FROM THE CHAIR
By Richard E. Climan

Our Committee will meet at the Sheraton Seattle Hotel on Saturday afternoon, April 3, in conjunction with the Spring Meeting of the ABA’s Section of Business Law. (For those of you keeping score, this will be our third West Coast meeting in the space of a year.) Our Committee meeting will be preceded by separate subcommittee, task force and working group meetings on Thursday afternoon, throughout the day Friday and on Saturday morning, including the first meeting of our newest subcommittee – the Subcommittee on M&A Market Trends – on Friday morning.

At our full Committee meeting, Jon Hirschoff and Scott Whittaker (the co-chairs of our Subcommittee on Recent Judicial Developments) will lead a discussion of the recent decision of the U.S. District Court for the Southern District of New York in Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc. (which is summarized elsewhere in this issue of Deal Points), and Joel Greenberg will lead a discussion of two recent decisions addressing the application of the SEC’s “best price” rule to acquisitions effected by means of tender offers.

Immediately following our full Committee meeting on April 3, Neal Brockmeyer, Lorna Telfer and Tom Van Dyke will present a Committee Forum program entitled “Controlled Auctions: Strategy and Managing the Process.” Our Committee
is sponsoring or co-sponsoring three other educational programs in Seattle: "So What's So Hot About Going Private? Nuts and Bolts of Taking a Public Company Private," chaired by Keith Flaum; "So What Does That Mean? Interpreting Preferred Stock Terms," chaired by Mark Morton; and "European Merger Control Reform: Everything the M&A Lawyer Needs to Know About the Revolution Before It Happens Next Month." (The first two of these programs originated as Committee Forum presentations at past meetings of our Committee.) You can find descriptions of these programs in the report by Neal Brockmeyer, co-chair of the Programs Subcommittee, elsewhere in this issue of Deal Points.

Our Committee cocktail reception and dinner will take place on Saturday evening, April 3, at Lowell-Hunt. Please submit your registration form if you have not already done so, as space is limited. Many thanks to Jessica Pearlman for organizing what promises to be a memorable event.

We had a successful and well-attended stand-alone meeting in Toronto in October 2003. Special thanks to the Toronto-based members of our Committee for their efforts in organizing the wonderful Committee receptions and dinners we enjoyed there.

In November 2003, a number of Committee members spoke at the Eighth Annual National Institute on Negotiating Business Acquisitions in Boston. Participating Committee members included Wilson Chu, Nat Doliner, Byron Egan, Diane Frankle, Joel Greenberg, Robert Harper, Jon Hirschoff, David Katz, Donald McKenzie, Judith Miller, Mark Morton, Larry Tafe, Leigh Walton and Alison Youngman. The National Institute continues to serve as an excellent showcase for the work of our Committee. More recently, in late February, several Committee members spoke in Southern California at UCLA Law School's First Annual Institute on Mergers and Acquisitions, which was organized by longtime Committee member Sam Thompson.

As reported elsewhere in this issue of Deal Points, two of the Committee's task forces held their own stand-alone meetings over the Winter. In January, the Task Force on the Model Stock Purchase Agreement and related working groups met in New York City. In February, the Task Force on Acquisitions of Public Companies met in Wilmington and sponsored a lively discussion with judges from the Delaware Supreme Court and the Delaware Court of Chancery. Rick Alexander and Mark Morton will report on this extraordinary event at the full Committee meeting in Seattle.

Our Committee continues to experience significant growth, both in its size and in the diversity of its membership. We now have more than 940 members, making our Committee one of the ten largest committees of the ABA's Section of Business Law. More importantly, a relatively high proportion of our members are active members who participate regularly in Committee-related activities.

The growth of our Committee has been fueled in part by a significant expansion in the scope of our activities. We now have more than ten active subcommittees, task forces and working groups. Indeed, over the past 18 months alone, we have added two new subcommittees (the Subcommittee on Recent Judicial Developments and the Subcommittee on M&A Market Trends) and one new task force (the "Dealmakers' Dictionary" Task Force).

In light of our continued expansion and the increasingly multifaceted nature of the Committee's functions, I have decided to appoint an additional Vice Chair, to supplement the work that the existing Vice Chairs - Byron Egan and Joel Greenberg - are doing for the Committee. In this regard, I am pleased to report that Leigh Walton has agreed to serve as a Vice Chair of the Committee. As many of you know, Leigh is an accomplished transactional lawyer who has been a mainstay of the Committee for well over a decade. Leigh has been a speaker at the annual National Institute on
Negotiating Business Acquisitions and a host of other educational programs sponsored by the Committee, and has contributed to the Committee in many other ways. I look forward to working closely with Leigh during the remainder of my term as Committee Chair.

I also have a number of additional organizational changes to announce:

- Wilson Chu and Larry Glasgow will be serving as co-chairs of the newly formed Subcommittee on M&A Market Trends, and Keith Flaum and Freek Jonkhart will serve as vice chairs of that subcommittee. This subcommittee’s inaugural report appears elsewhere in this issue of Deal Points.

- The Committee Forum Subcommittee, previously chaired by Keith Flaum, has been merged with and folded into the Programs Subcommittee (co-chaired by Neal Brockmeyer and Betsy Delling). I am grateful to Keith for his excellent efforts in organizing Committee Forum programs over the past several years.

Please calendar the two other full Committee meetings to be held in 2004. On August 8, 2004, we will meet in Atlanta in conjunction with the ABA’s Annual Meeting; and on October 30, 2004 we will hold a stand-alone meeting at the Ritz Carlton Hotel in New Orleans.

I welcome your continuing input and feedback on our Committee and its structure and activities. Please call or e-mail me with your observations and suggestions.

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FEATURE ARTICLE

THE POST-AGREEMENT MARKET CHECK REVISITED

By Michael K. Reilly

Introduction

In considering a transaction involving a change of control, directors of Delaware corporations are charged with obtaining the best transaction reasonably available for the corporation and its stockholders. During the late 1980s, Delaware courts frequently were called upon to consider whether target directors who had forsaken an open auction process in favor of negotiating with a single bidder had satisfied their heightened duties in a sale of control when they agreed to a transaction with a post-agreement market check. In fact, as recently as four years ago, the Court of Chancery approved a transaction involving a post-

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1 Michael K. Reilly is an associate in the Wilmington, Delaware law firm of Potter Anderson & Corroon LLP. The views expressed are solely those of the author and do not necessarily represent the views of the firm or its clients.

2 Revlon Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (finding that once directors have decided to sell control of the company “[i]n the directors’ role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company”).

