12. Confidentiality

COMMENT

Article 12 of the Model Agreement provides more in-depth treatment of confidentiality issues than many asset acquisition agreements. Often this greater detail will be appropriate.

Typically, a confidentiality agreement will have been signed by the time a buyer and seller are negotiating the terms of an asset acquisition agreement. Most definitive asset acquisition agreements, therefore, give only passing treatment to confidentiality issues, typically by addressing the existing confidentiality agreement in the integration clause to provide either that the confidentiality agreement survives or does not survive execution of the agreement or closing of the transaction.

For several reasons, this approach may not be satisfactory to the buyer. First, typically a confidentiality agreement is a unilateral document drafted by the seller to protect the confidentiality of its information. This is the approach taken in the Model Confidentiality Agreement (Ancillary Document No. 1). In the course of negotiating the asset purchase agreement and closing the transaction, confidential information of the buyer may be disclosed to the seller. This is likely when part of the consideration for the purchase is stock or other securities of the buyer. The buyer desires the confidentiality of this information to be protected. As noted in the Preliminary Note to the Model Confidentiality Agreement, this issue sometimes may be addressed during the course of due diligence by agreeing to make the provisions of the confidentiality agreement reciprocal and bilateral or entering into a mirror agreement protecting the buyer's confidential information that is disclosed to the seller. Neither of these steps, however, fully addresses the confidentiality issues that arise at the definitive agreement stage.

Second, the treatment of confidential information of the seller under a typical confidentiality agreement may not be appropriate following the closing of the transaction. There are four categories for consideration: (a) seller treatment of information relating to assets and liabilities retained by the seller, (b) seller treatment of information relating to assets and liabilities transferred to the buyer, (c) buyer treatment of information relating to assets and liabilities retained by the seller and (d) buyer treatment of information relating to assets and liabilities transferred to the buyer. After the closing, the buyer should maintain the confidentiality of category (c) information and be able to utilize category (d) information in whatever way it wants because the buyer now owns those assets and liabilities. Providing for the survival of the confidentiality agreement

would prohibit the buyer from using category (d) information, and providing for the termination of the confidentiality agreement would release the buyer from its obligation relating to the category (c) information. Neither option addresses category (b) information, which a typical buyer will want the seller to refrain from using and keep confidential. Article 12 is intended to address these issues.

The Model Agreement follows typical practice and assumes that the Model Confidentiality Agreement has already been signed. Article 12 supersedes that agreement, which, under Section 13.7, does not survive the signing of the Model Agreement. The provisions in Article 12 would also be applicable, however, where a confidentiality agreement had not been signed.

Because Article 12 assumes that the Model Confidentiality Agreement has already been signed, Article 12 is balanced and not as favorable to Buyer as it could be. Drafting a section heavily favoring Buyer would have required substantial deviation from the terms of the Model Confidentiality Agreement and resulted in inconsistent treatment of information as confidential or not. A drafter may want to consider this coverage issue when preparing an agreement for a specific transaction.

Substantive commentary concerning confidentiality issues is contained in the commentary to the Model Confidentiality Agreement. Commentary to this Article 12 is generally intended to highlight the different approaches taken in this Article from the Model Confidentiality Agreement.

In most cases, Article 12 uses the same substantive provisions as the Model Confidentiality Agreement, although the approach taken is not identical for the reasons set forth above. The exceptions, where Article 12 has no counterpart to the Model Confidentiality Agreement, are as follows: (a) Article 12 has no counterpart to Section 4 of the Model Confidentiality Agreement because this subject matter (nondisclosure of transaction) is addressed in Section 13.2 of the Model Agreement (public announcements); (b) Article 12 has no counterpart to Section 5 of the Model Confidentiality Agreement because this subject matter (disclosing party contact) is addressed in Section 5.1 of the Model Agreement (access and investigation); (c) Article 12 has no counterpart to Section 8 of the Model Confidentiality Agreement because the subject matter (contact with employees) is dealt with in both Sections 5.1 (access and investigation) and 10.1(b)(ii) (nonsolicitation of "Active Employees") of the Model Agreement; and (d) Article 12 has no counterpart to Section 13 of the Model Confidentiality Agreement (miscellaneous) because this subject matter is addressed in various provisions of Article 13 of the Model Agreement (general provisions).

