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Business Law Update

Spring 2016

Mergers & Acquisitions

What to Consider When Negotiating & Drafting Earn-Out Provisions

By Todd M. Schild & Caleb M. Tindell

As discussed in the Winter 2016 *Business Law Update*, earn-outs are mechanisms that provide sellers in M&A transactions with the right to receive additional consideration after the deal closes if certain performance conditions are achieved. While that article focused on the specific terms of earn-outs in some recent private M&A deals, this article will focus on a few of the legal considerations to keep in mind while negotiating and drafting earn-out provisions.

Post-Closing Operations

The post-closing management of a newly-acquired company will affect its financial performance and, therefore, the earn-out payment. A well-managed company that generates a high earn-out payment is beneficial to both parties. However, poor management or manipulation of financial results can negatively influence possible earn-out payments. For instance, short-term actions, such as incurring or ignoring costs and expenses, can artificially depress financial performance during the earn-out measurement period and affect the earn-out payments, but may not accurately indicate the long-term value of the company.

Therefore, post-closing covenants regarding the operation of the acquired business are essential components of a well-drafted earn-out provision. In negotiating a post-closing operations covenant, the seller typically desires to retain certain rights and impose obligations on the buyer in order to preserve and maximize its earn-out payment. For instance, the seller will often ask the buyer to operate the company consistently with the seller's pre-closing operation and use the buyer's best efforts to achieve the earn-out targets. Additionally, the seller may want the buyer to maintain separate books to evaluate the earn-out

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payments and maintain a minimum amount of working capital. The seller also may request veto rights over major decisions.

On the other hand, buyers wish to operate the acquired company as they see fit without any obligation to operate the company in a manner intended to achieve or maximize the earn-out. The longer the earn-out period, the greater the tension between the buyer's and seller's positions relating to control of post-closing operations.

Recent case law demonstrates the importance of post-closing operating covenants in an earn-out provision. In the absence of contractual protections, when a buyer takes measures to minimize its payments and undermine the success of the acquired company, some courts, including the Delaware Court of Chancery, have found a breach of the implied duty of good faith and fair dealing.

In contrast, other courts have declined to invoke the implied covenant of good faith and fair dealing when the seller attempts to impose on the buyer post-closing obligations that were considered or negotiated, but not reflected in the definitive acquisition agreement. To those courts, the implied covenant is merely a gap-filler applied when the parties do not anticipate an issue. Therefore, the parties should include in their definitive agreement covenants they intend to govern post-closing behavior to minimize the possibility that a court will read in the implied covenant of good faith and fair dealing.

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Tax Consequences

Counsel also should give some consideration to the characterization of possible earn-out payments. Depending on the seller's involvement in the acquired company post-closing, the earn-out payments could be treated as compensation, which generally is taxed as ordinary income, or as a deferred purchase price payment, which generally is taxed at the lower capital gains rate.

If the parties agree that certain selling members of the management will continue to be employed through the earn-out period, some courts have held that the earn-out payments may be considered compensation for services. Sellers typically want to continue their employment in order to help the company achieve the earn-out targets, but this comes at the expense of a potential higher tax liability.

On the other hand, if key selling management members are not retained, then any earn-out payment more likely would be characterized as a deferred purchase price payment and taxed as capital gains. Thus, the earn-out payments probably would receive more favorable tax treatment, but the sellers would have less control over the daily management of the business.

Securities Law Issues

Another legal issue to consider is whether the right to receive the earn-out payment may be considered a "security" under the broad definition in the Securities Act of 1933. If the earn-out right is considered a security, then either registration or exemption may be required, thus increasing transaction costs.

Under Section 2(a)(1) of the Securities Act of 1933, the definition of a "security" is broad. The definition includes, but is not limited to, any " … note, stock … bond, debenture, evidence of indebtedness, … [or] investment contract … " Under this definition, the right to receive an earn-out payment may be deemed a "security."

