insights

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Shumaker, Loop & Kendrick, LLP

A Newsletter from Shumaker, Loop & Kendrick, LLP | Autumn 2011

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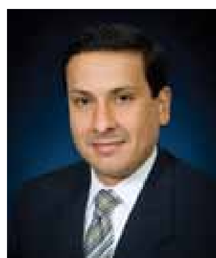
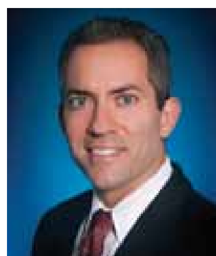
Dealing with Uncertainty in Mergers & Acquisition Transactions

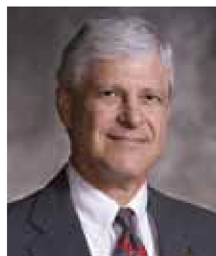
Over the last two years, since the nadir of the financial crises, M&A activity has been on the rise. In 2010, total U.S. M&A activity rose to 1,933 deals from 1,116 deals in 2009, an increase of 73%. Thus far in 2011, overall U.S. M&A deal volume remains healthy, with nearly 1,000 closed transactions in the first half of 2011, up nearly 30% from the prior year period. This trend should continue, given the unprecedented amount of cash on the balance sheets of many corporate buyers, limited opportunities for organic growth, the increasing availability of leverage (at historically low interest rates), and the need for hedge funds to invest their so-called "dry powder" or liquidate their portfolio investments as a result of their investment mandates.



By Julio Esquivel



By Ben Hanan



By Greg Yadley

VOLATILITY IN THE MARKETPLACE

Nevertheless, significant, ongoing financial concerns remain, led by fears of a European debt crisis, intransigent high unemployment, a glut of foreclosures, the potential for a double-dip U.S. recession, the recent downgrade of U.S. debt, and our seemingly dysfunctional political system. Is it any wonder the markets overanalyze every gesture of Fed Chairman Ben Bernanke and jump at the slightest rustle? Thus, even though U.S. banks today are better capitalized than they were in 2008 and corporations are sitting on unprecedented amounts of cash and GDP continues to grow (albeit at a slow pace), the credit markets and, hence, the M&A environment, remain highly volatile.

EDITOR'S NOTE

Recently, Shumaker has seen an increase in transactions involving mergers, acquisitions, sales of substantially all assets, divestitures, and joint ventures (collectively, "M&A"). Additionally, according to The Wall Street Journal (p. C1, Oct. 24, 2011), bank lending has returned to M&A transactions. Therefore, we have devoted our Autumn 2011 Insights Newsletter to highlight current M&A topics potentially of interest to our clients.

REGINA JOSEPH

As a result, there are significant risks in attempting to buy or sell a business under current market conditions. Will the buyer be able to obtain the financing required to pay the purchase price? What if there is another market downturn that negatively impacts the seller's business? Will pre-closing buyer's remorse require renegotiation or termination of the deal? What if the seller hasn't fully disclosed trends or events that will negatively impact the business in the future? How do buyers and sellers hedge their bets and protect their interests?

Negotiating M&A purchase agreements is, at its core, the allocation of risks among the parties to the transaction. A full discussion of the various interwoven and complex considerations that go into that allocation is beyond the scope of this article. Instead, we highlight below five hot topics to which buyers and sellers should pay particular attention as they strike deals in this uncertain environment.

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DON'T SKIP THE FIRST STEP

Usually, M&A discussions begin with the signing of a confidentiality agreement (sometimes called a non-disclosure agreement or "NDA"). Too often, the parties gloss over the importance of these agreements, considering them boilerplate, perhaps even signing the form provided by the other party without reviewing it with counsel. If the deal successfully closes, this will likely be a non-issue. But when a party walks away from the negotiation table, a confidentiality agreement may be all the other party has to protect its interests.

Take, for instance, a very recent case out of Atlanta, where Gemini, a private equity firm, signed a term sheet to finance the acquisition by AmeriPark of a competitor (Mile Hi). The term sheet included exclusivity and confidentiality provisions pursuant to which AmeriPark "agree[d] not to discuss this opportunity or reach any agreement with any person or entity regarding financing for this Transaction or the pursuit of any sale or major other financing." During the exclusivity period, AmeriPark abandoned the negotiations and began talks with one of its largest shareholders (Greenfield), who was also the sole shareholder of Mile Hi, eventually completing the acquisition using seller financing and totally cutting Gemini out of the deal. Gemini sued AmeriPark for breach of the exclusivity and confidentiality provisions arguing that the term "any person or entity" was unambiguous and clearly covered Greenfield. The court disagreed, noting that an exception to the confidentiality provision contemplated that the transaction could be discussed with "those in a confidential relationship with [AmeriPark]" and that in any event, discussions with Greenfield should have been anticipated since the proposed Gemini financing contemplated a redemption of Greenfield's stake in AmeriPark.

Regardless of whether you agree with the Court's ruling, the case highlights the need to carefully craft confidentiality agreements. With whom can the parties share confidential information? How is confidential information defined? Are there any exceptions? What are the permitted uses of confidential information? Should the agreement also include, among other things, a non-solicitation provision (preventing the other party from soliciting your employees, customers, vendors, and even shareholders), a standstill agreement (preventing the seller from soliciting other bids or pursuing other sales opportunities during the restricted period), or a provision restricting trading in securities (particularly important if one party is a public company)? Depending on your role in the transaction and the facts and circumstances, you may wish to include an expansive or narrower definition of confidential information, restrict the range of permitted uses of the information, or insist on some or many additional protective provisions.

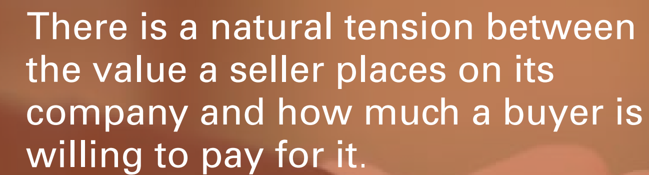
Once the parties have carefully crafted their NDA, they should be careful not to inadvertently supersede or render it void when they enter into subsequent letters of intent or definitive purchase agreements. Often those agreements include a provision that states "this agreement sets forth the entire understanding of the parties hereto with respect to the subject matter hereof and supersedes all prior agreements among the parties." If the letter of intent or purchase agreement neglects to include, or contains only a perfunctory, confidentiality provision, it may be deemed to have superseded the NDA, leaving the parties without the benefit of the NDA's protections.

BRIDGING THE PURCHASE PRICE GAP

There is a natural tension between the value a seller places on its company and how much a buyer is willing to pay for it. This tension is elevated in an uncertain economic environment, when no one knows what tomorrow may bring. An "earnout" is designed to bridge this gap by providing additional compensation to the seller if certain post-closing targets are met.

Over the last few years, earnouts have become increasingly important in M&A transactions. According to JP Morgan, the value of earnouts as a percentage of the total deal value rose to a new high of 41% in 2011, compared with 37% in 2010 and 25% in 2001. This is due, in part, to the uncertain economic environment, but also due to the fact that business valuations are increasing while less debt financing is available to provide the cash to pay such higher prices. We expect that earnouts will continue to be a significant component of deal compensation, at least in the near term.

Conceptually, earnouts seem straightforward. If the target company achieves certain targets following the sale, the seller "earns" more money. But like so many things, the devil is in the details, resulting in a high degree of pre-signing negotiations and post-closing disputes between buyers and sellers. Parties to M&A transactions



are well advised to focus on the details of earnouts during the negotiation process. While the structure of an earnout may vary widely, some of the more important issues to address include:

- earnout targets (these commonly include gross sales, net income and EBITDA, but earnouts can also be based on non-financial targets);
- earnout period (the additional payment could be a one-time event or stretched over multiple years; the period is sometimes tied to an employment or non-compete period);
- structure of the earnout (which could be a fixed amount or based on a multiple, percentage, or some other formula); and
- caps, early buyout provisions, and acceleration provisions (devices to limit the parties' ultimate monetary risks).

In many deals, the focus is on the first three items above, but equal attention should be given to the fourth consideration. A cap sets a limit on the total earnout payable, which is important to protect the buyer if the earnout is based, for example, on a multiple of EBITDA. Particularly in uncertain times, financing for the earnout payment may not be available, or existing loan covenants might create a conflict between the buyer's obligations to the seller and to the buyer's bank. A buyout option generally entitles the buyer to pay a specified amount to satisfy any remaining earnout payment obligations. This may become important, for example, if the buyer decides to sell its business prior to the end of the earnout period, since potential buyers may not be interested in buying a company with future earnout payment obligations, particularly if they are uncapped. Conversely, an acceleration provision generally requires the buyer to immediately pay a fixed earnout amount if certain specified events occur. For example, if the buyer undergoes a change of control after closing, the seller may prefer that a minimum earnout amount be paid immediately rather than undertaking the risks related to business performance under the new ownership.

