FROM THE CHAIR
By Joel I. Greenberg

Our Committee’s next meeting will be held in conjunction with the American Bar Association’s Annual Meeting in Chicago, Illinois, from Friday, July 31, through Sunday, August 2, at the Sheraton Chicago Hotel & Towers, 301 East North Water Street. The full Committee meeting will be held Sunday afternoon, starting at 2:00 p.m. (Central Time), with an unofficial Committee forum following at the end of the meeting. Most of our meetings will be available by conference telephone. The dial-in information for the full Committee meeting and Committee forum is as follows:

U.S. Domestic: (888) 391-0107
International: +1 (416) 641-6380
Pass Code: 8439038

Dial-in information for subcommittee and task force meetings is being circulated by the respective chairs and is also available on the Business Law Section website at:

http://www.abanet.org/buslaw/meetings/2009/annual/

The Committee dinner is scheduled for Saturday evening at Zealous at 419 West Superior Street, Chicago, with cocktails beginning at 7:00 p.m. and dinner at 8:00 p.m. Thanks to a generous contribution from J.P. Morgan Escrow Services, we are able to provide this dinner for only $85 per person.

At this meeting, our Committee will sponsor two very timely programs: “Distressed

(continued on next page)
M&A: Practical Insights From A Mock Negotiation” (Friday, July 31, from 8:00 a.m. until 10:00 a.m.) and “Don’t Fall at the First Hurdle – Preliminary Agreements in Cross-Border M&A” (Saturday, August 1, from 10:30 a.m. until 12:30 p.m.). Additional information on these programs can be found in the Programs Subcommittee report.

The full Committee meeting will include presentations on Section 363 sales under the Bankruptcy Code with a focus on their use in the Chrysler and General Motors cases, a study of market behavior with respect to post-closing escrows, a Delaware law update, an update from our jurisprudence subcommittee, and selected, recorded comments from Vice Chancellor Strine. The meeting will conclude with our regular Committee forum, which is, for ABA administrative reasons, not labeled as such in the official meeting schedules. We are fortunate that Michele Anderson, Chief of the Office of Mergers and Acquisitions in the Division of Corporation Finance at the Securities and Exchange Commission, will join that portion of the meeting to lead a discussion of a variety of M&A and securities topics.

As most of you know, this meeting will be my last as chair of our Committee. It has been a great three-year term for me, for it has given me the opportunity to work with many of you who contribute your talent and time to the Committee and its contribution to our profession. I am delighted that Leigh Walton will succeed me as chair following the Annual Meeting and look forward to the next three years of the Committee’s growth and success under her leadership.

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FEATURE ARTICLES

Optima is Optimal: Sidestepping Omnicare In Private Company M&A Transactions

By Alexander B. Johnson and Roberto Zapata

The general controversy surrounding the Delaware Supreme Court’s decision in Omnicare, Inc. v. NCS Healthcare, Inc. and the implications thereof are well-known to M&A practitioners. Although Omnicare has been the subject of extensive discourse and commentary, one less focused-upon concern involves the extent to which parties may effect an expeditious signing and closing of a private company merger. The concern arose from the seemingly Omnicare-mandated contingency of a meaningful stockholder vote or fiduciary out termination right. Practitioners have attempted to address this concern in the context of private company M&A transactions to varying degrees of effectiveness through several structuring alternatives ranging from less effective minor distinctions to the more generally implemented alternative of providing for a termination right in the event written consents are not received during a short post-signing window.

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2 818 A.2d 914 (Del. 2003).
In 2008, the Delaware Court of Chancery provided guidance on the permissibility of utilizing written consents to expedite the signing and closing of private merger transactions in its notable bench ruling in *Optima International of Miami, Inc. v. WCI Steel, Inc.* In addition to suggesting that the Court is inclined to narrow the application of *Omnicare*, Vice Chancellor Lamb’s ruling shed light on the permissible mechanics for implementing an expeditious signing and closing, thereby removing some of the ambiguity concerning whether one of the alternatives for doing so would pass judicial muster in Delaware.

**Setting the Stage: *Omnicare***

As has been recounted numerous times, *Omnicare* involved a merger agreement between NCS Healthcare, Inc. (“NCS”) and Genesis Health Ventures, Inc. (“Genesis”). The merger agreement was entered into after an extensive sales process and included the following principal terms which, taken together, were the focus of the decision:

- voting agreements with NCS’s two largest stockholders agreeing to vote their shares in favor of the merger agreement, which votes were sufficient to adopt the merger agreement;
- a “force-the-vote” provision, pursuant to which NCS was required to submit the merger agreement to a vote of NCS stockholders regardless of whether the NCS board continued to recommend the merger; and
- no fiduciary out termination right.

Soon after NCS executed the merger agreement, Omnicare, Inc. (“Omnicare”) submitted a superior proposal to NCS, prompting the NCS board to withdraw its recommendation of the NCS/Genesis merger.

Although Omnicare’s proposal was superior, the terms of the NCS/Genesis merger agreement effectively guaranteed that such merger would take place since, as mentioned above, (i) the NCS board was required to submit the proposed NCS/Genesis merger agreement to a vote of the NCS stockholders and (ii) the voting agreements executed by NCS’s two largest stockholders, whose holdings in NCS constituted the requisite majority, guaranteed that their shares would be voted for the NCS/Genesis merger irrespective of a change in the NCS board’s recommendation.

The Delaware Supreme Court, in a much criticized 3-2 decision, refused to enforce the merger agreement and found that the NCS board breached its fiduciary duties to the minority stockholders of NCS. According to the *Omnicare* court, the principal failing of the NCS board was that, due to the combination of the force-the-vote provision, the fully locked-up vote and the lack of a fiduciary out termination right to accept a superior proposal, neither the board nor the stockholders had the ability to accept a superior proposal following the execution of the merger agreement, thereby rendering the consummation of the transaction a *fait accompli*.

**Private Deal Implications of *Omnicare* and Controlling Stockholder Transactions**

While directors of private companies generally have the same fiduciary duties as those of public company directors, private companies are often able to act more quickly and efficiently than public companies, particularly in connection with the sale of the company given the typically more concentrated stockholder base of private companies and the
lack of public company disclosure and related requirements. For example, in structuring a private transaction involving a controlling stockholder and a large number of unaffiliated or unsupportive stockholders (such that a stock purchase executed by 100% of the target stockholders would not be feasible), a merger with a controlling stockholder vote at or near signing was generally perceived as a relatively straightforward exercise. In the wake of *Omnicare*, however, it became apparent that structuring such transactions required careful consideration.

Following *Omnicare*, a few structuring alternatives quickly emerged, most of which attempted, but did not necessarily properly accomplish, balancing private company practice with *Omnicare* compliance. The general theme in each of these alternatives centered around attempting to find a technical distinction from *Omnicare* and/or there being a meaningful “out” prior to the stockholder vote, while simultaneously accelerating the timing of the vote as much as possible.

It is important to note, however, that *Omnicare* is not the only issue that should be considered in determining whether and how to expedite the signing and closing of a private company merger transaction. If *Revlon* duties apply to the transaction,⁴ the target board will need to consider whether it is appropriate in light of the particular facts and circumstances to expedite the signing and closing of the transaction and, if so, how to do so in a reasonable manner that satisfies its *Revlon* duties.⁵ In particular, it will have to assess the fairness of the bid (and thus whether it has obtained the best transaction reasonably available)⁶ and whether an expedited signing and closing is consistent with that determination.

