Matthew W. Daus, Esq.

President, International Association of Transportation Regulators
http://iatr.global/
Transportation Technology Chair, City University of New York,
Transportation Research Center at The City College of New York
http://www.utrc2.org/
Partner and Chairman, Windels Marx Transportation Practice Group
http://windelsmarx.com

Contact: mdaus@windelsmarx.com
156 West 56th Street | New York, NY 10019
T. 212.237.1106 | F. 212.262.1215

<u>The Black Car & Limo M&A Market is Hot!</u> -
<u>So Let's Learn How to be Legally Prepared to Buy or Sell</u>[1]

For as long as economic activity has existed, market players have used mergers and acquisitions (M&A) to consolidate and grow power and wealth. The earliest recorded M&A transaction in western civilization was in 1602 when European powers consulted counsel to form the Dutch East India Company through a carefully orchestrated consolidation and amalgamation of a handful of competing Dutch trading companies. The end result was the first multinational corporation with interests circumventing the globe.

M&A transactions took root in the United States from 1895 – 1904 during a period of time known as "The Great Merger Movement" when smaller companies united their market share to form dominant market forces.[2] This era gave rise to powerful institutions such as the Standard Oil Company, DuPont, U.S. Steel, General Electric, and other companies that exist to this day. Since then, there has been an ebb and flow of M&A activity, like a pendulum swinging from consolidation to diversification, depending on the market forces of a particular industry.

As I noted in my prior M&A primer, published in the May, 2021 edition of the Black Car News, the post-pandemic environment has been conducive for M&A activity to pick-up in the ground transportation industry when considering the effects of the pandemic causing many companies to go into distress. You may link to my prior column, click here. Since that publication, the current market forces of a driver shortage (discussed further below) and higher operating costs (*i.e.*, fuel price increases, inflation, and higher interest rates) are counter-intuitively providing tailwinds for M&A transactions that are specifically geared toward consolidation.[3]

The modern form of M&A transaction runs the gambit of highly technical and exotic to routine and vanilla. In the luxury limousine industry, we are seeing a similar variance among the complexity of the transactions (*i.e.*, larger portfolio purchases of multiple companies operating in multiple states versus a single luxury base acquiring another struggling base). Each transaction presents a variety of legal issues to navigate until closing. In fact, some of these legal concerns will present themselves as post-closing issues.

Whether your company is the buyer or the seller, careful attention should be given to the legal issues and business points discussed above, so that you will know where to start when the time comes to either buy or sell. Because we are seeing an increase in the pace of M&A transactions in the luxury limousine industry, now is a good time to look inward to your own

---

[1] **<u>Disclaimer</u>**: The foregoing is provided solely as general information, is not intended as legal advice, and may not be applicable within your jurisdiction or to your specific situation. You are advised to consult with your attorneys for guidance before relying upon any of the information presented herein.
[2] https://www.cambridge.org/core/books/great-merger-movement-in-american-business-18951904/288F4A57AF9B4CFCBACAC0CBB9C1E384
[3] This article will appear in Chauffeur Driven Magazine's September 2022 edition, which was a follow-up article to my M&A primer published in the February 2021 edition of Chauffeur Driven Magazine. [*See*, https://www.chauffeurdriven.com/news-features/in-this-issue/2884-legal-ease-buy-sell-retire-weighing-your-post-pandemic-options.html]