HEDGING THE BET

Another way for buyers and sellers to bridge the gap on the purchase price while allowing the buyer to hedge its bet is to provide for a "holdback." A "holdback" is simply the negotiated portion of the purchase price which is placed in escrow at closing and held until the terms of the escrow have been satisfied. Typically, the holdback serves to ensure that the buyer will be able to get a portion of the purchase price returned to it if (a) there is a post-closing purchase price adjustment (*e.g.*, an adjustment based on a requirement that the seller's balance sheet at closing meet certain minimum requirements), or (b) the seller is required to indemnify the buyer post-closing (*e.g.*, for claims based on a breach of the seller's representations and warranties contained in the purchase agreement). Any portion of the holdback that is not returned to the buyer generally is released to the seller at the end of the holdback period.

Having an escrow holdback reduces the buyer's risk and, thus, can serve to increase the purchase price to the seller. Of course, the seller is deprived of the use of the holdback funds during the escrow period and the holdback may tend to shift the parties' respective leverage in any post-closing purchase price adjustment or indemnification dispute. Accordingly, the terms of the holdback, including the amount, duration, and specific purpose and terms of the holdback are often heavily negotiated.

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According to JP Morgan, based on a study of 250 publicly-disclosed M&A transactions in 2010:

- the median percentage of the purchase price placed into a holdback escrow was 9%;
- the median duration of the holdback escrow was 18 months;
- among transactions in which representations and warranties survived closing, 83% were supported by a holdback escrow to mitigate buyer risk; and
- 24% of escrow agreements called for multiple escrow accounts to be used for distinct purposes (one for general indemnification purposes and the other for purchase price adjustments).

As an alternative or supplement to a holdback, buyers and sellers also may wish to consider representation and warranty insurance. In general, representation and warranty insurance provides buyers with additional risk mitigation, particularly in situations where the holdback is non-existent or relatively small, or where sellers have imposed caps or other limitations on their indemnification obligations. Conversely, sellers may wish to purchase representation and warranty insurance to mitigate their indemnification exposure and as a means to exit their investment cleanly and quickly. For example, a seller may wish to buy insurance so that it knows exactly how much of the purchase price it has available to pay off creditors, limited partners, and other investors, or to enter into another venture, instead of having to reserve a part of the purchase price for indemnification contingencies. While representation and warranty insurance has been around for several years, in the U.S. this insurance product is still rarely used. Still, both buyers and sellers may wish to explore its benefits and costs, particularly in this economic environment.

NEGOTIATING THE OUTS THAT LET A BUYER WALK FROM A DEAL

Generally, once the parties sign an M&A agreement they are bound to close the transaction if the stated conditions to closing are satisfied. Common closing conditions include receipt of financing, third-party consents, and shareholder approval. However, during the pre-closing period (*i.e.*, the period between the signing of the M&A agreement and the closing), there is a risk that some event may arise that materially negatively impacts the business of the seller, a so-called "Material Adverse Event" or "MAE." Examples of MAEs include the loss of the seller's largest customer or a fire, flood, or other *force majeure* event that significantly impacts the seller's operations. Accordingly, most M&A purchase agreements state that one of the conditions to the buyer's obligation to close the transaction is that the seller "shall not have undergone a Material Adverse Event" prior to closing. Because the occurrence of an MAE would allow the buyer to walk from the deal without being in breach of the agreement, MAE clauses are heavily negotiated between the parties to M&A transactions.

Following the 2007/2008 financial meltdown, MAE clauses have received additional attention in M&A negotiations. Obviously, sellers want to limit the applicability and breadth of the clause, while buyers want to strengthen and clarify their ability to walk away from the deal. Furthermore, during the last few years, these negotiations have been impacted by a series of recent Delaware cases in which the courts consistently have ruled in favor of the sellers and concluded that no event had occurred that qualified as an MAE, as defined in the various purchase agreements at issue. As a result, we expect that buyers will become even more aggressive in negotiating MAE clauses.

Among the concessions that buyers may attempt to obtain from sellers are the following:

- <u>Limiting pro-seller exclusions to the definition of MAE</u> (typical pro-seller exclusions include changes in law or GAAP and general economic downturns that impact the seller's industry as a whole and not the seller individually);
- <u>Shifting the burden of proof to the seller</u> (which requires that the seller establish that no MAE has occurred, or at least that one of the MAE exclusions is applicable);
- <u>Making the MAE forward-looking</u> (by revising the definition of an MAE so that it includes "any event which results *or is reasonably expected to result either before or after Closing* in a material adverse impact on the seller's business, operations, assets, or *prospects*"); and
- <u>Setting the measurement period</u> (so that the determination of whether an MAE has occurred is not judged solely on the long-term prospects of the seller (as the Delaware courts tend to do), but also on the short-term).

AGREEING UP FRONT ON THE PENALTY FOR FAILING TO CLOSE

Because no deal is guaranteed to close, the parties should carefully consider their remedies should the other party fail to close, whether as a result of a non-willful breach (*e.g.*, the buyer's inability to obtain financing notwithstanding good faith efforts) or willful breach (*e.g.*, buyer's remorse). As was evidenced by the wave of busted deals during the recent financial crisis, this is particularly important to sellers in uncertain economic environments where financing is uncertain and bad economic news can easily spook buyers and their lenders and investors.

Unfortunately, buyers and sellers often fail to pay sufficient attention to the ramifications of a failure to close when negotiating M&A transactions. Perhaps this is because neither party wishes to think about the possibility that the deal may collapse, or perhaps it is because they are focused on what they believe are the bigger issues (like earnouts and holdbacks). Nevertheless, in this volatile market, both buyers and sellers should carefully consider their remedies prior to signing a definitive purchase and sale agreement.

Generally, the remedies available to a seller can be categorized into the following four categories, but these remedies may be combined and modified in several fashions:

- <u>Specific performance</u> (if the buyer refuses to close, the seller can request a court to force the buyer to do so);
- <u>Reverse break-up fee and no specific performance</u> (if the buyer fails to close, the seller is only entitled to payment of a negotiated fee as an exclusive remedy and cannot force the buyer to close or seek any damages; this can be a single fee or a two-tiered fee, with a higher fee payable for a willful breach and a lower fee payable for a non-willful breach);

Unfortunately, buyers and sellers often fail to pay sufficient attention to the ramifications of a failure to close when negotiating M&A transactions.

- <u>Specific performance if the financing is available; reverse break-up fee if the financing fails</u> (the seller has the right to force the buyer to close if financing is available, but if financing is unavailable, the seller's only remedy is a reverse break-up fee); and
- <u>Pure damages</u> (no specific performance and no break-up fee, but instead, if the buyer fails to close, the seller can sue the buyer to recover its expenses and damages, which it must prove).

While there is no absolute rule, the remedies reflected in negotiated M&A purchase agreements tend to vary depending on whether the buyer is a financial or strategic buyer and whether it needs debt financing to fund the transaction. Generally, because most strategic buyers do not require financing to complete a deal (many are sitting on large cash stockpiles), most are willing to sign agreements without a financing condition and to agree to specific performance should they fail to close. Conversely, most private equity/financial buyers require some debt financing to pay the purchase price, and, as a result, demand financing closing conditions and opt for some form of reverse break-up fee for failure to close, instead of specific performance. In either event, with both financial and strategic buyers, of the forgoing four categories of damages, the last (pure damages) is the least common.

CONCLUSION

In an uncertain economic environment, even the plain vanilla provisions in an M&A transaction are subject to greater scrutiny. The five areas highlighted in this article are among those that require closer attention and provide a means for counsel to use their creativity to help their clients negotiate and, more importantly, close deals in troubled times. While the possibility of unfavorable outcomes cannot be eliminated, by identifying and addressing the risks that are most critical, the parties can reduce the impact of unforeseen circumstances and protect themselves through skillful negotiation of the M&A deal provisions discussed in this article.

Alternative M&A Methods in Distressed Settings

While lingering tightness in the capital markets and volatile economic conditions continue to hinder the ability of many companies to refinance their debt or recapitalize their balance sheets, a significant number of otherwise fundamentally sound companies are financially distressed to the extent that a sale of the company, or substantially all of its assets, is the only viable alternative. As a result of ongoing economic woes, significant M&A opportunities continue to abound for strategic and financial buyers alike in the distressed M&A market to fuel business growth – especially where such assets can frequently be purchased for pennies on the dollar.