**Private Company Lock-Up Alternatives**

As noted above, following *Omnicare* a few structuring alternatives emerged for expediting the signing and closing of a private company merger transaction. Some structuring alternatives included (i) using irrevocable or revocable proxies, sometimes with a merger agreement termination right and/or termination fee payable in the event of non-delivery or revocation within a short time period, (ii) having post-signing written consents with a merger agreement termination right and/or termination fee payable in the event of failure to obtain consents within a short time period, (iii) inclusion of a fiduciary out termination right, with a termination fee payable if

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⁴ Generally speaking, other than in circumstances where controlling stockholder(s) have effectively ceded to the board control of the sales process on behalf of the stockholders, traditional *Revlon* duties typically should not apply in a sale led by a controlling stockholder, with the applicability of such duties being dependent on the particular facts and circumstances of the transaction. *See, e.g., McMullin v. Beran*, 765 A.2d 910 (Del. 2000), and *In re CompuCom Sys. Inc. Shareholders Litigation*, C.A. No. 499-N, 2005 Del. Ch. LEXIS 145 (Del. Ch. Sept. 29, 2005).

⁵ The recent decision by the Delaware Supreme Court in *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235 (Del. 2009), could play an important role in determining the remedy (or lack thereof) in the event that a target’s board of directors breaches its *Revlon* duties in connection with an expeditious signing and closing of a private company merger transaction. If the board is disinterested and independent with respect to the transaction at issue, did not breach its duty of loyalty (e.g., by failing to act in good faith) in connection with the transaction, and may only have breached its duty of care by failing to act in good faith in connection with the transaction, and may only have breached its duty of care by failing to fulfill its *Revlon* duties, a plaintiff challenging the transaction after the closing of the merger may be left with no remedy if the target corporation’s certificate of incorporation contains a provision authorized by Section 102(b)(7) of the General Corporation Law of the State of Delaware (“DGCL”).

exercised, and (v) in most cases, some requirement that the vote (whether through proxy or written consent delivery) be obtained within a few days of signing the merger agreement.

Of these alternatives, the written consent approach has generally been the most used, in light of both practical and legal considerations relative to some of the other above-mentioned structures. The general approach is as follows:

- after the target board approves, and the parties sign, the merger agreement, target stockholders holding the required vote promptly deliver written consents to approve the transaction;
- the merger agreement sometimes contains a covenant that the target company will use its best efforts to obtain the written consent of its stockholders;
- the merger agreement sometimes contains a fiduciary out termination right which expires upon receipt of the target company stockholder vote;\(^7\) and
- the merger agreement generally (although not always) calls for the payment of a termination fee from target to buyer if (i) consents are not delivered within a prescribed time period (usually a few days) or (ii) the target exercises any fiduciary out termination right it may have. In some instances, such a trigger event would lead to the payment of a “mini” fee, with a full break-up fee payable if a transaction is subsequently consummated within a tail period.

The basic premise of this approach (and some of the others) is that, because consents representing the requisite vote have yet to be delivered, the vote has not been irrevocably committed to or delivered at the time the target board has approved the transaction. Although this may only be for a moment in time, because the vote will almost certainly be delivered immediately after execution of the merger agreement, the argument is that this should be sufficient to distinguish this scenario from \textit{Omnicare}.\(^8\)

A further premise of this approach is that it generally is acceptable for any “outs” in a merger agreement to expire upon obtaining the stockholder vote, such that the board’s fiduciary

\(^7\) Although some transactions have included both a fiduciary out termination right and a termination right for failure to obtain consents so as to have additional distinguishing factors from \textit{Omnicare}, practitioners should consider the importance of doing so. For example, in a transaction where a board is otherwise comfortable as to its discharge of its fiduciary duties and assessment of the fairness of the transaction, such that it has no concerns with an expedited signing and closing approach, practitioners should consider whether bargaining for another “out” in the form of a fiduciary out termination right could be interpreted as a signal that the board determined that such a right was needed to discharge its fiduciary duties, notwithstanding the aforementioned determination that it independently satisfied such duties and the arguably illusory nature of such a termination right in light of the likely limited time period during which such right could be exercised.

\(^8\) Other variations of this approach are sometimes used to provide the buyer with more deal certainty. For example, the buyer may request that the consents be delivered either to the buyer’s or the target’s legal counsel to be held in escrow pending the closing. Given technical concerns under Section 251 of the DGCL with respect to stockholders approving a final agreement or there arguably being an uninformed vote, a target may resist that request. The buyer may also seek to obtain additional comfort by receiving a letter from the stockholders that they intend to deliver their consents within the designated time period after execution of the merger agreement and have no present intent to refrain from doing so. By contrast, a contractual agreement to deliver the consents would raise concerns under \textit{Omnicare}.
duties in respect of alternative transactions are discharged at such point.\textsuperscript{9} In this context, although the vote is obtained by means of a written consent, the same concept should apply, thereby allowing an ability to terminate prior to delivery of the consent, but not thereafter.

Under such approach, a buyer’s deal certainty concerns are addressed by making clear that, in the event such vote is not received promptly (sometimes as short as 24 hours, or even less), it may terminate the agreement and possibly receive a termination fee. One concern with this approach, however, has been focused on this very short time period between signing and obtaining the stockholder vote—namely, whether it is a sufficient amount of time to allow for an informed vote, as well as whether such termination right is anything other than illusory in light of such timing. The court in \textit{Optima}, however, recently confirmed its acceptance of a similar structure and time period.

\textbf{Enter Optima}

In \textit{Optima}, the Delaware Court of Chancery noted that \textit{Omnicare} is of “questionable continued vitality”\textsuperscript{10} and refused to enjoin a merger agreement between WCI Steel, Inc. (“WCI”) and Severstal Warren Acquisition Corp. (“Severstal”). The merger agreement required that WCI deliver written consent of the stockholders within 24 hours of the board’s approval of the merger agreement. Optima International of Miami, Inc. (“Optima”), having submitted a bid that was $14 million more than Severstal’s offer, alleged that the merger agreement’s restrictive provisions and short time frame constituted the functional equivalent of the locked-up, preclusive deal structures that were invalidated by \textit{Omnicare}.

In holding that the structure did not implicate \textit{Omnicare}, Vice Chancellor Lamb, ruling from the bench, noted that the stockholder consent was delivered after the board decided that it was “better for stockholders to take Severstal’s lower-but-more-certain bid than Optima’s higher-but-more-risky bid.”\textsuperscript{11} The board’s decision was made after consideration by the board of the company’s “severe liquidity problems” and the fact that it was completely unclear whether Optima would be able to consummate the transaction. Therefore, the stockholder consent, “although quickly taken, was simply the next step in the transaction as contemplated by the statute. Nothing in the DGCL requires any particular period of time between a board’s authorization of a merger agreement and the necessary stockholder vote.”\textsuperscript{12}

Vice Chancellor Lamb also determined that WCI directors satisfied their \textit{Revlon} duties despite agreeing to a structure that were free to reject the proposed deal, even though, permissibly, their vote may have been influenced by the existence of the deal protection measures.” \textit{Orman v. Cullman}, 2004 Del. Ch. LEXIS 150, at *7 (Del. Ch. Oct. 20, 2004).

\textsuperscript{9} Cf. \textit{In re Mobile Communications Corp. of Am., Inc.}, 1991 Del. Ch. LEXIS 4, at *20-21 (Del. Ch. Jan. 7, 1991) (finding that target corporation had no contractual obligation, following stockholder approval, to consider alternative transactions).

\textsuperscript{10} \textit{Optima}, C.A. No. 3833, at 127. Since 2001, other cases have also whittled away at the holding in \textit{Omnicare}. In \textit{Orman v. Cullman}, the majority Class B stockholders entered into a voting agreement (i) not to sell their shares and (ii) to vote their shares against any alternative acquisition proposal for 18 months following any termination of the merger agreement. Ultimately, the court approved the agreement, finding that the merger “could not proceed without approval by a majority of the minority” and thus sufficiently differed from \textit{Omnicare}. Specifically, “the deal protection devices at issue were not tantamount to a \textit{fait accompli}, the public stockholders.

\textsuperscript{11} \textit{Optima}, C.A. No. 3833, at 127.

\textsuperscript{12} Id.
contemplated a brief time period between signing and delivery of the stockholder vote. The Court found that the WCI directors undertook “a deliberative, informed and reasoned process in making their decision” and that their decision, when considered in the context of all the circumstances, was reasonable. Thus, while the Court found that this transaction did not implicate Omnicare, it is important to note that a board might still not satisfy its Revlon duties were it to agree to a structure such as this if the circumstances do not support the reasonableness of the decision.