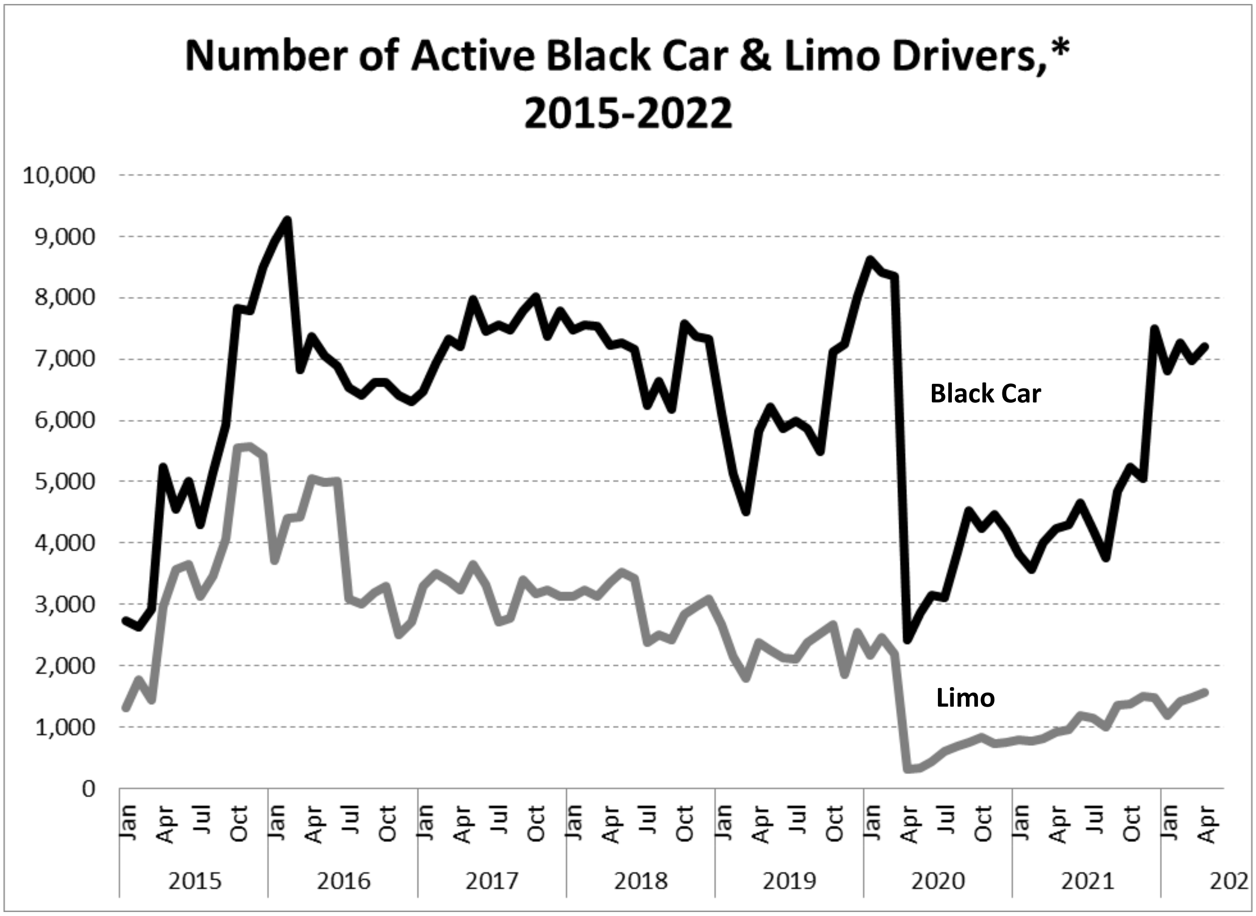
company to note the various items for corporate compliance and clean-up, or to look outward and scope out potential targets to acquire.

This article sets forth the current status of the M&A market with respect to black cars and limousines, and some of the trends that are fueling transactions. Then I delve into some of the key things that your company needs to do to get ready to buy or sell – including addressing licensing issues and due diligence liabilities.

The Current M&A Market

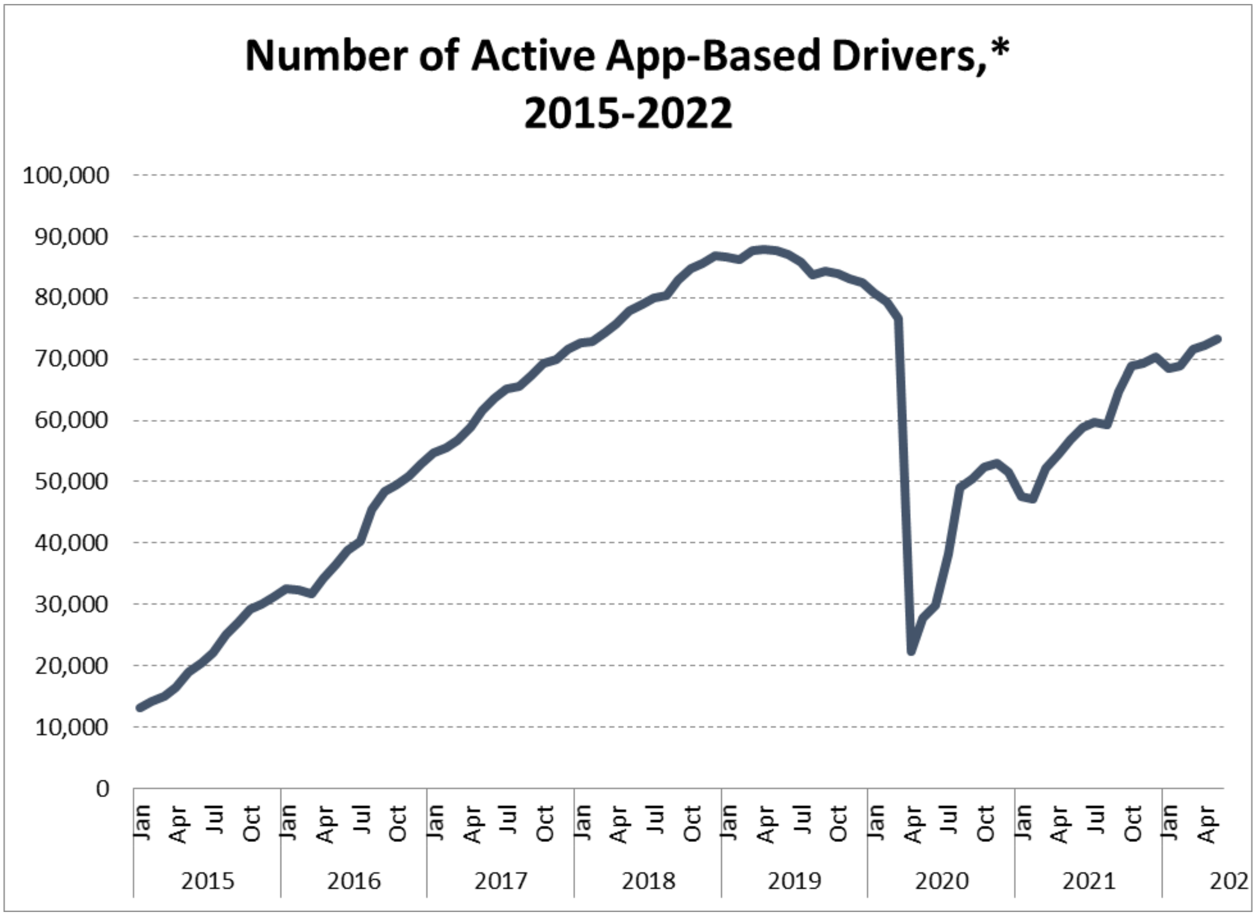
Driver shortages have turned the tables on the traditional models that favored the demand side over the supply. Limousine operators that cannot fulfill orders because of a lack of drivers may look to monetize their otherwise losing position by selling their book of business and taking an extended payout based on earnings generated by the transferred accounts or staying on as a manager or employee of the buyer. Comparing active black car drivers to active limousine drivers, shows that the luxury limousine industry is experiencing a much flatter recovery.