However, certain SEC no-action letters that have considered this issue focused on the following factors when determining the circumstances under which an earn-out is **not** considered a security:

- The earn-out right is part of the consideration in the transaction and the parties do not view the right as an investment by the sellers;
- The earn-out right is not represented by any certificate or instrument;
- The holder of the earn-out right has no voting or dividend rights, nor does the earn-out right bear a stated interest rate;
- The earn-out right does not represent an equity or ownership interest in the buyer; and

- The earn-out right cannot be transferred, except by operation of law.

Assuming the parties intend that the earn-out not be deemed a security, the purchase agreement should include a "No Security" provision that tracks this SEC no-action letter guidance.

These issues are just a few of the many important considerations in negotiating and drafting an earn-out provision. Other considerations include the earn-out metrics, caps, thresholds, forms of consideration, and the earn-out period. Earn-outs certainly can be an effective tool in an M&A transaction to close value gaps or incentivize post-closing performance, but the parties should keep in mind the legal implications of their choices.

With any questions, please contact Todd Schild or Caleb Tindell.

Thompson Hine Recognized by Corporate Counsel as Innovation Leader for Fourth Year

Thompson Hine LLP announced today that it has been recognized for the fourth consecutive year in every category for game-changing innovation in the report *BTI Brand Elite: Client Perceptions of the Best-Branded Law Firms*. BTI reviewed more than 650 firms across the country and ranked them based on attributes that differentiate them in the eyes of corporate counsel. Thompson Hine is positioned as one of the top seven "Client Service Strategists" – firms innovating by making changes others are not to improve the client experience. The firm also is among the top innovative "Value Drivers" – those making changes in process or the client experience to add value, and one of the leading firms considered "Movers & Shakers" – firms delivering new and valuable services that others are not. Thompson Hine is one of only 29 firms nationwide recognized in all innovation categories.

"Thompson Hine again earns its top spot in Innovation in Client Service by changing its service delivery to align itself with its clients' goals and priorities," said Michael B. Rynowecer, president of the BTI Consulting Group. "Clients report a fundamental change in the way Thompson Hine delivers services using tools like budgeting methodologies, workflow mapping, and value-based pricing. Corporate counsel recognize this and report the firm is embracing approaches playing directly into corporate counsel goals."

Caveat Emptor! Don't Buy Another Company's Export Violations

By Samir D. Varma

A company seeking to acquire another business typically uses the due diligence process to better understand the target company's financial condition. However, the process is also crucial for uncovering a variety of risks concerning successor liability. Having a clear picture of the target's history is essential to mitigating the potential conveyance of liabilities post acquisition. If not identified, these liabilities can impair the acquiring company's ability to conduct certain transactions and cause unwanted litigation.

Most companies address successor liability issues involving tort, environmental and contract laws but ignore those involving export compliance, often to their detriment. Because most export control laws and regulations have a five-year statute of limitations, buying a company with a history of export violations can burden the buyer with liability long after the deal is closed.

Because most export control laws and regulations have a five-year statute of limitations, buying a company with a history of export violations can burden the buyer with liability long after the deal is closed.

When a client plans to acquire a company that conducts cross-border business, counsel should invest the time and resources during the due diligence process to ensure any potential export compliance liabilities are revealed. Pre-acquisition due diligence is the only true method to identify potential export control violations and prevent them from being conveyed by the target to the acquiring company.

Common Pitfalls Discovered During Due Diligence

Every due diligence review is different, and each should focus on the specific risks that might be posed by a particular target company. Still, there are certain recurring pitfalls that counsel should be aware of when conducting export compliance due diligence.

Numerous third-party relationships. Many companies use third-party agents, distributors, sales representatives or other intermediaries to sell their goods or services internationally. These third parties can create liabilities for an acquiring company based on principal-agency theory. At a minimum, during the due diligence process the buyer's counsel should review the target company's relationships with third parties to confirm that none have created liabilities by selling products to prohibited end users or destinations, or for prohibited end uses.

No export compliance policies and procedures. The absence of export compliance policies and procedures may be a major red flag if the target company conducts cross-border business, signaling the company's ignorance regarding its compliance with export control laws and regulations. A lack of policies and procedures should compel counsel to further examine the target company's export history and compliance practices.