Additional Considerations

While M&A practitioners are increasingly comfortable using formulations similar to those in Optima, it is important to keep in mind that there is no “one size fits all” approach. Indeed, Revlon duties may still apply and a target’s compliance with its fiduciary duties is likely going to be more closely scrutinized in a transaction involving an expeditious signing and closing. Moreover, not every structuring consideration is addressed in Optima and the Delaware Supreme Court’s decision in Optima is still valid law.

Practical considerations and variations on these alternatives also continue to apply notwithstanding Optima. For example, notwithstanding the language in Optima that “[n]othing in the DGCL requires any particular period of time between a board’s authorization of a merger agreement and the necessary stockholder vote,” there remains an equitable and fiduciary duty consideration as to whether the target should allow for some time to pass. Moreover, even though the Optima structure appears to be legally permissible, buyers may still have practical concerns in light of their expectations that there should be no outs in a private company transaction. For example, even with a termination right and break-up fee as compensation for failure to obtain consents promptly, a buyer’s potential concern that the target stockholders not deliver the consents is not eliminated altogether. From a target’s perspective, however, it might be difficult for the target board to relent to a buyer’s demands in such circumstances, particularly if there was concern that the target’s board had not fulfilled its Revlon duties.

Conclusion

While in the wake of Omnicare practitioners were concerned about expediting the closing of private company merger transactions, Optima now provides a roadmap for effecting an expeditious signing and closing in the appropriate circumstances through the use of written consents. Cases such as Optima also serve as a reminder that, even though a transaction may not involve public companies, many of the same principles of Delaware law – such as the applicability of Revlon duties or even disclosure obligations in connection with appraisal rights and/or Section 228 of the DGCL – continue to apply and should not be forgotten.

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13 Id. at 131.


Negotiating M&A Solvency Provisions: 
The Financial Advisors Perspective

By William Epstein

Soon after the onset of the credit crisis, a number of pending M&A transactions ran into serious trouble. Many of the high-profile transactions that experienced problems had solvency as one of the central themes:

- Despite a decision by a Tennessee court ordering The Finish Line, Inc. (“Finish Line”) to complete its $1.5 billion acquisition of Genesco Inc. (“Genesco”), the lender in the transaction brought an action in an attempt to block the acquisition, claiming the combined company would be insolvent. A settlement resulted in the lender and Finish Line paying Genesco $175 million in cash and Finish Line issuing 12 percent of its outstanding common stock to Genesco.

- Hexion Specialty Chemicals, Inc. (“Hexion”), and its equity sponsor, Apollo Global Management, LLC (“Apollo”), surprised Huntsman Corporation (“Huntsman”) with an “insolvency” opinion in an attempt to exit a merger transaction. Claiming they were concerned about the solvency of the combined company, among other things, the lenders ultimately refused to close on the transaction. The lenders made that decision despite a solvency certificate from Huntsman’s CFO and an independent opinion of solvency produced by Huntsman’s financial advisor.

- A consortium of buyers, led by the Ontario Teacher’s Pension Plan, was set to take BCE Inc., the parent company of Bell Canada, private in a C$52 billion (US$41 billion) transaction. This would have been the largest such transaction to date. At the last minute, the transaction was tripped up by the financial advisor’s inability to deliver a solvency opinion.

These transactions, just a few of the public deals in which solvency provisions were a core contributor to the resulting chaos, underline the importance of the solvency issue. In addition to such high-profile examples, we must remember what is not adequately reported: the countless smaller, private transactions that simply were put on indefinite “hold” or vanished altogether.

In response to the increased scrutiny by transaction participants of the solvency provisions contained in the deal documentation, this article will provide an overview of the underpinnings of the solvency opinion and problems that financial advisors have seen in transactions involving solvency provisions. Given the small opening in today’s debt markets (albeit for smaller, private deals), practitioners should be acutely aware of the various solvency issues as they negotiate the transaction documents.

Solvency Primer

The Uniform Fraudulent Transfer Act (“UFTA,” the successor to the Uniform Fraudulent Conveyance Act) and the federal Bankruptcy Code provide guidance in understanding the content and underlying analytics of solvency opinions. Under UFTA, the important elements in determining constructive fraudulent transfer include whether the debtor (i) was or becomes insolvent, (ii) was left with unreasonably small capital, or (iii)

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1 William Epstein is the National Director of Opinion Services for American Appraisal. The views expressed are those of the author and may not be representative of those of American Appraisal or its clients.
incurred debts beyond its ability to pay as such debts matured.\textsuperscript{2} In the Bankruptcy Code, insolvency is defined as the sum of the subject company’s debts exceeding the sum of its assets (at a “fair valuation”).\textsuperscript{3} Three basic tests result from application of the principles set forth in UFTA and the Bankruptcy Code: the Balance Sheet Test, Cash Flow Test, and Capital Adequacy Test. A financial advisor must apply these three tests prior to rendering a solvency opinion.\textsuperscript{4}

\textbf{Balance Sheet Test}

The Balance Sheet Test measures whether the enterprise value of the company exceeds its liabilities after incorporating the effects of the subject transaction. Analytically, the financial advisor employs standard valuation methodologies to determine the company’s enterprise value, including the Market Approach,\textsuperscript{5} Precedent Transaction Approach,\textsuperscript{6} and Discounted Cash Flow Approach.\textsuperscript{7}

To determine if the subject company passes the Balance Sheet Test, debt and certain other liabilities are deducted from the enterprise valuation conclusions described above.

\textsuperscript{2} 11 U.S.C. § 548(2); UFTA § 4(a)(2).
\textsuperscript{3} 11 U.S.C. § 101(32).
\textsuperscript{4} Typically, the financial advisor is asked to conduct its solvency analysis as of immediately after the transaction. The financial advisor is occasionally requested to also perform the solvency analysis as of immediately before the transaction.
\textsuperscript{5} Using the Market Approach, the financial advisor determines the value of the subject company by comparing its financial condition and operating performance to that of publicly traded companies.
\textsuperscript{6} In the Precedent Transaction Approach, the value of the subject company is determined using the implied multiples from change-of-control transactions.
\textsuperscript{7} The Discounted Cash Flow Approach calculates the value of the subject company by discounting projections by a risk-adjusted discount rate.

Technically, the test is passed even if the result is only one dollar.

The portion of the solvency opinion addressing the Balance Sheet Test reads substantially as follows:

The Fair Value of the aggregate assets of the Company will exceed its total probable liability on its existing debts, including without limitation its subordinated, unmatured, unliquidated, disputed, and Identified Contingent Liabilities.

\textsuperscript* \textsuperscript* \textsuperscript*

The Present Fair Saleable Value of the aggregate assets of the Company will exceed its total probable liability on its existing debts, including without limitation its subordinated, unmatured, unliquidated, disputed, and Identified Contingent Liabilities.

Fair Value is usually viewed as the amount at which the company would change hands in a transaction between a willing buyer and a willing seller in a prudent manner within a reasonable period of time. The standard valuation approaches above are employed to determine Fair Value. Present Fair Saleable Value typically means the value that can be obtained if the company is sold with reasonable promptness under current market conditions. The latter is sometimes defined as equivalent to Fair Value or is determined assuming a more accelerated sale of the company.

\textbf{Cash Flow Test}

The Cash Flow Test essentially evaluates the subject company’s projections to determine if it has sufficient ability to pay its debt and other obligations during the projection period. This analysis requires the financial advisor to run sensitivities and to stress test the sufficiency
of cash flows with respect to financial covenants, debt amortization, and the payments of other liabilities. This test is “passed” if the subject company can repay its obligations under reasonable downside scenarios.

Language in the financial advisor’s solvency opinion indicating that the company has passed this test would be similar to the following:

Based upon the facts known by us as of the date of this Opinion, the Company will be able to pay its debts and other liabilities (including without limitation its subordinated, unmatured, unliquidated, disputed, and Identified Contingent Liabilities) as such debts become absolute and mature.

