, much more could be written on confidentiality amongst co-owned companies, but others have done so, and such discursion would stray from this Article's focus on the pathway to corporate marriage rather than post-closing realities.[232]

Before leaving discussion of the accretive timeline, however, a final note should be made on the *Weintraub* transfer of privilege to the acquiring company.[233] One commentator, John T. Hundley, has suggested that

> [i]f a voluntary, commercially motivated sale does not result in waiver of the privilege—and to the contrary, cases hold that such privileges, *as a matter of law*, become shared with the new parent upon consummation of such a transaction—then sharing of those confidences preparatory to the closing should not be waiver either.[234]

Although there is some practical logic to the notion, an acquirer preemptively sharing fully in the privilege of its acquisition target prior to consummation surely sweeps too broadly and raises too many difficult questions. (When and how would such a right attach? If such a preemptive

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230. *See In re Teleglobe*, 493 F.3d at 379; Bowne v. AmBase Corp., 150 F.R.D. 465, 491 (S.D.N.Y. 1993); *Gulf Islands*, 215 F.R.D. at 474 ("While cases have upheld assertions of the common interest rule for related companies, 'they have done so only upon a showing that a common attorney was representing both corporate entities or that the two corporations shared a common legal interest.' Thus, the proponent of the privilege must still prove a common legal interest and may not rely solely on the fact that the entities at issue are affiliated with each other. Some cases state the broad proposition that disclosure of attorney-client privileged information to an affiliated company does not waive the privilege—thereby obviating the need to invoke the common interest rule. But it appears that in such cases no waiver was found because the entities were represented by a common attorney or shared a common legal interest. In this case, however, Bombardier Capital and Bombardier Aerospace utilized different attorneys and held different interests of a commercial, not legal, nature.") (quoting *Bowne*) (citations omitted); *see also Yorke*, 121 B.R. at 796–97 (viewing parent-child companies as a sort of joint representation); Polycast Tech. Corp. v. Uniroyal, Inc., 125 F.R.D. 47, 49 (S.D.N.Y. 1989) (same).

231. *See In re Teleglobe*, 493 F.3d at 375–79; *Yorke*, 121 B.R. at 796–97; *Polycast*, 125 F.R.D. at 49; *see also Fogel*, 214 B.R. at 896–97 (discussing and approving *Yorke*).

232. *See generally In re Teleglobe*, 493 F.3d 345; Hundley, *supra* note 32.

233. *See supra* notes 216–223 and accompanying text.

234. Hundley, *supra* note 32, at 93.

sharing of privilege were to be recognized based on the inevitability of the privilege accruing to the purchaser, what then of transactions that fail to close? Could the preemptively shared privilege be retroactively voided? Would the sharing thereupon constitute waiver?) Nonetheless, Hundley's audacious proposal underscores the reality that the relationship of companies in courtship is an intimate one indeed.

IV. DOMESTIC QUARRELS: DISAGREEMENTS BETWEEN MERGER PARTIES

> *But the road to true love seldom runs smooth, even for companies that make paving materials.*[235]

As foreshadowed by the roll of cases analyzing regulatory scrutiny and legal challenges, the path to corporate marriage is not without obstacles. Although such vicissitudes usually come from without,[236] it is not uncommon that the parties to a merger find themselves in unfriendly postures in certain regards during the protracted process of reaching the closing.[237] This is hardly unexpected prior to the signing of a merger agreement, where there are few areas of common interest: the parties remain broadly adversarial, and thus lack the general safeguard of a shared privilege.[238] Subsequent to the agreement, however, the posture is reversed: parties can expect to collaborate on regulatory filings and submissions, strategy for obtaining approvals, advocacy in favor of the transaction, planning for integration activities in the event of a consummation, and the defense of any legal challenges.[239] What then of companies who, notwithstanding their overarching community of interests, find themselves in dispute during the course of obtaining regulatory approval or litigation? Like planning a wedding, the pressures of shepherding a merger to completion can try the patience and amicability of even the most close-knit couple.[240] Such internecine squabbles are no less common between corporate fiancées than individuals.[241]

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235. Martin Marietta Materials, Inc. v. Vulcan Materials Co., 56 A.3d 1072, 1092 (Del. Ch.), *aff'd*, 68 A.3d 1208 (Del. 2012).

236. *See, e.g.*, *id.*; United States v. Gulf Oil Corp., 760 F.2d 292, 293–94 (Temp. Emer. Ct. App. 1985).

237. *Gulf Oil Corp.*, 760 F.2d at 293–94.

238. *See supra* Section III.A.

239. *Id.*

240. *See* Africa, *supra* note 2, at 52; *cf.* Humble, Zvonkovich & Walker, *supra* note 24.

241. *Cf.* Africa, *supra* note 2, at 54 ("If all this attention to the subjective side of merger evaluation makes you nervous, consider this analogy: merger/marriage - the sharing of assets,

A. Distinguishing Common from Non-Common Interests

Fundamentally, one must differentiate whether quarrels are ultimately under the umbrella of the common interest, or relate to a different matter where there is no such commonality.[242] Given lawyerly nature,[243] any two parties will have differences of approach as to the best way to pursue their common interest in effectuating a merger transaction.[244] Clearly, it cannot be the rule that any trivial disagreement undermines a jointly-held privilege. As early as 1923, courts had found "that the privilege of one joint client cannot be destroyed at the behest of the other where the two have merely had a 'falling out' in the sense of ill-feeling or divergence of interests."[245] Indeed, much of the benefit of common interest privilege derives from allowing the parties ambit to speak frankly and freely about their views of legal strategy; to hold that cross words jeopardize the privilege would thus render it nugatory.[246] The touchstone is whether the two parties are cooperating in service of an ultimate legal goal, not whether they proceed amicably in each and every particular.[247] A Massachusetts court explained:

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debts, reputation and a mutual future. A merger search that merely considers economics is not enough."); *id.* at 52, 57; *e.g.*, cases cited *infra* note 244.

242. *See* EPSTEIN, *supra* note 14, at 307 ("When clients have adverse as well as common interests, the question of whether a particular communication is privileged depends on whether it relates to the common or the adverse interests.").

243. *Cf.* Chris Buller & William Taylor, *Partnerships Between Public And Private: The Experience of the Cooperative Research Center for Plant Science In Australia*, 2 AGBIOFORUM 17, 22 (1999) ("The old saying 'take two lawyers and expect three opinions' was proven again."); John Molnar, *Consent in the '90s*, 16 MED. & L. 567, 568 (1997) ("You will have heard the old adage that if there are two lawyers in a room, there is bound to be three opinions.").

244. *See, e.g.*, United States v. Gulf Oil Corp., 760 F.2d 292, 295–96 (Temp. Emer. Ct. App. 1985); 3Com Corp. v. Diamond II Holdings, Inc., No. 3933-VCN, 2010 WL 2280734, at *3 (Del. Ch. May 31, 2010).

245. *In re* Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974, 406 F. Supp. 381, 394 (S.D.N.Y. 1975) (citing State v. Archuleta, 29 N.M. 25, 217 P. 619 (N. Mex. 1923)); *see* EPSTEIN, *supra* note 14, at 317 ("In order for the parties to have 'fallen out,' there must be adversary litigation between them. It is not sufficient that there be only ill feelings or divergence of interest.").

246. *See* Steuer, Simala & Roberti, *supra* note 153, at 44 ("The joint defence agreement provides the parties with comfort that they may have frank discussions and share privileged materials to develop a clearance strategy and provide candid assessments."); Hundley, *supra* note 32, at 85 n.99; Fischer, *supra* note 17, at 637–39; *e.g.*, United States v. BDO Seidman, LLP, 492 F.3d 806, 815 (7th Cir. 2007); United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989); United States v. Stepney, 246 F. Supp. 2d 1069, 1079 (N.D. Cal. 2003) (quoting joint defense agreement calling for "open and candid exchange" between the parties).

247. *See* Hunton & Williams v. U.S. Dep't of Justice, 590 F.3d 272, 283 n.1 (4th Cir. 2010) (observing that common interest privilege "must leave room for the parties to debate the

> It is highly unlikely that any common or joint defense, at least in matters of some complexity, can proceed without some adjustment of differing interests. Indeed, joint consultations are likely to deal quite often with methods for adjusting those differing interests while maintaining a common front against the common opponent. If a joint defense or common interest privilege is to have any practical effect, therefore, it must survive exchanges in which the parties discuss and adjust those differing interests.[248]

By way of further illustration, in *United States v. United Technologies Corp.*,[249] a consortium of aerospace companies had shared legal advice regarding the structuring of their venture to minimize tax liability.[250] In a not unpredictable action by the Internal Revenue Service over that liability,[251] the government sought disclosure on grounds that there could be no common interest privilege amongst the competing parties.[252] The district court disagreed, citing *SCM Corp. v. Xerox Corp.*[253]:

> In formulating this strategy, the members acted not as adversaries negotiating at arms' length but as collaborators, legally committed to a cooperative venture and seeking to make that venture maximally profitable. The process revealed in the documents was

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means by which they will secure their common end"); SEC, Inc. v. Wyly, No. 10 Civ. 5760, 2011 WL 3851129, at *1 (S.D.N.Y. June 17, 2011) (holding that "parties do not need to be in exact lock-step of interest in order for the common-interest doctrine to apply"); *In re* Rivastigmine Patent Litig., No. 05-MD-1661, 2005 WL 2319005, at *4 (S.D.N.Y. Sept. 22, 2005); United States v. United Techs. Corp., 979 F. Supp. 108, 112 (D. Conn. 1997); Am. Auto. Ins. Co. v. J.P. Noonan Transp., No. 970325, 2000 WL 33171004 (Mass. Super. Ct. Nov. 16, 2000); *see also* United States v. Deloitte LLP, 610 F.3d 129, 139–40 (D.C. Cir. 2010) ("[T]he possibility of a future dispute between Deloitte and Dow does not render Deloitte a potential adversary for the present purpose. If it did, any voluntary disclosure would constitute waiver [of work product] . . . . Here, the question is not whether Deloitte could be Dow's adversary in any conceivable future litigation, but whether Deloitte could be Dow's adversary in the sort of litigation the Dow Documents address."); *In re* LTV Sec. Litig., 89 F.R.D. 595, 604–05 (N.D. Tex. 1981) ("The Court finds little merit in the class' contention that the joint defense privilege does not extend to civil defendants whose liability may arise from different acts or omissions, or who may assert cross-claims against each other. Even should such allies later become estranged, they would arguably still be entitled jointly to invoke the attorney-client privilege to protect shared confidences from disclosure at the behest of a third party.").

248. *Am. Auto. Ins.*, 2000 WL 33171004, *8.

249. United States v. United Techs. Corp., 979 F. Supp. 108 (D. Conn. 1997).

250. *Id.* at 110.

251. *Id.*

252. *Id.*

253. SCM Corp. v. Xerox Corp., 70 F.R.D. 508 (D. Conn. 1976).

> not without hostility, but it appears to have been closer to the "joint analysis and cooperative study" of Xerox's patent committee than to the price negotiation of the Rank-Xerox transaction.[254]

The pursuit of a common legal interest may thus involve some measure of "hostility" in service of that mutual goal.[255]

Nor could there be any requirement that parties be aligned in every regard to enjoy privilege.[256] Common interests regularly and unobjectionably coexist with even adverse interests; privilege then applies only to the former.[257] Indeed, "several courts have determined that even parties with significant conflicts of interest may maintain a privilege as to information shared concerning a common legal interest."[258] This allowance is most often identified in the joint defense context,[259] where codefendants have a clear common interest in exoneration even as each also has an adverse interest in saving itself at the expense of the other.[260] Even if an *inter partes* lawsuit is anticipated at some later date, the parties may still

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254. *United Techs.*, 979 F. Supp. at 111 (quoting *SCM Corp.*, 70 F.R.D. at 518).

255. *Id.*; *see* cases cited *supra* note 247; *see also* EPSTEIN, *supra* note 14, at 317.

256. Such alignment is realistically impossible: no two companies will ever be one-hundred-percent aligned prior to consummation of a combination, and perhaps not even then. *See* United States v. McPartlin, 595 F.2d 1321, 1336 (7th Cir. 1979) ("Ingram argues that the co-defendants' defenses must be in all respects compatible if the joint-defense privilege is to be applicable. The cases do not establish such a limitation, and there is no reason to impose it . . . . The Advisory Committee's Note to proposed Rule 503(b) makes it clear that the joint-interest privilege is not limited to situations in which the positions of the parties are compatible in all respects."); Hundley, *supra* note 32, at 85 n.99; *see also supra* Section III.F.

