

KIRKLAND M&A UPDATE

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Making Sure Your Contract Rights Don't Spin Away

Parties to contracts may want to consider expanding the standard "successors" clause to cover spin-offs and other separation transactions.

Most commercial and corporate contracts provide that the agreement is binding on a party's "successor and assigns". This boilerplate clause, coupled with the legal consequences of a stock purchase or merger, covers most corporate transaction scenarios and ensures that the agreement remains with, and binding on, the business that signed the contract.

But the current popularity of corporate "separation" transactions highlights that this simple clause may be insufficient to properly address the consequences of spin-offs and other separation transactions. When a company separates itself into two or more pieces via a spin-off, split-off, carve-out or similar deal structure, it is not clear whether contractual rights and obligation replicate themselves at the separated entity.

To take a simple example, shareholders often negotiate a set of governance rights in a stockholders' agreement to which the company is a party. What happens to those rights if the company spins-off a portion of the business into a separate independent company? While a party may expect contractual rights to replicate themselves at the new spin-off company, often there is nothing explicit in the agreement that dictates the outcome — the boilerplate "successors and assigns" provision typically is not implicated. In this scenario a party can lose important rights (e.g., vetoes, preemptive rights, board designation rights) as to a significant portion of the business in which it invested if the company does not agree to port the governance rights to the newly independent spin-off company. This very result was highlighted by a Delaware court in a 2015 [decision](#) holding that a litigation settlement agreement by News Corporation prohibiting the enactment of a poison pill did not bind its publishing business, which was spun-off as an independent public company.

Parties to contracts may want to consider expanding the standard "successors" clause to cover these scenarios. Here is a sample clause:

Spin-Offs or Split-Offs. In the event that a Party effects the separation of a [material/ substantial] portion of its business into one or more entities (each, a "NewCo"), whether existing or newly formed, including without limitation by way of spin-off, split-off, carve-out, demerger, recapitalization, reorganization or similar transaction, prior to such separation the Party shall cause any such NewCo to enter into an agreement with the other Party that contains rights and obligations of the Parties that are substantially identical to those set forth in this Agreement.

While this language may not be necessary or appropriate for all agreements, parties should consider its inclusion where they are at risk of losing significant benefits of a contract in the event of a separation transaction.

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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