Capital Adequacy Test

As with many aspects of solvency opinions, the test for capital adequacy is both an art and a science. The simple goal is to determine whether the level of equity remaining in the business is adequate to continue operations. The amount of the appropriate level of equity determined by the financial advisor can increase or decrease depending on many factors, including the subject industry’s outlook, the subject company’s financial performance and outlook, experience of management, the subject company’s access to the capital markets and other financing alternatives, working capital requirements, and how much flexibility the subject company has to meet its debt and other obligations during the projection period.

For example, if there is significant “cushion” in the cash flows to service debt (as demonstrated in the Cash Flow Test), then the financial advisor could be more comfortable with an equity cushion that falls lower in an acceptable range.

The financial advisor’s solvency opinion will contain language substantially as follows with respect to the Capital Adequacy Test:

The Company will not have unreasonably small capital for the business in which it is engaged, as management of the Company has stated such business is proposed to be conducted immediately following the consummation of the Transaction.

Additional Test

A fourth test sometimes creeps into the mix when a company intends to declare and pay a dividend. Some states have requirements that dividends be paid out of surplus, which is generally determined by the excess of the enterprise value of the company less its debt and certain other liabilities, and, in Delaware, less the capital of the corporation as determined under Delaware law. Simplistically, the amount of the dividend cannot exceed the amount of the surplus.

Problems, Fixes, and More

Experienced financial advisors see a number of recurring, solvency-related problems. The following views on these issues are an attempt to minimize the likelihood of deals being stalled or terminated because of the solvency provision in the definitive agreement and/or the lenders’ documentation. The earlier these issues are flushed out, the probability of last-minute deal-killers is reduced.

Solvency Provision Language

It is essential that the solvency language found in the various transaction documents be consistent and clear. In recent years issues have arisen when the language of the solvency condition in the definitive agreement is inconsistent with the language in the lender’s documents. This oftentimes results from the fact that the definitive agreement has been
negotiated far in advance of full loan documentation and funding; as a result, only the lender’s term sheet is finalized at the time of execution of the definitive agreement. Unfortunately, this results in the lender’s solvency provision being negotiated separately, following the negotiation of the definitive agreement.

For example, consider the following situation. In one recent transaction, the definitive agreement contained this language:

…[O]pinioning that, immediately after the Effective Time and after giving effect to the Merger and the other Transactions (including the Financing), (i) the aggregate value of the Surviving Corporation’s assets will exceed its total liabilities (including contingent, subordinated, unmatured and unliquidated liabilities) at a fair valuation and at fair saleable value; (ii) the Surviving Corporation will have the ability to pay its total debts and liabilities (including contingent, subordinated, unmatured and unliquidated liabilities) as they become due in the usual course of its business; and (iii) the Surviving Corporation will not have an unreasonably small amount of capital with which to conduct its business, based upon (A) the proposed financing structure for the Merger and (B) certain other financial information to be provided to the Appraiser by Parent.

That language can be contrasted with the solvency provision in the lenders’ documents. The lenders’ term sheet simply indicated that the solvency opinion was “mutually agreed to be in a form and substance customary for recent financings of this type with portfolio companies controlled by affiliates of or funds managed by the Sponsor.” This term sheet provides no comfort that the solvency language to be found in the final loan documentation will mirror what is contained in the merger agreement.

Avoidable Fire Drills

Very often, one can observe what I like to call the “eleven o’clock phenomenon” during a solvency project. It seems that invariably at eleven o’clock in the evening, the day before the issuance of the opinion and the closing of the transaction, the financial advisor will receive a phone call indicating that additional parties wish to rely on the solvency opinion. Typically, it is the lenders (or the lenders as agent to the bank syndicate) who realize that they “need” to rely on the opinion. The financial advisor, more often than not, will probe to determine if the lenders will accept an information copy of the opinion in lieu of the ability to fully rely on the solvency opinion – the latter subjects the financial advisor to increased risk and, therefore, will require additional fees. Assuming the financial advisor is amenable to the request for reliance, it is still a difficult conversation when the financial advisor must inform the borrower that the cost of services just increased at the last moment.

These are decisions that could be made earlier in the course of the transaction if the parties would allocate the time to focus on the solvency issues. The borrower typically does not raise the topic of reliance because the company does not want to pay more fees (maybe the lenders will forget?), and the lenders simply do not focus on the solvency opinion until immediately prior to close of the financing.

Who Should Provide the Solvency Assurance?

To the extent a definitive agreement has a solvency provision, it is not uncommon to permit the subject company’s chief financial officer to deliver a “CFO Certificate” to satisfy this requirement. The advantages of having the
CFO provide this certificate include utilizing the CFO’s familiarity with the company and cost savings. Presumably, the CFO knows the subject company better than an outside financial advisor and will not be charging a fee to deliver the certificate.

The trade off for those advantages, however, is a sacrifice of independence, experience providing solvency opinions, and time. Frequently, the CFO delivering the solvency certificate also is receiving consideration contingent on a successful closing of the transaction (in the form of a bonus and/or the sale of stock and/or continued employment). That raises the prospect of an inherent conflict. Also, most CFOs have had a career in accounting and operations and are not experienced in providing solvency opinions. Finally, determining the solvency of a company in a proper manner takes considerable time. The expenditure of that time may not be the highest and best use of the CFO, as he or she also must assist with the transaction negotiations and otherwise fulfill his or her role as an integral part of the company’s operations.

Another benefit of retaining an independent financial advisor is to provide a fresh eye. This is best illustrated by a current example. A company in the oil and gas industry was contemplating a dividend recapitalization. The general transaction structure involved three wholly-owned operating subsidiaries that would guarantee the debt of the parent company. A financial advisor was asked to provide solvency opinions with respect to each of the subsidiaries and the parent company. As part of the process, the financial advisor requested and received projections for each entity. The transaction was far along in documentation and, presumably, all parties were provided the opportunity to at least begin conducting their review of the projections and underlying assumptions. During review of each of the entities’ projections, the financial advisor noticed there were no contemplated provisions for taxes. When the financial advisor inquired about the absence of tax provisions, the client’s silence was telling. Had the deal been completed as structured, the corporate taxes would have impaired the company’s ability to immediately meet its financial covenants and make the scheduled principal payments, and would have reduced the returns to the private equity firm. The transaction was terminated and months later the financial advisor learned that the projections had been prepared jointly by the company and an individual employed by the lead bank. The bank’s and company’s checks and balances had somehow been defeated during this process.

Permitting a CFO Certificate to satisfy the solvency provisions of the definitive agreement and/or loan documentation carries risk which should be evaluated on a case-by-case basis. The potential ramifications of relying on a CFO Certificate prepared without an independent and rigorous analysis could be significant. How these issues will play out in court in any particular situation should not be left up to chance.

When to Start the Solvency Analysis?

The timing of requests for solvency opinions can be puzzling. Oftentimes, the borrower will wait to request the opinion until the company is fairly certain of closing the transaction. Rather than waiting until the transaction negotiations are almost completed, the borrower should request a preliminary solvency analysis early on, followed by the final opinion at close. This step would minimize the number of surprises and the frequency of having to recut the terms of the debt.

Untraditional and Traditional Solutions

Obviously, traditional fixes are available to cure potential shortfalls in the solvency analysis of a company, such as renegotiating covenants,
extending the amortization, and contributing more equity. Below are a few recent examples of attempts to keep a deal alive:

- In the middle of 2007, Hexion, an Apollo portfolio company, won a bidding war for Huntsman. The $10.6 billion transaction was to be financed almost entirely with debt capital. In the spring of 2008, Apollo and Hexion delivered an opinion from an independent financial advisor that the combined company would be insolvent. Hexion then filed suit in the Delaware Court of Chancery claiming that it did not have to close the transaction. The lawsuit started a chain of events including additional suits against the lenders, countersuits, a solvency opinion delivered by Huntsman, the refusal of the banks to fund the transaction at close, Vice Chancellor Lamb’s ruling that Hexion had to perform under the merger agreement, and ultimately, settlements whereby Huntsman received cash and other consideration from Hexion, Apollo, and the banks. Fixes, which assisted with the solvency analysis, were proposed to help close the transaction. First, affiliates of Apollo agreed to invest $750 million in additional equity commitments at close. In a more interesting twist, certain Huntsman stockholders agreed to provide backstop commitments of over $600 million, in return for which these stockholders would have received no equity, debt, or other securities or payments.