257. *See, e.g.*, Eisenberg v. Gagnon, 766 F.2d 770, 787–88 (3d Cir. 1985) ("We agree with the district court's ruling that the correspondence was privileged, since it is best viewed as part of an ongoing and joint effort to set up a common defense strategy between a defendant and an attorney who was responsible for coordinating a common defense position. Communications to an attorney to establish a common defense strategy are privileged even though the attorney represents another client with some adverse interests.") (citing *McPartlin*, 595 F.2d at 1336–37; Hunydee v. United States, 355 F.2d 183, 184–85 (9th Cir. 1965); Cont'l Oil Co. v. United States, 330 F.2d 347, 349–50 (9th Cir. 1964)).

258. Schaffzin, *supra* note 17, at 71 & nn.81–83 (citing United States v. Bay State Ambulance & Hosp. Rental Serv., Inc., 874 F.2d 20, 28 (1st Cir. 1989)); *see also* United States v. Melvin, 650 F.2d 641, 645 (5th Cir. 1981); Visual Scene, Inc. v. Pilkington Bros., PLC, 508 So. 2d 437, 441–42 (Fla. Dist. Ct. App. 1987).

259. *See* Bartel, *supra* note 39, at 876–77.

260. *See id.*; *see also Hunydee*, 355 F.2d at 184–85 (criminal codefendants considering implicating the other); *McPartlin*, 595 F.2d at 1336–37 ("The privilege protects pooling of information for any defense purpose common to the participating defendants. Cooperation between defendants in such circumstances is often not only in their own best interests but serves to expedite the trial or, as in the case at bar, the trial preparation."); *Eisenberg*, 766 F.2d at 787–88 (mutual correspondence regarding investor disclosure and trial strategy).

propone privilege on the matter of current common interest.[261] (Of course, in the event a lawsuit does transpire, such a risky undertaking of privilege may not survive.[262])

Taking concurrent common and non-common interests to their logical limit, in *Eureka Investment Corp. v. Chicago Title Insurance Co.*,[263] the D.C. Circuit Court of Appeals confronted a law firm that had purported to represent two parties (CTI and Eureka) against a common foe whilst also covertly representing Eureka in claims against CTI arising from the same set of transactions.[264] Setting aside the dubious ethical stance of the law firm,[265] the court held that CTI could not discover the attorney-client communications between its Janus-faced ally and attorneys, because that representation was clearly distinct from the joint representation that Eureka and CTI shared.[266] Eureka intended that its clandestine *inter partes* campaign be concealed from CTI, notwithstanding their privileged cooperation as co-clients, and thus its own attorney-client communications were to be protected.[267] Even in such extremity, common and adverse interests can coexist.[268]

This is manifestly so in the merger context, as there is no reason to expect merger parties will cease to have divergent interests in their

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261. *See In re* Leslie Controls, Inc., 437 B.R. 493, 497 (Bankr. D. Del. 2010) ("The privilege applies where the interests of the parties are not identical, and it applies even where the parties' interests are adverse in substantial respects. The privilege applies even where a lawsuit is foreseeable in the future between the co-defendants."); GUS Consulting GMBH v. Chadbourne & Parke LLP, 20 Misc.3d 539, 541–42 (Sup. Ct. N.Y. Co. 2008) ("The privilege applies when a limited common purpose necessitates disclosure to certain parties. Thus, even where a later lawsuit is foreseeable between the co-defendants[,] that does not prevent them from sharing confidential information for the purpose of a common interest.")

262. *See* Visual Scene, Inc. v. Pilkington Bros., PLC, 508 So. 2d 437, 441–42 (Fla. Dist. Ct. App. 1987); *see generally infra* Part V.

263. Eureka Inv. Corp. v. Chicago Title Ins. Co., 743 F.2d 932 (D.C. Cir. 1984) (per curiam).

264. *Id.* at 935–37.

265. *Id.* at 937–38 ("We need not express any view on CTI's contention that Fried, Frank should not have simultaneously undertaken to represent Eureka in an interest adverse to CTI and continued to represent CTI in a closely related matter. As Wigmore's second principle expressly states, counsel's failure to avoid a conflict of interest should not deprive the client of the privilege. The privilege, being the client's, should not be defeated solely because the attorney's conduct was ethically questionable.").

266. *Id.* at 938.

267. *Id.* at 936–37.

268. A similar result obtained in *Visual Scene, Inc. v. Pilkington Bros., PLC*, 508 So. 2d 437, 443 (Fla. Dist. Ct. App. 1987), where common interest in a distinct matter was upheld between a plaintiff and defendant opposed in ongoing litigation. *See infra* notes 362–366 and accompanying text.

commercial dealings.[269] Indeed, during the pendency of the merger, the parties *must* continue to compete as independent operators, lest they be accused of so-called gun-jumping under the antitrust laws.[270] A pending merger no more affords a common privilege to unrelated business activities than it allows the parties to collaborate in such activities in violation of antitrust law.[271] Accordingly, the transactional common interest reaches only as far as the community of the parties' interests in effectuating the agreement to merge.[272] Interactions between parties to a merger in the ordinary course of their business will receive whatever protection than they would or would not (generally the latter) absent the impending union.[273]

Nonetheless, it is vital to note that "[r]ecognizing that the privilege must be flexible enough to survive discussion of differing interests, however, is a far cry from saying that it survives . . . differences so deep and profound that litigation is the likely outcome."[274] Analogy may be found in *McNally Tunneling Corp. v. City of Evanston*, where a sewer contractor sued for recompense from Evanston, which had reached a settlement with the engineer it hired to oversee the project.[275] The contractor sought discovery of an agreement between Evanston and the engineer, claiming it was a settlement agreement reflecting arms-length negotiations; Evanston maintained it was a privileged joint defense agreement.[276] The court Solomonically deemed it both and held the settlement portion discoverable whilst the joint defense portion was privileged[277]:

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269. *See, e.g.,* Naughton, *supra* note 8.

270. *See, e.g.*, United States v. Gemstar-TV Guide Int'l Inc., No. 03-00198, 2003 WL 21799949, at *2 (D.D.C. July 11, 2003); United States v. Comput. Assocs. Int'l Inc., No. 01-02062, 2002 WL 31961456, at *2 (D.D.C. Nov. 20, 2002); *see generally* Naughton, *supra* note 8.

271. *Cf.* Naughton, *supra* note 8, at 76 ("Collaborations or coordinated market activities that are suspect outside of the merger context will also likely warrant scrutiny when undertaken by merging parties.").

272. *See, e.g.*, Blau v. Harrison (*In re* JP Morgan Chase & Co. Sec. Litig.), No. 06 C 4674, 2007 WL 2363311, at *5 (N.D. Ill. Aug. 13, 2007); Cohen v. Berkshire Hathaway, Inc., No. CL 81833, 2002 WL 34217931, at *6–7 (Iowa Dist. Ct. Apr. 15, 2002).

273. To be sure, even independent operators may on occasion enjoy privilege when they collaborate in a common legal endeavor. *See supra* Section III.A.

274. Am. Auto. Ins. Co. v. J.P. Noonan Transp., No. 970325, 2000 WL 33171004, at *8 (Mass. Super. Nov. 16, 2000).

275. McNally Tunneling Corp. v. City of Evanston, No. 00-C-6979, 2001 WL 1246630, at *1 (N.D. Ill. Oct. 18, 2001).

276. *Id.* at *1–2.

277. *Id.* at *3–4.

> The common interest doctrine does not apply if those parties have an incentive to blame each other for alleged wrongful conduct. In this case, however, because Evanston and Harza resolved their adverse interests in the settlement agreement, they do not have an incentive to blame each other for the alleged breach of contract. Accordingly, this Court concludes that Evanston and Harza have a common interest in defending McNally's suit, an interest that is reflected in the joint defense agreement.[278]

Such language might imply that common interests cannot coexist with express allegations regarding the same matter, which has some intuitive appeal. A few other cases have echoed *McNally*'s analysis, albeit also outside the context of a merger.[279] In any event, once accusations are in the air, lawsuits often follow.[280] When quarrels evolve into outright litigation, all bets are off.[281]

B. The Rule Against Unilateral Waiver

In the course of quarrels, both large and small, it may come to pass that one of the parties wishes to disclose information subject to common interest privilege for some strategic reason.[282] Or, for that matter, one party could inadvertently disclose shared privileged material under the burdens of extensive discovery, or through simple carelessness.[283] As a general rule, a client's purposefully divulging privileged material to an adversarial third

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278. *Id.* at *4 (citations omitted).

279. *E.g.*, Lislewood Corp. v. Am. Tel. & Tel. Corp., No. 13-CV-1418, 2015 WL 1539051, at *4 (N.D. Ill. Mar. 31, 2015) (quoting *McNally* in an action for breach of a commercial lease) ("[T]he common-interest doctrine is inapplicable if parties have an incentive to 'blame each other' for alleged wrongful conduct."); Jeld-Wen, Inc. v. Nebula Glasslam Int'l Inc., No. 07-22326-CIV, 2008 WL 756455, at *5–7, *7 n.2 (S.D. Fla. Mar. 11, 2008) (discussing *McNally* at length and following it in upholding common interest in part, finding that "*McNally*'s holding rests on the lynchpin that Evanston and Harza no longer had an incentive to blame each other for the alleged breach of contract for which they entered into the settlement agreement"); *see also* AMEC Civ., LLC v. DMJM Harris, Inc., No. 06–064 (FLW), 2008 WL 8171059, at *3 (D.N.J. July 11, 2008) (applying *McNally* and failing to find common interest privilege in part).

280. *Cf., e.g.*, *Jeld-Wen*, 2008 WL 756455; *McNally*, 2001 WL 1246630.

281. *See infra* Part V.

282. *See, e.g.*, Fogel v. Zell (*In re* Madison Mgmt. Grp.), 212 B.R. 894, 895–96 (Bankr. N.D. Ill. 1997).

283. *See, e.g.*, Julie Cohen, *Look Before You Leap: A Guide to the Law of Inadvertent Disclosure of Privileged Information in the Era of E-Discovery*, 93 IOWA L. REV. 627, 646 (2008).

party forever waives the privilege.[284] Even inadvertent disclosure can effect waiver absent diligent efforts to avoid error.[285] Indeed, the common interest rule essentially operates as an exception that prevents waiver when disclosure is made to an ally.[286] But the common interest privilege itself then raises a new question: under what circumstances can one party to the common interest waive the privilege for all sharing in it?[287] The Restatement helpfully provides a concise answer:

> In the absence of an agreement to the contrary, any member [of the community of interest] may waive the privilege with respect to that person's own communications. Correlatively, a member is not authorized to waive the privilege for another member's communication. If a document or other recording embodies communications from two or more members, a waiver is effective only if concurred in by all members whose communications are involved, unless an objecting member's communication can be redacted.[288]

At least in this summary, the Restatement reflects case law faithfully.[289] The circuits and cases are in accord that one party cannot unilaterally waive any privilege held by another that was shared pursuant to a common interest.[290] The requirement for unanimity reflects courts' concerns that if

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284. *See* Hunt v. Blackburn, 128 U.S. 464, 470–71 (1888); United States v. Collis, 128 F.3d 313, 320 (6th Cir. 1997).

285. *See* FED. R. EVID. 502(b); *see also, e.g.*, Amobi v. D.C. Dep't of Corr., 262 F.R.D. 45, 51 (D.D.C. 2009); *see* Cohen, *supra* note 283, at 633–41 (discussing varying approaches prior to the 2008 revision to the Federal Rules of Evidence).

286. *See generally* Bartel, *supra* note 39, at 890–91, 912–13; Cynthia B. Feagan, *Issue of Waiver in Multi-Party Litigation: The Attorney-Client Privilege and the Work Product Doctrine*, 61 UMKC L. REV. 757, 757–58 (1993); J. Randolph Evans & Shari L. Klevens, *Joint Defense vs. Common Interest Agreements*, LAW.COM: DAILY REPORT (Sept. 30, 2015), https://www.law.com/dailyreportonline/almID/1202737728156/?slreturn=20171010081908.

287. Schaffzin, *supra* note 17, at 69 ("Any jurisdiction striving to effectively apply the common interest doctrine, however, must definitively answer the following questions: . . . (5) To whom does the power to waive the common interest doctrine belong?").

288. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76(1) (AM. LAW INST. 2000).

289. *Cf.* Sunshine, *supra* note 18, at 838–39, 839 n.40 (noting uncertain reliability of the Restatement).