The following list may be helpful in comparing the other provisions of the Model Confidentiality Agreement with the corresponding provisions of Article 12:

Model Confidentiality Agreement	Model Agreement
Section 2	Sections 12.1 and 12.6
Section 3	Section 12.2
Section 6	Section 12.3
Section 7	Section 12.4
Section 9	Section 12.5

12.1 DEFINITION OF CONFIDENTIAL INFORMATION

(a) As used in this Article 12, the term "Confidential Information" includes any and all of the following information of Seller, Buyer or Shareholders that has been or may hereafter be disclosed in any form, whether in writing, orally, electron-

ically or otherwise, or otherwise made available by observation, inspection or otherwise by either party (Buyer on the one hand or Seller and Shareholders, collectively, on the other hand) or its Representatives (collectively, a "Disclosing Party") to the other party or its Representatives (collectively, a "Receiving Party"):

(i) all information that is a trade secret under applicable trade secret or other law;

(ii) all information concerning product specifications, data, know-how, formulae, compositions, processes, designs, sketches, photographs, graphs, drawings, samples, inventions and ideas, past, current and planned research and development, current and planned manufacturing or distribution methods and processes, customer lists, current and anticipated customer requirements, price lists, market studies, business plans, computer hardware, Software and computer software and database technologies, systems, structures and architectures;

(iii) all information concerning the business and affairs of the Disclosing Party (which includes historical and current financial statements, financial projections and budgets, tax returns and accountants' materials, historical, current and projected sales, capital spending budgets and plans, business plans, strategic plans, marketing and advertising plans, publications, client and customer lists and files, contracts, the names and backgrounds of key personnel and personnel training techniques and materials, however documented), and all information obtained from review of the Disclosing Party's documents or property or discussions with the Disclosing Party regardless of the form of the communication; and

(iv) all notes, analyses, compilations, studies, summaries and other material prepared by the Receiving Party to the extent containing or based, in whole or in part, upon any information included in the foregoing.

(b) Any trade secrets of a Disclosing Party shall also be entitled to all of the protections and benefits under applicable trade secret law and any other applicable law. If any information that a Disclosing Party deems to be a trade secret is found by a court of competent jurisdiction not to be a trade secret for purposes of this Article 12, such information shall still be considered Confidential Information of that Disclosing Party for purposes of this Article 12 to the extent included within the definition. In the case of trade secrets, each of Buyer, Seller and Shareholders hereby waives any requirement that the other party submit proof of the economic value of any trade secret or post a bond or other security.

COMMENT

Section 12.1 follows the same general approach as Section 2 of the Model Confidentiality Agreement in describing the confidential information. The major difference is that Section 12.1 describes confidential information of both Buyer and Seller, whereas the Model Confidentiality Agreement only describes confidential information of Seller.

Given that a buyer typically will be receiving information, a buyer may want to limit the scope of material within the "Confidential Information" definition. For example, a buyer may not want to include oral disclosures or material made available

for review within the definition and may also want to require confidential information to be specifically marked as confidential.

12.2 RESTRICTED USE OF CONFIDENTIAL INFORMATION

(a) Each Receiving Party acknowledges the confidential and proprietary nature of the Confidential Information of the Disclosing Party and agrees that such Confidential Information (i) shall be kept confidential by the Receiving Party; (ii) shall not be used for any reason or purpose other than to evaluate and consummate the Contemplated Transactions; and (iii) without limiting the foregoing, shall not be disclosed by the Receiving Party to any Person, except in each case as otherwise expressly permitted by the terms of this Agreement or with the prior written consent of an authorized representative of Seller with respect to Confidential Information of Seller or Shareholders (each, a "Seller Contact") or an authorized representative of Buyer with respect to Confidential Information of Buyer (each, a "Buyer Contact"). Each of Buyer and Seller and Shareholders shall disclose the Confidential Information of the other party only to its Representatives who require such material for the purpose of evaluating the Contemplated Transactions and are informed by Buyer, Seller or Shareholders, as the case may be, of the obligations of this Article 12 with respect to such information. Each of Buyer, Seller and Shareholders shall (iv) enforce the terms of this Article 12 as to its respective Representatives; (v) take such action to the extent necessary to cause its Representatives to comply with the terms and conditions of this Article 12; and (vi) be responsible and liable for any breach of the provisions of this Article 12 by it or its Representatives.

