KIRKLAND & ELLIS LLP

KIRKLAND **M&A UPDATE**

June 15, 2010

When a General Release is Too General

While general releases may serve a useful function in settling disputes, their typical blunt instrument approach is often unsuited for the tangled relationships between parties, especially in the transactional context.

A recent Delaware Chancery court decision shows that, absent cautious drafting, parties may be releasing more than anticipated when executing a customary general release. In settling disputes or litigation or otherwise unwinding relationships, parties often enter into general releases, frequently mutual, which broadly relinquish all claims that the parties have against each other. In an attempt to be as expansive as possible, general releases are typically replete with enough synonyms and Latin phrases to make Roget and Black proud, and such creative (i.e., "only a lawyer could come up with that") concepts as "from the beginning of the world through the date hereof."

In *CorVel v Schaffer*, a buyer of a business, simultaneously with entering into a stock purchase agreement, obtained a separate agreement from a major stockholder and employee that provided additional consideration to the individual in exchange for an agreement not to compete with the target business for five years. A post-closing dispute arose under the earn-out provisions of the stock purchase agreement that was ultimately resolved through the signing of a settlement and general release agreement that incorporated typical broad language covering "any claims arising out of any relationship between the [selling shareholders] and [buyer], including but not limited to any claims … in the [earn-out dispute]." Thereafter, the individual took a job with a competitor in seeming violation of his non-competition agreement. Vice Chancellor Noble dismissed the buyer's attempt to enforce the non-competition agreement, holding that the release, while clearly drafted in the context of settling the earn-out dispute (which was under the stock purchase agreement and involved multiple selling shareholders), was so broad and general as to include the surrender of claims to enforce the separate non-competition agreement with this one shareholder/former employee.

While general releases serve a very useful function in settling disputes or ending relationships by offering certainty and closure, their typical blunt instrument approach is often unsuited for the tangled relationships between parties, especially in the transactional context. Whether the release is executed as a closing deliverable or in settlement of a post-closing dispute, a buyer likely would be surprised that a general release in favor of a seller/founder might immunize the seller/founder from indemnification claims under the purchase agreement, fraudulent conduct of the business pre-sale or post-closing behavior as an employee of the buyer. Similarly, a seller/employee would not expect that a release in favor of a buyer might relinquish claims to accrued vacation, deferred compensation accounts or future post-closing employment incentives.

These unexpected and likely unintended results can be avoided either by more thoughtfully limiting the scope of the release to the present dispute or issue (albeit broadly covering any and all claims relating to the specific matter) or by supplementing the broad general release with a careful listing of obligations that remain intact notwithstanding the wide-ranging release of claims.

Using this sniper-rifle approach in lieu of the shotgun style of the typical general release should help parties avoid the type of collateral damage suffered by the buyer in the *CorVel* case.

If you have any questions about the matters addressed in this *M&A Update*, please contact the following Kirkland authors or your regular Kirkland contact.

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