By Peter Krebs

However, the distressed M&A landscape is vastly different from that found in a conventional M&A transaction. Potential purchasers in distressed M&A transactions must consider a variety of distinct issues, including the need and amount of bridge financing to complete a sale process, the relationship between classes of creditor constituents and their willingness to engage in a sale process, the priority and extent of existing liens of secured creditors, expedited due diligence, and limited contractual protections afforded to distressed purchasers. One of the fundamental questions for potential purchasers in a distressed M&A transaction is how to structure and implement the sale process. Most distressed M&A transactions are structured as asset deals, frequently enabling a purchaser to "cherry pick" select assets and leave behind certain liabilities of the existing business.

While the sale of distressed assets under a conventional bankruptcy proceeding pursuant to Chapter 11 of the Bankruptcy Code is largely a relic of the past due to the high costs and the protracted nature of such proceedings, the methods described below offer potential purchasers significant opportunities, albeit with a somewhat heightened level of risk. However, determining the appropriate structure and process for distressed M&A transactions is not a "one size fits all" endeavor. Rather, each transaction is unique and must be assessed based upon the specific facts and circumstances of the particular situation. Consequently, it is incumbent on the purchaser to strike a balance between the available opportunities and the attendant risks. Selecting the appropriate process is just the first step in the journey, but it can often set the tone for the overall transaction and should not be taken lightly.

The main procedural methods for implementing distressed asset sales include the following: (i) a sale pursuant to Section 363 of the Bankruptcy Code (a "363 Sale"); (ii) a sale pursuant to Article 9 of the Uniform Commercial Code (an "Article 9 Sale"); (iii) a sale in connection with a receivership; and (iv) an assignment for the benefit of creditors (an "ABC"). The following table contains a brief summary of each of the aforementioned methods and certain key characteristics of each method.

ALTERNATIVE METHODS

METHOD	DESCRIPTION	KEY CHARACTERISTICS
Section 363 Sale	Bankruptcy Code Section 363 provides a framework for asset sales (outside the ordinary course) and an opportunity for interested parties to be heard. Structurally, a Section 363 Sale is similar to a traditional auction process. A basic Section 363 Sale includes an initial "stalking horse" bidder who negotiates and enters into a "stalking horse agreement" to purchase all, or substantially all, assets from a Chapter 11 debtor. Through a formal and well-publicized bidding and auction process, the stalking horse agreement is subjected to higher and otherwise better bids by other qualified bidders using the stalking horse agreement as a baseline. Certain protections are also afforded to a stalking horse bidder, including strict qualification requirements for other qualified bidders, a break-up fee (generally between 1% and 5% of the sale price), expense reimbursement (up to a defined cap), and minimum overbid increments. The final purchase agreement between the prevailing bidder and the debtor is subject to bankruptcy court approval.	• Judicial proceeding under Chapter 11 of the Bankruptcy Code • Typically an abbreviated stay in bankruptcy • Assets are transferred free and clear of liens and encumbrances pursuant to section 363(f) • Purchaser is given clean title to assets and protection from successor liability by federal court order • Allows for the ability to bind non-consenting constituencies • Process can be expensive (debtor-in-possession financing, judicial oversight, professional fees) • Provides for the ability to "cherry pick" favorable contracts and leases
Article 9 Sale	An Article 9 Sale enables a secured creditor, following a default by the debtor on such secured obligations, to sell all of its collateral in a "commercially reasonable" manner. Generally, a disposition of collateral is "commercially reasonable" if the disposition is made: (i) in the usual manner on any recognized market; (ii) at the price current in any recognized market at the time of the disposition; (iii) in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition; or (iv) after approval in a judicial proceeding, by a creditors' committee, or representative of creditors.	• Non-judicial foreclosure proceeding under applicable state law • Sale must be "commercially reasonable" (process, time, place, and other terms) • Can be public or private sale process • Typically discharges junior liens, but does not afford the "free and clear" protections of a Section 363 Sale • Executed quickly and inexpensively as compared to Section 363 Sale • More likely to result in diminished going concern value • More limited notice requirements as compared to Section 363 Sale
Receivership	A receivership is a type of judicial insolvency proceeding involving the appointment of a "receiver" to administer the assets of a company. A receiver may run the company in order to maximize the value of the company's assets, sell the company as a whole, or sell part of the company and close unprofitable divisions.	• Judicial proceeding outside Chapter 11 • Expedited time frame for sale • Provides protection from waste or deterioration of underlying collateral • More costly option because of judicial oversight • Assets not transferred free and clear of all liens • Like a bankruptcy proceeding, a receivership forces creditors into a single forum
Assignment for the Benefit of Creditors	An ABC is a type of non-judicial insolvency proceeding governed by state law rather than federal bankruptcy law. An ABC typically involves a contract where a troubled entity transfers legal and equitable title to a third party assignee in trust. The assignee then conducts an orderly liquidation of the assets (either piecemeal or in bulk) and distributes proceeds to the assignor's creditors based on the priorities established under applicable law.	• Non-judicial proceeding governed by state law rather than federal bankruptcy law • Generally less expensive than a Section 363 Sale • Typically requires shareholder approval • Unlike a Chapter 7 trustee, who is randomly appointed from an approved panel, assignee is appointed by the company • Contracts and leases cannot be assigned without required consents • Assets not transferred free and clear of all liens (only known liens) • Risk of subsequent involuntary bankruptcy filing by unhappy creditors (requires 3 or more unsecured creditors) • Generally an event of default under most contracts

DUE DILIGENCE

IT in the Current M&A Market

M&A activity appears to be returning to, and may even exceed, levels seen in the middle of the last decade, if the effects of the financial meltdown do not continue to haunt us. As one commentator has noted:

> "If 2010 was the year in which mergers and acquisitions got back off the mat, 2011 could be the year in which it starts throwing haymakers. Global M&A has totaled $309 billion since January 1, according to data from Thomson Reuters. That's a 69% jump over the same period in 2009, and represents the busiest start since 2000."

In the new era, key characteristics of M&A activity have changed. At an ever-increasing pace, transaction value will derive from information technology. Yet, with tighter access to financial markets, Acquirers face little room for error. Since studies have shown that many M&A deals fail to achieve their primary goals, parties now pay more attention to diligence, which, during times of intensive dealflow, was often relegated to junior associates as a mere checklist item. Thus, with technology becoming increasingly important, technology due diligence is a top priority.

By Brandy Milazzo

In early stage planning, the Acquirer should identify its immediate business objectives (*i.e.*, to acquire new technology, new or complementary products, employees, technical knowledge, trademarks, channels, sources, or other intellectual property rights), as well as its long-term strategic goals. To accommodate a short-term exit strategy, for example, the acquired intellectual property assets might be assigned to the same subsidiary that acquires title to the tangible assets, in order to simplify a future divestiture, rather than assign the intellectual property to a subsidiary whose sole purpose is to own all the affiliated entities' intellectual property rights. Additionally, the scope, and thus the expense, of due diligence should be weighed against the transaction's strategic importance. Although expensive, due diligence is crucial to the discovery of "landmines."

If a transaction fails to close, the Acquirer's employees might retain their knowledge, gleaned during diligence, of the Target's valuable proprietary information. The Acquirer could be left at risk for misuse of such information, such as claims for misappropriation of the trade secrets of the Target or its competitors, as well as an increased risk of treble damages for patent infringement, if knowledge obtained during diligence serves as the basis for a "willfullness" finding. Therefore, the Acquirer should enter into a nondisclosure or standstill agreement with the Target that addresses permitted use of disclosed information, as well as permitted recipients.

In conducting intellectual property due diligence, a lawyer will focus on the *intellectual property rights*, rather than the *subject matter* of those rights. *Intellectual property rights* are patents, copyrights, trademarks, and trade secret rights. The *subject matter* of such rights includes, but is not limited to, software, semiconductor designs, product specifications, methods, processes, documentation, etc. In short, any product, invention, idea, material, or information may be protectable under intellectual property laws. A single asset might include multiple intellectual property assets or *subject matter* from a legal perspective. For example, proprietary software (a) may be copyrightable as a whole, (b) may include algorithms, code, methods or processes that might be independently patentable, (c) may include internal designs and internal documentation that constitute trade secrets, even if not patentable, and (d) may well be associated with brand names or logos that constitute trademarks. The distinction between rights and subject matter is also important to help the Acquirer remain focused on the *positive* or *value* **and** the *negative* or *limitations* of intellectual property. Acquirers should avoid focusing only on the *positive* or *value* of intellectual property, while ignoring the *negative* or *limitations*, such as infringement or misappropriation of third-party intellectual property rights, which may be derived, for example, from title defects at any point in the *chain* of ownership or from prohibitions on assignment in present or prior transactions.

An Acquirer should also keep in mind that express or implied licenses might be granted in agreements that are not titled as *license agreements*, such as distribution, manufacturing, development, joint venture, consulting, and settlement agreements.