- An alternative to the buyer making additional equity contributions to assist with a determination of solvency is the use of stub equity. “Stub equity” generally refers to shares representing a minority interest in an acquisition vehicle offered to stockholders of a target. Perhaps more common in transactions involving private companies, this structure gained a bit of traction in the public arena during 2007 with Clear Channel Communications’ going-private transaction. (Harman International was the subject of another going-private transaction involving stub equity; however, it never closed.) Although the Clear Channel Communications transaction was not structured this way specifically to assist with the solvency opinion, stub equity instead of debt lowers leverage.

- The Dow Chemical Company (“Dow”) was forced by the courts to complete its merger with Rohm & Haas Company. Dow had run into difficulties financing the transaction as a result of the termination of the sale of a joint venture interest, the contraction of the debt markets, and the volatile equity markets. To help bridge the gap, certain selling stockholders agreed to purchase $2.5 billion in Dow preferred stock and committed more than $500 million to purchase common equity. Although this specific solution was not designed to assist with the issuance of a solvency opinion, the remedy certainly would have that effect.

**Conclusion**

Many of the solvency-related problems financial advisors have seen over the years arise because the concerned parties do not focus on the solvency opinion until very late in the transaction. Issues such as reliance and the language in the solvency provision can be...
agreed on early in the process. Retaining a financial advisor as early as possible to provide preliminary feedback would help all parties to the transaction avoid many nasty surprises and difficult, often last-minute discussions.

Once it has been determined that there is not enough equity in the transaction, a number of fixes may be available to revise the deal structure, as evidenced in the market over the last couple of years. Of course, some of these structures may reduce the ultimate returns to the buyers; nevertheless, a number of solutions can split the pain between buyers and sellers and result in an acceptable outcome.

Buyers and sellers have more or less negotiating leverage depending on the stage of such negotiations and deal-specific issues. With solvency opinions becoming more commonplace, in part because lenders have been revising their procedures to more frequently require independent solvency opinions, it makes good sense for practitioners and their clients to operate from a position of knowledge. Understanding the potential pitfalls of and solutions to solvency provisions will maximize your negotiating leverage.

*     *     *

**TASK FORCE REPORTS**

**Task Force on Acquisitions of Public Companies**

We had great meetings in Vancouver in April 2009. At the Task Force meeting on Friday, April 17, Byron Egan provided a report on the work being done on the commentary for the “no third party beneficiaries” covenant addressing the *ConEd* issue. Ryan Thomas provided additional input regarding the various approaches. We had a lively discussion of the current approaches, and alternatives for the commentary. Byron indicated that he would provide a redrafted section.

We then discussed Section 1. Hal Leibowitz responded to various comments relating to the exchange provisions and indicated that the exchange ratio article would be ready for Task Force review in Chicago. Jim Walther and Jim Griffin provided comments for his consideration. We briefly discussed the termination section and agreed to review it at our upcoming meeting in Chicago.

On Saturday, April 18, the Editorial Board met and discussed the status of the various sections. Jim Griffin and Ed Deibert agreed to take responsibility for the definitions section. Diane Frankle agreed to contact Leigh Walton to confirm she had all the recent changes to the representations and warranties section and to schedule a call to discuss a plan for completion of this section.

At our meetings in Chicago, we will be reviewing the current draft of the termination section and revised representations and warranties and commentary, as well as a revised third party beneficiary section.
Our Task Force dinner will be held on Friday, July 31, at Ditka’s, 100 East Chestnut, Chicago. Cocktails will be at 7:00 p.m. and dinner will follow at 8:00 p.m. If you are interested in attending, please contact Diane Frankle.

Diane Holt Frankle
Stephen H. Knee
Co-Chairs

Task Force on Distressed M&A

The Task Force on Distressed M&A held its inaugural meeting in Vancouver. We featured Richard Eng of Brookfield Asset Management Inc. in Vancouver, a private equity fund investing in cross-border distressed M&A deals, David Hallett of Lazard Middle Market on the state of distressed M&A markets, and an esteemed panel, comprised of Lorna Telfer, Craig Menden, Wilson Chu, and Rick Alexander, on “Negotiating M&A Solvency Provisions: State of the Art in the State of Uncertainty.” The solvency presentation was subsequently repeated via national webcast.

On Friday, July 31, from 8:00 a.m. until 10:00 a.m., the Task Force will sponsor a program on “Distressed M&A: Practical Insights From A Mock Negotiation.” This program will explore, through the lens of a mock negotiation, some of the most critical issues that deal lawyers confront in distressed M&A transactions. The topics will include third-party beneficiary issues, specific performance, fiduciary considerations, and other implications of recent legislative and judicial developments. The panel will use the following particularly relevant cases to build the mock case being negotiated: *Equity-Linked Investors, Hokanson* and *ConEd*. The panel will be comprised of Chief Justice Myron T. Steele of the Delaware Supreme Court, J. Travis Laster, Mark Morton, William Savitt, and Leigh Walton, as well as Hendrik Jordaan as moderator.

Following this program, the Task Force will host its regular meeting. This meeting will feature multiple speakers including a representative from Houlihan Lokey (who will provide an overview of the distressed M&A market), Walter Florence from the Frontenac Company, a leading middle market private equity firm (on “How PE Firms are Capturing Opportunities through Distressed Deals”), Kendall Colman, a leading consultant (on “Building High Performance Teams and the Integration Best Practices in Distressed Deals”), a representative of Grant Thornton (on “A Look Ahead – Insights from Grant Thornton’s Recent Distressed M&A Report”) and David Weinstein, a leading Los Angeles based bankruptcy attorney (on the implication for deal lawyers on recent prominent bankruptcies).

We look forward to seeing everyone in Chicago!

Hendrik Jordaan
Chair

Task Force on the Model Stock Purchase Agreement

The Editorial Committee continues to work on the Commentary to the Revised Model Stock Purchase Agreement. The Editorial Committee is hoping to bring its work on the project to a close by our stand-alone meeting in December. Also, the Editorial Committee has included members of the ABA’s AICPA Task Force in its recent meetings. Presently, the AICPA participants are reviewing and updating the financial matters contained in the Earnout Agreement.

We look forward to seeing you in Chicago.

Robert T. Harper
Chair
SUBCOMMITTEE REPORTS

International M&A Subcommittee

The International M&A Subcommittee met on Friday, April 17, in connection with the Spring meeting of the ABA’s Business Law Section in Vancouver.

Acquisitions of and Exits from Off-Shore Holding Companies

The meeting began with a presentation by Stephen James on developments in acquisitions of and exits from off-shore holding companies.

FDI Restrictions Project

Frank Picciola gave an update of the progress on this current project summarizing foreign direct investment laws of major world jurisdictions. He will circulate an updated list of the jurisdictions currently covered by the project and of the other key jurisdictions not currently covered.

Future Projects and Programs

There was a discussion about the program that the Subcommittee was presenting the following morning entitled “Practical Impacts on M&A of U.S. and International Accounting Principles Convergence: What You Need to Know Now About IFRS and FAS 141(R).”

There was then a discussion of possible future Subcommittee projects and programs, including the following:

- Post-contract dispute resolution techniques, based on our current project.
- The increasing involvement of government in South American businesses (Saul Feilbogen).
- A program based on diligence issues which could lead to unforeseen exposures, including IP (Peter Haver), privacy (Joe Stegbauer of Procter & Gamble) and anti-corruption law (Jim Doub).
- Cross-border acquisitions of insolvent companies (which could be co-sponsored with the Committee’s new Task Force on Distressed M&A).
- PIPE-related transactions involving international M&A (Michel Galinas).