(b) Unless and until this Agreement is terminated, Seller and each Shareholder shall maintain as confidential any Confidential Information (including for this purpose any information of Seller or Shareholders of the type referred to in Sections 12.1(a)(i), (ii) and (iii), whether or not disclosed to Buyer) of the Seller or Shareholders relating to any of the Assets or the Assumed Liabilities. Notwithstanding the preceding sentence, Seller may use any Confidential Information of Seller before the Closing in the Ordinary Course of Business in connection with the transactions permitted by Section 5.2.

(c) From and after the Closing, the provisions of Section 12.2(a) above shall not apply to or restrict in any manner Buyer's use of any Confidential Information of the Seller or Shareholders relating to any of the Assets or the Assumed Liabilities.

COMMENT

Section 12.2(a) follows the same general approach as Section 3 of the Model Confidentiality Agreement in describing the restrictions placed upon confidential information. This section permits the confidential information to be used in connection with any of the Contemplated Transactions. This may not be expansive enough for the buyer's needs. For example, the buyer may need to obtain financing and to disclose some confidential information in connection with that process. In that situation, the buyer would want to make sure that obtaining financing was part of the contemplated transactions or to specifically permit disclosures of seller confidential information during that process.

Section 12.2(b) requires Seller to keep confidential all information relating to the assets and liabilities to be transferred to Buyer beginning when the agreement is signed. Because Seller needs to continue to operate its business until closing, however, Seller is permitted to use this information in connection with pre-closing activities permitted by the Model Agreement.

Section 12.2(c) relieves Buyer from the obligation to keep confidential information about the assets and liabilities to be acquired by it. Note that this provision becomes operative only upon the Closing. Thus, Buyer's confidentiality obligation continues until it actually acquires the assets and assumes the liabilities.

12.3 EXCEPTIONS

Sections 12.2(a) and (b) do not apply to that part of the Confidential Information of a Disclosing Party that a Receiving Party demonstrates (a) was, is or becomes generally available to the public other than as a result of a breach of this Article 12 or the Confidentiality Agreement by the Receiving Party or its Representatives; (b) was or is developed by the Receiving Party independently of and without reference to any Confidential Information of the Disclosing Party; or (c) was, is or becomes available to the Receiving Party on a nonconfidential basis from a Third Party not bound by a confidentiality agreement or any legal, fiduciary or other obligation restricting disclosure. Neither Seller nor either Shareholder shall disclose any Confidential Information of Seller or Shareholders relating to any of the Assets or the Assumed Liabilities in reliance on the exceptions in clauses (b) or (c) above.

COMMENT

Section 12.3 follows the same general approach as Section 6 of the Model Confidentiality Agreement in describing the exceptions from the restrictions placed upon confidential information. Unlike Section 6, Section 12.3 does include an exception for independently developed information. This may be included in a buyer's draft because the buyer typically will be the recipient of confidential information. For that same reason, the criteria to qualify for an exemption are easier to satisfy than in the Model Confidentiality Agreement.

Finally, the last sentence prevents Seller from using certain exemptions to disclose information about the assets and liabilities to be transferred to Buyer. The use of these exemptions would be inappropriate given that these items are Seller's property until Closing.

12.4 LEGAL PROCEEDINGS

If a Receiving Party becomes compelled in any Proceeding or is requested by a Governmental Body having regulatory jurisdiction over the Contemplated Transactions to make any disclosure that is prohibited or otherwise constrained by this Article 12, that Receiving Party shall provide the Disclosing Party with prompt notice of such compulsion or request so that it may seek an appropriate protective order or other appropriate remedy or waive compliance with the provisions of this Article 12. In the absence of a protective order or other remedy, the Receiving Party may disclose that portion (and only that portion) of the Confidential Information of the Disclosing Party that, based upon advice of the Receiving Party's counsel, the Receiving Party is

legally compelled to disclose or that has been requested by such Governmental Body, provided, however, that the Receiving Party shall use reasonable efforts to obtain reliable assurance that confidential treatment will be accorded by any Person to whom any Confidential Information is so disclosed. The provisions of this Section 12.4 do not apply to any Proceedings between the parties to this Agreement.

COMMENT

Section 12.4 follows the same general approach as Section 7 of the Model Confidentiality Agreement in describing when a Receiving Party may disclose Confidential Information due to legal compulsion. Given that the buyer typically will be the recipient of confidential information, however, the criteria to permit disclosure are easier to satisfy. Also, the last sentence of Section 12.4 clarifies that the parties are not restricted by this section in connection with any proceedings between them.