Product misclassification. All companies exporting products from the United States must ensure that they properly classify products according to the relevant export control laws and regulations. Product misclassification may prevent a company from obtaining required U.S. government export licensing. The acquiring company should obtain from the target company confirmation that its products have been properly classified.

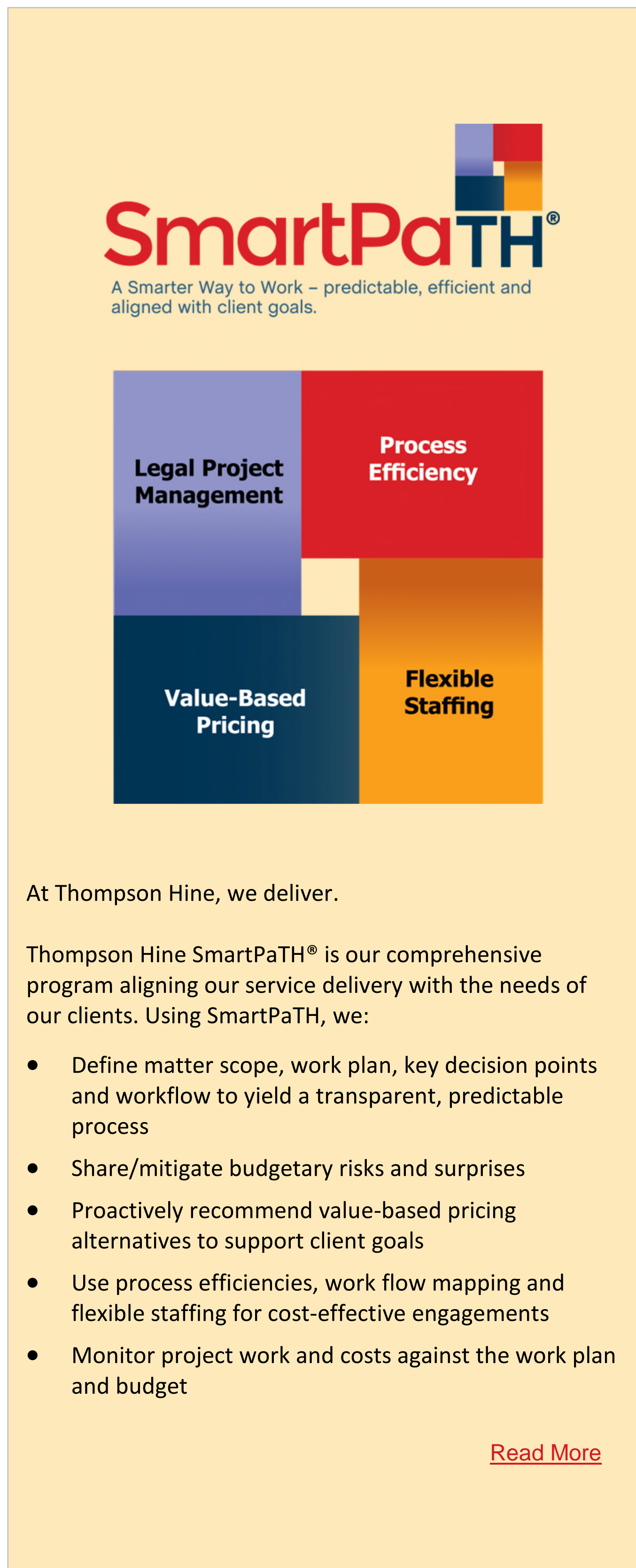
Deemed exports. Under export control laws, technology released to a foreign national, wherever located, generally is deemed to be an export to that individual's home country. As part of due diligence, counsel for the acquiring company should likely review the nationalities of the target's employees, both in the United States and abroad.

Inadequate follow-up to questionnaire responses. Many due diligence questionnaires contain numerous export compliance questions. Target companies, however, often provide answers that demand further inquiry, necessitating follow-up questions and/or document requests to complete the due diligence process.