BCE and Lyondell: Revlon Redux?

Nick Dietrich and Anthony Milazzo led a discussion on directors’ duties in change of control transactions in Canada and the U.S., based on a comparison of the recent BCE and Lyondell cases.

Current Developments Discussion

The meeting concluded with our customary general discussion by Subcommittee members regarding legal developments in their jurisdictions relevant to M&A practice and particular issues they have recently encountered. Issues discussed included:

- Mireille Fontaine updated the meeting on the changes to Canada’s Investment Canada Act, including increases in the thresholds for review of WTO investors.
- Nick Dietrich referred to changes in the review process set out in Canada’s Competition Act.
- Reid Feldman referred to changes in French reorganization and insolvency procedures.
The Subcommittee’s website is located at the following address:

www.abanet.org/dch/committee.cfm?com=CL5

The website contains the following information:

- The program materials from the Subcommittee’s program entitled “Practical Impacts on M&A of U.S. and International Accounting Principles Convergence: What You Need to Know Now About IFRS and FAS 141(R).”

- The presentation notes of Nick Dietrich and Anthony Milazzo and an article by Nick Dietrich comparing the recent BCE and Lyondell cases.

- Brief notes by Nick Dietrich summarizing the changes in the review process set out in Canada’s Competition Act and the changes to Canada’s Investment Canada Act, in each case as referred to in the meeting.

- A presentation by Reid Feldman on the changes in French reorganization and insolvency procedures referred to in the meeting.

- Details of the Subcommittee’s publications, future meetings, work-in-progress and past program materials.

We look forward to seeing you in Chicago.

Daniel Rosenberg
James R. Walther
Co-Chairs

Membership Subcommittee

Since our April 2009 report and despite the ongoing financial crisis, our membership is still growing. Our total Committee membership is over 3,600. Our membership has grown to represent 45 countries and 49 states.

The M&A Market Trends Subcommittee has grown to 1,320 members followed by the Private Equity M&A Subcommittee with 1,105 members. Given the number of attorneys affected by downsizing/layoffs, we have seen a slight decrease in our in-house counsel members (currently 376) and the “associate” (non-lawyer) members (currently 293). Positive news is that our newest task force, the Task Force on Distressed M&A, already has 229 members.

Hendrik Jordaan
Chair

M&A Jurisprudence Subcommittee

The M&A Jurisprudence Subcommittee has two working groups. The Annual Survey Working Group identifies and reports to the Committee on recent decisions of importance in the M&A area, and prepares the Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions, which is published annually in The Business Lawyer. The Judicial Interpretations Working Group examines and reports to the Committee on judicial interpretations of specific provisions of acquisition agreements and ancillary documents, looking not only for recent M&A cases of special interest, but also examining the entire body of case law on the specified type of provision. The work product of the Judicial Interpretations Working Group consists of memoranda summarizing our findings regarding these acquisition agreement provisions and M&A issues. The memoranda are posted in an extranet library, to which only M&A Jurisprudence Subcommittee members have access currently, but which we expect to
eventually make available to all members of the Committee.

The Annual Survey Working Group will meet in Chicago on Friday, July 31, from 12:30 p.m. until 1:30 p.m., in the Mississippi Room, Level Two of the Sheraton Chicago. The Judicial Interpretations Working Group will meet immediately thereafter, from 1:30 p.m. until 3:00 p.m.

**Annual Survey Working Group**

The sixth Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions was published in the February 2009 issue of *The Business Lawyer*. Our working group is collecting 2009 cases for consideration for inclusion in our 2009 annual survey, and we thank all Committee members who have suggested cases. In Chicago, we will discuss those cases and any additional cases presented at the meeting. We will thereafter begin the summarization process.

Among the cases we will discuss are *MPI Acquisition LLC* and *Trevek Enterprises, Inc.*, which are summarized below, and the recent decisions of the Delaware Court of Chancery in *Weygandt v. WECO, LLC* and *James Cable, LLC v. Millenium Digital Media Systems, L.L.C.*

We are asking all members of the Committee to send us significant judicial decisions for possible inclusion in the survey. You can email submissions either to Scott Whittaker (swittaker@stonepigman.com) or to Jon Hirschoff (jhirshoff@fdh.com). You may fax cases to Scott at (504) 596-0836 or to Jon at (203) 325-5001. Please state in your email or on the fax cover sheet why you believe the case merits inclusion in the survey.

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., 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 Delaware General Corporation Law 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 with federal law, securities law, tax law, and antitrust law. But if you feel a case dealing with an M&A transaction is particularly significant please send it, even if it does not meet the foregoing criteria.

To join our working group, please email Jon Hirschoff (jhirshoff@fdh.com) and Scott Whittaker (swittaker@stonepigman.com) or simply come to the working group meeting in Chicago.

**Decisions to be Discussed at the Chicago Meeting**


In *MPI Acquisition*, the Alabama Supreme Court held that federal bankruptcy law preempts state law successor liability theories, so as to bar a plaintiff from bringing a successor liability suit against a company that purchased assets pursuant to a bankruptcy court order declaring the assets free and clear of liabilities.

MPI Acquisition, LLC (“MPI”) purchased the assets of Manco Products, Inc. (“Manco”) pursuant to an order of the United States Bankruptcy Court for the Northern District of Indiana, which stated that the purchase was free and clear of liabilities for claims arising out of products previously manufactured by Manco.
The plaintiffs subsequently filed a products liability suit in Alabama state court, alleging that MPI was liable as Manco’s successor under Alabama’s “product line” successor liability jurisprudence. MPI filed a motion for summary judgment based on the bankruptcy court order. The trial court denied the motion, and certified its ruling for permissive appeal. The Alabama Supreme Court accepted the appeal, reversed the trial court’s holding, and remanded the case for entry of summary judgment in favor of MPI.


* * *


In *Trevek Enterprises, Inc. v. Victory Contracting Corporation*, a New York corporation (“Trevek New York”), brought a contract claim in the Connecticut Superior Court. The defendant moved to stay the proceedings on the basis that Trevek New York had not registered to do business in Connecticut. In response, Trevek New York assigned its claim to a Connecticut corporation (“Trevek Connecticut”) that had been formed subsequent to the events that gave rise to the claim but prior to the commencement of the litigation. Trevek Connecticut was substituted, over the defendant’s objection, as party plaintiff. The defendant then moved to stay the proceedings on the basis that under Section 33-291(b) of the Connecticut Business Corporation Act (the “Connecticut Act”), it was insufficient that Trevek Connecticut was not a foreign corporation; instead, Trevek New York had to comply with the registration requirement before Trevek Connecticut could proceed with the claim. The trial court denied that motion, but the Court of Appeals held that the motion should have been granted and remanded the case for further proceedings.

Section 33-291(b) of the Connecticut Act is based upon, indeed identical to, Section 15.02(b) of the Model Business Corporation Act (“MBCA”). Although *Trevek* did not involve a business acquisition, the decision is potentially relevant to many business acquisitions, regardless of the governing law of the acquisition agreement and the states of organization of the buyer and the seller. *See* Ernest M. Lorimer, “2008 Developments in Connecticut Business Entity Law”
Business acquisition agreements typically contain the seller’s representation that seller is duly qualified to do business as a foreign corporation and is in good standing under the laws of each state or other jurisdiction in which either the ownership or use of the properties owned or used by it, or the nature of the activities conducted by it, requires such qualification. In some transactions the seller will request and the buyer will agree to an exception for jurisdictions in which the failure to be qualified would not have a material adverse effect on the business or properties of seller. See Section 3.1 of MAPA and accompanying commentary.

In most states, the principal negative consequence of failure to register as a foreign corporation when registration was required is that the corporation may not commence a proceeding in the courts of that state. Except in a few states, the situation can be cured by registration by the foreign corporation. That will be a straightforward matter if the acquisition was by way of a purchase of stock or a merger in which the foreign corporation was the survivor. But what if the acquisition was an asset deal, and the selling foreign corporation has dissolved or refuses to register, or a merger in which the foreign corporation was not the survivor, and thus is no longer around to register?