3 There is a wide range of possible post-agreement market checks. Although post-agreement market checks may contain varying features, the post-agreement market checks approved by the Court of Chancery in the 1980s generally involved transactions in which the target corporation agreed with a single bidder to a transaction having limited deal protections, set a “floor” for a transaction and then announced in a press release that for an extended period of time post-signing the target may talk with any competing bidders that may emerge. See, e.g., Roberts v. General Instr. Corp., Consol. C.A. No. 11639, (Del. Ch. Aug. 13, 1990); In re Fort Howard Corp. S’holders Litig., Consol. C.A. No. 99991 (Del. Ch. Aug. 8, 1988).
agreement market check that closely resembled the post-agreement market checks at issue in its earlier decisions.⁴

More recently, however, the Court of Chancery has rendered two decisions, In re Pennaco Energy Inc.⁵ and In re MONY Group Inc.,⁶ approving post-agreement market checks that differ in certain important respects from the post-agreement market checks previously approved by the Court of Chancery. First, in both Pennaco and MONY, the target board agreed to termination fees that, by the standards generally applied in similar circumstances in the past, were significantly higher than might have been expected in the context of a sale of control to a single bidder in the absence of a market canvass.⁷ Second, the press releases issued by the Pennaco and MONY boards both failed to explicitly invite competing proposals.⁸ Finally, in both Pennaco and MONY, the single bidder obtained matching rights in the event of a post-agreement superior proposal from a competing bidder.

Given these differences, one is tempted to read the recent decisions as a signal for single bidders to demand larger termination fees and more restrictive lock up provisions than has been customary in the past for transactions involving a post-agreement market check. However, a closer reading of the Pennaco and MONY decisions suggests that their specific facts, including the fact that both cases involved unaffiliated single bidders (as opposed to management-led bidders), warrant the more restrictive post-agreement market check provisions used in each case. For that reason, when advising clients in single bidder transactions that involve a post-agreement market check, prudent counsel will have to consider whether the unique facts of the specific transaction in fact provide a basis for a more (or less) restrictive post-agreement market check.

The Post-Agreement Market Check

In the context of a sale of control transaction, a board of directors of a target corporation generally may satisfy its fiduciary duties to obtain the best transaction reasonably available under the circumstances for the corporation and its stockholders by engaging in one of several general types of transactions: (i) a transaction with the highest bidder after a full public auction of the target corporation, i.e. a pre-agreement market check; (ii) a transaction with the highest bidder after a more limited pre-agreement market check in which multiple potential bidders are contacted and participate in the bidding; (iii) a transaction with a single bidder where the target board has reliable evidence demonstrating that the board has obtained the best transaction reasonably available; or (iv) a transaction with a single bidder where the target board, due to the absence of reliable evidence that the board has obtained the best transaction reasonably available, bargains for a post-agreement market check. A transaction that follows a full auction or involves multiple bidders

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⁵ 787 A.2d 691 (Del. Ch. 2001).
⁷ Compare Pennaco, 787 A.2d at 707 (approving a termination fee amounting to 3% of the equity value in the context of a transaction involving a third party single bidder and a post-agreement market check); and MONY, slip op. at 19-20 (approving a termination fee amounting to 3.3% of the equity value in the context of a transaction involving a third party single bidder and a post-agreement market check); with Kohls, 765 A.2d at 1285 (refusing to enjoin a transaction involving a termination fee amounting to 2.2% of the equity value of the transaction); and Fort Howard, slip op. at 17, 32 (refusing to enjoin a transaction involving a termination fee amounting to 1.9% of the equity value of the transaction); and Braunschweiger, slip op. at 12, 19 (refusing to enjoin a transaction involving a termination fee amounting to 1.9% of the equity value of the transaction); and General Instr., slip op. at 21 (refusing to enjoin a transaction involving a termination fee amounting to 2% of the equity value of the transaction).
⁸ Pennaco, 787 A.2d at 703 (noting that the target company filed a form 8-K and attached the merger agreement which "gave the marketplace knowledge of Pennaco's ability to speak with rival bidders and the standard nature of the termination fee"); MONY, slip op. at 7 (noting that the transaction was announced on September 17, 2003).
may warrant more restrictive deal protections, such as a higher termination fee, a matching right and a more limited no shop provision, because the market has been canvassed for potential bidders. By contrast, when a target board lacks sufficiently reliable evidence to permit it to conclude that a transaction with a single bidder is the best transaction reasonably available, the use of a post-agreement market check (coupled with modest deal protection provisions) will permit interested competing bidders to emerge, thus ensuring that the target corporation obtains the best transaction reasonably available under the circumstances.  

A post-agreement market check is effective because it establishes a “floor” for the transaction and, by providing for a limited period of time after the announcement of the transaction for a competing bidder to emerge, allows the reasonableness of the transaction to be tested. A post-agreement market check may include the following components: (i) a period of time, longer than the time period legally required, following the announcement of the deal for competing bidders to emerge, (ii) a “window shop” prohibiting a target company from actively soliciting bids, but allowing a target company to negotiate with bidders who make superior proposals, (iii) a “fiduciary termination right” that allows the target company to terminate the deal in favor of a superior proposal, (iv) the use of limited deal protection devices (such as termination fees that fall significantly below the normal threshold for acceptable termination fees), and (v) a press release announcing the deal and inviting competing bids.

**In re Fort Howard Corp. S’holders Litig.**

The post-agreement market check was first tested in the Delaware courts in the case of *In re Fort Howard Corp. S’holders Litig.* In *Fort Howard,* plaintiffs, stockholders of Fort Howard Corporation (“Fort Howard”), sought a preliminary injunction against the closing of a public tender offer for up to all of the outstanding shares of Fort Howard. The tender offer was the first step of a two-step leveraged buyout transaction. The plaintiffs alleged, among other things, that the Fort Howard directors favored the management-led buyers and did not seek the best transaction reasonably available under the circumstances.