International transactions that are prohibited post-closing. A U.S. company purchasing a non-U.S. entity should be aware of the target company's transactions in foreign countries that may have been legal under the local laws but are prohibited under U.S. export control laws and regulations. The acquiring company's counsel should ensure that these types of transactions do not continue post acquisition.

Including export compliance in the due diligence review can uncover potential issues before closing and provide the acquiring company an opportunity to structure the deal to mitigate associated risks. Focusing on export compliance during due diligence also may result in substantial long-term savings and prevent ongoing violations of export control laws and regulations.

If you have questions, please contact Samir Varma.



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Employee Benefits

Your Retirement Plan: What You Don't Know Can Hurt You

By Edward C. Redder

Offering a retirement plan such as a 401(k) plan can be a great way to attract and retain talent. But it can also expose your business—and you personally—to significant liability. As companies like Boeing, Ameriprise, Lockheed Martin, Novant Health and Nationwide know all too well, greater scrutiny from both regulators and opportunistic plaintiffs' attorneys has raised the stakes for plan fiduciaries. These companies have settled alleged breach of fiduciary duty cases in the last three years costing, in the aggregate, in excess of $330 million.

Ask yourself a few questions. Do you know if the plan pays for recordkeeping, trustee, investment advisory or other services? If so, do you how much the plan pays for those services and how the expenses are allocated among participants? Are these expenses reasonable? How do you know? If you can't answer one or more of these questions, take action now.

The Stakes

The Employee Retirement Income Security Act of 1974, as amended (ERISA) exacts a high price on fiduciaries who breach their fiduciary duties. A fiduciary who breaches his or her duty "shall be **personally** liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary … " Further, a fiduciary may also be subject to excise taxes and penalties if a breach constitutes a prohibited transaction, as would be the case if a fiduciary enters into or continues an unreasonable arrangement with a plan service provider.

Plan Fiduciaries

ERISA requires that retirement plans have at least one named fiduciary who is responsible for the administration of the plan, including the selection and monitoring of plan service providers. The company sponsoring a retirement plan is the named fiduciary in the absence of an express designation otherwise.

In addition to the named fiduciary, other individuals that perform functions that are fiduciary in nature—such as the selection and monitoring of plan service providers—are fiduciaries, whether or not they acknowledge fiduciary status.

A plan fiduciary must discharge his or her fiduciary duties consistent with ERISA's high standards.

The ERISA Fiduciary Standards

An ERISA fiduciary must discharge his or her duties with respect to a plan:

- solely in the interest of plan participants and beneficiaries; and
- for the exclusive purpose of providing benefits to participants and beneficiaries, and defraying reasonable plan administrative expenses; and
- with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."

Fiduciaries must also avoid conflicts of interest known as prohibited transactions. Engaging a vendor to provide services to a plan constitutes a prohibited transaction unless the arrangement is necessary (or helpful) for the

establishment or operation of the plan, and provides for no more than reasonable compensation.

Understanding Service Provider Compensation

Rest assured, plan service providers do not work for free. However, it is not always easy to ascertain precisely how they are paid and how much they are paid. Generally, service providers are paid either directly by the company offering the plan or from the plan itself through direct charges to participant accounts, or indirectly through fee-sharing arrangements with the investment options offered under the plan. When providers are compensated through fee-sharing arrangements, the total amount and allocation of fees can be particularly difficult to determine. Fee-sharing arrangements can also lead to dramatic annual fluctuations in fees for the same level of service.

To aid fiduciaries in evaluating the reasonableness of service arrangements, the Department of Labor issued regulations that require most retirement plan service providers to furnish written disclosures of services, fees and other information to responsible plan fiduciaries in advance of being engaged. These disclosures, together with the underlying service contract, form a sensible starting point from which a fiduciary can evaluate the reasonableness of service arrangements.

