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A DealThink Case Study: Specialized Areas in M&A
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Editor's Note: Since the DealThink series began, we have focused on various M&A and governance issues facing general counsel of public companies. We would like to broaden the discussion to include the expert. of "specialist" attorneys (e.g., tax, employee benefits, intellectual property) with whom general and outsi corporate counsel will likely consult and rely upon during the course of an M&A transaction.

Set forth below is a hypothetical fact pattern that is intended to capture examples of many of the issues that a general counsel and outside transactional counsel may encounter in a typical merger scenario. Ove the coming months, specialists from a variety of practice areas of our firm wil identify and analyze specifi issues and concerns that appear in this fact pattern. We hope that this series of articles will assist gener counsel and other practitioners in identifying lurking issues in proposed transactions and determining wh a specialist should be consulted.

You are general counsel of a publicly-traded medical device company. Your company's Board has identified a publicly-held x-ray and CT scan component manufacturer that it would like to acquire. Th target is a Delaware corporation based in California, with additional manufacturing facilities in Utah a Kentucky; within the past three years, it has sold two mothballed manufacturing facilities. It sends salespeople to 15 different states, but due to its Internet presence, it ships components worldwide. also provides support services for its component parts within the continental U.S.

As general counsel, what should you be thinking about aside from the primary transaction terms? Below are some other issues related to the proposed transaction that may cause the general couns to consult various legal "specialists":

- **Environmental Concerns** – The target's manufacturing facility in Utah used to make x-ray film and developing solution, and the target may have dumped some related toxic materials on the plant s in the 1990s. How can you diligence this? Is there an applicable statute of limitations? Can you determine any related facts from target's public filings? What other professionals should be involv Your company's plans for the target post-acquisition include expanding the Utah facility to increas manufacturing capacity. How does this affect the diligence process and the transaction as a whole
- **Tax concerns** – In what states should the target have been paying taxes if it has operations in o 3 states, is incorporated in Delaware, ships worldwide and sends sales people to 15 states? Wha happens if the diligence uncovers that the target has not been paying its state taxes appropriatel In addition, the target currently gets a tax break because it built its newest plant in a depressed economic area in Kentucky. Could it lose that tax break in the event of a change of control?
- **Intellectual Property** – The target is party to a license agreement covering vital software that is used to control its manufacturing processes. It also has three patents related to its products. Hov can these intellectual property rights be protected in a change of control transaction? You also understand that there is a new competitor in the x-ray component industry. This competitor was started by a former employee of the target who is also the inventor of one of the patents. The ne competitor has sued for ownership of the patent listing the competitor's founder as the inventor. How can you weigh this threat to the target's intellectual property?
- **Employee Benefits** – The target has a prototype 401(k) plan, a self-funded health insurance plan and certain other fully-insured welfare benefits (life, disability, dental and vision), but it also has a

defined benefit plan that the target froze in the late 1990s. In addition, the target has agreement with two different unions for employees that work at the target's manufacturing facilities, and the: agreements require contributions by the target to a multiemployer defined benefit plan. The targe also may have experienced labor dissension in the past ten years. Your company currently mainta its own 401(k) plan and self-funded health insurance plan, but has never sponsored a defined benefit plan. Should your company continue to maintain the target's plans post-closing? Can the target's defined benefit plan be terminated prior to closing and liquidated? What concerns should you be aware of with respect to the benefits provided to the target's union employees?

- **Insurance** – The target has the typical insurance coverage, including commercial general liability insurance, D&O liability insurance, and environmental liability insurance. How is the transfer of risk from the target best handled by insurance? Is there a specific deal structure (merger vs. asset de that is considered more advantageous for insurance purposes? What happens if there is an environmental claim against the target before or after the sale? What do typical change of control provisions in insurance policies look like?

Look for a discussion of these issues in DealThink over the next several months. We hope the articles will be useful to you.

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