Critical items to be examined are the *chain of title* of *owned* assets and the *assignability* clauses of *licensed* assets. Common examples of *chain of title* problems include (a) ineffective assignments of rights under "work made for hire," because legal tests were not met, (b) lack of consideration in invention assignments, (c) lack of specificity with respect to assignment documents (particularly with catch all phrases such as "all rights *necessary*" for a particular purpose or license), and (d) failure to grant the licensee a right to sue third parties for infringement. For each significant license, the Acquirer should consider: (1) Does the license agreement contain any provisions regarding assignment, change of control, and similar issues? (2) Do such restrictions apply, given the contemplated structure of the deal? (3) Outside of the transaction agreement, what rules govern the transfer of this licensed asset? Whether a license contains restrictions is, of course, evident from examining the text, although provisions that indirectly affect assignment should be considered. Whether the transaction structure constitutes an assignment or change in control under the agreement's definitions (or lack thereof) or governing law may not be facially evident. Share purchases generally do not trigger non-assignment clauses , but may be blocked by an express change of control provision or in a "sham" transaction specifically intended to assign a license. Similarly, a reverse merger (including a reverse triangular merger) in which the licensee survives does not usually trigger a non-assignment clause. However, a merger in which the licensee does not survive does trigger a non-assignment clause. As one court has explained, "[a] transfer is no less a transfer because it takes place by operation of law rather than by a particular act of the parties. The merger was effected by the parties and the transfer was a result of their act of merging." Since judicial decisions turn on a transaction's facts, there are decisions contrary in result, pointing to the intellectual property subject matter, the fine points of the applicable state merger statute, the federal preemption deference, specific licensure provisions, and equitable considerations, such as whether the subject matter will be owned by a competitor.

Governing law might contradict the license agreement or itself be unclear. For example, some rights are governed by federal common law (e.g., patent licenses and copyrightable subject matter), while other rights are governed by state law (*e.g.*, trade secrets), and some rights involve both federal and state law (*e.g.*, trademark licenses).

Moreover, rights under an exclusive license may be viewed differently than non-exclusive rights. Other issues to consider are the existence of noncompetition commitments, most favored nations obligations, and open source software complications.

A consulting firm found that, while 50 to 60 percent of its clients' M&A activity was intended to capture synergies related to technology, most technology issues were not fully addressed during the diligence process or post-deal planning. An Acquirer that prioritizes and focuses its technology and intellectual property due diligence from the planning stages of a deal will no doubt recover more value, mitigate risks, and achieve greater goals. This is particularly true if the Acquirer's key information technology personnel are involved in the early planning stage, in coordination with the Target's counterparts, since discovered information might be too technical to be properly interpreted in a legal review. Thus, the Acquirer may gain a superior bargaining position in negotiating meaningful representations, warranties, and indemnifications that address identified intellectual property risks.

DUE DILIGENCE

Selected Regulatory Approvals

Mergers, sales of substantially all assets, and similar transactions in highly regulated industries, such as financial institutions, frequently require specific regulatory approvals. Significant transactions in non-regulated industries must also consider the possibility of regulatory approvals under certain circumstances. This article will highlight a few instances.

HSR: Transactions meeting certain thresholds will be subject to the Hart-Scott Rodino Antitrust Improvements Act of 1976, as amended ("HSR"), which is administered by the Federal Trade Commission ("FTC") and the Antitrust Division of the U.S. Department of Justice ("DOJ"). If HSR applies, the parties must submit notices on HSR forms to both the FTC and DOJ, triggering a waiting period that must expire or be terminated before the parties may consummate the transaction. The reviewing agency may make a second request for information or initiate other investigation, which could significantly delay the transaction or require its restructuring. Thus, compliance with HSR adds considerable expense to a transaction. Generally speaking, transactions that are subject to HSR compliance are large transactions (*e.g.*, if the acquiring person will acquire aggregate total amount of voting securities or assets in excess of a threshold, which at the present date is $66 million), although there are alternate thresholds that could ensnare large entities. On August 18, 2011, new HSR Rules became effective that made significant changes to the HSR Premerger Notification Rules and the Premerger Notification and Report Form (the "HSR Form"), that may substantially increase the burden placed on filing parties, particularly private equity and hedge funds having diverse portfolio investments. Additionally, manufacturers must now provide revenues and NAICS codes for each product manufactured outside the U.S. but sold in or into the U.S.

By Regina Joseph

The HSR Form, in Item 4(c), previously required the reporting person to submit a number of attachments, including documents created by or for officers or directors of the reporting person that were prepared for the purpose of evaluating or analyzing the transaction with respect to market shares, competition, competitors, markets, potential for sales growth, and the potential for expansion into new products or geographic markets. Item 4(d) now requires three additional types of documents that might not have been captured by Item 4(c):

- "Confidential Information Memoranda" (or any equivalent document, not including ordinary course documents and/or financial data) that specifically relate to the sale of the acquired entity or assets and produced up to one year before the date the notice is filed.
- Studies, surveys, analyses, and reports prepared by investment bankers, consultants, or other third party advisors for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets that specifically related to the sale of the acquired entities or assets, which were produced up to one year before the date the notice is filed.
- Studies, surveys, analyses, and reports evaluating or analyzing synergies and/or efficiencies prepared for the purpose of evaluating or analyzing the acquisition.

Federal regulators have had the power under "Exon-Florio" for decades to derail a transaction in the interests of national security.

Antitrust Update: For many decades, monopolistic and anticompetitive transactional behavior has been subject to the scrutiny of regulators under federal and state laws. On June 17, 2011, the DOJ updated its Policy Guide to Merger Remedies, which is located at http://www.justice.gov/atr/public/guidelines/272350.pdf. In the Guide, the DOJ stresses that its review is fact specific and that, through a careful application of legal and economic principles, its remedies are designed to preserve competition, not to protect individual competitors. Typically, remedies are viewed as having either structural or conduct provisions. A structural remedy generally involves the sale of physical assets or requiring that the merged firm create new competitors through the sale or licensing of intellectual property rights. A conduct remedy usually entails provisions that prescribe certain aspects of the merged firm's post-consummation business conduct. The DOJ believes that conduct remedies are valuable for enabling it to preserve a merger's potential efficiencies, while remedying the perceived competitive harm. Common forms of conduct relief are firewall, non-discrimination, mandatory licensing, transparency, and anti-retaliation provisions, as well as prohibitions on certain contracting practices. The Guide shows a new propensity on DOJ's part to create innovative remedies, as well as to develop a post-transaction monitoring process to ensure that the remedies are enforced.

National Security: Federal regulators have had the power under "Exon-Florio" for decades to derail a transaction in the interests of national security. In recent years, that power has been enhanced through a review process under the Committee on Foreign Investment in the United States ("CFIUS"). CFIUS is an interagency committee, chaired by the Secretary of the Treasury, that evaluates whether national security would be harmed if a transaction were consummated. A CFIUS review for a transaction that could result in foreign control of a U.S. entity or assets may be voluntarily initiated by any transaction party. However, CFIUS has the power to unilaterally initiate a transaction review. 31 C.F.R. § 800.401. A CFIUS review can last up to 30 days (31 C.F.R. § 800.404), but may be extended for another 45 days if CFIUS determines further investigation is required (31 C.F.R. 504). If CFIUS concludes that national security is threatened, it makes a recommendation for enforcement to the President, who has 15 days to act on the recommendation. Since national security is not defined, the question of whether CFIUS is applicable rests largely on the question whether a foreign party will obtain "control" over the U.S. entity or assets. Here too, however, the CFIUS requirements are unclear, because regulations adopted by the Treasury Department include an open-ended definition of "control," which can encompass different types of influence by the foreign party. For example, in 2008, CFIUS raised concerns about an acquisition proposed by Bain Capital Partners and Huawei Technologies of 3Com Corp. Based on press reports, it appears that CFIUS's concerns focused upon a 3Com business unit that supplied certain security technology to U.S. Government agencies. Being unable to restructure the transaction to CFIUS's satisfaction, the parties announced the termination of the transaction in March 2008. To commentators, a surprising aspect of this matter was that Huawei would only have obtained a 16.5% stake in the transaction, with an option of purchasing another 5% stake, and receiving 3 of 11 board members. *(Reported in 11 Mergers & Acquisitions Law Report No. 14, p. 267).*

DUE DILIGENCE

Foreign Corrupt Practices Act

In 1977, as a response to reports of bribery of foreign government officials by U.S. companies, Congress adopted the Foreign Corrupt Practices Act (the "FCPA"). The FCPA contains two primary parts: (1) an anti-bribery provision that prohibits corrupt payments to foreign officials to obtain or retain business, and (2) accounting and internal control requirements.

In recent years, FCPA investigations and enforcement actions by the Department of Justice and the Securities and Exchange Commission have increased dramatically. The penalties for FCPA violations are stiff, including fines of up to $2 million for violations of the anti-bribery provision and up to $25 million for violations of the accounting and internal control requirements.