290. *E.g.*, United States v. Gonzales, 669 F.3d 974, 978, 982 (9th Cir. 2012); United States v. BDO Seidman, LLP, 492 F.3d 806, 817 (7th Cir. 2007) (holding that "the privileged status of communications falling within the common interest doctrine cannot be waived without the consent of all the parties . . . ."); *In re* Teleglobe Commc'ns Corp., 493 F.3d 345, 364 (3d Cir. 2007); *In re* Grand Jury Subpoena (Newparent), 274 F.3d 563, 572–73 (1st Cir.

one party could waive the privilege of all, common interest arrangements would become highly hazardous, if they even continued to exist at all; even close allies would be reluctant to share key confidences if they thereby surrendered any ability to protect themselves in the future.[291] Such cases have adverted pointedly to the possibility that a faithless party might seek to trade its allies' secrets for its own exoneration.[292] Or, for that matter, after the parties' alliance had reached an end, one might seek to market the other's confidences for personal or pecuniary gain.[293] The rule against unilateral waiver deftly prevents such abuses and thus preserves the viability of common interest arrangements.[294]

2001); *In re* Sealed Case, 29 F.3d 715, 719 (D.C. Cir. 1994); John Morrell & Co. v. Local Union 304A of the United Food & Commercial Workers, 913 F.2d 544, 556 (8th Cir. 1990); *In re* Grand Jury Subpoenas, 89–3 and 89–4, John Doe 89–129, 902 F.2d 244, 248 (4th Cir. 1990); Abbett Mun. Income Fund, Inc. v. Asami, No. C-12-03694 DMR, 2013 WL 5609333, at *5 (N.D. Cal. Oct. 11, 2013); United States v. Balsiger, No. 07–CR–57, 2011 WL 10879630, at *9 (E.D. Wis. May 11, 2011); W. Fuels Ass'n v. Burlington N. R.R. Co., 102 F.R.D. 201, 203 (D. Wyo. 1984); Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 29 (N.D. Ill. 1980); *In re* Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974, 406 F. Supp. 381, 394 (S.D.N.Y. 1975); Fogel v. Zell (*In re* Madison Mgmt. Grp.), 212 B.R. 894, 898 (Bankr. N.D. Ill. 1997); Yorke v. Santa Fe Indus., Inc. (*In re* Santa Fe Trail Transp. Co.), 121 B.R. 794, 796–97 (Bankr. N.D. Ill. 1990); *see also* Bartel, *supra* note 39, at 893 ("Most courts hold that the consent of all members is necessary for a valid waiver to occur."); Drumright & Griffin, *supra* note 41, at 45. *But see* Hundley, *supra* note 32, at 108–09 (arguing that unilateral waiver is permissible in common interest privilege but not joint defense privilege).

291. *See* Bartel, *supra* note 39, at 877 (discussing such issues and proposing solutions); Drumright & Griffin, *supra* note 41, at 45; Fischer, *supra* note 17, at 661; *see*, *e.g.*, *Gonzalez*, 669 F.3d at 978; *W. Fuels*, 102 F.R.D. at 203 ("This limitation is necessary to assure joint defense efforts are not inhibited or even precluded by the fear that a party to joint defense communications may subsequently unilaterally waive the privileges of all participants, either purposefully in an effort to exonerate himself, or inadvert[e]ntly."); *In re Grand Jury Subpoena*, 406 F. Supp. at 394 ("Indeed, to allow such disclosure would so further erode the privilege's protection as to reduce joint defense to an improbable alternative. How well could a joint defense proceed in the light of each co-defendant's knowledge that any one of the others might trade resultant disclosures to third parties as the price of his own exoneration or for the satisfaction of a personal animus? The attorney-client privilege, carved out to ensure free disclosure between client and counsel, should not thus be whittled away."); *In re Wagar*, No. 1:06-MC-127, 2006 WL 3699544, at *12 (N.D.N.Y. Dec. 13, 2006) ("[T]he essential benefit of such joint collaboration is that a member of the common legal enterprise cannot reveal the contents of the shared communications without consent of all the parties . . . the privilege continues long after a member of the agreement has departed from the legal consortium and none of the parties to the agreement may unilaterally waive the privilege.").

292. *See W. Fuels*, 102 F.R.D. at 203; *In re Grand Jury Subpoena*, 406 F. Supp. at 394.

293. *See In re Grand Jury Subpoena*, 406 F. Supp. at 394; *In re Wagar*, 2006 WL 3699544, at *12.

294. *See In re Grand Jury Subpoena*, 406 F. Supp. at 394.

By contrast, there is no such reason to prevent a party from divulging and thus waiving its own privilege; indeed, public policy militates in favor of control over one's own secrets.[295] Most courts have found a party is free to do so.[296] Some have found such waivers render the disclosed information freely admissible against all the allied parties.[297] More courts, however, along with the Restatement, would hold that the other common interest parties should not be penalized: "Any member of a common-interest arrangement may invoke the privilege against third persons, even if the communication in question was not originally made by or addressed to the objecting member."[298] One commentator pondered rhetorically of such situations, "once one [party] has waived a joint privilege by disclosing the privileged communications, what does there remain to protect?"[299] But that very commentary answered its own question, as have cases addressing such discrepant waivers: a court can enter a protective order preventing the use of the waived material against allies who did not concur.[300]

Regardless of the effect on allies, it would be odd indeed were a company to relinquish its right to disclose its own secrets elsewhere because it had already revealed the secret to an ally. If anything, a few courts have been over-deferential to privilege in this context, proposing just such an

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295. *In re Sealed Case*, 29 F.3d at 719 (quoting Wigmore for the principle that "[w]here the consultation was held by several clients jointly, the waiver should be joint for joint statements, and neither could waive for the disclosure of the other's statements; yet neither should be able to obstruct the other in the disclosure of the latter's own statements"); *Balsiger*, 2011 WL 10879630, at *9; *see* Schaffzin, *supra* note 17, at 83.

296. *See, e.g.*, *Balsiger*, 2011 WL 10879630, at *9; *In re Teleglobe*, 493 F.3d at 364; *In re Sealed Case*, 29 F.3d at 719; *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 922 (8th Cir. 1997) (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 126(1) (AM. LAW INST. 2000)); Abbett Mun. Income Fund, Inc. v. Asami, No. C-12-03694 DMR, 2013 WL 5609333, at *5 (N.D. Cal. Oct. 11, 2013); Cargill Inc. v. Budine, No. CV–F–07–349–LJO–SMS, 2008 WL 2856642, at *4 (E.D. Cal. Jul. 21, 2008); United States v. Agnello, 135 F. Supp. 2d 380, 383 (E.D.N.Y.), *aff'd*, 16 F. App'x 57 (2d Cir. 2001).

297. *E.g.*, *Agnello*, 135 F. Supp. 2d at 383.

298. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76(1) cmt. g (AM. LAW INST. 2000); Schaffzin, *supra* note 17, at 83–84 ("Courts treat the unauthorized waiver of the privilege by one member of a common interest group as a waiver as to that party only. The non-waiving members of the group retain the privilege."); Drumright & Griffin, *supra* note 41, at 45; *e.g.*, *Abbett*, 2013 WL 5609333, at *5; *Cargill*, 2008 WL 2856642, at *4.

299. EPSTEIN, *supra* note 14, at 323.

300. *E.g.*, *Abbett*, 2013 WL 5609333, at *5; *Cargill*, 2008 WL 2856642, at *4 ("The line of cases which hold that waiver by one party to the joint privilege does not constitute a waiver for any other . . . can only be so as to privileges that have not been shared, since if one party to the joint privilege discloses the privileged communications, the cat is out of the bag. Nonetheless a protective order could be entered precluding use of the privileged communications against any but the disclosing party.") (quoting EPSTEIN, *supra* note 14, at 323–24).

oddity: that one party to common interest cannot even waive *its own* privilege in a document that is shared with the other party, under the rule against unilateral waiver.[301] Such solicitude likely goes too far and has been expressly rejected by some courts in favor of the Restatement's approach.[302] That approach neatly protects the parties to common interest jointly whilst declining to handcuff allies' control over their own secrets, deferring to both public policy concerns.[303] Nevertheless, the prohibition against unilateral waiver between common interest parties can only protect the documents against outsiders. When mergers fail and the parties themselves become opponents as to the matters in which they once held a common interest, the analysis is perforce different.[304]

V. BREAKING OFF THE ENGAGEMENT: PRIVILEGE IN FAILED TRANSACTIONS

> *The conflicting desires of Martin Marietta and Vulcan played out in a typically awkward way. Rather than flat out call things off, Vulcan management became distant and uncommunicative. . . .*
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> *As the relationship context itself would predict, the friendly deal dance did not end in an agonizing sharing of internal feelings. Responding to Martin Marietta's continued inquiries, James met Nye on June 27, 2011 at the Atlanta airport and told him that Vulcan was no longer interested in a merger, but would reach out if its views changed. At some point after this, Carr, Vulcan's banker,*

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301. *See, e.g.*, *Balsiger*, 2011 WL 10879630, at *6–7 ("The facts in *In re Grand Jury Subpoenas (89–3 and 89–4)* indicate that the court held that neither the parent company nor its [former] subsidiary could unilaterally waive the common interest privilege, even as to its own communications. In other words, the court apparently held that the parent company was entitled to assert the common interest privilege even over communications made by its [former] subsidiary, essentially overriding the subsidiary's waiver of all privilege claims.").

302. *E.g.*, *id.* at *7–9.

303. *Id.* at *9 ("In other words, it will not allow one member of the joint defense to effectively eviscerate the common interest privilege by revealing each and every confidential communication made by any joint defense member. However, this holding also allows any joint defense member to pursue his or her own interests by cooperating with the government, as they still may offer their own confidential communications in return for leniency."); Schaffzin, *supra* note 17, at 85 ("Allowing the original privilege holder to control the waiver of the common interest doctrine after information is shared will encourage parties to share more information.").

304. *See* United States v. Gonzalez, 669 F.3d 974, 982 (citing *In re* Teleglobe Commc'ns Co., 493 F.2d 345, 366 (3d Cir. 2007)).

> *confirmed to Nye on the phone that James was just not that into the idea of a merger anymore.*[305]

Not all engagements lead to marriage. (Certainly, most mere flirtations do not.) For much of history, engagements—*née* betrothals in stricter times and places—were a far cry from the often informal arrangements seen in modern Western society; marriage was closer to a business transaction, with dowry and brideprice arrangements being negotiated vigorously.[306] The formalization of an agreement to marry in a betrothal had legal force in both common and ecclesiastical law.[307] Persons wishing to dissolve a betrothal were required to follow formal processes, and an aggrieved fiancé or fiancée could bring suit for damages occasioned by the betrothal's termination.[308] By contrast, contemporary engagements are more akin to an "agreement to agree" to marry,[309] which black letter contract law would view as unenforceable.[310]

Corporate marriage invokes the stricter sense of engagement or betrothal: once a merger agreement is signed, the parties have legal obligations to one another that cannot be readily (or inexpensively) terminated on the basis of cold feet or the emergence of a better prospect.[311]

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305. Martin Marietta Materials, Inc. v. Vulcan Materials Co., 56 A.3d 1072, 1094–95 (Del. Ch.), *aff'd*, 68 A.3d 1208 (Del. 2012).

306. *See* Siwan Anderson, *The Economics of Dowry and Brideprice*, 21 J. ECON. PERSP. 151, 152 (2007) ("Most societies, at some point in their history, have been characterized by payments at the time of marriage. Such payments typically go hand-in-hand with marriages arranged by the parents of the respective spouses. These marriage payments come in various forms and sizes but can be classified into two broad categories: transfers from the family of the bride to that of the groom, broadly termed as 'dowry,' or from the groom's side to the bride's, broadly termed as 'brideprice.'"); *see also* George L. Haskins, *The Development of Common Law Dower*, 62 HARV. L. REV. 42, 42–44 (1948).

307. *See* HENRY AMANS AYRNIHAC, MARRIAGE LEGISLATION IN THE NEW CODE OF CANON LAW 33–41 (Benziger Bros. 1919); Haskins, *supra* note 306, at 43, 45.

308. *See* AYRNIHAC, *supra* note 307, at 34.

309. *See* WORDSWORTH DONISTHORPE, LAW IN A FREE STATE 191 (London, Macmillan & Co. 1895) ("Let us endeavour to forecast what would happen in the absence of any marriage law whatever among people in an advanced state of civilization . . . . The mother, father, or guardian would, just as is now done, make the usual inquiries, and, if satisfied, consent to the betrothal—call it marriage or by any other name. The absurd agreement to agree, promise to promise, now called an engagement, would probably disappear, and with it the even more anomalous action for breach of promise.").

310. *See* Cyberlock Consulting, Inc. v. Info. Experts, Inc., 939 F. Supp. 2d 572, 578 (E.D. Va. 2013), *aff'd*, 549 F. App'x 211, 211 (4th Cir. 2014) (per curiam). *But cf.* Temkin, *supra* note 147 (analyzing when agreements in principle give rise to enforceable obligations).