In April 2022, there were 7,209 active licensed black car drivers in New York City, which is 24% higher than the 5,824 black car drivers working in April 2019 prior to the pandemic. These figures indicate a general recovery for black car bases in New York City and a genuine bounce back to pre-pandemic levels for black car drivers. The same, however, cannot be said for luxury limousine bases and drivers that are likely missing out on the work in the recovering market. In April 2022, there were 1,572 active luxury limousine drivers in New York City, which is 34% lower than 2,374 active luxury limousine drivers in April 2019. See figure below:



*The term "active" refers to unique drivers who completed *at least* one trip in a month

The overall number of active drivers using ride-hailing applications in New York City as of May 2022 was 73,287. Although this number is 16% lower compared to 87,719 drivers in May 2019, the trajectory of the recovery is not nearly as flat as that of luxury limousine drivers as shown above. See figure below:



*The term “active” refers to unique drivers who completed at least one trip in a month

These stats, as set forth in these 2 charts above, indicate that – in the New York City market – the driver shortage is having a greater impact on the luxury limousine industry, which will be a driving force in the luxury limousine M&A market. As more luxury limousine operators sit with parked limousines waiting on drivers to operate them and start farming out overflow work in the meantime, larger operators with the economies of scale to absorb the increased operational costs and/or an expansive network of drivers can look to leverage their resources for strategic acquisitions. My practice is already seeing an increased pace of M&A transactions as we note the above trends in the industry.

As indicated in the graphs above, in the pre-pandemic era we saw a deepening driver pool to support increasing demand; however, the pandemic brought about an extreme and sudden retraction. This retraction caused significant losses for the companies that could not withstand the deepest troughs, which left gaps in the luxury limousine market that are becoming more apparent in the current recovery period. As service demand continues to increase, despite driver shortages, we will invariably witness some consolidation in the marketplace, as major luxury limousine players set their sights on acquisition targets.

Licensing Requirements and Pitfalls

The first of those issues to navigate in a regulated industry such as the executive sedan and limousine industry, is licensing and regulatory compliance. Ensuring knowledge of the regulations, and confirming compliance with same, is essential to avoiding legal pitfalls that can derail a deal. The buyer will need to understand any authorizations, licenses, and permits that are required for the target company to operate in the jurisdiction, the status of those licenses, and the process for regulatory approval to transfer a license to a new owner.

The first thing to determine is the types of authorizations and permits that the target company holds. In New York City, for example, a limousine or black car company will likely have one or more dispatching base licenses that allows it to dispatch vehicles, as well as separate licenses for each vehicle that it owns. In other cities, the same company may only need to obtain permits for the vehicles, but different types of vehicles may likely require different types of permits. For example, in Broward and Miami-Dade Counties in Florida, luxury sedans operate under a different type of license than stretch limousines and luxury vans. In addition, for larger vehicles, like motorcoaches and any "stretch" limousines, in some jurisdictions, the vehicles may require registration with the United States Department of Transportation ("USDOT"), and may possibly trigger interstate Operating Authority (*i.e.*, a Motor Carrier, or MC, number).