By Zachary Madden

The FCPA may be applicable to companies who merge with or acquire another company. Generally, when a company merges with or acquires another company, it assumes the liabilities of that company, including the liability for FCPA violations.

An understanding of the FCPA will help companies to implement certain procedures and processes...

To detect any potential FCPA violations of a target company, a company should conduct a thorough due diligence process, including assessing the corruption level of the countries where the target company does business, reviewing the target company's FCPA compliance program, if any, and inspecting the target company's accounting and internal controls.

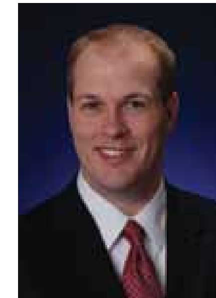
Even if such due diligence review does not uncover any FCPA violations, a company should incorporate into a merger or purchase agreement language to protect itself against the possibility of assuming a FCPA violation. Such language may include certain representations and warranties by the target company regarding FCPA compliance, a termination right under certain circumstances and indemnification of any damages resulting from a breach of the agreement.

An understanding of the FCPA as it relates to mergers and acquisitions will help companies to implement certain procedures and processes to protect them from unwillingly assuming FCPA-related liabilities.

DUE DILIGENCE

Withdrawal Liability from the Employer's Perspective

A liability that may easily exceed hundreds of thousands of dollars, extends beyond normal corporate entity protections, bears no intuitive relation to historical monthly obligations toward the liability, and has only a 90 day period to challenge any aspect of the liability before all rights and ability to dispute the liability are lost. This is an accurate, though starkly worded, description of withdrawal liability for employers who cease a contribution obligation to a multiemployer defined benefit pension plan. Failure to understand and act on significant developments and hard statutory deadlines can lead to irreversible consequences for employers.



By Scott Newsom

"Employer withdrawal liability" is a statutory obligation imposed on an employer that contributes to a multiemployer defined benefit pension plan, generally as a negotiated benefit for unionized employees pursuant to a collective bargaining agreement. In the event that the employer ceases to have an obligation to contribute to a multiemployer defined benefit pension plan (for example, a termination of the collective bargaining agreement), the employer must pay its proportionate share of unfunded vested benefits (the difference between the plan's assets and the present value of accrued vested benefits) to the plan as "employer withdrawal liability." In addition, in some circumstances, a reduction in an employer's contributions over a period of years can cause a "partial withdrawal" with a proportionate assessment of liability. With the substantial decline in the value of investments over the past several years combined with reduced contributions, many multiemployer defined benefit pension plans now have, and must collect, withdrawal liability from withdrawing employers for the first time. The assessed amounts of withdrawal liability are often a surprising and shocking discovery for the employer.

A plan has the obligation to notify an employer "as soon as practicable" after a withdrawal of the amount of the employer's withdrawal liability, provide a schedule of monthly or quarterly installment payments amortized over a set period of time with interest, and to demand payment in accordance with the schedule. Immediately upon receipt, the employer's ability to preserve its right to dispute any aspect of the demand begins to expire.

An employer has the right to "request a review" within 90 days of the date of its receipt of a demand for payment of withdrawal liability. The employer may:

1. Ask the plan to review any specific matter relating to the determination of the employer's liability and the schedule of payment;
2. Identify any inaccuracy in the determination of the amount of the unfunded vested benefits allocable to the employer; and
3. Furnish any additional relevant information to the plan.

An employer's request for information about the assessment, or merely stating that it disagrees with the liability assessment, is not a request for review. If the employer fails to "request a review" within the 90 day period, the employer is precluded from challenging the assessment, amount, or any aspect of the demanded withdrawal liability in any venue, including any defense to a subsequent collection suit. Employers can make the mistake of issuing a response in the form of a denial of liability or simple refusal to pay without invoking their statutory right to a review of an assessment of withdrawal liability, often mistakenly believing that they may advance a defense in an anticipated suit by the plan.

continued on next page >

Common issues raised for review include:

1. The date of withdrawal. Since the amount of the withdrawal liability is determined as of the end of the year prior to the withdrawal date, a different date of withdrawal can have a huge impact on the owed liability.
2. Actuarial or calculation errors. Differences between the employer and the plan's records can also have a material impact on the eventual liability amount.
3. The application of available statutory exemptions and limitations on the amount of liability in situations such as the sale of assets by the employer or whether the liability would exceed a percentage of employer's liquidating assets. These exemptions and limitations must be affirmatively advanced by the employer and can significantly reduce or sometimes eliminate withdrawal liability.
4. Whether the employer has actually withdrawn. Continued contributions to the plan from a related entity to the employer means that the employer has not ceased to have an obligation to contribute to the plan and a withdrawal has not occurred.

After a reasonable review, the plan is required to notify the employer of its decision on review, the basis for the decision, and any change in the determination of the employer's liability.

If a dispute remains between the employer and plan following the review process, the employer may proceed to mandatory arbitration within 60 days after the earlier of:

1. The date the employer receives notice of the plan's determination on review; or
2. 120 days after the employer's request for review.

If the employer fails to timely invoke arbitration and satisfy the applicable procedures to properly preserve its rights, even a minor procedural error, the employer will be precluded from challenging the assessed withdrawal liability. Disputes regarding withdrawal liability must be arbitrated; no state or federal court has jurisdiction to hear the dispute between the parties (except in extraordinarily limited situations). Provided the employer timely requested a review, any issue may be contested in arbitration regardless of whether the employer raised such issue on review. However, any determination by the plan on review has a presumption of correctness in the subsequent arbitration. The determination of the arbitrator is effectively the end of the dispute. A party dissatisfied with the arbitrator's decision has very limited ability to challenge the decision in court.

The review and arbitration process also has unique rules requiring interim payment of the withdrawal liability installments. The process is commonly referred to as "pay now, dispute later." An employer who fails to pay any installment of withdrawal liability when due has 60 days from receipt of a notice of failure to pay from the plan to cure the non-payment. Failure to make the payment within the cure period results in a default and the acceleration of the entire amount of the assessed withdrawal liability. In the event that an employer has its withdrawal liability reduced or eliminated on review or in arbitration, any overpayment of withdrawal liability is refunded or credited towards amounts due. Thus, an employer who does not understand or appreciate the impact of paying the interim withdrawal liability may lose the advantage of paying any ultimate liability over a period of years instead of immediately.

Unlike most liabilities of a corporate entity, withdrawal liability responsibility extends to all organizations and entities under common control of the employer. In general, this means that any entity that has 80% or more common ownership or is a parent or subsidiary entity of the employer will also be responsible for the withdrawal liability. Many employers attempt to utilize corporate planning or transactions to shield related organizations from withdrawal liability; however, a transaction or reorganization with a primary purpose to avoid or evade withdrawal liability may be set aside or voided. Further, recent cases have found successor employer liability in asset sale transactions. As a result, any transaction, corporate reorganization, or business planning involving any entities with potential withdrawal liability must consider the impact of withdrawal liability

Withdrawal liability is a contingent liability that is not owed until the employer ceases to have an obligation to contribute to the plan, or in some circumstances, the employer's contributions to the plan have declined substantially over a period of years. This determination of whether a withdrawal occurred is often a complex question and involves an analysis of the employer's contributions, the employer's related entities, and other questions of fact and law. Unfortunately for the employer, once withdrawal liability is assessed, only a short period of time exists to invoke the limited path to defend its rights. Without engaging significant familiarity and expertise in multi-employer withdrawal liability, the employer puts itself at a significant disadvantage in the proceedings and possibly puts itself at risk for more than necessary liability at disadvantageous terms.

Lastly, an employer may proactively inform itself of its withdrawal liability. The employer possesses the statutory right to request, in writing, from the plan an estimate of its withdrawal liability once per year. The statutory mandated disclosure is based on assumption that the employer withdrew the previous year; however, some plans will provide a current estimate if the employer pays the cost of actuarial services, if any.