Evaluating the Reasonableness of Compensation

Of course knowing the compensation paid to a service provider is only the first step. ERISA requires that the compensation paid from plan assets (either directly or indirectly) for plan services be reasonable. Reasonableness cannot be evaluated in a vacuum. Without periodically soliciting competitive bids or obtaining benchmark information, a fiduciary cannot properly evaluate the reasonableness of service provider compensation. While there is no established hard-and-fast rule for how often competitive bids should be solicited, at least one court has endorsed doing so every three years in the absence of circumstances that would warrant doing so sooner.

Conclusion

If you do not know the answers to the questions initially posed, now is the time to act. By carefully evaluating your current arrangements and implementing policies and procedures to monitor your service provider arrangements, you can mitigate your risks in the future.

If you have questions regarding next steps or would like assistance as you work through the process, please reach out to any member of our Employee Benefits practice group.

International

Forum Selection Clauses in Agreements with Foreign Counterparties: Not Just Another Boilerplate Provision

By Eric N. Heyer

Contracts with sophisticated foreign counterparties typically include a choice of law clause. They may also include a forum selection clause. From a litigator's perspective, the importance of a precise forum selection clause cannot be overstated—the clause is far more than just another boilerplate provision and may dictate the outcome of an entire case.

As an initial matter, to ensure that any dispute be resolved in a party's elected forum, it is often critical that the forum selection clause be "exclusive" in nature; that is, the clause should specify not only where the parties may litigate their claims, but where the parties must litigate their claims. Absent language designating an exclusive forum, a court designated by such a clause may conclude that while the court can exercise personal jurisdiction over the foreign counterparty, if the foreign counterparty has filed first in a foreign forum, the court cannot or should not prevent the foreign action from proceeding in parallel.

Additionally, federal courts have come to recognize the importance that forum selection clauses play in international commerce not only by designating such clauses to be "prima facie valid," but also by enforcing them against related parties and entities that are not signatories to the agreement. One of several equitable theories under which a forum selection clause can be enforced against non-signatories is so-called "direct-benefits estoppel." Under this doctrine, a forum selection clause binds non-signatories who, during the life of the contract, embrace the contract despite their non-signatory status but then, during litigation, attempt to repudiate the binding nature of the forum selection clause. A non-signatory can "embrace" a contract, and so be bound by its forum selection clause by, for example, seeking and obtaining "direct benefits" under the contract, seeking to enforce the terms of the contract, or asserting claims that must be determined by reference to the contract.

Forum selection clauses may also compel a party to litigate non-contractual claims in the designated forum. This will likely be the case if the forum selection clause provides, for example, that "any controversies or disputes arising out of or related to … the relations, dealings, interactions, or conduct of the Parties hereto" is subject to the forum selection clause. However, even if such broad language is not included, the presumptive validity of a forum selection clause is not overcome by a mere allegation that the contract was induced by fraud. Rather, the party challenging enforcement of the forum selection clause must demonstrate that the clause itself was inserted into the contract as a direct result of fraud—a much steeper hill to climb.

For each of these reasons, forum selection clauses in agreements with foreign counterparties should be crafted with care—the impact a clause's wording may have on the parties impacted thereby may be far greater than they ever anticipated.

With any questions, please contact Eric Heyer.

Litigation

Demystifying the Attorney-Client Privilege

By John T. Bergin

Companies generally know that attorneys have an ethical obligation to keep information relating to their representation confidential, but many companies misunderstand how the attorney-client privilege ("privilege") works and incorrectly think that they can tell or send their attorneys anything without the risk of having to disclose that information in a lawsuit or arbitration (collectively referenced here as a "lawsuit"). Unfortunately, that misunderstanding could have serious consequences and jeopardize a company's claims, defenses and/or arguments in a lawsuit. Accordingly, companies must know the following three basic principles about the privilege to ensure that they will not end up having to turn over communications to their attorney that they thought were privileged to their adversary in a lawsuit.

What and Who Is Protected?