12.5 RETURN OR DESTRUCTION OF CONFIDENTIAL INFORMATION

If this Agreement is terminated, each Receiving Party shall (a) destroy all Confidential Information of the Disclosing Party prepared or generated by the Receiving Party without retaining a copy of any such material; (b) promptly deliver to the Disclosing Party all other Confidential Information of the Disclosing Party, together with all copies thereof, in the possession, custody or control of the Receiving Party or, alternatively, with the written consent of a Seller Contact or a Buyer Contact (whichever represents the Disclosing Party) destroy all such Confidential Information; and (c) certify all such destruction in writing to the Disclosing Party, provided, however, that the Receiving Party may retain a list that contains general descriptions of the information it has returned or destroyed to facilitate the resolution of any controversies after the Disclosing Party's Confidential Information is returned.

COMMENT

Section 12.5 follows the same general approach as Section 9 of the Model Confidentiality Agreement in describing the procedure for return or destruction of Confidential Information if the Model Agreement is terminated. The last clause authorizes a receiving party to retain a list of returned or destroyed information. This list may be helpful in resolving issues relating to the Confidential Information. For example, this list may support a receiving party's contention that it independently developed information because it never received confidential information from the other party on that topic.

12.6 ATTORNEY-CLIENT PRIVILEGE

The Disclosing Party is not waiving, and will not be deemed to have waived or diminished, any of its attorney work product protections, attorney-client privileges or similar protections and privileges as a result of disclosing its Confidential Information (including Confidential Information related to pending or threatened litigation) to the Receiving Party, regardless of whether the Disclosing Party has asserted, or is or may be entitled to assert, such privileges and protections. The parties (a)

share a common legal and commercial interest in all of the Disclosing Party's Confidential Information that is subject to such privileges and protections; (b) are or may become joint defendants in Proceedings to which the Disclosing Party's Confidential Information covered by such protections and privileges relates; (c) intend that such privileges and protections remain intact should either party become subject to any actual or threatened Proceeding to which the Disclosing Party's Confidential Information covered by such protections and privileges relates; and (d) intend that after the Closing the Receiving Party shall have the right to assert such protections and privileges. No Receiving Party shall admit, claim or contend, in Proceedings involving either party or otherwise, that any Disclosing Party waived any of its attorney work-product protections, attorney-client privileges or similar protections and privileges with respect to any information, documents or other material not disclosed to a Receiving Party due to the Disclosing Party disclosing its Confidential Information (including Confidential Information related to pending or threatened litigation) to the Receiving Party.

COMMENT

Purpose of Section 12.6. One of the more troublesome problems related to the disclosure of confidential information during the due diligence process is how to disclose certain information to the recipient to facilitate a meaningful evaluation of litigation-related confidential information without waiving any work-product protections, attorney-client privileges and similar protections and privileges. The language of Section 12.6 constitutes an attempt to allow Seller to furnish to Buyer Confidential Information without waiving Seller's work product, attorney-client privilege and similar protections by demonstrating that Buyer and Seller have or should be presumed to have common legal and commercial interests or are or may become joint defendants in litigation. The language of Section 12.6 is not yet reflected in statutory or case law, may be disregarded by a court and may even "flag" the issue of privilege waiver for adverse parties that obtain the Agreement. As a result, Section 12.6 should not be viewed as an alternative to managing issues of privilege in a cautious manner.

There may be instances when the receiving party is an actual or potentially adverse party in litigation with the disclosing party (e.g., when litigation is the driving force behind an acquisition). In those cases, the language of Section 12.6 is intended to bolster a claim by the disclosing party that the recipient is later precluded from using disclosure as a basis for asserting that the privilege was waived.

Whether work-product protections and attorney-client privileges will be deemed to be waived as a result of disclosures in connection with a consummated or unconsummated asset purchase depends upon the law applied by the forum jurisdiction and the forum jurisdiction's approach to the joint defendant and common-interest doctrines (these doctrines are discussed below). In most jurisdictions, work-product protection will be waived only if the party discloses the protected documents in a manner that substantially increases the opportunities for its potential adversaries to obtain the information. By contrast, the attorney-client privilege will be waived as a result of voluntary disclosure to any third party unless the forum jurisdiction applies a form of the joint-defense or common-interest doctrines.