311. *See* Steuer, Simala & Roberti, *supra* note 153, at 35–45; *e.g.*, United Rentals v. RAM Holdings, Inc., No. 3360-CC, 2007 WL 4496338 (Del. Ch. Dec. 21, 2007). Many agreements, however, provide an escape hatch in the event of a "material adverse effect" on

The parties typically must use "reasonable best efforts" or "commercially reasonable efforts" to make necessary filings, secure regulatory approvals, defend against litigation,[312] and have duties of cooperation in providing access to contracts, records, and personnel.[313] Many agreements provide for either a termination fee payable by the acquisition target to the acquirer,[314] or a reverse termination fee payable by the acquirer to the target,[315] ostensibly compensating the payee for costs and business disruption in the event that the merger fails to close.[316] That failure can occur for any number of reasons, including the denial of required regulatory approvals,[317] successful litigation to halt the merger,[318] or the decision of one party to unilaterally terminate the deal.[319]

A. The Subsequent Litigation Exception

Therefore, given such formalities and fees, failed transactions not uncommonly give rise to litigation between the parties.[320] These lawsuits tend to fall into two main causes of action: those alleging wrongdoing *ab initio*, in that one party fraudulently induced the other to enter into the failed

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the acquisition target's business, the meaning of which has also occasioned much litigation. *E.g.*, Hexion Specialty Chems., Inc. v. Huntsman Corp., 965 A.2d 715 (Del. Ch. 2008); *In re* IBP, Inc. v. Tyson Foods, Inc., 789 A.2d 14 (Del. Ch. 2001).

312. *E.g.*, Herrmann Holdings Ltd. v. Lucent Techs. Inc., 302 F.3d 552, 556 (5th Cir. 2002) ("reasonable best efforts" defined as those being "commercially reasonable"); Faulkner v. Verizon Comms. Inc., 156 F. Supp. 2d 384, 388 (S.D.N.Y. 2001) ("commercially reasonable efforts"); *In re* Del Monte Foods Co. S'holders, 25 A.3d 813, 842 (Del. Ch. 2011) ("reasonable best efforts"); Alliance Data v. Blackstone Capital, 963 A.2d 746, 749 (Del. Ch. 2009) (same).

313. *See, e.g.*, Cooper Tire & Rubber Co. v. Apollo (Mauritius) Holdings Private Ltd., No. 8980–VCG, 2013 WL 5787958, at *3–5 & *4 n.24 (Del. Ch. 2013).

314. *See, e.g.*, Samjens Partners I v. Burlington Indus., Inc., 663 F. Supp. 614, 624 (S.D.N.Y. 1987).

315. *See, e.g.*, *In re Del Monte*, 25 A.2d at 843.

316. *See* Jonathan T. Wachtel, *Breaking Up is Hard to Do: A Look at* Brazen v. Bell Atlantic *and the Controversy over Termination Fees in Mergers and Acquisitions*, 65 BROOK. L. REV. 585, 586–87 (1999).

317. *See, e.g.*, 3Com Corp. v. Diamond II Holdings, Inc., No. 3933-VCN, 2010 WL 2280734, at *1 (Del. Ch. May 31, 2010).

318. *See, e.g.*, United States v. H&R Block, Inc., No. 11-00948, 2011 WL 5438955, at *43–44 (D.D.C. Nov. 10, 2011).

319. *See, e.g.*, Faulkner v. Verizon Commc'ns Inc., 156 F. Supp. 2d 384, 389 (S.D.N.Y. 2001); IBP, Inc. v. Tyson Foods, Inc. (*In re* IBP, Inc. S'holders Litig.), 789 A.2d 14, 23 (Del. Ch. 2001).

320. *See, e.g.*, cases cited *infra* notes 321–324.

transaction by deception,[321] and those alleging material breach of the merger agreement.[322] Cases in the latter category can be further classified by whether they seek general damages incurred by virtue of the breach,[323] or represent an attempt to recoup a contractual termination fee over the resistance of the other party.[324] In any such actions, former allies in common interest have become adversaries as to the same matter, leading to seismic shifts in the assessment of privilege.[325]

As a general rule, the relationship of the parties at the time a communication is made determines common interest and thus its continuing privilege.[326] That generality, however, yields to the harsh specificities of adversarial litigation.[327] Communications between erstwhile common interest parties now opposed in litigation cannot be privileged from use, because they were never intended to be shielded from the counterparty.[328] Common interest privilege represents a joint right of the parties as against the rest of the world, not against each other.[329] Thus, in the event of open

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321. *See, e.g.*, Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLP, 80 A.3d 155, 156 (Del. Ch. 2013); Narrowstep, Inc. v. Onstream Media Corp., No. 5114-VCP, 2010 WL 5422405, at *15 (Del. Ch. Dec. 22, 2010) (denying motion to dismiss on fraudulent inducement and unjust enrichment).

322. *See, e.g.*, The Williams Cos., v. Energy Transfer Equity, L.P., No. 12168-VCG, 2016 WL 3576682, at *1 (Del. Ch. June 24, 2016); Hexion Specialty Chems., Inc. v. Huntsman Corp., 965 A.2d 715, 723 (Del. Ch. 2008).

323. *See, e.g.*, *Hexion*, 965 A.2d at 724.

324. *See, e.g.*, United Rentals v. RAM Holdings, Inc., 937 A.2d 810, 841 (Del. Ch. 2007).

325. *See In re* Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974, 406 F. Supp. 381, 394 (S.D.N.Y. 1975) (referring to a "restructuring" of privilege rights).

326. *See supra* notes 139–141 and accompanying text.

327. *Cf.* Zedalis v. Foster, 343 So. 2d 849, 850 (Fla. Dist. Ct. App. 1976) ("When reconciliation is not possible the maxim *generalia specialibus non derogant* would normally apply, thereby retaining the effectiveness of the special act notwithstanding a subsequent general act on the same subject.").

328. *See* Fogel v. Zell (*In re* Madison Mgmt. Grp.), 212 B.R. 894, 896 (Bankr. N.D. Ill. 1997); Yorke v. Santa Fe Indus., Inc. (*In re* Santa Fe Trail Transp. Co.), 121 B.R. 794, 799 (Bankr. N.D. Ill. 1990); Medcom Holding Co. v. Baxter Travenol Labs., Inc., 689 F. Supp. 841, 844 (N.D. Ill. 1988); Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 32 (N.D. Ill. 1980); *In re* Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974, 406 F. Supp. 381, 393 (S.D.N.Y. 1975); *see also In re* Teleglobe Commc'ns Corp., 493 F.3d 345, 366 (3d Cir. 2007) ("The great caveat of the joint-client privilege is that it only protects communications from compelled disclosure to parties outside the joint representation. When former co-clients sue one another, the default rule is that all communications made in the course of the joint representation are discoverable.").

329. *See* EPSTEIN, *supra* note 14, at 309 ("The privilege usually applies for the group against the world, namely when it is used as a shield against outsiders."); *e.g.*, *In re Grand Jury Subpoena*, 406 F. Supp. at 394; *Medcom*, 689 F. Supp. at 845; *Ohio-Sealy*, 90 F.R.D. at 29; *Yorke*, 121 B.R. at 799.

hostilities, neither can prevent the other from using that selfsame privileged material in its case for fraud or breach, as it was freely shared in happier times.[330] This "subsequent litigation exception" to common interest privilege applies even to documents that reflect only attorney-client advice of one of the parties, so long as they were disclosed to the other.[331] As the Southern District of New York has cogently summarized,

> the law exacts a higher cost for participation in a joint defense. To be sure, confidences shared by joint defendants and their counsel are effectively shielded against outside access. On the law established to date, that shield may be lowered only when the parties once joined assume the stance of opposing parties in subsequent litigation. This restructuring of the parties' rights is a logical incident of their later posture: when they face one another in litigation, neither can reasonably be allowed to deny to the other the use of information which he already has by virtue of the former's own disclosure.[332]

Even following this logic, however, that court and others still held that materials subject to common interest remain privileged as against any third party, should such a party seek their discovery for their own reasons.[333]

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330. *See, e.g.*, *In re Grand Jury Subpoena*, 406 F. Supp. at 394; *see also, e.g.*, *Ohio-Sealy*, 90 F.R.D. at 32; *Yorke*, 121 B.R. at 799; *Medcom*, 689 F. Supp. at 845.

331. *See Ohio-Sealy*, 90 F.R.D. at 32 ("The subsequent litigation exception is based on the view that a joint defendant who later becomes adverse cannot 'reasonably be allowed to deny [the] other [defendant] the use of information which he already has by virtue of the former's own disclosure.'"); *e.g.*, *In re Grand Jury Subpoena*, 406 F. Supp. at 394.

332. *In re Grand Jury Subpoena*, 406 F. Supp. at 394; *e.g.*, *Ohio-Sealy*, 90 F.R.D. at 32.

333. EPSTEIN, *supra* note 14, at 312 ("After a falling out between parties with a common interest, any privileged communications exchanged between them or by one of them with joint counsel retains its privileged character in respect to litigation with third parties. But the privilege will not apply in litigation between the parties."); *e.g.*, United States v. Gulf Oil Corp., 760 F.2d 292, 296 (Temp. Emer. Ct. App. 1985); *In re Grand Jury Subpoena*, 406 F. Supp. at 394 ("There is no similar justification for requiring the disclosure of a former co-defendant's confidences for use in a third-party proceeding. Indeed, to allow such disclosure would so further erode the privilege's protection as to reduce joint defense to an improbable alternative."); *Ohio-Sealy*, 90 F.R.D. at 32 ("It is quite another matter, however, to make this information available to an adverse party who never participated in a joint defense."); Visual Scene, Inc. v. Pilkington Bros., PLC, 508 So. 2d 437, 440 (Fla. Dist. Ct. App. 1987); *Fogel*, 212 B.R. at 897 ("[T]he adversity or subsequent litigation exception has only been applied between the parties whose interests were originally joined. In those situations, as the Court notes above, there is no longer any purpose for containing information to which both parties have already had access. They are now using it against each other. It is quite a different matter, however, to reveal the information to a third party unless both of the parties whom the

Former common interest parties can even shield their privileged documents from co-litigants in their action against one another![334] That the quondam allies are now adversarial is "inapposite" to the right of third parties to documents originally exchanged pursuant to a common interest.[335] Outsiders to the privilege thus remain barred from fishing expeditions into the merger parties' exchanges,[336] even if one of the parties now seeks such excursions.[337] Under the rule against unilateral waiver,[338] only if and when the former allies mutually publicize jointly privileged documents in the course of litigation between them will there be a general abrogation of the privilege as to the world at large.[339] (Of course, by the same rule, a company remains free to forfeit protection for documents whose privilege derives only from its own counsel.[340])

Finally, it is often the case that there are multiple parties to common interest in a transaction;[341] what then ensues if only a subset later becomes adversarial? Several courts have provided the answer: the adversarial parties may use common interest materials against one another in litigation, even over the objections of uninvolved allies.[342] As an early court sensibly explained,

> "[b]y definition, the defense effort is joint among all defendants; thus, there are likely to be few documents which reflect communications solely between two parties who later become adverse litigants. No doubt it was for this reason that the court in *Grand Jury Subpoena* noted that the [subsequent litigation]

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privilege is protecting consent to waive it."); *see also*, *e.g.*, *Yorke*, 121 B.R. at 799 (observing that "[t]he claim of privilege as to those outside the family is a totally different problem" without addressing that problem).

334. *Visual Scene*, 508 So. 2d at 442.

335. *See Gulf Oil*, 760 F.2d at 296.

336. *See id.*; *In re Grand Jury Subpoena*, 406 F. Supp. at 394; *Ohio-Sealy*, 90 F.R.D. at 29; *Fogel*, 214 B.R. at 394.

337. *See, e.g.*, *Fogel*, 214 B.R. at 897.

338. *See supra* Part IV.B.

339. *See Fogel*, 214 B.R. at 897 (quoted *supra* note 333); *see also In re Grand Jury Subpoena*, 406 F. Supp. at 394.

340. *See supra* notes 295–303 and accompanying text.

341. Yorke v. Santa Fe Indus., Inc. (*In re* Santa Fe Trail Transp. Co.), 121 B.R. 794, 799 (Bankr. N.D. Ill. 1990).

342. *In re Grand Jury Subpoena*, 406 F. Supp. at 394; Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 32 (N.D. Ill. 1980).

> exception applies where 'any one of the former clients stands as an opposing party in such action.'"[343]

Lest this seem unfair to bystanders to the suit, *In re Grand Jury Subpoena* also emphasized the "higher cost" associated with the risk of later litigation incurred in invoking the benefits of common interest privilege.[344]

B. Analyzing Erstwhile Allies in Opposition

The precarious position of privilege when allies become adversaries is convoluted at best, especially when third parties come on the scene, whether as co-litigants or curious interlopers. Some exemplary applications, however, can illustrate the consequences for the common interest privilege both between now-adversarial onetime common interest parties and when third parties seek to interpose themselves.