The privilege protects communications made to obtain legal advice. The privilege protects confidential communications (both verbal and written) and allows attorneys and their clients to discuss actual and potential legal matters openly and honestly without worrying that the information will be disclosed to their adversary in a lawsuit. This encourages full and frank discussion between attorneys and their clients. Significantly, however, merely saying or forwarding something to an attorney does not necessarily mean that the privilege protects that communication from disclosure. Rather, a company asserting the privilege (under federal law and most state laws) must establish the following five elements:

- the company is (or is seeking to become) the attorney's client;
- the company speaks to an attorney or the attorney's representatives, such as a paralegal;
- the company expects the communication to be confidential;
- the company seeks legal advice and the communication relates to that purpose; and
- the company claims the privilege applies and does not waive it (see *United States v. Mass, Inst. Tec.* 1997).

The privilege does not protect criminal or fraudulent communications with an attorney or the attorney's representative.

While a company benefits from the privilege, it does not automatically extend to the company's employees, officers, board of directors or shareholders. The privilege covers certain communications between a company's employees and its attorney that involve matters within the scope of the employees' corporate duties and are made to obtain legal advice for the company (see *Upjohn Co. v. United States*, 1981).

In addition, the privilege protects communications in the lawsuit for which the company has retained the attorney to represent its interests and does not extend to any other issues or matters.

Common Misconceptions

Many companies (and even some attorneys) incorrectly believe that labeling emails, letters and other documents as "Attorney-Client Communication" or "Subject to the Attorney Work Product" protects them from disclosure. Yet the labels themselves have no legal meaning; they simply

highlight the fact that the documents relate to legal advice and should be kept confidential internally. Such documents must still satisfy all of the elements necessary to establish the privilege.

Similarly, many companies believe that simply copying an attorney on emails, letters or other documents automatically protects them from disclosure. But the privilege applies only to documents a company provides to its attorney to obtain legal advice. This distinction can be especially challenging for companies with in-house counsel who have dual legal and business roles. As a federal court stated, “modern corporate counsel have become involved in all facets of the enterprises for which they work … in-house legal counsel participate in and render decisions about business, technical, scientific, public relations, and advertising issues, as well as purely legal issues.”

Courts know that companies may try to shield internal communications regarding claims or disputes from discovery by merely copying counsel on them. As such, courts usually apply the privilege to attorneys who are clearly acting in a legal, not a business, capacity. While companies can, and should, seek advice from their attorneys, they must understand that business-related communications to counsel are not privileged unless their primary purpose is obtaining legal advice.

Moreover, companies cannot protect certain facts under the privilege simply by communicating them to their attorney. For example, information that can be gathered from a source other than the privileged communication is not protected (see *Upjohn, 449 U.S*. at 395-96). A company’s normal business records do not somehow become privileged if it discusses them with its attorney. Companies must remember that merely communicating something to an attorney does not prevent the underlying facts from disclosure if they can be properly discovered from another source. In other words, the privilege does not transform discoverable information into privileged information.

Waiving the Privilege

Companies most commonly waive the privilege by disclosing the protected conversation, email, letter or other document (or its contents) to a third party outside the attorney-client relationship, such as an insurance agent, financial adviser, accountant or consultant not involved in the claim or dispute. Companies inadvertently waive the protection afforded by the privilege most often by being careless with emails. Companies must always check and double-check the email addresses in the “To” and “Cc” lines before sending confidential communications to counsel or forwarding emails from an adversary in a lawsuit. This waiver occurs even if the company inadvertently includes or forwards privileged communications to third parties.

Likewise, companies should think very carefully before forwarding emails from counsel to others since that could terminate the privilege. While companies can sometimes preserve the privilege after an inadvertent disclosure, it is, of course, much easier to prevent disclosure in the first place, as a company can never really “un-ring the bell.”

Courts, however, recognize that companies can share protected communications with certain third parties without waiving the privilege and “tend to mark out a small circle of ‘others’ with whom information may be shared without losing the privilege (e.g., secretaries, interpreters, experts retained for the lawsuit and counsel for a cooperating co-defendant).” Even so, companies should be extremely cautious when discussing conversations or forwarding information sent to their attorney as well as the attorney’s resulting advice on legal matters.