The transaction at issue in *Fort Howard* included a number of features that have since become known as a post-agreement market check. In particular, the Fort Howard board approved a transaction with a single bidder, but provided a mechanism by which competing bidders could later emerge. The transaction contained the following features: (i) a four day period between the announcement of the transaction and the commencement of the tender offer; (ii) a 26 business day period between the commencement of the tender offer and the anticipated closing of the tender offer; (iii) a window shop allowing Fort Howard to receive and consider alternative proposals, but not to actively solicit such proposals, (iv) a termination fee amounting to 1.9% of the equity value of the transaction; and (v) a press release stating that Fort Howard had the right to entertain alternative proposals, would entertain

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11 In the context of a transaction involving a tender offer, the parties typically agree to announce the transaction and delay the commencement of the tender offer for some limited period of time after the announcement. See, e.g., *Fort Howard,* slip op. at 1, 18 (delaying the commencement of the tender offer for four business days after the announcement of the transaction). Also, the length of time between the commencement of the tender offer and the anticipated closing of the tender offer is typically extended beyond the required twenty day period. See, e.g., *Fort Howard,* slip op. at 1 (delaying the closing of the tender offer for twenty-six business days after the commencement of the tender offer).

alternative proposals and would cooperate with anyone submitting a competing bid.\(^\text{14}\)

The Court of Chancery concluded that the rationale for adopting this approach – “for permitting the negotiations with the management affiliated buyout group to be completed before turning to the market in any respect” – made sense. The Court of Chancery noted that “[t]o start a bidding contest before it was known that an all cash bid for all shares, could and would be made, would increase the risk of a possible takeover attempt at less than a ‘fair’ price or for less than all shares.”\(^\text{15}\) The Court of Chancery also determined that the “alternative ‘market check’ that was achieved was not so hobbled by lock-ups, termination fees or topping fees; so constrained in time or so administered (with respect to access to pertinent information or manner of announcing ‘window shopping’ rights) as to permit the inference that this alternative was a sham designed from the outset to be ineffective or minimally effective.”\(^\text{16}\) The Court of Chancery was “particularly impressed with the announcement in the financial press and with the rapid and full-hearted response to the eight inquiries received.” Thus, having reached the conclusion that the Fort Howard board acted in good faith by structuring the transaction in this manner, the Court of Chancery concluded that the Fort Howard board did not violate its Revlon duties in agreeing to a transaction with a management-led single bidder followed by a post-agreement market check.

For more than a decade after the Fort Howard decision, the Court of Chancery consistently reiterated both the rationale and factors relied upon by the court in that decision.\(^\text{17}\)

However, in a case decided in 2001, the Court of Chancery revisited post-agreement market checks and for the first time condoned a transaction that utilized a form of post-agreement market check that differed in significant respects from the Fort Howard model.\(^\text{18}\)

**In re Pennaco Energy, Inc.**

Plaintiffs, stockholders of Pennaco Energy, Inc. (“Pennaco”), sought a preliminary injunction against the closing of a tender offer by Marathon Oil (“Marathon”) for the acquisition of all the shares of Pennaco. The plaintiffs alleged, among other things, that the Pennaco directors did not undertake efforts that were reasonably calculated to secure the best value for Pennaco. The Court of Chancery, applying the traditional test for a preliminary injunction, denied the motion.

Although the Pennaco board did not canvas the market to determine if any other buyers might exist, the Pennaco board made an effort to negotiate for minimum deal protections in the merger agreement in order to create an effective post-agreement market check. The result of these negotiations was a merger agreement containing, among other things, the following components: (i) a non-restrictive no shop clause that allowed Pennaco “to talk and provide information to any party that could reasonably be expected to make a superior offer that could be consummated without undue delay”; (ii) a broad fiduciary out permitting Pennaco to terminate the merger agreement in the event such a superior proposal emerged; (iii) a three day window for Marathon to match any superior proposal; and (iv) a termination fee amounting to 3% of the equity value of the deal.\(^\text{19}\) Marathon also agreed that it would not commence its tender offer until 9 business days, or 17 calendar days, after announcement of the transaction. Significantly, while Pennaco did announce the transaction in a

\(^{14}\) *Fort Howard*, slip op. at 1, 18-23.

\(^{15}\) Id., slip op. at 32.

\(^{16}\) Id.


\(^{18}\) *In re Pennaco Energy Inc.*, 787 A.2d 691.

\(^{19}\) Id., 787 A.2d at 702.

\(^{20}\) Id., 787 A.2d at 702-3.
press release (and filed a form 8-K attaching the merger agreement and press release as exhibits), Pennaco did not explicitly solicit competing bids in the press release.\textsuperscript{21}

In determining the merits of plaintiffs’ allegations, the Court of Chancery concluded that the plaintiffs were unlikely to prove that the Pennaco board failed to satisfy its Revlon duties when the board did not actively shop for any potential buyers and dealt solely with Marathon. The Court of Chancery reasoned as follows:

The board’s actions must be evaluated in the context of Pennaco’s market posture. Even the plaintiffs concede that Pennaco was a source of industry interest. The company was followed by reputable analysts. The company communicated with the market in a bullish manner and freely communicated with interested parties. The company had done an extensive search for a joint venture partner in 1998, which brought it to the attention of twenty to thirty industry players. Not only that, the company had reincorporated in Delaware to facilitate its participation in the mergers and acquisitions market.\textsuperscript{22}

The Court of Chancery noted that had the merger agreement contained “onerous deal protection measures that presented a formidable barrier to the emergence of a superior offer, the Pennaco board’s failure to canvass the market earlier might tilt its actions toward the unreasonable.”\textsuperscript{23} The Court found, however, that the Pennaco board was “careful to balance its single buyer negotiation strategy by ensuring that an effective post-agreement market check would occur.”\textsuperscript{24} Turning to the key provisions of the merger agreement, the Court of Chancery determined that the agreement “left Marathon exposed to competition from rival bidders, with only modest and reasonable advantages of a 3% termination fee and matching rights.”\textsuperscript{25} The Court of Chancery, citing cases decided in the context of a stock-for-stock merger, found that the plaintiffs’ “attack on the termination fee’s level is make-weight and at odds with precedent upholding the validity of fees at this level.”\textsuperscript{26}

**In re MONY Group Inc.**

Plaintiffs, stockholders of MONY Group Inc. ("MONY"), filed suit in the Court of Chancery seeking a preliminary injunction against a stockholder vote on cash-out merger between MONY and AXA Financial, Inc. ("AXA"). Among other things, the plaintiffs alleged that the MONY board violated its Revlon duties by not seeking the best transaction available. In particular, the plaintiffs alleged that the MONY board breached its fiduciary duties by refusing to hold a pre-agreement auction and instead choosing a process involving a single bidder negotiation followed by a post-agreement market check.\textsuperscript{27}

As in Pennaco, the MONY board made an effort to negotiate a merger agreement that would provide for an effective post-agreement market check. The merger agreement that resulted from the negotiations contained: (i) a window shop provision that prohibited MONY from actively soliciting bidders, but permitted MONY to furnish information to and participate in discussions and negotiations with any person that makes a bona fide written “inquiry, proposal or offer … relating to, or that could be reasonably expected to lead to” a business combination with MONY that the MONY board “determines in good faith by resolution duly adopted, after consultation with outside legal counsel and a financial advisor of nationally