The answer to that question is entirely a matter of the law of the jurisdiction in which the buyer wishes to bring litigation (the “Preferred Jurisdiction”). It is not controlled by the acquisition agreement. Section 15.02(b) of the MBCA and Section 33-291(b) of the Connecticut Act both provide: “The successor to a foreign corporation that transacted business in this state without a certificate of authority and the assignee of a cause of action arising out of that business may not maintain a proceeding based on that cause of action in any court in this state until the foreign corporation or its successor obtains a certificate of authority.” According to the Commentary to Section 15.02, all but 13 jurisdictions follow the substance of the MBCA on this point.

Section 15.02 places significant weight on the word “successor,” which it does not define, and which is not defined elsewhere in the MBCA. If the seller no longer exists, or if the buyer does not have an enforceable right to cause the seller to register as a foreign corporation, which the seller may well wish to avoid in light of the likely penalties for non-registration (query whether a further assurances clause might create such a right in buyer), the buyer, even though it has obtained an assignment of the cause of action, will be unable to bring the litigation in the Preferred Jurisdiction unless the buyer is a “successor” that can obtain the required certificate of authority. Particularly in situations in which the buyer cannot get jurisdiction over the intended defendant except in the Preferred Jurisdiction, the meaning of “successor” becomes extremely important.

Unfortunately, the Official Comment to Section 15.02 is not helpful. After stating an intention to avoid “harsh or erratic sanctions,” it goes on to say: “Section 15.02(b) prevents evasion of section 15.02(a) by an assignment of a claim on which the foreign corporation is barred from bringing suit under section 15.02(a). If the successor has acquired assets of the foreign corporation in a transaction requiring approval by the foreign corporation’s shareholders, the successor may maintain suit after it has qualified. In the case of all other assignments, the foreign corporation itself must obtain a certificate of authority before the assignees may maintain suit on the claim. See Sections 12.01 and 12.02.” (emphasis added.)
is required in an asset deal. Those sections, as in force in the Preferred Jurisdiction, will not govern the shareholder approval question, because it will be governed by the law of the seller’s state of incorporation, which *ex hypothesis* is not the Preferred Jurisdiction.

The approach of the Official Comment may be helpful to a buyer needing to commence litigation in a Model Act state following an acquisition through a merger in which seller is not the survivor, as that is a transaction inevitably requiring shareholder approval.

The Official Comment’s approach is, however, inappropriate in the context of an asset deal. There is no reference to shareholder approval in the MBCA text, and it is hard to see how the criteria for shareholder approval of an asset deal are appropriate criteria for determining whether an assignee of a cause of action is a “successor” for purposes of the Section 15.02(b) of the MBCA.

It may be that in a future case brought by a buyer of assets in a Model Act state, in which the defendant, like the defendant in *Trevek*, moves to stay the action until the seller or its “successor” has qualified to do business, the buyer will be able to persuade a court to interpret “successor” without assistance from the Official Comment. But in the *Trevek* case, the Connecticut court did not hesitate to cite approvingly the Connecticut version of an earlier version of the Model Act commentary: “If the successor has acquired all or substantially all of the assets of the foreign corporation, the successor may maintain suit after it has qualified. In the case of all other assignments, the foreign corporation itself must obtain a certificate of authority before the assignee may maintain suit on the claim.” (emphasis supplied in *Trevek* opinion.)

Acquisition of all or substantially all of the assets was, of course, at the time this earlier commentary was drafted, the test for whether shareholder approval of the asset sale was required.

In light of the uncertainty regarding the meaning of “successor” in Section 15.02(b) of the MBCA, it would be sensible for buyer’s counsel to consider certain precautions, before and in connection with the closing of the transaction, with respect to buyer’s ability to commence litigation following an asset deal that does not require approval by seller’s shareholders.

The first and most important safeguard in this area is pre-closing due diligence. In considering whether the seller conceivably is required to register as a foreign corporation in any state, buyer’s counsel should consider the jurisdictions in which the seller’s business might require the commencement of litigation in the future based on events before the closing. If there is any possibility that the seller should have registered in any such jurisdiction, buyer should consider requiring the seller to do so, especially if such state has a provision like Section 15.02 of the MBCA.

Second, since there may be potential litigation situations not discovered by due diligence, and since the defendant in litigation commenced by buyer after the closing may take an extreme position with respect to whether seller should have registered, buyer’s counsel should consider whether he or she is comfortable that the further assurances provision of the acquisition agreement is sufficient to require the seller to register as a foreign corporation in any jurisdiction where that is necessary or appropriate in order for buyer to be able to commence litigation arising out of the conduct of the seller’s business pre-closing. Counsel might consider a specific commitment on the part of the seller to do so. Depending upon the circumstances, counsel might also consider strengthening the qualification to do business representation and providing for specific indemnification for those
situations in which seller’s failure to register prevents buyer from commencing litigation it otherwise could have commenced.

**Judicial Interpretations Working Group**

The Judicial Interpretations Working Group met at the Spring meeting of the ABA Business Law Section in Vancouver. During the meeting we had a spirited discussion of Don Dalik’s paper on the jurisprudence interpreting full disclosure or 10b-5 representations, and the paper on attorney-client privilege prepared by Brian North, Shima Roy, and Frederic Smith. The attorney-client privilege paper has been added to the extranet library of judicial interpretations memoranda, to which Working Group members have access, and the full disclosure paper will be added after further editing.

The Chicago meeting of the Judicial Interpretations Working Group will be held on Friday, July 31, from 1:30 p.m. until 3:00 p.m., in the Mississippi Room, Level Two of the Sheraton Chicago. We will discuss the paper by Gabe Saltarelli and Mark Klein on judicial interpretations of financial statements representations. We will also discuss the status of work of the teams that are preparing memoranda pertaining to exclusivity and standstill provisions, bring-down conditions, and best efforts/reasonable efforts provisions.

To join our working group, please email Jim Melville (jcm@kskpa.com) and Scott Whittaker (swhittaker@stonepigman.com) or simply come to the working group meeting in Chicago.

Scott T. Whittaker  
Subcommittee Chair  
Jon T. Hirschoff  
Chair, Annual Survey Working Group  
James C. Melville  
Chair, Judicial Interpretations Working Group  

**M&A Market Trends Subcommittee**

The members of the M&A Market Trends Subcommittee continue to be busy getting ready for the release of the 2009 M&A Deal Points Studies. Before we get there, we wanted to thank everyone for their participation in the April meeting in Vancouver.

At the Vancouver meeting, representatives of Duff & Phelps’ Los Angeles office discussed the study recently released by Duff & Phelps on the increased use of fairness opinions in M&A and other transactions, with representatives of Potter Anderson & Corroon chiming in on Delaware cases relating to fairness opinions. In addition, the leaders of our Canadian Study and our Continental European Study presented a program on those studies. We also heard Hendrik “Carnac the Magnificent” Jordaan lead a discussion of what will be market in 2009. Were Hendrik & Co. correct so far? Well, come to the meeting in Chicago and find out.

At our Chicago meeting (scheduled for 10:00 a.m. until 11:30 a.m., on Saturday, August 1):

- Jennifer Muller of Houlihan Lokey will discuss deal stats for the first six months of 2009.
- Wilson Chu and other members of the working group for the 2009 Private Target M&A Deal Points Study will give you a sneak preview of selected results from that study.
- Jim Griffin and other members of the working group for the 2009 Strategic Buyer/Public Target Deal Points Study will preview that study.

Both of those discussions will include mock negotiations of the various deal points. Also, we will get an update on the status of the next studies in Continental Europe and Canada.
The dial-in numbers for the meeting for those of you who cannot attend in person are:

- U.S. Domestic: (888) 209-3912
- International: (416) 620-2001
- Code – 7135953

We look forward to seeing you in Chicago.

