

Business Law: Start to Finish

Clarifying Procedures in Mergers and Acquisitions of Privately-Held Companies

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Preliminary Considerations

- + Private companies tend to be founder-driven
- + Cash vs. Accrual accounting
- + Valuation should consider lack of marketability

Drafting Acquisition Documents

- + Who are you representing?
- + Pro-seller terms
- + Pro-buyer terms
- + Remove the legalese

Strategic Provisions in Stock and Asset Purchase Agreements

- ✚ Earn outs
 - Earn outs keep buyers' skin in the game
- ✚ The interplay between indemnification, hold backs, and reps and warranties cannot be overstated
- ✚ Buyers want pro-sandbagging provisions, if not silence, and sellers want anti-sandbagging provisions
 - The right to claim a breach based on the purchaser's knowledge of problems before finalizing the purchase
- ✚ Buyers want tipping basket/first-dollar indemnifications, while sellers want high deductible baskets
 - Baskets are thresholds that must be met before a party can be liable for any damages

Representations and Warranties

- ✦ They may seem like boilerplate terms, but they matter, A LOT
- ✦ Materiality matters
- ✦ Knowledge qualifiers matter
- ✦ Types: Fundamental, tax, IP, employment, litigation, environmental,

Covenants and Conditions

- + Non-competes are mandatory for key people
- + Key person consulting agreements are vital for all small and mid-market companies

Indemnification and Adjustments to Price

- + What is it?
- + The right to get reimbursed by another for damages.
- + Why is escrow better than pure indemnification?
- + Because there is less of a fight to get the money!

Indemnification and Adjustments to Price, cont.

- ✦ Buyers want carve outs to ***caps, baskets, survival times*** for fundamental reps (organization, due authority, capitalization, etc.), tax, IP, fraud
- ✦ Can have different survival times for different types of reps. E.g., fundamental and tax reps survive for SOL, IP reps survive for 1-2 years, fraud survives indefinitely
- ✦ Caps can vary by reps. E.g., fundamental and tax reps capped at 100% of purchase price, IP reps capped at 50% of purchase price, fraud not capped at all.
- ✦ Good to have dispute resolution with independent accountants mechanism in the purchase agreement

Legal Opinions

- ✦ Great if you can get them, but probably not worth it unless deal is \$10M+
- ✦ Typically represent that fundamental reps are accurate

Negotiation Strategies

- ✚ Here is market for private companies:
 - Survival period = 18 months
 - Basket deductible = .5% of purchase price
 - Escrow amount/hold back = 12% of purchase price
 - Damages caps = 13% of purchase price

Pre-Closing, Closing, and Post-Closing Considerations and Checklists

- ✚ Mediation: formal negotiations with a third-party neutral person facilitating a resolution.
 - In my experience, mediation is productive and saves on litigation costs, but only when the parties are properly motivated.
 - And parties motivations change over time and with new information.

Pro-Buyer Asset Purchase Agreement

+ Attached for your edification