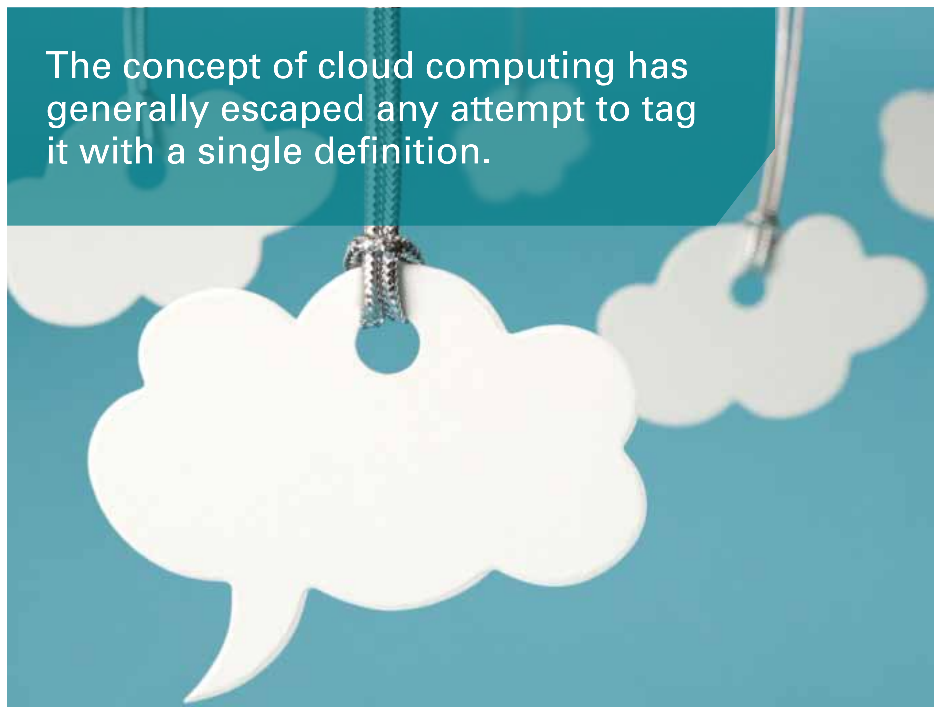
DUE DILIGENCE

HEAD IN THE CLOUDS?

Leveraging the New Wave of Technology During Discovery

Tabbed as the newest technological standard for productivity and efficiency, cloud computing is currently all the rage. The concept of cloud computing has existed in various forms for years, but suddenly it's infectious. Some of the heaviest hitters in the world of technology—Microsoft, Google, Amazon—have taken up the banner of the cloud and paraded this newfound concept into both boardrooms and living rooms across the country. Businesses large and small have been wooed away from traditional in-house data networks, software platforms, and storage systems in favor of the almighty cloud. The benefits and burdens of such a change can be numerous, widespread, and somewhat unknown. In the age of electronically stored information, however, how can the cloud help a company's litigation strategy?

By Nicholas Stack



The concept of cloud computing has generally escaped any attempt to tag it with a single definition.

The concept of cloud computing has generally escaped any attempt to tag it with a single definition. Although it remains a somewhat abstract and fluid concept, the National Institute of Standards and Technology ("NIST") has dubbed cloud computing "a model for enabling convenient, on-demand network access to a shared pool of configurable computing resources (*e.g.*, networks, servers, storage, applications, and services) that can be rapidly provisioned, scaled, and released with minimal management effort or service provider interaction."

To be sure, cloud computing is a multi-faceted approach to the delivery and utilization of computer technology. It is akin to a virtual warehouse for electronic data that also provides just about every ancillary service necessary to ensure immediate access to and delivery of information anywhere in the world. In this respect, a company foregoes the capital costs necessary to build its own infrastructure and delivery mechanisms and, instead, leases as much or as little virtual space as it needs, as well as the necessary delivery services.

Subject to very real concerns, pitfalls, and general uneasiness about privacy and security in the cloud, cloud computing can be beneficial[1]. For example, if utilized correctly, it can trim costs and improve efficiency in an increasingly mobile world. However, can it make discovery easier and more cost-effective? In some ways, cloud computing offers clear advantages in that it can trigger an unprecedented amount of collaboration and provide continuous accessibility with regards to a company's electronically-stored information ("ESI").

In the litigation context, the idea of sorting through and producing copious amounts of ESI during discovery can prove daunting. Further, the breadth and scope of various individual data systems have effectively prevented any sort of meaningful uniformity in the application of the discovery rules. And, it is no secret that companies are generating ever-increasing mountains of virtual information. When a discovery dispute arises, parties are oftentimes left to either work things out themselves on a case-by-case basis or allocate valuable resources to the resolution of these disputes in court. Perhaps no concept in recent memory has caused more headaches for both litigants and judges than ESI.

Cloud computing can help avoid these potential legal quagmires in at least three ways. First, because of its anywhere/anytime accessibility, cloud computing breeds cost-effective collaboration. This collaboration exists both between a company's representative and its litigation team and within the litigation team itself. For example, the cloud can virtually eliminate the need to physically transfer data from one location to another. Instead a company and its litigation team can have simultaneous access to the same universe of ESI at any given time, thereby improving information management. Within a litigation team, the cloud's accessibility can improve document identification procedures and the division of labor. Whether building a case or responding to requests for production based on ESI, the litigation team can optimize its resources—wherever they are located—to deliver a better product more quickly.

Second, cloud computing may stifle costly discovery disputes through a streamlined approach to document identification and preservation. A company that utilizes the cloud concept limits the universe of potential places where discoverable information may exist to a single source. The cloud would eliminate the need to harvest data off 25-50 local PC hard drives. Additionally, when hit with a lawsuit, the cloud may allow for a more streamlined approach to document preservation—a concept that can otherwise be like herding cats.

Finally, the companies pioneering the cloud concept represent some of the most innovative technology companies in the world. These companies are adept at addressing the unexpected and, as the technology world continues its rapid evolution, rest assured these companies will not only adapt but improve.

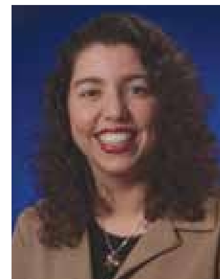
Ultimately, with proper management and careful consideration, cloud computing has the potential to greatly minimize some of the costliest risks associated with discovery production, as well as disputes. In this context, the cloud can be leveraged to a company's advantage.

1. Relinquishing control over data to a third-party cloud operator poses obvious security risks. For an overview of the risks associated with cloud computing and suggestions on how to limit vulnerability see "Cloud Computing's Dark Lining," 264 BNA Insights No. 33, at 264 (Aug. 24, 2011).

DUE DILIGENCE

Selected Employment Issues in Mergers & Acquisitions

By Mechelle Zarou



Along with the many other issues that arise in a merger or acquisition, you must be careful to review the following employment-related issues:

Employment Agreements.
Identify which employees have signed employment agreements. Review the terms, paying special attention to covenants not to compete, stock options, loans, compensation, and the duration of the agreements. Determine whether the agreements are assignable to the new entity.

Confidentiality, Assignment, and Noncompetition Agreements.
Determine which employees have signed these types of agreements (if they do not have employment agreements already containing these provisions). Review the terms to ensure that they adequately protect the successor's confidential business information and intellectual property. Draft agreements for any other employees who are in positions in which these agreements are necessary. Determine whether the agreements are assignable to the new entity.

Review the policies to determine if there are any unusual or potentially problematic policies.

Employee Policies, Manuals, or Handbooks.
Review the policies to determine if there are any unusual or potentially problematic policies. Ask whether any issues have come up involving particular policies. Determine whether the policies have been consistently applied in the past, and develop an understanding of the Company's past practices that may bind the new entity going forward.

Collective Bargaining Agreements.
Determine whether the merger or acquisition may violate the collective bargaining agreement, or whether bargaining with the union about the effects of the corporate change is required. Review for other relevant terms.

I-9 Review.
Determine whether the predecessor entity has maintained I-9 forms demonstrating that each of its employees is legally permitted to work in the United States. If the predecessor entity has also maintained supporting documentation for the I-9 forms, determine whether the entity has done so for all employees. You do not need to file new I-9 forms for the predecessor entity's employees if the new entity continues to employ some or all of the predecessor entity's work force, and the workers have a reasonable expectation of continued employment. Note that if you do not file new I-9s, you will be liable for any errors or omissions on the I-9s made by the predecessor entity, so you should review each I-9 for accuracy and completeness.

Nonimmigrant Workers.
If the predecessor entity employs workers on employment-based nonimmigrant visas, and those workers will continue to work for the new entity, you must determine the following:

- *Employees in H-1B status (i.e., professional workers in specialty occupations).*
  You must determine whether an amended H-1B visa petition must be filed with U.S. Citizenship & Immigration Services ("USCIS"), which would include a new Labor Condition Application ("LCA") filing with the Department of Labor to certify that the new entity will pay at least the prevailing wage for the position.

Generally, an amended petition is not required if the new entity (1) assumes all immigration-related obligations and rights of the predecessor company, and (2) the terms and conditions of the H-1B employment (such as job duties, wages, and work location) remain the same, such that the identity of the petitioner is the only change.

Similarly, a new LCA is not required if (1) the new entity assumes all obligations under the LCAs filed by the predecessor entity, and (2) the worker continues to perform the same job duties in the same work location. The new entity must document its assumption of the predecessor entity's LCAs by placing a memorandum in each H-1B employee's Public Access File documenting the assumption of LCA obligations.

If the predecessor entity terminates the H-1B employees, it is liable for payment of the costs for return transportation to each H-1B employee's home country. The predecessor entity must also notify the USCIS of the termination of employment to avoid liability for the future payment of wages under the certified LCA.

