

THIS WAY FORWARD

SMALL BUSINESS SOLUTIONS



M&A Advice in Troubled Times

>>> *So many intricacies in a weakened economy.* By John D. Cromie and Joseph A. Villani

The ability for small businesses to complete merger and acquisition (M&A) transactions in this turbulent environment requires companies and their professional advisors to be mindful of the intricacies of M&A transactions. Deal documentation must provide solid legal protections for clients, while taking into account the effect of a weakened economy. Here are a few items businesses should be aware of when drafting M&A documents:

Material Adverse Change Clauses

A material adverse change (MAC) clause is a method for parties to allocate risk. When a company agrees to an acquisition, there is often a waiting period between the dates of the original transaction agreement and the closing. A MAC clause enables the M&A parties to allocate which party will bear the risk of adverse events which may occur during the interim period.

Financing Contingencies

The collapse of the credit markets facilitated the need for transactional lawyers to re-introduce financing

contingencies in M&A proposals. Buyers have relied upon the alleged revocation of financing as a means to renegotiate and/or terminate transaction documents.

Reverse Termination Fee

The reverse termination fee provides the buyer a right to abandon a transaction in return for payment of a fixed fee to the seller, generally in cash. These clauses provide sellers with a clear financial and legal remedy and are analogous to liquidated damages.

Best Efforts and Specific Performance Clauses

Many sophisticated sellers are negotiating to include a best efforts clause into transaction documents. Such clauses require buyers to use best efforts to enforce debt and equity

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financing letters. Prudent sellers employ specific performance clauses in transaction documents requiring buyers to close a transaction as specified. Sellers are also incorporating so-called “hell or high water” provisions in the transaction documents. A cousin of best efforts clauses, these stipulations oblige buyers in regulated industries to ensure they comply with regulatory mandates as a condition to closing.

Charting a Course to Closing

To weather the current economic storm of instability, prudent lawyers and clients should keep some of the following suggestions in mind as they navigate the M&A landscape:

- Avoid letters of intent and rely on signed transaction deal documents. Wherever possible, keep things simple.
- Encourage clients to assemble a qualified team of professionals: attorneys, investment bankers and accountants; and to deal with reputable firms and lenders.
- Review, revise and update boiler-plate transaction documents to ensure they are relevant to the new realities of the marketplace.
- Avoid complex drafting.
- Communicate with your litigation colleagues and monitor recent case law developments.
- Financing documents are critical. Clients and their counsel should request, review and scrutinize closely any commitment and financing letters.

Despite the current economic climate, well-positioned companies will be able to take advantage of strategic opportunities. **NJB**

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