The court in *Ohio-Sealy Mattress Manufacturing Co. v. Kaplan* confirmed the discoverability of documents shared between parties to a transaction now engaged in active litigation, despite the objections of uninvolved parties to the common interest.[345] When squarely opposed in adversarial litigation, privilege cannot bar disclosure as between the parties.[346] By contrast, the facts in *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.* compelled the opposite conclusion.[347] Baxter had sold a subsidiary to Medcom, the latter of which was now suing the former over fraud in the transaction.[348] Medcom argued that the common interest privilege as between the subsidiary and Baxter prior to the transaction was abrogated by the litigation.[349] The court, however, refused to order production, reasoning that despite Medcom's ownership, the subsidiary and Baxter were not adversarial such that the subsequent litigation exception would apply: Medcom could not "stand[] in the shoes" of its subsidiary to effect abrogation,[350] and thus Baxter could insist the common interest materials remain privileged and inadmissible over the desires of the former

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343. *Ohio-Sealy*, 90 F.R.D. at 32 (quoting *In re Grand Jury Subpoena*, 406 F. Supp. at 393–94).

344. *See supra* text accompanying note 332.

345. *Ohio-Sealy*, 90 F.R.D. at 32.

346. *Id.*

347. Medcom Holding Co. v. Baxter Travenol Labs., Inc., 689 F. Supp. 841, 845–46 (N.D. Ill. 1988).

348. *Id.* at 841.

349. *Id.* at 842.

350. *Id.* at 845.

subsidiary (as directed by Medcom), under the rule against unilateral waiver.[351]

Confronting the involvement of third parties and fishing expeditions, the court of appeals in *United States v. Gulf Oil Corp*. was called on to adjudicate privilege between parties to a failed transaction.[352] In 1982, Cities Service Oil & Gas had entered a merger agreement with Gulf, and under terms that allowed plenary reciprocal access to business records, Gulf received certain legal analyses generated by Cities in connection with a Department of Energy investigation in 1980.[353] After the merger collapsed and litigation *inter partes* ensued, the Department renewed its investigation and subpoenaed Cities' analyses from Gulf, arguing any privilege was waived by disclosure to Gulf, given the parties were now in opposition.[354] The court demurred, finding it "inapposite that an adversarial relationship ultimately developed between Cities and Gulf. This was not the case at the time the disclosure was made. We therefore affirm the district court's conclusion that the work product privilege attached to these documents was not waived by virtue of their disclosure."[355]

The bankruptcy court in *Fogel v. Zell* provides a valuable survey of much of the precedent as well.[356] There, a subsidiary had gone into bankruptcy, and the appointed trustee filed suit against the parent corporation and its directors for fraudulent conveyance in an effort to recoup assets.[357] To that end, the trustee sought to share with third-party creditors confidences between the subsidiary, the parent, and its directors that were relevant to the alleged fraud.[358] Analyzing the relationship between parent and child company as one of common interest,[359] the court reasoned that the lawsuit abrogated the privilege as between them, but did not allow

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351. *Id.* at 845–46.

352. United States v. Gulf Oil Corp., 760 F.2d 292, 293 (Temp. Emer. Ct. App. 1985).

353. *Id.* at 293–94.

354. *Id.* at 294.

355. *Id.* at 296.

356. Fogel v. Zell *(In re* Madison Mgmt. Grp.), 212 B.R. 894 (Bankr. N.D. Ill. 1997) (discussing CFTC v. Weintraub, 471 U.S. 343, 349 (1985)); *see, e.g.*, Yorke v. Santa Fe Indus., Inc. (*In re* Santa Fe Trail Transp. Co.), 121 B.R. 794, 798–800 (Bankr. N.D. Ill. 1990); Medcom Holding Co. v. Baxter Travenol Labs., Inc., 689 F. Supp. 841, 844–45 (N.D. Ill. 1988); Ohio-Sealy Mattress Mfg. v. Kaplan, 90 F.R.D. 21, 32 (N.D. Ill. 1980); *In re* Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974, 406 F. Supp. 381, 394–95 (S.D.N.Y. 1975).

357. *Fogel*, 212 B.R. at 895–96.

358. *Id.*

359. *See supra* notes 224–231 and accompanying text (discussing courts viewing affiliated companies within the common interest model).

disclosure to third parties, even in connection with the suit.[360] And looking to basic principles of waiver of common interest, the trustee's unilateral desire for disclosure was insufficient; all parties to the common interest had to assent.[361]

Finally, in an extraordinary example, a Florida court of appeals upheld common interest between opposing parties in a lawsuit in *Visual Scene, Inc. v. Pilkington Bros., PLC*.[362] Despite being engaged in active litigation against one another, the court approved a limited common interest for a defendant and plaintiff in developing legal strategy against a crossclaim common to both.[363] Whilst under the adversarial waiver rule, such strategizing was presumably fair game for use against one another in the primary litigation, third parties—including the codefendant of one member of this odd couple!—could nonetheless be excluded.[364] Citing the Southern District of New York, the court explained:

> To extend the common interests privilege to parties aligned on opposite sides of the litigation for another purpose is not inconsistent with any policy underlying the attorney-client privilege and merely facilitates representation of the sharing parties by their respective counsel. Sharing parties on opposite sides of litigation, being uncertain bedfellows, run a greater than usual risk that one may use the information against the other should subsequent litigation arise between them, yet there is no sound reason not to protect from the rest of the world . . . information intended by VSI and Metro to be kept confidential and to be used to further the common litigation interests.[365]

To say adversaries in active litigation "run a greater than usual risk" of their interlocutor misapplying their confidences is quite the understatement.[366]

There is thus precedent that common interest parties can at least depend that their corporate secrets will remain protected as against the world at

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360. *Fogel*, 212 B.R. at 896–97.

361. *Id.* at 897; *see supra* Section III.B.

362. Visual Scene, Inc. v. Pilkington Bros., PLC, 508 So. 2d 437, 439 (Fla. Dist. Ct. App. 1987).

363. *Id.* at 441.

364. *Id.* at 442.

365. *Id.* (citing *In re* Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974, 406 F. Supp. 381 (S.D.N.Y. 1975)).

366. *Cf.* Schaffzin, *supra* note 17, at 70–71 (discussing *Visual Scene*).

large. This may be little solace to a company being hoisted by its own petards in the form of legal opinions shared with a onetime ally.[367] Fortunately, there remain potential remedies even in litigation *inter partes*, but they lie in contract rather than privilege law per se.[368] The possibility of eventual litigation between the parties is a powerful argument for preemptive execution of a common interest agreement to prevent just such weaponization of secrets.[369]

VI. CORPORATE PRENUPS: COMMON INTEREST AND JOINT DEFENSE AGREEMENTS

> *Therefore, when James and Nye met in April 2010, Nye emphasized the need for confidentiality. This need met with no resistance from James, who as a fellow CEO, was not inclined to put himself in a vulnerable position that he could not control. Although neither James nor Nye discussed the need for a standstill preventing Martin Marietta or Vulcan from proceeding against the other without consent, both agreed upon the need for a confidentiality agreement to cloak any merger discussions between the companies and any information exchanged.*[370]

Matrimonial lawyers have long advocated that prospective helpmates enter into prenuptial agreements defining the obligations of the parties in the unhappily plausible event that the marriage does not last until death do them part.[371] The prudent practitioner of privilege law should be no less solicitous to participants in corporate marriages. A common interest or joint defense agreement can augment the parties' ability to assert privilege against

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367. WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK act 1, sc. 4, ll. 202–09 ("There's letters seal'd, and my two schoolfellows, / Whom I will trust as I will adders fang'd— / They bear the mandate, they must sweep my way / And marshal me to knavery. Let it work; / For 'tis the sport to have the enginer / Hoist with his own petard, an't shall go hard / But I will delve one yard below their mines / And blow them at the moon.").

368. *Cf. In re* Teleglobe Commc'ns Corp., 493 F.3d 345, 366 (3d Cir. 2007) ("According to the Restatement, it is permissible for co-clients to agree in advance to shield information from one another in subsequent adverse litigation, though the drafters concede finding no direct authority for that proposition.").

369. *See infra* Part VI.

370. Martin Marietta Materials, Inc. v. Vulcan Materials Co., 56 A.3d 1072, 1081 (Del. Ch.), *aff'd*, 68 A.3d 1208 (Del. 2012).

371. *See* Allison A. Marston, Note, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STANFORD L. REV. 887 (1997).

outsiders,[372] as well as provide for protecting the parties' secrets in the event they become adversarial.[373] Given all the nuances and challenges for privilege discussed when companies combine and the possibility of the transaction's failure, the precaution of contractually defining the parties' rights and obligations may seem less a convenience than a necessity.[374]

A. Bolstering the Joint Privilege Against Outsiders

Talk of necessity is not literally true: courts have emphasized that the *sine qua non* of privilege is the existence of a common legal interest or joint defense; an informal and unwritten understanding between the parties suffices for commonality.[375] Nonetheless, "it is better practice to enter into a formal agreement stipulating the privileged materials will be shared because of the existence of some community of interest and that the parties recognize that the shared materials should be kept confidential," because such a writing "can be helpful in protecting privilege claims."[376] It is therefore standard procedure for attorneys to promulgate common interest agreements in the context of mergers.[377] Absent such a writing, a finding of common interest depends more heavily on a court's independent sifting of evidence of commonality,[378] which may not yield a favorable result.[379] Courts

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372. *See* EPSTEIN, *supra* note 14, at 304; Jason M. Rosenthal, *Joint Defense Agreements and the Common Interest Privilege: What You Don't Know Can Hurt You*, *in* A YOUNG LAWYER'S GUIDE TO DEFENSE PRACTICE 143, 151–52 (2008); Schaffzin, *supra* note 17, at 82.

373. *See* Drumright & Griffin, *supra* note 41, at 45; Fischer, *supra* note 17, at 658; Pavento, Marti, Siddiqui & Eagan, *supra* note 76, at 365; Rosenthal, *supra* note 372, at 151–52.

374. *See, e.g.*, Hundley, *supra* note 32, at 110; Pavento, Marti, Siddiqui & Eagan, *supra* note 76, at 365; Steuer, Simala & Roberti, *supra* note 153, at 44 ("Antitrust risk allocation requires cooperation and consultation among competition counsel for both parties. This requirement for cooperation has made it a common practice for parties early on in a transaction to enter into a joint [defense] agreement so that they may share information.").

375. *In re* Grand Jury Subpoena, 274 F.3d 563, 572 (1st Cir. 2001); Denney v. Jenkins & Gilchrist, 362 F. Supp. 2d 407, 415 (S.D.N.Y. 2004); Lugosch v. Congel, 219 F.R.D. 220, 237 (N.D.N.Y. 2003); United States v. Stepney, 246 F. Supp. 2d 1069, 1079 n.5 (N.D. Cal. 2003) ("No written agreement is generally required to invoke the joint defense privilege."); Katz v. AT&T Corp., 191 F.R.D. 433, 437 (E.D. Pa. 2000); *see* EPSTEIN, *supra* note 14, at 304–07 (discussing cases); Fischer, *supra* note 17, at 649–50; Giesel, *supra* note 17, at 553.

376. EPSTEIN, *supra* note 14, at 304.

377. *See* Hundley, *supra* note 32, at 110; Pavento, Marti, Siddiqui & Eagan, *supra* note 76, at 365; Steuer, Simala & Roberti, *supra* note 153, at 44; *see also* Fischer, *supra* note 17, at 649–50; Schaffzin, *supra* note 17, at 81–82.

378. *See* Drumright & Griffin, *supra* note 41, at 44; Hundley, *supra* note 32, at 110; Steuer, Simala & Roberti, *supra* note 153, at 44 ("The analysis as to when interests are aligned can be nuanced and until an agreement is signed, there is a risk that a court may find that the parties do not share a common interest.").

themselves have commended the wisdom of such written safeguards even when they find a preexisting common interest.[380]

That said, the parties must in fact concur in the existence of the common interest, whether in writing or not: even the most punctilious document could not create privilege where the parties have not actually reached agreement as to their common interest.[381] Where the parties differ as to the intention that their exchanges be privileged, therefore, courts will likely treat such divergence as negating privilege, since there cannot be any confidentiality upheld in exchanges with a party who does not acknowledge any is due.[382] Moreover, once one party withdraws from or disclaims a common interest agreement, subsequent communications will not enjoy privilege.[383] Common interest, in short, cannot be imposed upon an unwilling partner,[384] even if that partner was amenable at one time or executed an agreement to that effect.[385]

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379. *E.g.*, Beyond Sys., Inc. v. Kraft Foods, Inc., No. CIVA PJM-08-409, 2010 WL 1711502, at *1–2 (D. Md. Apr. 23, 2010); Avocent Redmond Corp. v. Rose Elecs., Inc., 516 F. Supp. 2d 1199, 1204 (W.D. Wash. 2007); United States v. Weissman, 22 F. Supp. 2d 187, 189–90 (S.D.N.Y. 1998); Steuer, Simala & Roberti, *supra* note 153, at 44.