- *Employees in Other Nonimmigrant Statuses*. For employees in other nonimmigrant statuses sponsored by the predecessor entity, such as nonimmigrants in E, L, or TN status, an amended petition is required to reflect the change in company ownership.

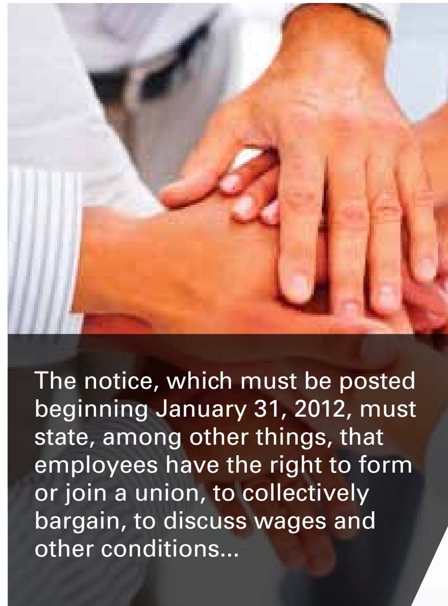
Workers' Compensation and Unemployment Insurance.
Review the predecessor entity's experience rating for workers' compensation (if the predecessor entity is a state-fund employer) and unemployment insurance. Under Ohio law, the target company's experience rating for workers' compensation and unemployment compensation insurance purposes is almost always transferred to the acquiring entity.

New National Labor Relations Act Posting Rule

The National Labor Relations Board ("NLRB") recently issued a final rule requiring private employers subject to the National Labor Relations Act ("NLRA"), whether unionized or not, to post a notice informing employees of their rights under the NLRA. The regulation applies to virtually all private employers in the United States, with the exception of those in the railway and airline industry, and certain agriculture-related employers.

By Serena Lipski

The notice, which must be posted beginning January 31, 2012, must state, among other things, that employees have the right to form or join a union, to collectively bargain, to discuss wages and other conditions of employment, and to refrain from any of these activities. It must also tell employees how to contact the NLRB with questions or complaints. The notice must be posted with similar employee notices (such as notices required under wage and hour laws or OSHA), and if employers communicate with employees electronically, for example, by posting personnel rules on a company intranet site, the employer must also distribute the notice using that same means. The NLRB has issued a sample poster that employers can print out and display, available at http://www.nlrb.gov/poster.


The notice, which must be posted beginning January 31, 2012, must state, among other things, that employees have the right to form or join a union, to collectively bargain, to discuss wages and other conditions...

Employers that fail to post the required notice will be subject to liability for committing an unfair labor practice under Section 8(a)(1) of the NLRA. Also, the NLRA's six-month statute of limitations on the filing of an unfair labor practice charge may be suspended if the required notice is not posted, which would leave employers vulnerable to unfair labor practice charges for events occurring more than six months before the charge is filed.

On October 5, 2011, following the NLRB's issuance of the rule, the NLRB pushed back the effective date for more than two months, from November 14, 2011 to January 31, 2012, citing uncertainty from businesses and trade organizations concerning the entities to which the rule will apply.

Additionally, the regulation is being challenged on several fronts. The National Association of Manufacturers ("NAM") recently filed an action against the NLRB in the U.S. District Court for the District of Columbia, claiming that the NLRB exceeded its authority under the NLRA in promulgating this new rule. NAM, therefore, is seeking an injunction against the implementation of the rule. We will watch this case closely and update you with any developments.

Members of Congress are also working to stop the regulation from taking effect. Rep. Ben Quayle (R-Ariz.) introduced H.R. 2833, the Employee Workplace Freedom Act, which would overturn the NLRB's regulation. Additionally, Rep. Scott DesJarlais (R-Tenn.) introduced H.R. 2854, the Employer Free Choice Act, which would similarly overturn the rule. We will continue to keep you updated on the status of the legislation.

Since the regulation is being challenged on multiple fronts, we recommend that employers do not begin complying with the regulation until the January 31, 2012 effective date.

Partial Lien Waivers in N.C. Do Not Alter Date of First Furnishing

A lien waiver releases a contractor's claim to the progress payment received.

As in many states, North Carolina law grants to contractors and sub-contractors certain lien rights on improved property. These are often referred to as mechanics' and materialmen's liens. A key provision in the North Carolina lien statute is that any lien relates back to the date labor or materials were first furnished to a project. This strict priority protects contractors, putting them in line ahead of subsequently-perfected lien-holders or lenders to a project. An April 2010 decision of the North Carolina Business Court, however, threatened to abolish this protection.

By Derick Thurman

In that case, *Wachovia Bank, N.A. v. Superior Construction Corp.*, the Business Court ruled that partial lien waivers signed by the contractor, Superior, operated to shift the date of first furnishing -- to the date any such partial lien waiver was signed.

Typically, lenders to a project require execution of a partial lien waiver before making progress payments on the project. A lien waiver releases a contractor's claim to the progress payment received. By the Business Court's ruling, however, Superior's lien claims for unpaid progress payments no longer related back to the date of first furnishing. As a result, Wachovia's later-filed deed of trust moved ahead in priority of Superior's lien.

On appeal, Superior argued that the Business Court had misinterpreted the applicable law and the language of the unambiguous lien waivers at issue. In July of this year, the North Carolina Court of Appeals agreed, holding, "Having examined the relevant language on appeal, we conclude that the trial court erred by construing the partial lien waivers to effectively change the date of first furnishing and that the partial lien waivers merely precluded Defendant Superior from asserting a lien relating to the amounts already paid for work performed ... without having any further effect."

Contractors are nonetheless cautioned to review carefully the language of partial lien waivers and to address any change of language or questionable language to their counsel.

The Plaintiff in the Superior case has petitioned the North Carolina Supreme Court for discretionary review of this case. Whether the higher court decides to take up this case will likely not be known for some time.

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Toledo Labor Law - Management Lawyer of the Year

Chambers USA 2011 "Leaders in their Field"

Michael E. Born
Natural Resources & Environment (Ohio)

Douglas G. Haynam
Natural Resources & Environment (Ohio)

Paul R. Lynch
Corporate/M&A & Private Equity (Florida)

William L. Patberg
Natural Resources & Environment (Ohio)

Darrell C. Smith
Corporate/M&A & Private Equity (Florida)

Louis E. Tosi
Natural Resources & Environment (Ohio)

Gregory C. Yadley
Corporate/M&A & Private Equity (Florida)

2011 Florida Super Lawyers

Anthony J. Abate
Erin Smith Aebel
C. Philip Campbell, Jr.
Steven J. Chase
Ronald A. Christaldi
Bruce H. Gordon
Mark D. Hildreth
W. Kent Ihrig
John S. Inglis
Ernest J. Marquart
Steven G. Schember
Darrell C. Smith
Theodore C. Taub
J. Todd Timmerman
Gregory C. Yadley

Florida Super Lawyers "Top 100 Lawyer" 2011

Ronald A. Christaldi
Gregory C. Yadley

2011 Florida Rising Stars

Liben M. Amedie
Jaime Austrich
Jason A. Collier
Jennifer B. Compton
Hugo S. deBeaubien
Meredith D. DeNome
Michele Leo Hintson
Adria Maria Jensen
Hunter G. Norton
Maria del Carmen Ramos
Melissa A. Register
Mindi M. Richter
Michael H. Robbins
Christopher Z. Staine
Seth P. Traub
Kelly A. Zarzycki

Toledo Business Journal's 2011 "Who's Who in Toledo Area Law"

John C. Barron
Jenifer A. Belt
Thomas P. Dillon
Sharon M. Fulop
Douglas G. Haynam
John W. Hilbert, II
Michael S. McGowan
Brian N. McMahon
Joseph A. Rideout
Stephen A. Rothschild
Gregory S. Shumaker
Peter R. Silverman
Louis E. Tosi
Barton L. Wagenman
Mark D. Wagoner, Jr.
David F. Waterman
James F. White, Jr.
Dennis P. Witherell

SHUMAKER CHARLOTTE

TOP 25

Shumaker's Charlotte office was recognized as one of the *Charlotte Business Journal's* "Top 25 Largest Area Litigation Practices", ranking No. 9, as determined by its number of Local Area Litigation Attorneys.

slknews

Tony Abate and Chris Staine presented "ABC's of Florida Construction Lien Law: What You Need to Know to Make the Lien Law Work for You" at the Gulf Coast Builders XChange (GCBX) in August.

Erin Smith Aebel was named Walk Chair of the American Diabetes Association's Step Out to Stop Diabetes Walk which took place Saturday, November 12, 2011 at the University of South Florida Tampa Campus. Erin has been elected to the Executive Council of the Florida Bar Health Law Section.

Liben Amedie has been appointed to the Hillsborough County Industrial Development Authority Board by the Board of County Commissioners.

