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Mergers & Acquisitions in a Pandemic

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The understatement of the year would have to be, "We haven't seen anything like this ever."

The statement applies to our lives in an all-encompassing way. Quarantines, shelter at home, lockdowns, social distancing and work from home have become a part of everyday life. Everything has changed, nothing is the same – or is it? This article addresses changes for deal lawyers and asks the question, "Is anything different?"

Lawyers have worked in very different ways based on types of practices and scope of work for as long as we have divided ourselves into practice areas. Whether you travel constantly or never leave your city, whether you spend your time in courtrooms or boardrooms, and whether you constantly interface with clients on a regular basis or not, all largely depend on your practice area. Generally speaking, we divide lawyers into two areas – litigation and transactional. Within these areas, just as much variety exists. Rest assured, a trial lawyer and a deal lawyer are rarely confused.

Deal lawyers, M&A in particular, have seen a dramatic shift from how business was conducted even a decade ago. We rarely travel. We often are "one and done," meaning we are hired to represent the seller of a business, then the business is sold, and finally representation is over. In many ways, M&A lawyers have been working remotely for years. It's been more than a decade since opposing counsel sat together in a conference room for an all-hands drafting session, conducted due diligence at the company's office or held a closing in person. Deal lawyers often do not meet their clients face-to-face, other than perhaps a predeal interview where a few attorneys present their firm's skill set when auditioning against other firms, but many are hired after a phone call. Instead, conference calls, electronic data rooms and the electronic exchange of documents have been the ordinary course of business for some time. Surely a pandemic has changed something about the practice? Yes, it has.

Ignoring the economic impact of the pandemic and the election year (economics and politics often drive M&A activity), the biggest change when comparing the way things were prepandemic to now has to be time. Everything is taking longer. Skipping the very real issue of client hesitancy to enter a deal because of the pandemic, the lawyer side has its share of bottlenecks. Letters of Intent or "LOIs" are now being actively scrutinized in areas that were skimmed over or left out prepandemic. Expiration dates, exclusivity periods and termination provisions are front and center. The deal lawyers are being engaged earlier in the process as well. Prepandemic, it was not entirely uncommon to engage the lawyers after the LOI was signed. The biggest term in an LOI remains price, but the items around price are have shuffled remarkably.

The next time lag is due diligence, the nuts and bolts of analysis conducted by buyers when deciding to buy a company. The core aspects of the due diligence process are the company's financials and major contracts. Most M&A attorneys rely on the client to either load the data room or, in some cases, provide all the materials requested on a buyer's due diligence checklist. Lawyers then jump in and with the help of their clients prepare the disclosure schedules, which accompany the purchase agreement. Many of these people have not returned to work and are working from home and therefore don't have the access that we are accustomed to relying on as part of the process. The result is a longer due diligence period for the buyer.

The purchase agreement, the cornerstone to any M&A deal, is the most negotiated document, but even this phase has slowed down. Often, a purchase agreement's negotiation will turn to particular sections based on the deal, and client input is needed to finalize. Meanwhile, there comes a time toward the end of the deal when both parties accelerate their efforts (compromising and agreeing to terms at a rapid pace), which often requires attorneys to work around the clock to finalize the purchase agreement and related documents. Running a business at the same time it is being sold is always an issue from a timing standpoint. Scheduling time with key executives is normal course for any deal attorney and often requires flexibility by client and attorney to find meaningful time to discuss the transaction. Running a business in a pandemic has cranked that variable up considerably.

Finally, bringing it all home is taking longer. Everyone is concerned about the actual transaction and the pandemic. New issues are being considered on the same level as core deal terms. Lenders are scrutinizing loans with greater effort. Buyers and sellers are constantly monitoring the world around them when deciding to make the final decisions necessary to conclude negotiations in a truly unique environment. Businesses and attorneys have dealt with numerous recessions, political elections and natural disasters, but the pandemic is uncharted water for everyone.

The good news is deals are getting done. By all accounts, after factoring in the second quarter slow down, M&A activity is on a healthy pace and commentators are quick to point out that unlike past recessions, the economy was in a really good place before the pandemic hit. Key fundamentals were strong. Now, they are indicating that everyone should sit tight and see what happens over the fourth quarter – things are improving, it's just going to take some time. One other change for deal lawyers, no closing dinners.

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