\textsuperscript{21} Id.
\textsuperscript{22} Id., 787 A.2d at 705.
\textsuperscript{23} Id., 787 A.2d at 708.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} Id.
\textsuperscript{27} MONY, slip op. at 1.
recognized reputation, constitutes or is reasonably likely to constitute a Superior Proposal....", 28 (ii) a fiduciary out permitting MONY to terminate the merger agreement in the event of a superior proposal; (iii) a five day window for AXA to match any competing proposal; and (iv) a termination fee amounting to 3.3% of the equity value of the deal. 29 The press release announcing the deal on September 17, 2003 did not contain an explicit invitation for competing proposals. The transaction was announced on September 17, 2003 and a stockholder vote on the transaction ultimately was set for February 24, 2004.30

In responding to plaintiffs' arguments, the Court noted that “[s]ingle-bidder approaches offer the benefits of protecting against the risk that an auction will be a failed one, and avoiding a premature disclosure to the detriment of the company's then on-going business.”31 The Court noted that MONY took into consideration a number of factors in deciding not to engage in a public auction, including “a concern that an earlier attempt by Allmerica Financial to conduct a public auction in the life insurance industry resulted in no buyer emerging and very harsh consequences thereafter to that company's business and the market performance of its stock; that an auction or active solicitation would jeopardize MONY’s career agency force; that competitors might use the process to obtain due diligence from MONY and gain access to MONY’s career agents; and the knowledge of the possibility of a post-agreement market check.”32 The Court of Chancery concluded that “[g]iven the nature of MONY’s business, specifically its career agency force, the Board’s judgment was reasonable that the risks of a pre-agreement auction, as opposed to a post-agreement market check, outweighed the benefits.”33

The plaintiffs also challenged the adequacy of the post-agreement market check, arguing that: (i) hostile bids in the insurance industry are rare and therefore any post-agreement market check is suspect; (ii) the complexity of the insurance industry requires that any competing bidders conduct extensive due diligence that could not be done before the scheduled stockholder vote; and (iii) the additional costs of the termination fee, which amounted to 3.3% of the equity value of the deal, and certain change of control agreements (“CICs”) prevented an adequate market check.

With respect to the first argument, the Court of Chancery noted that it presupposes a hostile bid when a friendly bid could be generated by the market check. The Court of Chancery likewise rejected the second argument, finding that the five month period, which exceeded the typical market check periods of one to two months approved by the Court of Chancery in the tender offer context, was a sufficient amount of time to allow for competing bids, even in the regulated insurance industry. Finally, the Court of Chancery rejected the third argument noting that the termination fee was “well within the range of reasonableness” and the CICs were bidder neutral.34

Analyzing Pennaco and MONY

The Pennaco and MONY decisions differ in certain material respects from prior post-agreement market check cases. In prior decisions, the Court of Chancery approved post-agreement market checks containing termination fees ranging from 1.9% to 2.2% of the equity value of the deal.35 Only when the market has been canvassed prior to the deal has the Court of Chancery approved termination fees in

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28 Id., slip op. at 17 n.31.
29 Id., slip op. at 17-20.
30 Id., slip op. at 19.
31 Id., slip op. at 14.
32 Id., slip op. at 14 -15.
33 Id., slip op. at 14.
34 Id., slip op. at 19-20 (citing Kysor Indus. v. Margaux, Inc., 674 A.2d 889 (Del. Super. 1996)).
35 See supra note 7.
the context of post-agreement market checks exceeding this minimal percentage. Citing precedent decided in the context of stock-for-stock mergers or liquidated damages provisions, the Court of Chancery approved the higher termination fees in Pennaco and MONY without any analysis as to whether a higher termination fee of this size was reasonable in comparison to the fees previously approved by the Court of Chancery in earlier decisions involving single bidders and post-agreement market checks. The Court of Chancery avoided any analytical discussion of the termination fee appropriate for the type of deal before it and merely decided that the termination fees in each of Pennaco and MONY was in the range of reasonableness previously approved by the Court of Chancery. The Court of Chancery also avoided any analytical discussion in these cases as to why the Court was not troubled by the absence of a press release explicitly inviting competing proposals or by the presence of a matching right for the single bidder.

The Court of Chancery’s approval of these higher termination fees and cursory discussion thereof, as well as the approval of the transaction despite the absence of an explicit press release and the presence of a matching right, invites one to consider whether more restrictive deal protections are now acceptable in post-agreement market checks, regardless of the context. Following the Court of Chancery’s decisions in the late 1980s, practitioners were of the view that a target, even when it had not engaged in a prior canvass of the market, could negotiate with a single bidder and agree to be acquired by that bidder, provided that the transaction included a post-agreement market check and a modest (approximately 2% of the equity value or less) termination fee. Practitioners also understood that competing bids should be solicited in a press release and other deal protections, such as a matching right, should be kept to a minimum. These recent decisions cast that view in some doubt and raise the question as to whether the facts of these new decisions differ in some material respect from the prior decisions of the Court of Chancery, thus accounting for the anomaly.

Upon closer review of the precedent, a distinction may be drawn between the prior market check cases, in which the single bidder was a management-led group, and the Pennaco and MONY decisions, in which the single bidder was an unaffiliated third party. A higher termination fee may be warranted in the context of a third party single bidder transaction because a third party will invariably incur greater costs, and thus is at risk of greater opportunity lost, in conducting the due diligence and otherwise evaluating a transaction. Moreover, a higher termination fee may be necessary in the third party context to lure a third party bidder to make a competitive offer while ensuring that the single bidder will be compensated for its costs if a competing proposal emerges. This greater cost is in marked contrast with a management-led group who, due to its access to the inner working of the target company, necessarily will have greater insight into the value of the target

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36 See, e.g., KDI, slip op. at 13-14 (refusing to enjoin a transaction involving a three month pre-agreement market check and a post-agreement market check and containing a termination fee amounting to 4.3% of the equity value); Formica, slip op. at 22, 35 (approving a transaction involving an active pre-agreement market check and a post-agreement market check and containing a termination fee amounting to 4.5% of the equity value).


38 See Pennaco, 787 A.2d at 707 (“The merger agreement’s provisions leave Marathon exposed to competition from rival bidders, with only the modest and reasonable advantages of a 3% termination fee and matching rights. The plaintiffs’ attack on the termination fee’s level is make-weight and at odds with precedent upholding the validity of fees at this level.”); MONY, slip op. at 19-20 (“The termination fee is well within the range of reasonableness; here representing only 3.3% of MONY’s total equity value . . . .”).
company. As such, the costs that a management-led group must bear in conducting due diligence and otherwise evaluating a transaction may be significantly less than a third party’s costs. Because of this lower cost, it seems appropriate to require a lower termination fee in post-agreement market check transactions that involve a management-led buyout.

