LOOKING FORWARD BY FIRST LOOKING BACK

I've been reflecting on the many past engagements as I plan for new ones. It's only natural to look forward by looking back first.

I've represented countless businesses in connection with acquisitions, dispositions and joint ventures, over the past 30 years. I have successfully concluded over 300 business transactions, of all types and sizes, for clients' large and small, public and private, locally and beyond.

I've assisted with more acquisitions than anything else, probably because I've enjoyed an aggressive and acquisitive clientele and have helped many clients make the all-important first acquisition.

It's only logical to ask, "How did these acquisitions work out?" Were the buyers happy, did they profit handsomely, etc.?

I haven't done a scientific survey of the clients I've represented in connection with acquisitions. But as I have continued contact with most of many past clients, in general I have a pretty good sense of whether and how the transactions have worked out for my clients.

Overwhelmingly, my clients have been very happy with the businesses they acquired. Many still own the acquired businesses, and, of all those who don't, many sold the businesses for a handsome profit (after generating income while owning and operating the business.) (Looking at the experience of my clients with the businesses I've assisted them in acquiring, I often wonder why more people aren't lined up at my door looking to acquire existing businesses!)

Let's pursue this inquiry a bit further. Of those of my clients that had a negative experience with the businesses they acquired with my assistance, what was the most common cause of their disappointment?

Again, and I haven't done a scientific survey of this, I have no doubt that most of my clients who ended up disappointed with businesses they acquired with my assistance did scant/inadequate due diligence prior to acquiring the business. Although, in each of these situations of which I am aware, the contracts which I drafted covered and protected my client with respect to the problems they were unaware of pre-closing, the scant/inadequate due diligence left the client struggling to address the problems post-acquisition.

Let me explain with these three examples, obviously not mentioning client or business names for reasons of client confidentiality:

1. <u>Client Acquires Two Radio Stations</u> I remember this transaction well. The buyer bought two radio stations, one in Parkersburg, West Virginia and one in Sandusky, Ohio. Because my client failed to perform adequate operational due diligence relative to the stations and in particular, the West Virginia station, and because the buyer was so highly leveraged, when the West Virginia station under performed for reasons that could have been discovered pre-closing and therefore anticipated, but weren't, my client was ultimately forced to relinquish both stations to the seller. This situation and problem could have been easily avoided if the Buyer had performed thorough operational due diligence.

2. Client Acquires Tool Business I remember this transaction well. My client acquired a tool business. My client was not an accountant and had little to not help with accounting as his accountant was experienced only with preparing personal (as opposed to business) returns and was unavailable to perform any accounting due diligence since we closed in April. Because the buyer had no accounting expertise and performed little to no accounting due diligence, he acquired the business and learned only post-closing that there was a very substantial post-closing adjustment due buyer from seller. Seller refused to pay the amounts required to be paid to buyer per contract, which made it necessary for buyer to sue seller post-closing resulting in unanticipated and costly delays and expenses. If buyer had performed the basic accounting due diligence prior to closing, the post-closing adjustment could have reduced the cash purchase price payable at the closing and avoided all or a great deal of the delay and expense.

3. Client Acquires Microphone Business I remember this transaction well. My client acquired a distributor of microphones and related products. Buyer's investment bankers represented both seller and buyer and undertook to do certain accounting due diligence for buyer. Between buyer, himself, and his investment bankers, they failed to discover pre-closing that (a) the acquired company's largest customer account was terminating, and (b) the acquired company's largest supplier's price increase and both issues could have and should have been addressed up front. (I performed first level legal due diligence and if I hadn't, buyer would not have even acquired good title to the acquired business.)

In each of these situations, my client did not want me or other professionals to invest time (and dollars) in significant due diligence. In each of these situations, my client was penny wise but pound foolish by performing the due diligence himself, which he was unprepared to do, or by relying on others to perform the due diligence (who either didn't know what they were doing or didn't do it.) In each of these situations, my client ended up with a contractual "right" and a "lawsuit" but with problems in the business and/or diminished cash flows and either lost the business altogether (as was the case with the radio stations which were ultimately relinquished to the original seller) or struggled for a long period of time to restore the business to its condition pre-closing.

What's the takeaway? As important as good contracts and other agreements are, it's essential for buyers of businesses to perform, or have professionals perform, at least the basic due diligence relative to the acquired business. Issues can then be identified and addressed pre-closing or the buyer can walk away, or adjust the purchase price, or make other adjustments. I give my clients an acquisition checklist or due diligence checklist (see attached) at the outset and recommend that we (the client and I working together possibly with an accountant or other professional) conduct rudimentary due diligence. I highlight the areas I'd focus on.

In essence, we're talking about buying a used car and I'm suggesting let's take the used car to a trusted mechanic for a thorough inspection before buying it, whether or not the used car come with a warranty! For any and all problems are best discovered and addressed at the outset! Prevention better than cure!

All of that said, I can lead a horse to water but I can't make it drink. As recently as a week ago, I assisted a client with an acquisition and the client didn't even wait for me to order a good standing relative to the seller ($5.00) or order a basic lien and judgment search!

Overwhelmingly, my many clients who have acquired businesses with my assistance over the past 30 years have done well with/benefitted from the acquisitions. Of the few clients that have experienced difficulties with those acquisitions the common theme was that the client performed inadequate due diligence prior to closing the acquisition. While all of these clients were fully protected by contract relative to the issues they failed to discover pre-closing, the contract gave the clients a claim or lawsuit which of course was no substitute for addressing the problem up front or avoiding it altogether.