After the determining the types of licenses and authorities needed to operate the business, the parties will then need to determine whether the licenses may be transferred to a new owner. For example, if the jurisdiction does not cap the number of licenses, the local regulations may not allow transfers. In those jurisdictions, the buyer/new owner will need to separately apply for new permits. For example, in California, the Public Utilities Commission only allows transfers of operating certificates; vehicle permits may not be transferred. In addition, the original owner of the certificate must remain as an active company with the California Secretary of State to initiate and complete the transfer process. If the company is dissolved, then its certificate is revoked and cannot be transferred, making post-closing cooperation a continuing obligation of the seller.

Using New York City as an example, there is currently a cap on all new for-hire vehicle ("FHV") licenses, except for wheelchair accessible vehicles ("WAVs"). The NYC Administrative Code – the city's ordinance – prohibits the transfer of FHV licenses, absent the creative workarounds that can be provided by competent counsel such as stock purchase or membership interest transfer in the entity owning the underlying FHV licenses. These transactions present their own unique issues; therefore, it is important to understand the requirements and processes to transfer licenses in each jurisdiction you are seeking to consolidate or operate. Some things to consider:

- Does the regulator require a bill of sale or legal document showing the sale of the asset? Do the M&A documents contemplate any such requirements?
- Can the sale be completed before the transfer? In Miami-Dade County, the application to transfer ownership must be filed within 30 days of the ownership change. Under the Broward County Code, approval of a certificate transfer must be "a condition precedent to any actual certificate transfer," and, any attempted assignment, sale, or transfer without prior approval will result in the certificate being declared void.

- Will vehicles have to come out of service while the transfer is pending? Local regulations may prohibit a buyer from operating the license during the pendency of the application approval process. Be sure to ask the regulator how long a transfer typically takes, and consider transferring permits in waves to minimize business interruption.
- Are there are other timing concerns? In California, transfers cannot be done if the transferor has less than 180 days left on its certificate.
- Are the licenses and the operator in good standing? Make sure that the license is in active status and free and clear of any open violations or tickets. In New York City, for example, an ownership transfer will not be approved for any license if the buyer or seller has any outstanding fees or violations for any license in its name.
- When is the license up for renewal and what are the regulatory requirements and costs for the renewal?

Local regulations will dictate the requirements for transferring licenses, and each regulator will have its own unique set of rules and processes. It is important to understand those rules before even starting the transfer process so that the parties have the requisite foundation to proceed with an orderly M&A transaction.

Evaluating the Target and Due Diligence Matters

The next issue to consider when contemplating an M&A transaction is the seller's compliance with applicable laws and regulations. Non-compliance with statutes and regulations can taint a deal before closing has occurred and can result in unwanted toxic assets. Sellers will want to ensure that their business is free and clear of liens and encumbrances in order to fetch top dollar, while the buyer will want seller to cure any deficiencies prior to closing or re-trade the purchase price in the event of serious lapses in compliance or gross violations of law.

For example, New York Business Corporation Law §630, imposes personal liability on corporate shareholders for wages to due to laborers, servants or employees, and a corporation's non-compliance with applicable labor laws constitutes a non-waivable liability that can attach to the assets of the seller and may result in purchaser liability in some instances. Additionally, New York City imposes a "Business Corporation Tax," and failing to file necessary returns on business activity can result in the docketing of a lien against the corporation's assets without notice other than regular mailing.[4][5]

Because these types of "phantom liabilities" are not necessarily of record, a lien may be lurking until buyer makes a proper request for disclosure from the seller. Therefore, an "airtight" due diligence list is essential to avoiding the derailment of your transaction, and examples of diligence items that a buyer can request of seller can be found here.[6]

[4] https://www1.nyc.gov/site/finance/taxes/business-corporation-tax.page

[5] https://www1.nyc.gov/assets/finance/downloads/pdf/21pdf/business_tax_forms/nyc-2_2021.pdf

[6]https://www.chauffeurdriven.com/news-features/in-this-issue/2878-should-i-buy-or-sell-either-way-get-your-shop-in-order.html

With a strong diligence request list and full disclosure from the seller, the transaction should proceed at a smoother, quicker pace and with fewer last minute corporate clean-up and renegotiation so that the parties can take advantage of the market forces spurring the M&A transaction. The current trend of the chauffeured driven market, as mentioned above, has tailwinds, and appears to be swinging toward consolidation despite rising operational costs and driver shortages.