John Barron has been selected as a Fellow of the Litigation Counsel of America. The Litigation Counsel of America (LCA) is a trial lawyer honorary society and Fellows are selected based upon effectiveness and accomplishment in litigation, both at the trial and appellate levels, and superior ethical reputation.

Jeni Belt was a speaker at the 45th Annual Convocation and Exposition of the American College of Health Care Administrators in May in New Orleans, Louisiana.

Jeni Belt and Dennis Witherell were the featured speakers at the Healthcare Financial Management Association's "Structuring Physician-Hospital Models for Mutual Success" seminar in August.

Tim Garding was named Co-Chair of the 42nd Annual Raymond James Gasparilla Festival of the Arts.

Steve Berman has been elected to serve a three year term on the Board of Directors of the California Bankruptcy Forum. Steve participated in the 2nd Annual American Bankruptcy Institute Southwest's Great Debates in September. Steve also participated in a bankruptcy training session with JAG Corps lawyers at Naval Base Coronado, which includes San Diego and Coronado, California.

Mike Briley was a presenter at the Third Annual Great Lakes Antitrust Institute in October. This is an annual program sponsored by the Ohio, Indiana, Illinois and Michigan Bar Association antitrust law sections.

Doug Cherry participated in a panel discussion on the Pitfalls and Opportunities of Social Media at the American Advertising Federation-Suncoast's first ever Luncheon Panel Series – Educational Seminar in May. Doug was speaker at the Legal Aid of Manasota CLE Program in Sarasota, Florida and he also participated in a Lunch and Learn for BarCamp Sarasota in June. Doug was a panelist at The Greater Sarasota Chamber of Commerce's seminar in August.

Ron Christaldi spoke to aspiring law students at the New College Alumni Association's Coffee Talk in Sarasota, Florida about developing the tools for a successful career in law. Ron was elected Vice Chair of the Board of Directors of The Spring of Tampa Bay, Inc. and also participated in a Tampa City Council Workshop in September in City Council Chambers.

Jamie Colner and Steve Smith recently settled a case on behalf of a personal injury plaintiff for $500,000.00.

David Conaway presented a webcast before The Association of International Credit and Trade Finance Professionals. The topic of discussion was "Chapter 15 - Cross Border Insolvency Issues." David was a speaker at the 31st INSOL Europe Annual Congress in September in Venice, Italy.

Mark Connolly was the lead advocate for House Bill 1019 (tort reform legislation relating to child welfare agencies) at the Pinellas County Juvenile Welfare Board public forum debate/round table discussion held in March.

Mary Li Creasy presented "Social Networking and the Workplace" to the Tampa Bay Medical Group Management Association in Tampa in May.

Meredith DeNome graduated from Tampa Connection. The Tampa Connection helps guide executives into key leadership roles while helping meet Tampa's growing social, health and education needs.

Julio Esquivel has been selected to the 2012 Class of Leadership Tampa.

Julio Esquivel, Ben Hanan and Greg Yadley presented "Recent M&A Trends and Developments" at the Second Annual Association of Corporate Counsel – West Central Florida Chapter ("ACC-WCFL") Symposium in August.

Bruce Gordon was a speaker at the Society of Financial Service Professionals - Tampa Bay Chapter, 3rd Annual Professional Day 2011 in May.

David Grogan was a presenter at the National Apparel & Footwear Credit Association in September.

Dan Hansen and Bill Sturges were speakers at the Southeast Surety Conference in New Orleans, Louisiana, in April and at the Northeast Surety Conference in Atlantic City, New Jersey, in September.

Michele Leo Hintson has been appointed as the Assistant Chair of the Grants Committee for the Junior League of Tampa for 2011-2012.

Adria Jensen and Hunter Norton were the featured presenters at the Third Annual BBT REO Agent Training Seminar in April.

Serena Lipski was appointed to the Board of Directors of the YWCA of Greater Toledo.

Moses Luski presented the "Shumaker Legal Minute" before the Latin American Chamber of Commerce of Charlotte at their July and September meetings.

Ed McGinty made a presentation at the monthly meeting of the Society of Financial Service Professional's monthly meeting held in April.

Brian McMahon was a speaker at the Ohio State Bar Association's "Franchising in Ohio – What Every Lawyer Needs to Know" CLE seminar in September.

Brandy Milazzo was a presenter at the National Apparel & Footwear Credit Association in September.

Bill McNair received the Citizen Lawyer Award presented by the North Carolina Bar Association. The award recognizes attorneys who have provided exemplary service to their communities through volunteering and civic involvement beyond their law practice.

Scott Newsom was a speaker at the 39th Annual Ohio Human Resource Conference in Sandusky, Ohio in September.

Cate O'Dowd spoke at the Florida Refrigeration and Air Conditioning Contractors Annual Conference and to the Air Conditioning Contractors Association of Central Florida. She also spoke at the 90th Annual Convention of the Florida Association of Plumbing Heating & Cooling Contractors in Orlando, Florida. Cate was re-elected Treasurer and will serve on the Board of Directors of the Raymond James Gasparilla Festival of the Arts for a three-year term.

Tom Pletz was presented with the "Distinguished Toledo Lawyer" Award from the University of Toledo's Law Alumni Affiliate.

Melissa Register spoke at the June 2011 Florida Bar Annual meeting. Her topic was "Estate Planning and Probate Law Update."

Kathleen Reres was selected to serve on the STEPS Committee of Tampa Bay Beautification.

Joe Rideout was a recipient of the Diocese of Toledo's Centenary Award for Outstanding Service. The Centenary Award is presented to individuals for their outstanding service to a single parish or institution.

Dick Rogovin and Steve Smith recently obtained a fee arbitration award on behalf of a claimant from a three lawyer panel appointed by the Ohio State Bar Association. The arbitration lasted two full days. The pretrial offer in the case was zero.

slknews

Steve Rothschild was a recipient of the Toledo Board of Jewish Education's (TBJE) "Ben Solomon Outstanding Trustee Award."

Jack Santaniello was a speaker at The Entrepreneur's Source Franchise Ownership Workshop in September.

Pete Silverman was quoted in the June 6, 2011 issue of *Forbes* magazine in a story about franchise disputes and in the July 2011 issue of *Nation's Restaurant News* regarding a franchisee's restructuring efforts. Pete was a speaker at the ABA's 34th Annual Forum on Franchising in October in Baltimore, Maryland.

Jason Stearns has been elected to the Board of Directors of the Campo Family YMCA.

Mike Trocke participated in the 22nd Annual Southern Surety Conference in New Orleans, Louisiana.

Greg Yadley was a presenter at the American Bar Association Business Law Section's Spring Meeting in Boston, Massachusetts. Greg has been elected Chair of the Middle Market and Small Business Committee of the American Bar Association Business Law Section. Greg has been named to a new high-level national Advisory Committee to the U.S. Securities and Exchange Commission on Small and Emerging Companies.

worth noting

Jamie Colner recently obtained a groundbreaking decision favorable to our clients in a charter school case. We represent 10 charter school boards in litigation against one of the biggest for profit operators of charter schools in the country. Most of the schools have performed poorly. The lawsuit centers on the Boards' effort to get the management company/operator to account for how they spend the public funds received to operate the schools. Charter schools are, in fact, public schools that operate from tax dollars distributed by the Department of Education through the Boards to the private operators or management companies. The management company has long refused to divulge exactly how it spends the public money or its profit margins on the basis that it is a private corporation with no obligation to detail how it spends the money that becomes private upon receipt. In an October 7, 2011 Decision and Entry granting in part our motion for partial summary judgment, the Court ruled that the defendants are public officials who must account to the plaintiff school boards and the State of Ohio for how it spends the public money.
The Court also ruled that the terms of the management agreements that delegated the power to unilaterally decide how it spends the money are void. If upheld on appeal, this will become a major decision that reforms charter school law to the betterment of the students who choose to attend non traditional public schools.

In an expedited election case before the Ohio Supreme Court, **Doug Haynam** secured a writ of mandamus directing the Board to declare our client to be qualified as a candidate for the office of Trustee of Sylvania Township and certify him to the ballot for the General Election on November 8, 2011. Doug has represented a number of clients in a wide variety of election related litigation matters over the last decade.

insights

A Newsletter from Shumaker, Loop & Kendrick, LLP

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A SUCCESSFUL TEAM FOR MORE THAN 40 YEARS.

Since Health Care REIT's inception, Shumaker has served as the company's outside general counsel, including representation in connection with acquisitions, financings and securities matters.

And in less than three years, beginning in January 2009, Shumaker represented Health Care REIT in executing more than $8.6 billion of new investments and publicly issuing approximately $8.1 billion of unsecured debt and equity capital.

Health Care REIT understands the value of long-term relationships.
So does Shumaker.

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