Work-Product Doctrine. The work-product doctrine protects documents prepared by an attorney in anticipation of litigation or for trial. *See* Hickman v. Taylor, 329 U.S. 495, 511 (1947). The work-product doctrine focuses on the adversary system and attorney's freedom in preparing for trial. *See* Union Carbide Corp. v. Dow Chem., 619 F. Supp. 1036, 1050 (D.C.Del. 1985). The threshold determination in a work-product

case is whether the material sought to be protected was prepared in anticipation of litigation or for trial. Binks Mfg. Co. v. National Presto Indus., Inc., 709 F.2d 1109, 1118 (7th Cir. 1983). Work-product protection, codified by FED. R. CIV. P. 26(b)(3), allows protected material to be obtained by the opposing party only upon a showing of substantial need and undue hardship. FED. R. CIV. P. 26(b)(3). This form of protection relates strictly to documents prepared in anticipation of litigation or for trial. *See Hickman*, 329 U.S. at 512. Therefore, in the absence of any anticipated or pending litigation, documents prepared for the purposes of a specific business transaction are not protected by the work-product doctrine.

In most jurisdictions, a waiver of the work-product protection can occur where the protected communications are disclosed in a manner that "substantially increases the opportunity for potential adversaries to obtain the information." *See* Behnia v. Shapiro, 176 F.R.D. 277, 279 (N.D.Ill. 1997); *see also* 8 WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE: CIVIL, § 2024, at 369 (1994). The question is whether the particular disclosure was of such a nature as to enable an adversary to gain access to the information. *See Behnia*, 176 F.R.D. at 279–80; United States v. Amer. Tel. & Tel., 642 F.2d 1285, 1299 (D.C.Cir. 1980). Disclosure under a confidentiality agreement militates against a finding of waiver, for it is evidence that the party took steps to insure that its work product did not land in the hands of its adversaries. Blanchard v. EdgeMark Fin. Corp. 192 F.R.D. 233, 237 (N.D.Ill. 2000). In a minority of jurisdictions, the waiver of work-product protection depends upon whether the parties share a common legal interest. In such jurisdictions, the courts will apply the same analysis as for the waiver of attorney-client privilege. *See In re* Grand Jury Subpoenas 89-3 v. United States, 902 F.2d 244, 248 (4th Cir. 1990).

Attorney-Client Privilege. The attorney-client privilege protects communications of legal advice between attorneys and clients, including communications between corporate employees and a corporation's attorneys to promote the flow of information between clients and their attorneys. *See* Upjohn Co. v. United States 449 U.S. 383, 389 (1981). An oft-quoted definition of the attorney-client privilege is found in *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358–59 (D. Mass. 1950):

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Although the attorney-client privilege does not require ongoing or threatened litigation, it is more narrow than the work-product doctrine because it covers only "communications" between the lawyer and the client for the purposes of legal aid. *See Upjohn*, 449 U.S. at 389.

The core requirement of the attorney-client privilege is that the confidentiality of the privileged information be maintained. Therefore, the privilege is typically waived when the privilege holder discloses the protected information to a third party. A waiver of attorney-client privilege destroys the attorney-client privilege with respect to all future opposing parties and for the entire subject matter of the item disclosed. *See In re* Grand Jury Proceedings, 78 F.3d 251, 255 (6th Cir. 1996).

The courts have developed two doctrines of exceptions to the waiver of the privilege through voluntary disclosure. The joint defendant rule, embodied in UNIF. R. EVID.

502(b)(5), protects communications relevant to a matter of common interest between two or more clients of the same lawyer from disclosure. UNIF. R. EVID. 502 (d)(5). This widely accepted doctrine applies strictly to clients of the same lawyer who are joint defendants in litigation. Several courts have expanded the joint-defense doctrine in order to create another exception to the waiver of attorney-client privilege: the doctrine of common interest. Under the common-interest doctrine, privileged information can be disclosed to a separate entity that has a common legal interest with the privilege holder, whether or not the third party is a co-defendant.

