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Title: Legal Issues and the Role of Outside Counsel In Mergers and Acquisitions

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**Legal Issues and the Role of Outside Counsel In Mergers and Acquisitions
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**Ernest Stern and Edwin Martin, Jr.
Piper & Marbury L.L.P.**

I. INTRODUCTION OF EACH SPEAKER

- A. Work History
- B. Size of the General Counsel's office during each speaker's employment at a company
- C. Specialists in the General Counsel's office in mergers and acquisitions and other areas of law involved in M&A transactions and similarity of M&A transactions
- D. Involvement of in-house and outside counsel in the following areas in M&A transactions

II. INITIAL INTEREST PHASE

- A. If a public company is a seller, engagement of an investment banker
- B. Preliminary investigation of target
 - 1. Publicly available information (e.g., SEC and state corporation commissions)
 - 2. Identification of due diligence issues (e.g., material third-party contracts, shareholder approval)
 - 3. Steps by Seller to facilitate transaction (e.g., document preparation, major due diligence issues identified, document room)
- C. Confidentiality Agreements
 - 1. Scope (including non-public information communicated orally)
 - 2. Notes of Buyer based upon Confidential Information
 - 3. Procedures for return on destruction of Confidential Information
 - 4. Disclosure of Confidential Information to agents of Buyer and Seller
- D. Standstill Agreements
 - 1. Importance if public company is involved
 - 2. Prohibition by Buyer against acquiring securities, commencing tender offer, soliciting proxies

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3. Term

E. Antitrust issues if competitors exchanging information

F. Structuring the transaction

1. Taxable Acquisitions

2. Stock purchase - Purchase of shareholders' stock or reverse subsidiary merger

3. Asset purchase - P direct purchase of T assets or "forward merger" in which T merges into P or S

4. Tax-free Reorganizations

- a. Reorganization

1. Pursuant to federal or state law

2. Continuity of interest (consideration of at least 50% stock)

3. Forward and reverse subsidiary mergers

- b. Reorganization

Solely P stock for T stock and P in control of T (80% of voting power and 80% of each non-voting class of stock)

- c. Reorganization

P acquires substantially all T's assets for P voting stock

- d. Section 351 of the IRC

One or more persons transfers property to a corporation in exchange for stock and after such exchange those persons are in control (80% of the voting and 80% of each class of non-voting stock)

III. LETTER OF INTENT

A. Advantages

1. Saves time and expense of drafting definitive agreements if material terms are agreed to initially

2. Commence Hart-Scott-Rodino filing to start waiting period

B. Disadvantages

1. Delays preparation and completion of definitive documents

2. Premature public disclosure of transaction

3. May increase costs of transaction

C. Provisions

1. Binding v. non-binding provisions

2. No shop

3. Confidentiality

4. Joint decision on public announcements

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5. Basic v. Levinson ("agreement in principle")
6. Instructions to investment banker
7. Status of negotiations between principals or intermediaries

IV. DRAFTING DEFINITIVE DOCUMENTS

- A. Price
- B. Form of payment (cash, notes, stock)
- C. Earnouts
- D. Collars (public company stock)
- E. Due diligence (representations and warranties)
- F. Corporate organization (good standing, capitalization)
- G. Authority
- H. Financial statements (A/R's and uncollectible ones post-closing; debt obligations; obsolete or unsaleable inventory; plant and equipment in poor operating condition; no undisclosed liabilities except as set forth in financial statements and schedules; unpaid or unfiled taxes)
- I. Material Agreements (assignability of significant contracts)
- J. Title to real and personal property
- K. Customer and supplier relations (must be satisfactory; schedule of principal customers and suppliers)
- L. Litigation (threatened and pending) (knowledge qualifiers)
- M. Patents, trademarks and copyrights (scheduled; intellectual property not being infringed upon and Seller not infringing upon intellectual property of third parties)
- N. Insurance (adequate and reputable insurance companies; scheduled)
- O. Absence of material adverse changes since most recent financial statements
- P. Compliance with laws and regulations
- Q. Environmental compliance
- R. Product liability
- S. Employee issues (Seller's potential liability for health plans, pension plans, retirement plans and compliance with ERISA; union and labor relations; severance payments and golden parachutes; ESOPs to finance purchase)
- T. Covenants (affirmative and negative)
- U. Delayed closings for third-party consents (e.g., government agencies, landlords) and shareholder approval
- V. Hart-Scott-Rodino
- W. Rule 145 and S-4 registration statements
- X. Shareholder notice
- Y. Specific covenants
 1. No shop ("fiduciary out" to allow Seller to entertain unsolicited third-party

1. No shop ("fiduciary out" to allow Seller to entertain unsolicited third-party offers if failure to do so would violate fiduciary duties of Seller's board to its shareholders (generally for public companies))
2. Stock option or asset option ("crown jewel") for Buyer in event of triggering event in light of fiduciary out
3. Break-up or termination fees to deter competing offers (must be reasonable in relation to size of whole transaction)
4. Legality of such provisions (cannot limit fiduciary duty of Seller's board to secure transaction offering best value reasonably available for shareholders)

Z. Legal opinion

1. Forces legal counsel to perform due diligence
2. Can be inside or outside counsel
3. Generally covers incorporation in good standing, qualification to do business where necessary, definitive agreements enforceable in accordance with their terms, consents, no violation of law or breach of the charter or bylaws or any material agreement to which Seller is a party by Seller's execution of the definitive agreement

AA. Indemnification (monetary risk shifting)

1. Who indemnifies (shareholders of Buyer and Seller)
2. Scope
3. Covers breaches of representations and warranties
4. Fees and expenses for enforcing indemnification provisions (but usually not consequential damages)
5. Third-party post-closing claims (e.g., products liability litigation, unpaid taxes, environmental liabilities)
6. Who is indemnified (Buyer, Seller and respective officers, directors, employees, shareholders, affiliates and funding sources)
7. Amount of indemnification
8. Limits of "basket" - threshold amount (e.g., 5% of purchase price) or a deductible
9. Impact of materiality exceptions in representations and warranties together with basket
10. Survival period for representations and warranties
 - a. Usually at least until first audited financial statements post-closing
 - b. Until expiration of statute of limitations for ERISA, taxes and environmental representations and warranties
 - c. Unlimited time for capitalization, organization and authority representations and warranties

AB. Arbitration clauses

V. POST CLOSING ISSUES

VI. LESSONS LEARNED

[Back to Top](#)

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