In the end, companies must know the privilege’s basic parameters so that they can properly and effectively communicate with their counsel at all times regardless of whether they are currently, or are expecting to be, involved in a lawsuit. A company should include that knowledge in its best practices and hopefully avoid having to produce communications mistakenly thought to be privileged to their adversary in a lawsuit with potentially devastating consequences.

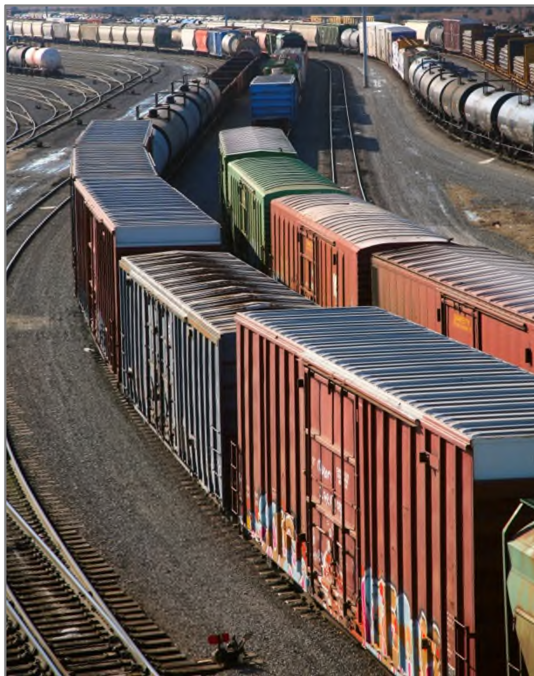
For more information, please contact John Bergin.

Transportation

What to Consider if You Have a Rail Line on Your Property

By David E. Benz

Is there a freight rail line on your property? If so, do you know what the implications are? If you are a business owner, then the rail line on your property may be used for your business operations – such as transportation of various commodities, whether raw materials or manufactured goods. Alternatively, you may not be a current user of rail transportation, yet you still may have a rail line on your property. In either case, it is advisable to consider the many consequences arising from a rail line's presence because they could prove materially relevant to the operations of your business. This article provides a brief overview of some legal and commercial implications of having a freight rail line on your property.



Track Ownership

Ownership of the track is one consideration. Sometimes the owner of the actual track – the "steel on the ground" – is not the same as the owner of the underlying real estate; it is possible, for example, that an easement is held by the owner of the track across your property. Conversely, if you do own the track, then you likely also have the track's maintenance obligation unless it has been contractually assumed by another party. Federal law might apply to such track maintenance because safety requirements of the Federal Railroad Administration (FRA) apply not just to tracks owned by railroads, but also to some tracks owned by non-railroads. Therefore, if you own a rail line, it is possible that you need to comply with FRA track safety standards.

Track Usage

Usage of the track is also important. If a railroad operates on the track, then, depending on the character of both the railroad and the track, a common carrier obligation may attach to the railroad's operations, meaning that the railroad must provide rail service on "reasonable request" pursuant to 49 U.S.C. § 11101. Most railroads are common carriers subject to this obligation; these include not only well-known names like Norfolk Southern and BNSF, but also hundreds of smaller regional and "short-line" railroads. However, occasionally what appears to be a typical railroad is actually a private switching carrier that is neither subject to common carrier law nor authorized for common carrier operations. Such carriers generally operate in and near industrial or port facilities under contract with the facility owner.

Rail lines owned by common carriers are either common carrier lines under 49 U.S.C. § 10901 or "excepted track" under 49 U.S.C. § 10906. A common carrier obligation only attaches to § 10901 track. Distinguishing between common carrier track and excepted track requires evaluation of details related to the track and how it is used; in close calls, the determination is made by the federal Surface Transportation Board (STB).