As with termination fees, the analytical justification for not requiring an explicit press release inviting competing proposals and allowing a matching right may lie in the fact that a third party single bidder was involved, and not a management-led group. In the context of a management-led buyout, an inherent chilling effect may be present in light of the perception that management would be less than cooperative in providing information to a competing bidder. A competing proposal may, therefore, be less likely to arise given the fact that potential bidders would be uncertain as to whether their competing proposals would be welcome and seriously considered. An explicit press release addresses this uncertainty.

Moreover, a more explicit press release may be warranted in a management-led buyout context in light of the fact that the market may not have been aware of the potential for an extraordinary transaction involving the target company. In fact, the Court of Chancery makes it clear in *Pennaco* that the market was aware of the potential for an extraordinary transaction. In the context of a management-led buyout, however, information that a company is ripe for an extraordinary transaction may not be present in the market and may merely be available to management given their status as insiders. It follows, therefore, that a transaction involving a management-led buyout should include a press release specifically inviting competing proposals. Likewise, a matching right may be more tolerable in the context of a third party single bidder transaction as such a deal protection device may be required to entice the third party single bidder to engage in the transaction, and arguably is less-chilling to competing bidders than a matching right in the hands of a management-led group.

**Conclusion**

In providing advice with respect to transactions involving post-agreement market checks, practitioners must be mindful of the context in which the transaction arises. Practitioners should be cautious in providing advice that deal protection measures similar to those approved in *Pennaco* and *Mony* will always be acceptable. In a situation in which the single bidder is management-led or otherwise has an advantage in the bidding process that may cause a chilling effect on competing bids, practitioners should advise clients that the post-agreement market checks approved in the late 1980s, and more recently in *Kohls v. Duthie*, may provide a better model for structuring such transactions.

**TASK FORCE REPORTS**

**Task Force on Acquisitions of Public Companies**

We met on Friday and Saturday, October 16-17, 2003, in Toronto. We also had a wonderful Task Force dinner on Thursday, courtesy of Edward Kerwin. Many thanks also to our gracious hosts, McCarthy Tetrault (Ed Kerwin) and Stikeman Elliott (Alison Youngman), for our Friday and Saturday meetings at their offices. We had a great turnout at both meetings. Beyond the great food...
and company, we significantly advanced the ball with regard to the Model Agreement and commentary.

On Friday, we had the following Task Force members present: Diane Frankle (Co-Chair), Steve Knee (Co-Chair), Yvette Austin-Smith, Steve Bigler (by phone) Jay Bothwick, Rick Climan, Domenico Colella, Lori Czepiel, Nat Doliner, Byron Egan, Keith Flaum, Joel Greenberg, Guy Harles, John Kazanjian, Ed Kerwin, Jonathan Lampe, Pat Leddy, Hal Leibowitz, Jay Lefton, John Leopold, Mark Morton, Eileen Nugent (by phone), Michael O'Bryan, Francesco Portolano, Carl Ravinsky, Leon Reymond, Jim Walther and Scott Whittaker.

We discussed Yvette Austin Smith's excellent article on exchange ratios and agreed to include the article, with revisions, as an appendix to our Model Agreement. Eileen Nugent will also provide a short summary of the key issues in Section 1. We agreed to cover mixed consideration issues in limited commentary.

We then reviewed the conditions sections prepared by Lori Anne Czepiel, Phil Stamatakos and Chris Bartoli, agreed to eliminate the "mutual" conditions section and instead present, as appropriate, tailored conditions for buyer and target. We discussed various issues to be raised in the commentary, as well as revisions to the provisions. Revisions are due in April 2004.

On Saturday, we had the following Task Force members present: Diane Frankle, Steve Knee, Jay Bothwick, David Bronner, Bryan Davis (by phone), Byron Egan, Keith Flaum, Joel Greenberg, David Katz, Ed Kerwin, Jonathan Lampe, Pat Leddy, Hal Leibowitz, John Leopold, Henry Lesser, Mark Morton, Pete November (by phone), Mike O'Bryan, Francesca Ruf, Neil Sheehy and Peter Stone (by phone).

We discussed Keith Flaum's commentary on the target's covenant to hold a special stockholders' meeting (including the "force the vote" discussion and fiduciary duty issues). We then turned to Bryan Davis' draft voting agreement and discussed revisions and additional commentary.

Our stand-alone meeting of the Task Force was held on Friday and Saturday, February 6-7, 2004, in Wilmington, Delaware. Rick Alexander, Mark Morton and Steve Bigler organized our meeting in Wilmington. On Friday evening we enjoyed an excellent dinner with members of the Delaware judiciary at the Grand Opera Café, arranged by Morris Nichols Arsht & Tunnell.

Saturday morning we met at the offices of Richards Layton & Finger. The following members of the Delaware judiciary were present: Chief Justice Norman Veasey, Justice Myron Steele, Justice Jack Jacobs, Vice Chancellor Leo Strine and Vice Chancellor Donald Parsons. Also present was Professor Larry Hamermesh. The following task force members and guests of Delaware firms were present: Diane Frankle (Co-Chair), Steve Knee (Co-Chair), Rick Alexander, Michael Allen, Yvette Austin-Smith, Chris Bartoli, Steve Bigler, Jay Bothwick, Dick Canady, Bruce Cheatham, Rick Climan, Lori Anne Czepiel, Bryan Davis, Nat Doliner, Byron Egan, Keith Flaum, Drew Fuller, Maria Gentle, Aaron Ghais, Joel Greenberg, John Grossbauer, Bill Haubert, Pat Leddy, Hal Leibowitz, Jim Melville, Mark Morton, Pete November, Bill Payne, Michael Pittenger, Lorna Telfer, C. Porter Vaughan, Patricia Vella, James Walther, Leigh Walton and Charles Williams.

Delaware Judiciary

Vice Chancellor Strine expressed the appreciation of the Delaware judiciary for the opportunity to meet with deal lawyers and understand better the many considerations we face in negotiating and drafting merger agreements in compliance with Delaware case law. We focused on a hypothetical prepared by Rick Alexander, who served as moderator (and counsel for the 70% shareholder). The target company was represented
by Jim Melville and Mark Morton, and the buyer by Joel Greenberg and Steve Bigler. The Delaware bench responded to questions with a great deal of candor and a willingness to explain the key factors they would consider important in deciding the many difficult issues posed by the fact pattern.