380. *E.g.*, HSH Nordbank AG N.Y. Branch v. Swerdlow, 259 F.R.D. 64, 72 n.6 (S.D.N.Y. 2009) ("[W]hile Nordbank and the non-party lenders wisely chose to reduce their common agreement to writing, their decision to do so does not mean that there was no prior agreement. To the contrary, Nordbank has made a persuasive showing that the parties shared a common interest."); Boyd v. Comdata Network, Inc., 88 S.W.3d 203, 217 (Tenn. Ct. App. 2002).

381. *See* Brown v. Adams (*In re* Fort Worth Osteopathic Hosp.), No. 07-04015-DML, 2008 WL 2095601, at *2 (Bankr. N.D. Tex. May 15, 2008) ("The law is clear that, in order to retain the protection of the attorney-client or work product privilege when sharing documents with another party, there must at least be an agreement among the parties. Whether the parties must, in fact, agree to a joint prosecution and pursue that end, certainly at a bare minimum there must be a meeting of the minds that documents subject to attorney-client or work product privilege are being shared in the expectation that the privilege is not being waived by the sharing and that each party will protect the documents from disclosure or loss of the privilege.").

382. *E.g.*, *id.*; *Avocent*, 516 F. Supp. 2d at 1203; J.E. Dunn Const. Co. v. Underwriters at Lloyd's London, No. 05-0092-CV-W-FJG, 2006 WL 1128777, at *1–2 (W.D. Mo. 2006).

383. EPSTEIN, *supra* note 14, at 320; *e.g.*, United States v. Lecroy, 348 F. Supp. 2d 375, 387–88 (E.D. Pa. 2004); United States v. Stepney, 246 F. Supp. 2d 1069, 1086 (N.D. Cal. 2003).

384. *Brown*, 2008 WL 2095601, at *2; *see also Avocent*, 516 F. Supp. 2d at 1203 (explaining that parties must explicitly intend and agree to establish a common interest); Fischer, *supra* note 17, at 643 (noting that even if parties share interests, they cannot be "forced" into cooperation and information sharing unwillingly).

385. *Cf. Stepney*, 246 F. Supp. 2d at 1086 (ordering that a "joint defense agreement must explicitly allow withdrawal upon notice to the other defendants").

What should the corporate prenup specify? In joint defense arrangements grounded in litigation, many of the details are self-evident by the nature of the lawsuit.[386] By contrast, "[b]ecause the existence of common interests is not as obvious as in the litigation context, it is especially important that clients and attorneys document the inception, duration, scope, boundaries and termination of any common interest agreement."[387] Some commentators have provided yet more meticulous descriptions of terms and conditions that parties are well-advised to include or at least consider addressing in their compact.[388] In particular, agreements should, and generally do, provide the terms of document protection and disclosure to which the parties must adhere, to ensure the requisite confidentiality for privilege is preserved.[389] On rare occasions, courts have interceded to demand stipulations regarding such things as the nature of the relationship between the parties and provisions for withdrawal from the agreement.[390]

Care must be taken, however, that a written agreement not curtail privilege that would otherwise exist. For example, if a common interest agreement specifies that the common interest between the parties arises on a certain date, courts may use the specified date as a line in the sand and deny common interest to communications prior to it.[391] Thus, if merger partners only belatedly execute a common interest agreement, they should specify that communications prior to the date of execution on matters of common legal interest are still encompassed.[392] Similarly, whilst a well-drafted agreement will specify the zones in which the parties share common

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386. Evans & Klevens, *supra* note 286, at 2; *see also, e.g.*, Trading Techs. Int'l Inc. v. eSpeed, Inc., No. 04-C-5312, 2007 WL 1302765, at *2 (N.D. Ill. May 1, 2007) ("GL has indicated that '[e]ach defendant entered the JDA with the other defendants as of the date of their particular suit with TT began.' Such timing is not surprising, considering TT's visible and calculated effort to enforce its patent rights against competitors throughout the futures industry.") (internal citation omitted).

387. Evans & Klevens, *supra* note 286, at 3.

388. *See, e.g.*, Drumright & Griffin, *supra* note 41, at 44–45 (expansively detailing items to include in an agreement and citing authorities).

389. Pavento, Marti, Siddiqui & Eagan, *supra* note 76, at 365; *e.g.*, Martin Marietta Materials, Inc. v. Vulcan Materials Co., 56 A.3d 1072, 1138 (Del. Ch.), *aff'd*, 68 A.3d 1208 (Del. 2012).

390. *See, e.g.*, *Stepney*, 246 F. Supp. 2d at 1086.

391. *E.g.*, For Your Ease Only, Inc. v. Calgon Carbon Corp., No. 02 C 7345, 2003 WL 21920244, at *2–3 (N.D. Ill. Aug. 11, 2003); Bank of Am., N.A. v. Terra Nova Ins. Co. Ltd., 211 F. Supp. 2d 493, 498 (S.D.N.Y. 2002).

392. *See For Your Ease Only*, 2003 WL 21920244, at *2–3; *Bank of Am.*, 211 F. Supp. 2d at 498.

interest,[393] such areas should be drawn broadly lest an interpreting court find the parties have disclaimed commonality on an unanticipated matter.[394]

Although not without a whiff of begging the question, common interest and joint defense agreements are typically themselves viewed as privileged.[395] Indeed, even the negotiation of a common interest agreement and preliminary drafts have been held immune from discovery—even when no written agreement is ultimately signed.[396] This makes greater sense when one recalls that common interests do not depend upon a written agreement; the writing merely memorializes a preexisting relationship.[397] A few courts, however, confronting agreements defining the metes and bounds of the multiple attorney-client unit have declined to find them privileged, likening them to attorney retention agreements.[398] By parallel reasoning, even if an arrangement is unwritten, its participants may still be called on to divulge its foundational parameters, such as the participants in the privilege and date of inception.[399]

Finally, as this Article has illustrated, jurisdictions and even courts differ on the scope of privilege protections, and thus the forum in which privilege is litigated can be dispositive. For example, in *3Com Corp. v.*

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393. *See supra* notes 386–388 and accompanying text.

394. *Cf.* Rosenthal, *supra* note 372, at 151 (discussing danger of mistakenly sharing information thought to be within the scope of a common interest agreement).

395. Jeld-Wen, Inc. v. Nebula Glasslam Int'l Inc., No. 07-22326-CIV, 2008 WL 756455 at *5–7, *7 n.2 (S.D. Fla. Mar. 11, 2008); McNally Tunneling Corp. v. City of Evanston, No. 00-C-6979, 2001 WL 1246630, at *1 (N.D. Ill. Oct. 18, 2001); Boyd v. Comdata Network, Inc., 88 S.W.3d 203, 217 (Tenn. Ct. App. 2002) (citing cases); *see also* Drumright & Griffin, *supra* note 41, at 44.

396. *Boyd*, 88 S.W.3d at 217 ("If a joint defense agreement itself is privileged, it would be anomalous to conclude that drafts of a joint defense agreement are discoverable. Obviously, a joint defense agreement must be preceded by negotiations regarding the terms of the agreement. Holding that communications involving a proposed joint defense agreement are not privileged unless the parties actually enter into a joint defense agreement will place the parties in a 'Catch-22' situation and will seriously impair efforts to negotiate a joint defense agreement. Accordingly, communications occurring during the negotiation of a proposed joint defense agreement are privileged, even if the parties have not, or ultimately do not, unite in a common enterprise or execute a formal agreement.").

397. *See* cases cited *supra* note 375.

398. United States v. Stepney, 246 F. Supp. 2d 1069, 1078 (N.D. Cal. 2003); *see, e.g.*, Rosenthal, *supra* note 372, at 152 (noting risk of divergent court approaches); *cf. In re* LTV Sec. Litig., 89 F.R.D. 595, 603 (N.D. Tex. 1981) (observing in a joint defense case that "at the risk of confusing by stating the obvious," no privilege applies to "terms and conditions of an attorney's employment").

399. *E.g.*, Trading Techs. Int'l Inc. v. eSpeed, Inc., No. 04-C-5312, 2007 WL 1302765, at *2 (N.D. Ill. May 1, 2007).

Diamond II Holdings, Inc.,[400] a Delaware chancery court had to determine whether Massachusetts or Delaware law would apply, as the communications occurred in the former state, but the parties' agreements designated the latter for choice of law.[401] The choice mattered, for the materials at issue would be admissible in the former, but privileged in the latter.[402] The court, perhaps predictably, ruled in favor of the forum state, Delaware:

> The parties selected Delaware law to govern the Merger Agreement, and chose Delaware as the forum for any disputes arising out of the Merger Agreement. Delaware has a considerable interest in ensuring that corporate entities seeking a business combination under its laws may expect consistent and predictable treatment when appearing before its Courts. . . . Applying Delaware law in this context would avoid the uncertainty generated by the varying loci of communications involved both in this case and others like it. This, in turn, would foster predictability for parties to major corporate transactions that have availed themselves of Delaware law.[403]

Drafters of merger and common interest agreements seeking greater surety for their secrets should thus ensure their designated forum enjoys favorable privilege precedent,[404] as do Delaware and the Northern District of California, to name but two possibilities.[405]

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400. 3Com Corp. v. Diamond II Holdings, Inc., No. 3933-VCN, 2010 WL 2280734 (Del. Ch. May 31, 2010).

401. *Id.* at *2–3.

402. *Id.* at *3–5.

403. *Id.* at *5.

404. Pavento, Marti, Siddiqui & Eagan, *supra* note 76, at 365–66. *But see* Schaffzin, *supra* note 17, at 65 ("Even when states adopt the common interest doctrine, the lack of uniformity in its application further compounds such uncertainty."); *id.* at 49 n.3.

405. *See, e.g.*, Hewlett-Packard Co. v. Bausch & Lomb, Inc., 115 F.R.D. 308, 311 (N.D. Cal. 1987). Of course, no jurisdiction will be uniformly protective of all matters of privilege. *Compare 3Com*, 2010 WL 2280734 (noting that an expectation of confidentiality can be enough to justify a privileged common interest), *and Hewlett-Packard*, 115 F.R.D. at 311–12 (finding that a defendant and a prospective buyer had sufficiently overlapping legal interests that justified finding a common interest), *with* Union Carbide Co. v. Dow Chem. Co., 619 F. Supp. 1036, 1050 (D. Del. 1985) (holding that communications with respect to evaluation of business ramifications do not justify finding a common interest), *and* Nidec v. Victor Co. of Japan, 249 F.R.D. 575, 579–80 (N.D. Cal. 2007) (failing to extend a common interest privilege to disclosures made in connection with prospective buyers of a business). M&A practitioners might at least eschew jurisdictions with particularly unfavorable law. *See supra* notes 172–177 (discussing stricter privilege law in New York and a minority of other states).

B. Protecting the Parties in Subsequent Adversarial Litigation

Common interest agreements are not merely important in strengthening the parties' claims of privilege against outsiders. They may be most uniquely valuable in providing protection in the event that the merger collapses or is blocked. As discussed, absent contrary agreement, common interest communications are fair game in litigation between the parties,[406] which may be to neither party's benefit.[407] A common interest agreement, however, can specify that the materials shared may be used solely for the purpose of effectuating the contemplated transaction,[408] or even more specifically, prescribe that the common interest privilege will survive the onset of *inter partes* litigation.[409] Of course, not every set of merger partners will want these limitations, but some courts at least have been receptive to those that do enter into such contracts.[410] Other courts, however, have not.[411]

In *Price v. Charles Brown Charitable Remainder Unitrust Trust*,[412] an Indiana court of appeals confronted a paradigmatic case of two former allies turned adversaries. In 2006, the Department of Justice had begun a criminal conspiracy investigation into both Brown and his lawyer Price, who executed a joint defense agreement in 2008 to govern the sharing of documents in their defense.[413] But by 2009, the yesteryear allies were suing one another over a litany of wrongs (meanwhile, they were eventually exonerated in the criminal inquiry).[414] Pointing to a JDA clause specifying privilege would not be abrogated in the event of hostilities,[415] Price sought

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406. *See supra* Section V.A.

407. *See* Drumright & Griffin, *supra* note 41, at 46 ("Institute a clear protocol for resolving issues relating to the joint defense agreement as they arise in litigation and amongst the parties.").

408. *E.g.*, Martin Marietta Materials, Inc. v. Vulcan Materials Co., 56 A.3d 1072, 1077 (Del. Ch.), *aff'd*, 68 A.3d 1208 (Del. 2012) (transferee could only use materials "for the purpose of considering a 'business combination transaction' that was 'between' the parties"); *see also id.* at 1105.

409. *See* Price v. Charles Brown Charitable Remainder Unitrust Tr., 27 N.E.3d 1168, 1174 (Ind. App. 2013).