Federal circuit courts and state courts diverge in their interpretation and application of the common-interest and joint-defendant doctrines. United States v. Weissman, 1996 WL 737042 *7 (S.D.N.Y. 1996). In the most expansive application of the common-interest doctrine, courts exclude a waiver of the attorney-client privilege when there is a common interest between the disclosing party and the receiving party, and parties have a reasonable expectation of litigation concerning their common interest. *See* Hewlett-Packard Co. v. Bausch & Lomb, 115 F.R.D. 308, 309 (N.D.Cal. 1987). More restrictive courts require that the parties share an identical legal, as opposed to purely commercial, interest. *See* Duplan Corp. v. Deering Milliken, 397 F. Supp. 1146, 1172 (D.S.C. 1974). Finally, some courts persist in rejecting the common-interest theory absent actual or pending litigation in which both parties are or will be joint defendants. *See* International Ins. v. Newmont Mining Corp., 800 F. Supp. 1195, 1196 (S.D.N.Y. 1992).

Although there is no uniform test for application of the common-interest doctrine, courts have consistently examined three elements when applying the doctrine: (1) whether the confidentiality of the privileged information is preserved despite disclosure; (2) whether, at the time that the disclosures were made, the parties were joint defendants in litigation or reasonably anticipated litigation; and (3) whether the legal interests of the parties are identical or at least closely aligned at the time of disclosure. *See, e.g.* United States v. Gulf Oil Corp., 760 F.2d 292, 296 (Temp. Emer. Ct. App. 1985).

The core requirement of the common-interest doctrine is the existence of a shared legal interest. Courts will have less difficulty finding an exception to a waiver when the parties to the purchase agreement actively pursue common legal goals. *See* United States v. Schwimmer, 892 F.2d 237, 244 (2nd Cir. 1989). An agreement in which the buyer does not assume the litigation liability of the seller does not demonstrate an alignment of the parties' interests. A common business enterprise, such as the sale of assets or a potential merger, will not suffice unless the parties' legal interests are at least parallel and nonadverse. Jedwab v. MGM Grand Hotels, 1986 WL 3426 * 2 (Del. Ch. 1986). Disclosures by a corporation and its counsel to the corporation's investment banking firm during merger discussions have resulted in a waiver of the attorney-client privilege because the common-interest rule did not apply. *See Blanchard*, 192 F.R.D. at 233. The court said that the common-interest rule protects from disclosure those communications between one party and an attorney for another party "where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel," noting that the common interest must be a legal one, not commercial or financial. *Id.* at 236. The court concluded, however, that the common-interest rule did not apply because the defendants did not demonstrate that the investment banking firm's legal interest in the threatened litigation was anything more than peripheral. *Id.* at 237.

Although the consummation of a transaction is not determinative of the existence of a waiver, the interests of the parties may become closely aligned as a result of the closing. As a result, there is a higher probability that information will remain protected in a transaction that closes and in which the buyer assumes liability for the seller's

litigation than in a transaction that does not close and in which the buyer does not assume liability for the seller's litigation. *See* 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 (Fall/Winter, 1992/1993), which concludes that (a) in a statutory merger, the surviving corporation can assert the attorney-client privilege; (b) in a stock-for-stock deal, the privilege goes with the corporation, although, in some cases, the buyer and seller may share the privilege; and (c) in the case of an asset sale, most cases hold no privilege passes because the corporate holder of the privilege has not been sold. The article suggests that, in an asset sale, including a sale of a division, the parties could provide contractually for the buyer to have the benefit of the privilege, as Section 12.6 does, and, by analogy to joint-defense and common-interest cases, the privilege agreement should be upheld. Further, by analogy to those cases and the principle that the privilege attaches to communications between an attorney and prospective client prior to engagement, parties should be able to provide that due diligence information provided is protected by the attorney-client privilege. *Cf.* Cheeves v. Southern Clays, 128 F.R.D. 128, 130 (M.D. Ga. 1989) ("Courts have found a community of interest where one party owes a duty to defend another, or where both consult the same attorney".)

Courts may also maintain the attorney-client privilege when the interests of both parties are aligned through specific contractual relationships. *See In Re* Regents of Univ. of Cal., 101 F.3d 1386, 1390 (Fed. Cir. 1996) (holding that parties to an exclusive license agreement have a substantially identical legal interest). Therefore, the parties may find some comfort in provisions that align their legal interests and burdens, such as provisions pursuant to which the buyer assumes the litigation liability of the seller, indemnification provisions or assistance provisions, which may facilitate a court's application of the common-interest doctrine. If appropriate, the parties also should consider signing a "common-interest agreement" or a "joint-defense plan," which evidences their common legal interests and stipulates a common plan for litigation.