Future Meetings

We then discussed our upcoming meeting in Seattle. Our Task Force meets from 1-4 p.m. on Friday, April 2. Our Task Force dinner, which Gray Cary is organizing, will be held Friday evening. Our full committee meeting will be held Saturday afternoon. Rick Climan also reviewed plans for the October stand-alone meeting of the full Committee in New Orleans; the tentative dates are October 28-30 with our Task Force meeting likely to be held on Friday, October 29. As you may recall, the August meeting is in Atlanta – we don’t have dates yet for this meeting but we will keep you apprised as we learn more. Bryan Davis and Pete November from Alston & Bird are organizing our Task Force dinner in Atlanta.

Model Agreement

We then turned to our Model Agreement. We reviewed all of the covenants sections in Sections 4 and 5 except Sections 4.3 (no shop/initial review completed), 4.4 (registration statements), 4.5 & 4.6 (meeting covenants), 4.7 (antitrust) and 4.8 (disclosure). We decided to combine Sections 4 and 5 and we adopted the drafting convention to refer to the Parent and Company in commentary as “the buyer” and “the target” for clarity and ease of understanding.

We determined that our default standard of level of effort would be “commercially reasonable efforts” (as opposed to “best efforts” or “reasonable best efforts”), modified in certain covenants to one of the higher standards. Hal Leibowitz undertook to review the agreement to recommend the places where a higher level of effort was advisable and to prepare commentary on the differences among the levels of effort.

At our Seattle meeting, we plan to discuss Sections 4.4, 4.5, 4.7 and 4.8 and the revisions to the other covenants sections. We also will review Section 1, the exchange ratio article, the revised voting agreement and revised commentary to the termination section.

Diane Holt Frankle
Stephen H. Knee
Co-Chairs

Task Force on
International Transactions

The International Transactions Task Force had a very successful meeting in Toronto with approximately 40 attendees, either in person or by telephone. This is the first time the Task Force has provided for participation by telephone conference. We intend to follow this format at our future stand-alone meetings.

The principal focus of the meeting was on the current project of the Task Force, which is to attempt to internationalize the Model Asset Purchase Agreement by creating a new form of the agreement that can be used in acquisitions outside the United States. We discussed and commented at the meeting on the proposed fact pattern to be used as a framework for the agreement. A revised draft of the fact pattern is to be provided by Stan Weiner and Daniel Rosenberg. We also spent a considerable amount of time talking about the approach on the agreement itself. We agreed that the representations, warranties and covenants that were, for the most part, generic to all countries would be included in the main body of the agreement. We also agreed that the representations, warranties and covenants that were specific to a country would be covered by way of schedule. The specific representations would, in some cases, supersede and, in other cases, supplement the terms
of the master agreement. We agreed that, for the
next meeting, the members of the Task Force would
attempt to identify which of the representations
from the master Asset Purchase Agreement could
be used in their current form with little change for
their country, and which ones would require
material modification or be replaced by some other
representation. Many thanks to Stan Weiner for
organizing and running this portion of the meeting.

On the program front, Nat Doliner has
generosously agreed to serve as the program chair for
our Task Force. As has been the custom of our Task
Force, it will be doing a program at the annual
meeting in Atlanta. If you are interested in
participating in this program, please contact Nat.

On the publications front, the project next in
line for publication is the private company stock
acquisition international overview. The form of
questionnaire has been finalized and the responses
are being edited by an editorial committee led by
John Grossbauer. The project is intended to be a
stand-alone project and we are currently projecting
publication sometime in the first part of this year.
Wilson Chu's subgroup is also close to finalizing its
product on cross border due diligence.

The questionnaire for the public company
project has been finalized and we are now working
with the Task Force on Acquisitions of Public
Companies to coordinate the editorial part of the
process as well as the timing for publication.

Finally, Edward Kerwin, one of our Task
Force members from Canada, made a substantive
presentation on some of the key issues and
considerations raised by an acquisition in Canada.

John W. Leopold
Chair

Task Force on Joint Ventures

The Task Force on Joint Ventures is
currently waiting for the ABA publication office to
provide the formatted document with commentary.
Because that document will not be available for the
meeting in Seattle, the Task Force will not be
meeting then. The Task Force will be meeting at
the ABA Annual Meeting in Atlanta in August as it
pushes towards a publication date of early 2005.

Thomas B. Hyman, Jr.
Alison J. Youngman
Co-Chairs

Task Force on the
Manual of Acquisition Practice
and Process

The Task Force met in Toronto on October
17, 2003 and critiqued a number of new and revised
draft chapters for the Manual.

The following Task Force members
submitted new or revised text for discussion at the
Toronto meeting: Neal Brockmeyer on
"Schedules"; George Taylor on "Closings and the
Closing Process"; Bill Payne, Ralston Steenrod and
Henri Bybelezer on "Due Diligence"; Ric Brown on
"Pre-Agreement Documents"; Dan Minkus on
"Price Negotiation" and "Structure Negotiation";
David Gavsie on "The Acquisition Team"; and Neal
Brockmeyer and Tom Van Dyke on "Finding an
Acquisition Partner."

A considerable part of the discussion
revolved around closing practices, proof of
execution issues arising out of the use of facsimile
signature and email and fax closings. The Task
Force wrestled with how to describe, capture and
reconcile best practices and practical approaches to closings. In addition to reviewing the new and revised chapters, the Task Force discussed style and different presentation formats.

Thomas M. Thompson
Vincent F. Garrity, Jr.
Co-Chairs

Task Force on the Model Stock Purchase Agreement

A Task Force stand-alone meeting was held on January 10-11, 2004 in New York City. Special thanks to Sam Friedman of Morgan Lewis and Bockius for hosting our meetings and arranging a wonderful dinner at Sparks Steakhouse. The stand-alone meeting focused attention on the revised text of the Model Stock Purchase Agreement and significant progress was made. Murray Perelman reported on the work of the Ancillary Documents Working Group. The Task Force will devote its attention at the Seattle meeting to drafting the Revised Model Stock Purchase Agreement and Ancillary Documents. In lieu of a meeting of the Working Group on the Seller’s Response Document, the editorial process will commence. Assignments are available for those willing to begin work on the Commentary. Please contact Bob Harper at rtharper@klettrooney if you are willing to undertake an assignment.