410. *See, e.g.*, Hundley, *supra* note 32, at 108–09 (discussing *In re* Sealed Case, 120 F.R.D. 66, 71 (N.D. Ill.), *objections overruled and order aff'd sub nom.*, Medcom Holding Co. v. Baxter Travenol Labs., Inc., 689 F. Supp. 841 (N.D. Ill. 1988)).

411. *See* Fischer, *supra* note 17, at 658–59, 658 n.81 (citing and discussing courts refusing to enforce agreements prohibiting divulgence of shared materials); EPSTEIN, *supra* note 14, at 305–06.

412. *Price*, 27 N.E.3d at 1168.

413. *Id.* at 1170–71.

414. *Id.* at 1172.

415. *Id.* at 1174 ("The joint defense privilege described above and recognized by this Agreement shall not be destroyed or impaired as to any Joint Defense Materials exchanged

to preclude the claims against him on the grounds that "the terms of the JDA and the sharing of information under the JDA bar the Browns and the Trust's claims, and 'the only appropriate remedy available to Price is dismissal.'"[416] Demurring from such a severe result, the appellate court agreed that the JDA precluded use of the joint defense materials in the suit, giving effect to the parties' intent to preserve privilege, but allowed the suit to go forward with that limitation.[417]

Also relevant to corporate marriages is *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*,[418] where the parties had executed both non-disclosure and joint defense agreements in considering a consensual merger; each agreement provided (in slightly different terms) that the materials exchanged could be used only in connection with a transaction between the companies.[419] After they failed to reach terms, Martin Marietta launched a hostile takeover bid and proxy contest, publicizing numerous excerpts from materials supplied under the agreements[420] and sought a declaratory judgment that its disclosures did not violate the NDA and JDA, whilst Vulcan counterclaimed that they did.[421] Having meticulously and thoughtfully parsed both the agreements and parties' arguments,[422] Chancellor Strine concluded that Martin Marietta's wide-ranging disclosures breached both agreements and granted injunctions in favor of Vulcan requiring Martin Marietta to desist from its hostile bid for four months and forbear from any further disclosures.[423] Sitting en banc, the Delaware Supreme Court affirmed unanimously.[424]

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pursuant to this Agreement if any adversary positions shall subsequently arise between some or all of the Parties and regardless of whether the joint defense privilege becomes inapplicable after the emergence of adversary positions among Parties or this Agreement is terminated for any reason.").

416. *Id.* at 1172.

417. *Id.* at 1174 ("What the JDA does establish is that Brown and Price cannot use the materials shared pursuant to the JDA against each other, and that the exchange of materials does not limit any privileges or work-product protections that would otherwise apply.").

418. Martin Marietta Materials, Inc. v. Vulcan Materials Co., 56 A.3d 1072 (Del. Ch.), *aff'd*, 68 A.3d 1208 (Del. 2012). Chancellor Strine's opinion is a model of clarity, exposition, legal reasoning, and even wit, and should be required reading for anyone considering confidentiality clauses in merger discussions. Not coincidentally, the epigrams to this and the preceding Parts draw from this opinion.

419. *Id.* at 1082–84.

420. *Id.* at 1099–1101.

421. *Id.* at 1077–78.

422. *Id.* at 1144.

423. *Id.* at 1138–47.

424. Martin Marietta Materials, Inc. v. Vulcan Materials Co., 68 A.3d 1208, 1228 (Del. 2012).

Notwithstanding such holdings, some doubt remains as to whether courts will respect common interest parties' preemptive self-denial of common interest materials in the event of subsequent litigation. The Third Circuit observed in the seminal 2007 case *In re Teleglobe Communications Corp.* that whilst the Restatement approved such arrangements for co-clients, it could cite no authority for their enforceability.[425] The sole relevant case the court of appeals could uncover featured a court refusing to give effect to prior contractual limitations on the parties' discovery from one another, albeit not in the form of a common interest agreement.[426] Some courts have indeed declined to give full effect to agreements purporting to preserve privilege between onetime allies turned adversaries.[427] (This is little different from prenuptial agreements, where ample case law has developed as to clauses that courts will find unenforceable.[428]) But others have clearly upheld such precautionary limitations.[429] The latter group and Restatement likely have the better of public policy: in *Martin Marietta*, Chancellor Strine discussed at length but ultimately rejected arguments that giving effect to written agreements barring disclosure of commonly shared materials in subsequent adversarial settings would put a "chill on M&A activity"[430] and instead found rigorous enforcement would benefit the market.[431]

In any event, there is little disadvantage in allies executing a common interest agreement should that be their predilection, even if its ultimate efficacy may be the subject of dispute should hostilities ensue.[432] And

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425. *In re* Teleglobe Commc'ns Corp., 493 F.3d 345, 366 (3d Cir. 2007).

426. *Id.* at 647 n.23 (citing *In re* Mirant Corp., 326 B.R. 646, 652 (Bankr. N.D. Tex. 2005)).

427. *See In re* Taproot Sys., Inc., No. 11-05255-8-JRL, 2013 WL 3505621 (E.D.N.C. July 11, 2013) (citing cases); Fischer, *supra* note 17, at 658–59, 658 n.81; *see, e.g.*, United States v. Stepney, 246 F. Supp. 2d 1069, 1080–84 (N.D. Cal. 2003).

428. *See generally* Jonathan E. Fields, *Forbidden Provisions in Prenuptial Agreements: Legal and Practical Consideration for the Matrimonial Lawyer*, 21 J. AM. ACAD. MATRIM. L. 413 (2008).

429. *E.g.*, *In re* Grand Jury Subpoenas 89-3 and 89-4, 734 F. Supp. 1207, 1211 n. 5 (E.D. Va.), *aff'd in part, rev'd in part*, 902 F.2d 244 (4th Cir. 1990); *In re* Sealed Case, 120 F.R.D. 66, 70–72 (N.D. Ill.), *objections overruled and order aff'd sub nom.*, Medcom Holding Co. v. Baxter Travenol Labs., Inc., 689 F. Supp. 841 (N.D. Ill. 1988); Price v. Charles Brown Charitable Remainder Unitrust Tr., 27 N.E.3d 1168, 1173–75 (Ind. App. 2013); *see, e.g.*, Martin Marietta Materials, Inc. v. Vulcan Materials Co., 56 A.3d 1072, 1147 (Del. Ch.), *aff'd*, 68 A.3d 1208 (Del. 2012).

430. *Martin Marietta*, 56 A.3d at 1142.

431. *Id.* at 1142–43.

432. *See In re* Grand Jury Subpoenas 89-3 and 89-4, 734 F. Supp. 1207, 1211 n.5 (E.D. Va.), *aff'd in part, rev'd in part*, 902 F.2d 244, 249–50 (4th Cir. 1990); *In re* Taproot Sys., Inc., No. 11-05255-8-JRL, 2013 WL 3505621, at *2–4 (E.D.N.C. July 11, 2013); United States v. Stepney, 246 F. Supp. 2d 1069, 1080–84 (N.D. Cal. 2003); *In re* Sealed Case, 120

subsequent litigation aside, the parties can only benefit from the relative clarity afforded to both them and an interpreting court by a well-drafted and prudently phrased written agreement codifying the scope of their intended privilege.[433]

VII. THE CONCEIT OF CORPORATE MARRIAGE

If issues of privilege law in corporate combinations are thorny, it is because the natures of these arrangements are as well. Whether the companies are conducting due diligence, seeking regulatory approval, or defending litigation, the relationship is fundamentally inchoate: neither one of wholly independent operators nor of having unified into a single operator.[434] Such uncertainties are categorically worse than that of a closed transaction, which at least brings finality to the parties' legal status and unification to their interests in the mine run of postures.[435] Yet, even the consummation of a corporate marriage leaves lingering questions,[436] just as civil marriage has raised problems in legal philosophy since the law's inception.

In marriage, spouses are biblically said to "become one flesh,"[437] a notion that the law embraced formally for centuries. Most fundamentally, the concept of coverture, odious though it now be to modern sensibilities, subsumed the identity and property of the wife into the person of the husband, creating a single legal entity.[438] Interspousal tort immunity imagines that one spouse cannot offend the other at law.[439] The oft-baffling legal estate of tenancy by the entirety between spouses (the scourge of bar

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F.R.D. at 70–72; Medcom Holding Co. v. Baxter Travenol Labs., Inc., 689 F. Supp. 841, 843–44 (N.D. Ill. 1988); Price v. Charles Brown Charitable Remainder Unitrust Tr., 27 N.E.3d 1168, 1173 (Ind. App. 2013); Martin Marietta Materials, Inc. v. Vulcan Materials Co., 56 A.3d 1072, 1106–07 (Del. Ch.), *aff'd*, 68 A.3d 1208 (Del. 2012); *see also* Fischer, *supra* note 17, at 658–59, 658 n.81.

433. Rosenthal, *supra* note 372, at 151–52; *see supra* Section VI.A.

434. *See generally Martin Marietta*, 56 A.3d at 1108–13.

435. *Id.*

436. *See supra* Section III.F.

437. *Genesis* 2:24 (New Int'l Version); *Mark* 10:8 (New Int'l Version).

438. *See generally* Claudia Zaher, *When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 LAW LIBR. J. 459 (2002).

439. *See generally* Carl Tobias, *The Imminent Demise of Interspousal Tort Immunity*, 60 MONT. L. REV. 101, 108 (1999); David M. Weaver, *Interspousal Tort Immunity*, 30 BAYLOR L. REV. 291, 304 (1978).

applicants for decades[440]) sees the married couple holding land singly and undividedly rather than individually.[441] And, of course, marital privilege forbids the state from penetrating the sanctity of communications between the married couple and prevents either spouse from being compelled to testify against the other at all.[442] In justifying such restrictions, the Supreme Court has repeatedly reasoned that such intrusions would fundamentally compromise the harmony and privity of the marriage.[443]

And yet for all these attempts at enforcing connubial unity, the indefeasible fact remains that a marriage is comprised of two separate persons. The legal fictions discussed above are rowing against the tide of that reality, zealously striving to make one plus one equal one. Their application has thus given rise to a notoriously complicated body of law, and many such fictions have been deprecated or are rapidly obsolescing: coverture was long ago relegated rightly to the ashbin of legal history;[444] interspousal tort immunity is close to defunct;[445] tenancy by the entirety is in a long slide into desuetude;[446] and even marital privilege faces challenges to its cogency in an era with ever more diverse notions of relationships.[447] The law has largely despaired of trying to extend already strained fictions of

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440. *See, e.g.*, 1 JAMES J. RIGOS, MULTISTATE BAR EXAM (MBE) REVIEW 490 (Aspen Publishers, 2008) ("MBE Tip: The co-ownership FAPS rules [of tenancy by the entirety] are heavily tested on the MBE.").

441. *See generally* John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common-Law Marital Estate*, 1997 BYU L. REV. 35 (1997).

442. *See* Trammel v. United States, 445 U.S. 40, 51–53 (1980); Blau v. United States, 340 U.S. 332, 333–34 (1951) (citing Wolfle v. United States, 291 U.S. 7, 14 (1934)).

443. *See* Stein v. Bowman, 38 U.S. (13 Pet.) 209, 223 (1839) ("This rule is founded upon the deepest and soundest principles of our nature. Principles which have grown out of those domestic relations that constitute the basis of civil society and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To break down or impair the great principles which protect the sanctities of husband and wife would be to destroy the best solace of human existence."); *Trammel*, 445 U.S. at 51–53 (quoting *Stein* with approval); *Blau*, 340 U.S. at 334; *Wolfle*, 291 U.S. at 14; *see also* Hawkins v. United States, 358 U.S. 74, 77–78 (1958), *overruled by Trammel*, 445 U.S. 40.

444. *See* sources cited in Zaher, *supra* note 438, at 480–86.

445. *See* Tobias, *supra* note 439; Weaver, *supra* note 439.

446. *See* Orth, *supra* note 441.

