



THE MORGAN LEWIS M&A ACADEMY

M&A Academy - Q&A For October 5, 2016 Session

Choosing an Acquisition Structure and Structuring a Deal

One Law Firm Representing Multiple Bidders in Sale Process

Q: What if outside counsel represents more than one bidder in an "informal auction" process?

A: We occasionally run into this in multi-bidder sales processes. First, any firm representing multiple bidders will have to review the matter to determine whether it raises legal or commercial conflicts issues, and in the case of legal conflicts whether they can be waived by the client(s). Second, and perhaps more importantly, if the firm concludes it can represent multiple bidders, the firm would need to make sure that the clients are represented by completely separate deal teams, and information barriers are put in place so no deal team gets information about the other bidders' price, bid strategy, etc.

A seller facing this issue should, at a minimum, make sure that the law firm has implemented separate deal teams and information barriers as noted above, and also consider entering into a written agreement with the law firm that includes an obligation by the firm to prevent information flow across teams.

Evaluating and Mitigating Potential Successor Liability Issues

Q: If an asset purchase is for substantially all of the assets and no liabilities are assumed by buyer, how often do successor liability issues arise? What can be done to mitigate successor liability issues (e.g., choice of law)?

A: It is difficult to say how often these issues arise, other than to note that if a selling entity has retained liabilities that it can't perform, it is almost a certainty that any major creditor of the selling entity will explore its ability to assert these claims against someone else, including the buyer.

As a general rule, the buyer of assets does not automatically assume the liabilities of the seller. However, in certain circumstances, and this does vary somewhat from state to state, the buyer can be held responsible for the seller's liabilities if a court determines that one of the following exceptions are met:

- the buyer expressly (for example, pursuant to the terms of the asset purchase agreement) or impliedly assumed the liabilities;
- the transaction is deemed a “de facto merger” under state law;
- the transfer was fraudulent or intended to defraud creditors;
- the buyer is a mere continuation of the seller; or
- the buyer continues essentially the same operations or product line of the seller.

In addition, there may be applicable federal or state laws that create successor liability for certain liabilities. For example, under federal law certain employee pension and environmental liabilities associated with a business can follow the business even in an asset acquisition. In addition, under some state and local tax laws, the buyer may be responsible for certain of the seller's taxes.

I think the principal ways to mitigate these liability issues are:

- adequate due diligence to determine the scope of any unassumed liabilities;
- assess the creditworthiness of the seller to determine its ability to perform known retained liabilities;
- assess what types of unknown liabilities the seller may face, such as old tax claims, product liability claims, environmental claims or claims relating to businesses or entities that are no longer owned by the seller;
- assess what type of insurance the seller has in place to address certain types of claims that may be asserted post-closing and consider whether the buyer should obtain insurance (to the extent available) to cover certain of these risks; and
- get an indemnity against all retained liabilities from a creditworthy party, such as the stockholder(s) of the selling entity.

I don't think that picking the right choice of law in the acquisition agreement will eliminate these successor liability risks - depending on the claim, the law of the jurisdiction of organization of the selling entity or where the claim arises or is asserted could also be relevant.