Robert T. Harper
Chair

SUBCOMMITTEE REPORTS

Programs Subcommittee

Immediately following our full Committee meeting on April 3, Neal Brockmeyer, Lorna Telfer and Tom Van Dyke will present a Committee Forum program entitled “Controlled Auctions: Strategy and Managing the Process.”

In addition, the Committee will be sponsoring or co-sponsoring three other programs at the Spring Meeting in Seattle. On Thursday, April 1, 2004, from 2:30 p.m. to 4:30 p.m., the Committee will present “What’s So Hot About Going Private? Nuts and Bolts of Taking a Public Company Private.” Keith Flaum will chair the panel, which will cover structuring going-private transactions, fiduciary and securities law implications of going private and unusual features of acquisition agreements in these transactions.

On Friday, April 2, 2004, from 8:00 a.m. to 10:00 a.m., the Committee will co-sponsor (together with the Venture Capital Committee) a program entitled “So What Does That Mean? Interpreting Preferred Stock Terms.” Chairing the panel will be Mark Morton. The panelists will discuss, among other things, the appropriate interpretation of various preferred stock voting rights provisions, the validity of “deemed liquidation” clauses, issues raised by “pay to play” provisions and some of the fiduciary duty issues presented by preferred stock investments.

Finally, on Saturday, April 3, 2004, from 8:00 a.m. to 10:00 a.m., the Committee will co-sponsor with the Committee on Antitrust Law, the Committee on International Law and the Committee on Corporate Counsel a program entitled “European Merger Control Reform: Everything the M&A Lawyer Needs to Know About the Revolution Before It Happens Next Month.”

Neal H. Brockmeyer
Elizabeth A. Dellinger
Co-Chairs
Subcommittee on M&A Market Trends

The Subcommittee on M&A Market Trends is our Committee's newest subcommittee. This subcommittee will provide essential resources to M&A professionals who want to stay abreast of current trends and practices in the M&A area. These resources will include annual studies on private company and public company M&A, an M&A message board, an online interactive chat room and a "Local Counsel 911" resource. A copy of the Subcommittee's complete "Operating Plan" has already been distributed electronically to the Committee.

If you are interested in becoming actively involved in the work of this new subcommittee, please send an e-mail to Wilson Chu (Wilson.chu@haynesboone.com), Larry Glasgow (lglasgow@gardere.com), Keith Flaum (kflaum@cooley.com) or Freek Jonkhart (Freek.Jonkhart@NautaDutilh.com).

Wilson Chu
Larry Glasgow
Co-Chairs

Subcommittee on Recent Judicial Developments

The Subcommittee on Recent Judicial Developments has completed our second annual survey of significant judicial decisions in the area of mergers and acquisitions, and our survey of significant 2003 cases is scheduled for publication in either the May or the August 2004 issue of The Business Lawyer. Many thanks are owed to our hard-working fellow Subcommittee members, Patrick J. Leddy, Robert R. Ouellette, Michael A. Pittenger, Patricia O. Vella, Arthur Wright and Howie Wong. We also thank Leigh Walton for providing the final edits to the finished product.

We are now collecting 2004 cases for inclusion in our next annual survey, and we are asking members of the Committee on Negotiated Acquisitions to send to us significant judicial decisions for possible inclusion in this survey. Submissions may be sent by email to either Scott Whittaker at swhittaker@stonepigman.com, or Jon Hirschoff at jhirschoff@fdh.com. You also may fax cases either to Scott at (504) 596-0836 or to Jon at (203) 348-5777. If possible, please include in your email or fax cover sheet a brief statement as to why you consider the case to be significant.

The first criterion for inclusion is that the decision must involve a merger, an equity sale of a controlling interest, a sale of all or substantially all assets, a sale of a subsidiary or division or a recapitalization resulting in a change of control. The second criterion is that the decision must (a) interpret or apply the provisions of an acquisition agreement or an agreement preliminary to an acquisition agreement (e.g. a letter of intent, confidentiality agreement or standstill agreement), (b) interpret or apply a state statute that governs one of the constituent entities (e.g. the General Corporation Law of the State of Delaware, or the Louisiana Limited Liability Company Law), (c) pertain to a successor liability issue, or (d) decide a breach of fiduciary duty claim. We are currently excluding cases dealing exclusively with federal law, securities law, tax law or antitrust law. But if you feel a case dealing with an M&A transaction is significant, please send it to one of us even if it does not meet the foregoing criteria.

Decision to be Discussed at Seattle Committee Meeting

We believe the following case will provide good food for thought and lively discussion at our upcoming Committee meeting in Seattle. In Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc., the U.S. District Court for the Southern District of New York refused to dismiss state-law fraudulent
inducement claims brought by the buyer of an energy commodities trading business, despite the existence of "non-reliance" provisions in both the confidentiality agreement and the asset purchase agreement executed by the buyer in that transaction. The court also analyzed several of the seller’s representations and warranties, as well as the provisions of the asset purchase agreement regarding survival of the representations and warranties, and refused to dismiss the buyer’s claims for indemnification based on the seller’s alleged breach of those representations and warranties.

Scott T. Whittaker
Jon T. Hirschoff
Co-Chairs

_Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc._ (2003 WL 22795650) arose out of the purchase by Allegheny Energy, Inc. ("Allegheny") from Merrill Lynch & Co. and one of its affiliates ("Merrill Lynch") of the commodities trading business owned by Merrill Lynch and known as Global Energy Markets ("GEM"). In late 2000, Allegheny, which provides retail electric and natural gas services to residents of several mid-Atlantic states, sought to acquire an energy-commodities trading business in order to expand the business of its energy trading subsidiary. Allegheny approached Merrill Lynch, who had acted as Allegheny’s long-time financial advisor, with a view toward having Merrill Lynch locate a suitable target company. Merrill Lynch instead introduced Allegheny to GEM and (after withdrawing as Allegheny’s advisor) made several presentations to Allegheny about GEM as a potential acquisition target for Allegheny.

In September 2000, the parties executed a confidentiality agreement governing the parties' use and exchange of information in connection with the transaction. The confidentiality agreement survived the closing of the transaction, and contained both an express disclaimer of any liability with respect to any information supplied during the due diligence process, and a statement that only the representations and warranties to be set forth in the definitive agreement would have any legal effect.

In January 2001, the parties entered into an Asset Contribution and Purchase Agreement (the "APA"), which contained the following non-reliance provision:

Except for the representations and warranties contained in this Article III, neither the Sellers nor any other Person make any express or implied representation or warranty on behalf of or with respect to the Sellers, the Business or the Purchased Assets, and the Sellers hereby disclaim any representation or warranty not contained in this Article III.

