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Dealmakers Q&A: Loeb & Loeb's Ross Emmerman

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Ross D. Emmerman, a partner at Loeb & Loeb LLP, provides comprehensive legal counsel to help businesses grow and prosper at every stage of their life cycle, from inception to disposition. Throughout his career, he has played a key role in helping private and public companies negotiate mergers and acquisitions, raise capital and form joint ventures. He also regularly represents high-net worth individuals and family offices with a wide variety of matters, including investing, corporate structuring and entity formation, contract negotiations and executive employment matters.

Ross Emmerman

Emmerman has counseled clients in many industry sectors, including technology, transportation, business services, heavy construction, manufacturing, distribution, health care, travel and leisure, insurance, gaming, and parking garage acquisitions and management. While his practice concentrates on transactional matters, he is also well-versed in a variety of legal areas, including federal income taxation, private wealth services, and labor and employment matters.

As a participant in Law360's Q&A series with dealmaking movers and shakers, Ross Emmerman shared his perspective on five questions:

Q: What's the most challenging deal you've worked on and why?

A: I once completed a middle-market sell-side transaction after working on it for five years. That is a very long time in the life of a M&A practitioner. A combination of dynamics made the transaction extremely challenging. The elements included:

- the client's principals spoke very little English;
- the client's financial statements were unaudited and noncompliant with any generally recognized accounting standards;
- one of the client's customers accounted for more than 80 percent of the client's revenues and the underlying customer contract was one-sided in the customer’s favor;
- the client had not previously worked with counsel (the use of outside counsel is not common in the client's country of origin);

- the client's business records were disorganized (which made due diligence extremely difficult);
- the client was a party to several government contracts and, with no regular inside or outside counsel, did not fully understand the consequences associated with these contracts;
- the client's principal asset (which was the primary reason for the buyer's interest) consisted of trade secrets; and
- the client and his affiliated entities (one of which was the seller) were parties to several related-party transactions (many of which were undocumented).

As a result, this business was largely unprepared for sale. Nonetheless, the client's business is very successful and made for a very attractive acquisition candidate for a variety of potential purchasers.

To make matters even more difficult, prior to engaging us, the client signed a letter of intent with a public company buyer that included an earnout for more than 60 percent of the total transaction price. Over the five-year period, I worked with the client to terminate the initial letter of intent, make a voluntary filing with a federal government agency (that ultimately included an appeal of the agency's initial determination), terminate and then renegotiate the commercial contract with the client's largest customer, sign a letter of intent with a different buyer (a private equity firm) and, after extensive negotiations, complete a transaction for a much higher cash purchase price than the initial transaction's expected value (excluding the substantial rollover equity that was a part of the ultimate deal).

After five years (and much hand-wringing), the business was sold for a terrific price and on satisfactory terms, the clients valued my advice and counsel, and I was able to develop a long-term friendship with the client's principals.

Q: What aspects of regulation affecting your practice are in need of reform, and why?

A: Federal regulations that apply to middle-market companies need to be significantly overhauled. Regulations such as the International Traffic in Arms Regulations, Office of Foreign Assets Control regulations and portions of the Federal Acquisition Regulation (even though some of them have small-business provisions) are complicated, cumbersome and costly for these businesses to comply with. To make matters worse, the consequences of noncompliance can be severe.

Many middle-market businesses do not have the financial or human resources that are necessary for these purposes. As a result, even though these laws are intended to assist smaller businesses, they end up resulting in a significant barrier to entry (or substantial operational cost) for them. This is troublesome to dealmakers because buyers don't want to take on unknown risks (especially if these risks can adversely affect the target's existing business operations) and sellers don't want to bear (or want to limit) the risk of their prior noncompliance. So, as an unintended result, these regulations often work to the disadvantage of middle-market businesses and sometimes operate to stymie innovation.

Q: What upcoming trends or under-the-radar areas of deal activity do you anticipate, and why?

A: Recently, we have witnessed the increased use of representations and warranties insurance in M&A transactions. Although this type of insurance has been available for more than 15 years, its use as a helpful M&A tool has only emerged recently (perhaps because of increased cost-effectiveness and broader coverage terms).

Representations and warranties insurance are used in M&A transactions to bridge gaps between purchasers

and sellers relating to the scope or magnitude of the seller's indemnification obligations. From a buyer's perspective, these insurance policies provide additional protection in situations where the seller may be a credit risk or where there are multiple sellers and collection from them may be difficult for a variety of reasons. In addition, by obtaining representations and warranties insurance, a buyer can be more generous in its negotiations with respect to various indemnification aspects, such as survival periods and escrow/holdback amounts. This extra flexibility can be helpful in an auction context to distinguish a buyer's bid.

From a seller's perspective, these insurance policies serve to reduce, or even eliminate, the amount of transaction proceeds that are subject to holdback or escrow. These insurance policies also serve sellers by minimizing concerns relating to joint and several seller liability. As the insurance markets continue to gain experience with the issuance of representations and warranties insurance and the underwriting process continues to become more streamlined, I anticipate that these policies will be used on an ever more frequent basis.

Q: What advice would you give an aspiring dealmaker?

A: I would give an aspiring dealmaker three pieces of advice:

First, your ability to make a deal is only as good as your ability to understand your counterparty's position. Too often, dealmakers fall in love with their client's position without listening carefully to understand the other side's thinking. Without carefully considering your counterparty's sensitivities, your ability to resolve issues is limited.

Second, make sure to "keep your eyes on the prize" and advise your client to do so as well. In a transactional setting, it is common for unforeseen circumstances to arise and lead dealmakers down blind alleys. It is important to recognize these distractions early on and not let them attract more attention than they deserve. In my experience, clients are best served and greatly appreciate it when counsel is able to keep issues in perspective, particularly when emotions may be running high.

Third, lead by example. Effective transaction management requires effective leadership. Your team will function at a high level if you don't ask a team member to take on a task that you are unwilling to do yourself. Dealmaking is no place for big egos and good communication starts with the team leader. If your team functions well, your client will be well-served and understand the value your team adds — and that is good for all concerned.

Q: Outside your firm, name a dealmaker who has impressed you and, and tell us why.

A: Geoff Ligibel is a director of corporate finance in Houlihan Lokey's health care investment banking practice. On a daily basis, Geoff displays patience, good listening skills and unwavering client commitment. He articulates his positions clearly, works very hard to understand differing points of view and displays terrific analytical skills. On top of all of this, Geoff's honesty and integrity are beyond reproach. Clients appreciate that he is a tireless worker and business traveler. As a result of these attributes, Geoff earns the trust and loyalty of the clients he serves. Houlihan Lokey is lucky to have Geoff on its deal team.

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