447. *See, e.g.*, I. Bennett Capers, *Enron, DOMA, and Spousal Privileges: Rethinking the Marriage Plot*, 81 FORDHAM L. REV. 715, 725 (2012) ("[T]he attorney might argue that any couple in a marriage-like relationship, including unmarried heterosexual couples, should be able to secure the benefits of [these] evidentiary privileges. Of course, even these arguments are still variations on the marriage plot. But one can imagine other plots that do not use marriage as the measuring stick for determining what relationships are deserving of protection. For example, one might argue that familial groupings should be entitled to privileges. There could be an evidentiary privilege for siblings, or for the parent-child relationship.").

unity to such sundry arrangements, leaving those limited to marriage isolated and increasingly disused.[448]

Courts grappling with privilege when companies combine face analogous complexities. In the adversarial context prior to a merger agreement, it is difficult to discern a unifying principle establishing when information-sharing will enjoy privilege protections.[449] Even after an agreement is executed, jurisdictions differ on the extent of common interest available as the combining companies navigate regulatory challenges or even once combined.[450] Given that the road to marriage is rarely without quarrel, courts will also be called on to distinguish when parties' interests diverge, or even become adversarial, and determine who holds the reins on waiver.[451] And when the parties break off their engagement and resort to litigation, adjudicating the persistence and application of privilege between now-warring parties will be challenging.[452] Even the theoretical certitude of a written common interest agreement may be subject to ambiguity and dispute.[453]

Responding in part to such challenges, a leading academic voice in privilege law, Professor Grace M. Giesel, has called for the common interest privilege to be abolished generally.[454] She would prescribe that if multiple parties wish to enjoy privilege, they must engage the same legal team as co-clients.[455] Such a restriction would certainly create a blackline rule for establishing privilege, and conveniently leverages the ethical duties of the legal profession to ensure the parties' interests actually coincide sufficiently for a single attorney to represent all.[456] (Of course, dependence on attorneys'

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448. *Id.*

449. *See supra* Sections III.B, III.C.

450. *See supra* Sections III.D, III.E, III.F.

451. *See supra* Part IV.

452. *See supra* Part V.

453. *See supra* Part VI.

454. *See generally* Giesel, *supra* note 17. Needless to say, Giesel is not alone in questioning the workability of modern common interest privilege, though others have recommended strengthening rather than abolishing it as the solution. *See, e.g.*, Schaffzin, *supra* note 17.

455. Giesel, *supra* note 17, at 558–61.

456. *Id.* at 481 ("Indeed, the nature of joint representation and the ethical constraints on any attorney handling a joint representation make application of the privilege relatively straightforward."); *id.* at 512–19; Blau v. Harrison (*In re* JP Morgan Chase & Co. Sec. Litig.), No. 06-C-4674, 2007 WL 2363311, at *5 (N.D. Ill. Aug. 13, 2007) ("If Defendants' argument holds true, nothing would prevent a single attorney from representing both the buyer and the seller in a real estate transaction, for example. The reason such a situation does not occur—and is most likely ethically prohibited—is that the buyer and seller maintain opposite legal positions with respect to the transaction.").

professional rectitude may occasionally fall short of achieving the desired surety.[457]) But such a regime would presumably result in fewer companies taking that route and thus enjoying the aegis of privilege.[458]

How much then does common interest privilege really matter to merging companies? By the lights of the New York Court of Appeals, not much:

> There is no evidence, for example, that mergers, licensing agreements and other complex commercial transactions have not occurred in New York because of our State's litigation limitation on the common interest doctrine . . . Put simply, when businesses share a common interest in closing a complex transaction, their shared interest in the transaction's completion is already an adequate incentive for exchanging information necessary to achieve that end. Defendants have not presented any evidence to suggest that a corporate crisis existed in New York over the last 20 years when our courts restricted the common interest doctrine to pending or anticipated litigation, and we doubt that one will occur as a result of our decision today.[459]

But the court of appeals asks the wrong question; one may as well question how many couples would opt against matrimony absent marital privileges.[460] The value of privilege here lies not in whether its application is dispositive of corporate strategic decision-making, but in fostering an atmosphere of frankness, forthrightness, and open lines of communication that is important to both corporate and personal marriages.[461] Forcing

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457. *See, e.g.*, Eureka Inv. Corp. v. Chi. Title Ins. Co., 743 F.3d 932, 935–38 (D.C. Cir. 1984) (per curiam).

458. *See* Fischer, *supra* note 17; Giesel, *supra* note 17, at 545–51; Kapnick & Rosen, *supra* note 8, at 550–52, 555.

459. Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 27 N.Y.3d 616, 628–29 (N.Y. App. Div. 2016).

460. The answer, presumably, is very few, if any. *Cf.* Milton C. Regan, Jr., *Spousal Privilege and the Meaning of Marriage*, 81 VA. L. REV. 2045, 2093–96 (1995) (examining *ex ante* rationales for marital privilege).

461. *Compare* Trammel v. United States, 445 U.S. 40, 51 (1980), *and* Wolfle v. United States, 291 U.S. 7, 14 (1934) ("The basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails."), *and* Stein v. Bowman, 38 U.S. (13 Pet.) 209, 223 (1839), *with* Hewlett-Packard Co. v. Bausch & Lomb, Inc., 115 F.R.D. 308, 311 (N.D. Cal. 1987) (arguing privilege yields openness and frankness between merging companies), *and* OXY Res. Cal. LLC v. Superior Court, 9 Cal. Rptr. 3d 621, 626–27 (Cal. Ct.

companies or spouses to decide between candor and confidentiality is a prescription for dissembling, discord, and ultimately the dissolution of more unions.[462] That intolerable dilemma, after all, is the chief rationale for the marital privilege itself.[463] In matrimony, society has wisely preferred the stability of civil marriages over the inquisition of outsiders.[464] Courts too have often chosen to encourage gainful business combinations by protecting the confidences that foster their formation[465]—even when they do not ultimately succeed.[466] Failure to protect a developing combination's secrets can only make the combination's failure more likely[467]: "Deal lawyers create a large amount of potentially privileged information, and cases [seeking to enjoin mergers] can be won or lost based on whether such documents are successfully withheld as privileged."[468]

VIII. CONCLUSION

Whatever the administrative difficulties of common interest privilege, it is too late to readily roll back its protections for companies wholesale.[469]

App. Feb. 11, 2004) (citing same). *See also* Fischer, *supra* note 17, at 638–39 (discussing value of common interest).

462. *Compare* Blau v. United States, 340 U.S. 332, 334 (1951) ("Petitioner's refusal to betray his wife's trust therefore was both understandable and lawful. We have no doubt that he was entitled to claim his privilege."), *and Stein*, 38 U.S. at 223, *with Hewlett-Packard*, 115 F.R.D. at 311 (finding no privilege between companies will lead to more lawsuits between them), *and* Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 998 N.Y.S.2d 329, 336–337 (N.Y. App. Div. 2014), *rev'd*, 27 N.Y.3d 616 (N.Y. 2016). *See also* Fischer, *supra* note 17, at 638–39 (discussing same dilemma); Kapnick & Rosen, *supra* note 8, at 555 ("Corporations should not have to choose between maintaining privileges and effective conduct of their affairs.").

463. *See Blau*, 340 U.S. at 333–34; *Stein*, 38 U.S. at 223; *see also* Hawkins v. United States, 358 U.S. 74, 77–78 (1958), *overruled by Trammel*, 445 U.S. at 43–44.

464. *See Trammel*, 445 U.S. at 51–53; *Wolfle*, 291 U.S. at 14; *Stein*, 38 U.S. at 223; *see also Hawkins*, 358 U.S. at 77.

465. *Compare supra* Sections III.B, III.C, *with supra* Sections III.D, III.E.

466. *See supra* Part V.

467. *See* sources cited *supra* note 462.

468. Olson, Varallo & Koch, *supra* note 70, at 901.

469. EPSTEIN, *supra* note 14, at 277 ("The conceptual critique of the common interest privilege probably comes too late. Only a sweeping Supreme Court ruling that the many cases which have recognized the validity of some forms of common interest privilege have overreached would now serve to undo the concept and the cases that have recognized it."). *Contra* Giesel, *supra* note 17, at 489 ("Finally, abolishing privilege for the allied lawyer situation does not undo centuries of legal precedent. Rather, the application of privilege to the allied lawyer situation is a creature of recent origin. Only four cases applied the privilege to the allied lawyer setting before 1965. Only in the last three decades have claims of privilege in the allied lawyer situation become common and problematic. By abolishing the privilege for

Many thousands of court decisions and commentators have applied and discussed the doctrine,[470] and even more litigants have depended on its protections.[471] Nor is there compelling reason to fear its application; courts have proven admirably prudent in pruning back corporate overreach that may shield corruption or wrongdoing, whilst maintaining the core ability for companies to confidentially consult with counsel when they combine.[472] As the court in *Hewlett-Packard* wrote:

> Unless it serves some significant interest courts should not create procedural doctrine that restricts communication between buyers and sellers, erects barriers to business deals, and increases the risk that prospective buyers will not have access to important information that could play key roles in assessing the value of the business or product they are considering buying. Legal doctrine that impedes frank communication between buyers and sellers also sets the stage for more lawsuits, as buyers are more likely to be unpleasantly surprised by what they receive. By refusing to find waiver in these settings courts create an environment in which businesses can share more freely information that is relevant to their transactions. This policy *lubricates* business deals and encourages more openness in transactions of this nature.[473]

The bench regularly pronounces that promoting candor amongst clients and counsel is the principal purpose of common interest privilege and the most compelling of rationales.[474] "At a time and in an age where

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the allied lawyer situation, courts would simply be making a correction to a recently taken jurisprudential wrong turn.").

470. *See, e.g.*, Drumright & Griffin, *supra* note 41, at 41–43; King, *supra* note 8, at 1424 & n.73; Schaffzin, *supra* note 17, at 52–53 n.7.

471. *See* Buzzetta, *supra* note 176 (discussing reliance issues arising from *Ambac*'s retraction of a broader view of common interest in New York); *cf.* Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis*, 86 N.C. L. REV. 1165, 1172–2000 (2008) (explaining factors involved in departures from *stare decisis*, including reliance).

472. EPSTEIN, *supra* note 14, at 277 (noting courts have "resisted the attempts" of litigants to unduly expand the privilege); *id.* at 294 (discussing cases); *see, e.g.*, *In re* Teleglobe Commc'ns Corp., 493 F.3d 345, 382 (3d Cir. 2007); Nidec v. Victor Co. of Japan, 249 F.R.D. 575, 579 (N.D. Cal. 2007); OXY Res. Cal. LLC v. Superior Court, 9 Cal. Rptr. 3d 621, 626–27 (Cal. Ct. App. Feb. 11, 2004).

473. Hewlett-Packard Co. v. Bausch & Lomb, Inc., 115 F.R.D. 308, 311 (N.D. Cal. 1987) (emphasis added).

474. *E.g.*, United States v. BDO Seidman, LLP, 492 F.3d 806, 815 (7th Cir. 2007); United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989) ("The need to protect the free

transactions and the litigation they produce are increasingly complex,"[475] companies "simply cannot obtain such advice if their attorneys must proceed in splendid isolation."[476] In the jurisprudential medicine cabinet, sunlight may be the best disinfectant,[477] but privilege is the best lubricant.[478] Yet privilege will scarcely serve that purpose if its protections are uncertain.[479] More rigorously consistent understanding and application of common interest privilege throughout the process when companies combine best serves economy of both commercial and judicial deliberations.[480]

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flow of information from client to attorney logically exists whenever multiple clients share a common interest about a legal matter.").

475. Am. Auto. Ins. Co. v. J.P. Noonan Transp., No. 970325, 2000 WL 3317004, at *7 (Mass. Super. Nov. 16, 2000).

476. *Id.*; *see also* King, *supra* note 8, at 1433–34 (expressing the same sentiment).

477. Buckley v. Valeo, 421 U.S. 1, 67 (1976) (quoting LOUIS BRANDEIS, OTHER PEOPLE'S MONEY 62 (National Home Library Foundation ed. 1933)).

478. *See Hewlett-Packard*, 115 F.R.D. at 311; *accord* Ctr. Partners, Ltd. v. Growth Head GP, LLC, 981 N.E.2d 345 (Ill. 2012); OXY Res. Cal. LLC v. Superior Court, 9 Cal. Rptr. 3d 621, 626–27 (Cal. Ct. App. Feb. 11, 2004).

479. *See* Swidler & Berlin v. United States, 524 U.S. 399, 409 (1998); Upjohn Co. v. United States, 449 U.S. 383, 392 (1981); Kapnick & Rosen, *supra* note 8, at 552 (noting certainty issue in transactional common interest); Schaffzin, *supra* note 17 (studying certainty issue in common interest context).

480. *See* Martin Marietta Materials, Inc. v. Vulcan Materials Co., 56 A.3d 1072, 1142–43 (Del. Ch.), *aff'd*, 68 A.3d 1208 (Del. 2012) (evaluating whether punctilious enforcement of NDAs and JDAs in merger negotiations is beneficial or deleterious to commercial society); Kapnick & Rosen, *supra* note 8, at 555 (proponing economy of privilege in merger discussions); King, *supra* note 8, at 1442; *see also In re* LTV Sec. Litig., 89 F.R.D. 595, 603 (N.D. Tex. 1981) (quoting Matter of a Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974, 406 F. Supp. 381, 388 (S.D.N.Y. 1975)) ("The assurance of confidentiality is as important and appropriate where a cooperative program of joint defense is helpful or necessary to represent clients whose attorneys are separately retained as it is where co-defendants have engaged common counsel. No policy served by the privilege is disserved by recognition of the joint defense privilege. And its recognition makes savings in expense and effort likely.").