The APA also contained what the Court referred to as "a standard merger clause" under which the parties agreed that the APA constituted their entire agreement and superseded all prior written and oral agreements other than the confidentiality agreement.

The transaction closed in the spring of 2001. Allegheny paid to Merrill Lynch $490 million in cash and a 2% equity interest in its trading subsidiary. The APA also provided that Allegheny was to contribute certain generation assets to its trading subsidiary by September 16, 2002, failing which Merrill Lynch had the right to "put" its equity interest to Allegheny for $115 million.

Soon after the closing, Allegheny realized that GEM's financial performance was based in part on sham transactions with Enron and possibly others, and that GEM's CEO, Daniel Gordon, had employed "highly questionable, if not criminal, business practices," including so-called "wash" and "round trip" energy trades, and an allegedly fraudulent $43 million trade with an Anguilla-based
corporation that Allegheny believed Gordon owned or controlled. Following these revelations, Allegheny refused to contribute the generation assets to its trading subsidiary, as required by the APA, and Merrill Lynch brought suit. Allegheny brought counterclaims against Merrill Lynch for fraudulent inducement, breach of fiduciary duty, breach of contract and negligent misrepresentation. This decision addressed Merrill Lynch's motions to dismiss those counterclaims.

The Court cited Consolidated Edison, Inc. v. Northeast Utilities (249 F. Supp. 387 (S.D.N.Y. 2003)), and Harsco Corp. v. Segui (91 F.3d 337 (2d Cir. 1996)) as evidencing a "general hostility of courts to claims by sophisticated business entities for fraudulent inducement." Nevertheless, Judge Baer, who authored the opinion, went on to state that "under the standards applicable at this stage of the litigation, I am unwilling to conclude as a matter of law that Allegheny's reliance on these alleged misrepresentations was unreasonable." The Court distinguished Harsco and Consolidated Edison on the basis of the following representation by Merrill Lynch in the APA:

"the information provided by Sellers to Purchasers, in the aggregate, includes all information known to Sellers, which in their reasonable judgment exercised in good faith, is appropriate for Purchasers to evaluate the trading positions and trading operations of the Business."

According to the Court, whereas the agreements in Harsco and Consolidated Edison placed the burden on the buyer to perform its due diligence and ensure that the representations in the final agreement cover known or readily knowable risks, the APA at issue in this case "places at least some of that burden on Merrill Lynch."

The Court also found "significant" that Merrill Lynch had a fiduciary relationship with Allegheny, which existed until shortly before the APA was executed. Finally, Allegheny alleged that the information was peculiarly within Merrill Lynch's knowledge, which, under the reasoning of Banque Arabe Et Internationale D'Investissement v. Maryland Nat'l Bank, 57 F.3d 146, 155 (2d Cir. 1995), renders an express waiver or disclaimer ineffective.

The Allegheny decision is also interesting in its analysis of Allegheny's breach of contract claims. Specifically, Allegheny alleged that by failing to disclose the sham trades with Enron and perhaps others, and the problems with Mr. Gordon, Merrill Lynch breached three representations and warranties in the APA.

First, Allegheny alleged that Merrill Lynch breached its representation that "[e]xcept as set forth in Section 3.05 of the Sellers' Disclosure Schedule, the Sellers are conducting the Business in compliance in all material respects with all applicable Laws and all material governmental approvals, permits and licenses ... required for the Sellers to conduct the Business as currently conducted and have been obtained." Merrill Lynch argued that the words "are conducting" as used in this representation meant that the representation should only encompass activities as of the date of the closing and, because the Enron trades were in the past, the representation was not breached. While the Court seemed sympathetic to this defense, it refused to dismiss this allegation because Allegheny also pleaded that Merrill Lynch made other unspecified sham trades that may have been in effect on the closing date.

Allegheny also alleged that the sham trades improperly inflated GEM's revenues, resulting in a breach of the representation that GEM's "Business Selected Data has been prepared in good faith ... [and the] financial records of the Business (i) are in
all material respects true, complete and correct…. "Merrill Lynch argued that the fees it earned on the trades with Enron were accurately and properly reported and reflected on the financial statements. The Court concluded, however, that even if it were true that the books were "in all material respects true, complete and correct, "Allegheny's allegations also touched on the introductory part of the representation that the "Business Selected Data has been prepared in good faith."

Allegheny also alleged that Merrill Lynch breached the representation that the information provided by Merrill Lynch to Allegheny, in the aggregate, included all information known to Merrill Lynch that, in Merrill Lynch's reasonable judgment exercised in good faith, was appropriate for Allegheny to evaluate "the trading positions and trading operations" of GEM. Merrill Lynch argued that the representation was not breached because the Enron trades were not part of GEM's "trading positions and trading operations" when the APA became effective in early 2001. The Court disagreed with Merrill Lynch's interpretation of this representation, stating that "it is difficult to see how the information about the sham Enron trades, even if they were cancelled before the Purchase Agreement, would not be appropriate in order for Allegheny to evaluate GEM's trading positions and trading operations."

Finally, the Court also dispensed with Merrill Lynch's contention that Allegheny should not be allowed to pursue any claims based on the $43 million trade with Falcon Energy, the Anguilla-based corporation Allegheny believed Mr. Gordon owned or controlled. Merrill Lynch argued that Allegheny had failed to specify the Falcon Energy trade in its claim notice, which was given on the last day of the 18 month survival period provided for representations and warranties in the APA. The Court disagreed with Merrill Lynch noting that the notice provision did not include any language requiring that the claim notice describe the basis for the claim with specificity. Rather, the APA provided only that "written notice of a claim [b]e given prior to the expiration of the applicable representations and warranties."

The Court distinguished the survival clauses in the cases relied on by Merrill Lynch on the basis that those clauses required that the claim be made "with specificity" or that the party "specify the nature and amount" of the claim.

Like AES Corp. v. Dow Chemical Company, 325 F.3d 174 (3d Cir. 2003), which we discussed in our 2003 meeting in San Francisco, Allegheny is a good reminder to M&A practitioners that non-reliance provisions will not necessarily allow a seller to avoid claims under Rule 10b-5, or state-law fraudulent inducement claims, especially at the motion to dismiss stage or where particularly egregious conduct is alleged by the buyer. Balancing the scales, however, are cases such as Consolidated Edison and Harsco, which remind buyers of the importance of specifically identifying and allocating the risks of material business issues in the transaction documents, as opposed to relying on oral representations made during due diligence, or in the broadly worded, generalized representations, warranties and covenants that are typically contained in M&A agreements.

Jon T. Hirschoff
Scott T. Whittaker
Co-Chairs