

Legality of mergers and acquisitions in the COVID era



Wesley René

As Wesley René was working on a corporate transaction since February, his client was hoping to be able to close on the transaction in October. But looming over the transaction was the fact his client had a Paycheck Protection Program loan that wasn't yet forgiven by the Small Business Administration.

Then the SBA issued guidance that answered a question on whether they'd be triggering a default under the PPP note by proceeding, says René, an associate in Harris Beach PLLC's corporate practice group team.

PPP loans are just one example of the biggest needs for corporate law assistance local law firms are seeing amid the COVID-19 pandemic.

Tyler O'Reilly, another associate in Harris Beach's corporate practice, says that issues with PPP loans are coming up with mergers and acquisitions and the sales of equity, affecting the timeline of deals and whether the deals can move forward at all.



Tyler O'Reilly

A key unanswered question was whether SBA approval had to be given for mergers and acquisitions, O'Reilly says. Some lenders were willing to give their consent for mergers and acquisitions and other transactions, some lenders said they would only do so if the SBA gave their consent and other lenders said companies needed to apply for forgiveness and deal with this later, he says.

But recent guidance from the SBA about how to handle PPP loans during change in ownership, including asset and equity deals, has clarified that a change in ownership will only be considered to have occurred if: at least 20 percent of the common stock or ownership interest of a PPP borrower is transferred; or if the PPP borrower sells or transfers at least 50 percent of its assets; or if a PPP borrower is merged into another entity.

In some transactions, the change in ownership can be undertaken without the permission of the SBA so long as an interest-bearing escrow account is established with funds equal to the outstanding balance of the PPP while a forgiveness application is still pending, O'Reilly says.

René says that some companies are just repaying the PPP loans because they may have weathered the pandemic better than expected and won't be able to qualify for loan forgiveness.

O'Reilly also notes that companies have to look ahead to see if their financial statements can support the necessity of having received PPP loans during possible audits, especially if they got loans for \$2 million or more, which will be subject to automatic audits.



Isaac Figueras

Isaac Figueras, an associate in Nixon Peabody LLP's mergers and acquisitions and corporate transactions group, says the public health crisis of COVID-19 and the natural disasters of the historic wildfires in California and Oregon are changing how businesses need to operate and companies have had to figure out how to deal with their supply chain issues.

"At this point, companies may receive push back when attempting to exercise a 'force majeure' clause on the basis of the pandemic because counterparties may argue that the pandemic is becoming less and less the type of event that is unexpected and, as a result, the force majeure clause does not excuse their duties to perform under their contracts. Parties need to look more holistically at a contract during negotiations to make sure COVID-19 and other disruptive events, such as the wildfires, are addressed properly throughout the contract rather than solely relying on a standard force majeure clause," Figueras says.

Figueras notes that many clients on the West Coast rushed to harvest their crops so they could meet their representations and warranties about the safety of the crops they were delivering to their customers.

"I've seen parties working harder to negotiate or renegotiate a contract or find alternative ways to avoid a breach," Figueras says. "Oftentimes, in my personal experience, you're dealing with long-term relationships."



Eric Ferrante

Nixon Peabody associate Eric Ferrante, who works in the firm's complex commercial disputes group, says that judges are not going to look very favorably on parties running for the courthouse over contractual breaches like rent owed for commercial leases because everyone in the country is dealing with the impacts of COVID-19.

Ferrante also has seen a willingness of parties to work together in the context of commercial real estate leasing with landlords being willing to spread rental payments out or defer them onto the back

end of leases.

With parties entering mergers and acquisitions, Figueras says he has had to rethink the contractual terms "ordinary course of business" or "consistent with past practices."

"They became default terms, in a way, on how a party will operate as opposed to giving very detailed obligations of what exactly they are going to do," Figueras says.

The last 12 months have not been ordinary, so parties are now looking at contracts that refer to the ordinary course of business prior to the past 12 months or that refer to the way they are operating currently, Figueras says.

Buyers in mergers and acquisitions are going to want "fulsome" representations and warranties that sellers have complied with stay-at-home orders and other laws and regulations related to COVID-19, Figueras says.

Local lawyers say that mergers and acquisitions are as busy as ever, despite the pandemic.

"We are seeing continued action in the M&A space," says Emily Cohen, senior associate in Harter Secrest & Emery's corporate practice. "We're seeing the action you would see at the end of the year, coupled with a potential change in the regulatory system with a new president next year. If you want to get deal done with the tax structure that exists now, now is the time to do it."

Both O'Reilly and Cohen say that having access to capital is a big issue for companies because it is still uncertain if further stimulus will be provided by the federal government.

Clients are coming up with creative solutions to pull money out of their businesses, Cohen says.

"You're going to try to hold onto all the cash you have and think about creative ways to survive a potential shutdown," Cohen says.

Kevin Mulvehill, partner with Phillips Lytle LLP and the firm's Rochester office leader, says that some litigation has started. He is seeing litigation against universities and colleges regarding claims for tuition reimbursements because of partial or complete closures.

Mulvehill has also seen lawsuits filed by employers, alleging they faced a hostile work environment or were discriminated against because of furloughs or layoffs related to COVID-19. Additionally, there has been a rise in lawsuits against insurance companies for denying business interruption claims.

"This will unfold in the courts," Mulvehill says.

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