Agreements

Many agreements could apply and impart rights and liabilities regarding the rail line on your property. For example, if a common carrier railroad is operating on track that you own, you may have an Industry Track Agreement (ITA), Side Track Agreement or other similar agreement pursuant to which the operations occur. If you do not have an ITA but such rail operations are nonetheless occurring on your track, then there are strategic considerations involved in whether to create an ITA and otherwise formalize this

aspect of your relationship with the railroad. Many railroads have significant market power, and there is no common carrier obligation requiring railroads to operate on privately-owned track. In other words, the railroad might require onerous liability terms in an ITA. These considerations must be balanced, of course, with issues of insurance and risk management. Absent an agreement prohibiting such use, the railroad might use a privately-owned track for the storage or switching of third parties' rail cars – meaning that rail cars containing unknown commodities could occasionally be on your track. In an ITA, you could attempt to limit the presence of third-party rail cars, or set the terms for such use as part of your negotiating strategy.

If the track on your property is owned by a railroad, you may have an Easement Agreement, Track Lease or some other agreement with the railroad. An Easement Agreement would likely represent permission granted to the railroad to construct the track and then operate via that track on your property; your business may not even be a user of the rail transportation provided. A Track Lease suggests a more involved relationship with the local railroad. A Track Lease is customarily used when a railroad, as the lessor, leases certain of its track to a rail customer, as the lessee, so that the customer can store rail cars and/or operate its private switching locomotives on the track.

Whether you use it or not, it's important to evaluate the many legal and practical implications of the existence of a freight rail line on your business property.

Preemption

When rail lines are involved, preemption of state and local law is possible depending on the ownership and usage of the relevant rail line. Preemption is potentially game-changing for various disputes. For example, state and local governments are not permitted to require pre-construction or pre-operation permits for certain kinds of track or rail-related facilities; this means that local opposition cannot prevent construction or operation of covered track and facilities. As a second example, preemption also generally bars state law nuisance complaints about noise and vibration from certain rail operations. The determination of state law property rights is generally not preempted, however, meaning that issues like interpreting an easement agreement and establishing exact property boundaries remain under state and local law.

Rail Operations by Your Business

If your business conducts rail operations on the rail line using a trackmobile or locomotive, various other considerations come into play. Numerous FRA regulations could apply to such operations in areas such as employee training, drug testing and locomotive safety standards. However, these rail operations would be exempt from FRA regulations if the so-called "plant railroad" exception applies. A careful assessment of the circumstances surrounding the rail operations is necessary to determine whether they represent a "plant railroad" free from FRA rail operation standards.

If your business is providing rail operations of any kind, this also raises the question of STB licensing and whether unauthorized common carrier operations are being provided. Unless the goal is to be a common carrier railroad, your business needs to be very careful in providing any rail services for neighboring businesses or other third parties. Although it is possible to provide private rail switching services to a third party without implicating the STB's regulation of common carriers, extreme caution should be exercised. If STB jurisdiction is implicated, then such rail services could be considered unauthorized common carrier operations in violation of the STB's licensing statutes.

Rail operations also may implicate the railroad retirement system. If your business does own or operate a common carrier railroad, then your rail employees are entitled to special railroad retirement and unemployment benefits administered by the Railroad Retirement Board (RRB) under federal law. These benefits exceed those available to non-railroad employees, and covered employers must pay special payroll taxes for their railroad employees. Reporting and

recordkeeping obligations also apply to such employers pursuant to RRB regulations.

Track Crossings

Crossings of rail lines are frequently an issue. Crossings include not just vehicular and pedestrian crossings on the surface but also wires and pipelines, whether overhead or underground. Obviously, safety issues are implicated in any crossing, and your business should have a Crossing Agreement apply regardless of whether you own the rail line being crossed or the roadway, wire or pipe doing the crossing. If safety would be comprised or rail operations would be unreasonably hindered by a crossing, it may be lawful for a railroad to prohibit a crossing of its rail line. At the same time, many entities wishing to build public roads, wires or pipelines may have the right of eminent domain under state law. Again, evaluation of the relevant facts would enable your business to best make use of applicable law.

Conclusion

This article is intended to provide a brief introduction to some of the many issues that can arise in dealing with and benefitting from a rail line on your business property. We hope this article has been helpful as you consider the various legal and practical implications arising from the existence of such a rail line.

For more information, please contact David Benz.

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