Keith Flaum
Chair
Hendrick Jordaan
Jessica Pearlman
Co-Chairs

Private Equity M&A Subcommittee

The Private Equity M&A Subcommittee met in Vancouver on Saturday, April 18, in conjunction with the Spring meeting of the ABA’s Business Law Section. The Subcommittee discussed events and developments affecting the private equity markets during the past year. The Subcommittee also arranged for Professor Steven Davidoff to visit with the Subcommittee, where he provided a thorough presentation and review of recent developments affecting private equity. Professor Davidoff is Associate Professor of Law at the University of Connecticut School of Law; Visiting Professor of Law at The Ohio State University School of Law; founder of the M&A Law Professors Blog; and a regular contributor to the New York Times “Deal Book” publication where he provides commentary on many M&A and private equity-related topics under the pen name “The Deal Professor.” The discussions prompted a number of questions and follow-on discussions. The Subcommittee meeting was well-attended, and the Subcommittee Co-Chairs thank Professor Davidoff and all participants for contributing to the session.

Henry Lesser
John Hughes
Co-Chairs

Programs Subcommittee

At the 2009 Annual Meeting in Chicago, the Committee will be the primary sponsor of two very timely programs and will co-sponsor two additional programs of interest to our Committee members. In addition, the Private Equity M&A Subcommittee has arranged for Michele Anderson, Head of Mergers & Acquisitions at the Securities and Exchange Commission, to join our full Committee meeting on Sunday and discuss developments involving M&A at the SEC.

Distressed M&A: Practical Insights From A Mock Negotiation
Friday, July 31
8:00 a.m. – 10:00 a.m.

The Task Force on Distressed M&A will sponsor a program on “Distressed M&A: Practical Insights From A Mock Negotiation.” This program will explore, through the lens of a mock negotiation, some of the most critical issues that deal lawyers confront in distressed M&A transactions. The topics will include third-party beneficiary issues, specific performance, fiduciary considerations, and other implications of recent legislative and judicial developments. The panel will use the following particularly relevant cases to build the mock case being negotiated: Equity-Linked Investors, Hokanson and ConEd. The panel will be comprised of Chief Justice Myron T. Steele of the Delaware Supreme Court, J. Travis Laster, Mark Morton, William Savitt and Leigh Walton, as well as Hendrik Jordaan as moderator.
Don’t Fall at the First Hurdle – Preliminary Agreements in Cross-Border M&A
Saturday, August 1
10:30 a.m. – 12:30 p.m.

Co-chaired by Christiaan de Brauw and Alfredo Rovira, practitioners from key jurisdictions around the world will discuss important issues, pitfalls, and traps for the unwary that can arise when negotiating pre-contractual M&A documentation such as letters of intent, standstill and exclusivity agreements, and confidentiality undertakings. The program will also deal with overarching principles of good faith in some countries and other pitfalls and traps for the unwary in pre-contractual negotiations, including different fiduciary duties in the various jurisdictions and recent trends regarding preliminary agreements in the current global financial crisis. Specific topics include: (i) potential liability for breaking-off negotiations based on good faith principles applicable in certain jurisdictions; (ii) provisions on binding effect in a cross border environment and other safeguards and practical solutions to avoid pre-contractual liability based on behavior of the parties in negotiations; (iii) miscellaneous provisions when negotiating LOI’s, MoU’s, and confidentiality agreements in cross-border M&A, covering peculiarities from each jurisdiction, including applicable law and jurisdiction; (iv) exclusivity and standstill agreements in respect of listed companies, including exceptions and issues regarding fiduciary duties and different fiduciary duties in the various jurisdictions; and (v) specific issues and provisions prompted by the financial crisis and restructuring transactions.

In addition to the Co-chairs, the panelists include Jean Paul Chabaneix, Wolfgang Kau, Shivpraya Nanda, Remco van der Kroft, and Murray Perelman.

IP Reps and Warranties in Cross Border Acquisition Agreements
Saturday, August 1
2:00 p.m. – 3:30 p.m.

The Committee is also co-sponsoring a program, chaired by Peter Haver, that will strive to give business lawyers the necessary IP background to enable them to understand the potential IP pitfalls in an international M&A transaction as well as provide strategies and drafting techniques for securing the buyer’s rights to the target’s intellectual property in an international setting. Topics to be discussed will include: (i) means of identifying the transferred IP in the acquisition agreement and related due diligence issues; (ii) insuring that seller has unencumbered rights to the transferred IP (including meeting any registration formalities); (iii) protecting against third party rights (ownership or monetary) to the transferred IP; (iv) licensing issues; (v) trade secrets; and (vi) reps as to the transferred IP’s capabilities and performance.

In addition to Peter Haver, the panelists will include: Leianne Crittenden, Senior In-House Counsel at Oracle, Emilio Beccar Varela, Vincent K. Yip, Patricia Kane Schmidt, and Patrick J. Whalen (Moderator).

Whirlwind Tour Through an Acquisition Agreement
Saturday, August 1
2:30 p.m. – 4:30 p.m.

The Committee is co-sponsoring a program entitled “Whirlwind Tour Through an Acquisition Agreement” with the Committee on Business Law Education and the Young Lawyer Forum. The program, which is intended for inexperienced M&A lawyers and those who don’t regularly practice in the field, will begin with a discussion of the business and legal issues associated with representations and warranties, covenants and conditions, and contract concepts that are the foundation of
every acquisition agreement, and then will proceed with a mock negotiation that utilizes those concepts in discussing key provisions of M&A agreements. Committee members David Albin and Robert Copeland will be featured on the panel.

The SEC and M&A
Sunday, August 2
Full Committee Meeting

The Private Equity M&A Subcommittee has arranged for Michele Anderson, Head of the Office of Mergers & Acquisitions at the Securities and Exchange Commission, to visit with the Committee in conjunction with the full Committee meeting and review and talk on selected issues and topics that the SEC is currently addressing, or that the SEC is seeing in the marketplace. Committee members are encouraged to participate in the program and should feel free to raise questions as part of this session. This presentation will be in lieu of the traditional Committee Forum but will not be a CLE accredited program.

Future Programs

The Programs Subcommittee is developing its slate for the 2009 Fall stand-alone meeting and 2010 Spring meeting. If any of you have program ideas, please contact Tom Thompson (thomas.thompson@bipc.com), Bob Copeland (rcopeland@sheppardmullin.com) or David Albin (dalbin@fdh.com).

Thomas Thompson
Chair

Technology Subcommittee

Technology is receiving greater emphasis in the Business Law Section as a result of adoption of its business plan. Among the strategic goals adopted by the Business Law Section in April 2008 are more efficient methods for delivery of information and content to members and ways for members to participate in meetings without being physically present. A critical element of the business plan is the formation of a Content Committee for the Business Law Section, which is charged with bringing together all of the various elements of content (publications, website, committee meetings, etc.) under one umbrella and then providing for its distribution to the members in as efficient a manner as possible. The Content Committee is already hard at work and has produced a very impressive Content Plan that was adopted by the Council in Vancouver. Among the 2009-2010 priorities established by the Business Law Section are website improvements to make our online presence more valuable to members, and better access to meetings and programs, including dial-in and teleconference capabilities. Members of our Committee should begin to see these priorities implemented on the website and elsewhere soon.

The Annual Meeting will again include many opportunities for members to participate in meetings via conference call. Dial-in numbers have been furnished to all the subcommittee and taskforce chairs. Please contact your chair directly for information about participating by phone.

Thanks to those (few) of you who have signed up for the ABA’s new “Legally Minded” networking tool. The network is still in its formative stages but the staff remains optimistic that it can form into a vibrant social network for the exchange of ideas and information among members of the legal community. If you have not yet signed up, you may do so at the following link:

http://www.legallyminded.com/default.aspx

Members who are interested in technology in the ABA in general are encouraged to attend the meeting of the Technology Committee of the Business Law Section, scheduled for 9:00 a.m. on Monday, August 3, at the Chicago
Sheraton, Parlor G, Level 3. ABA staff will be presenting demonstrations of several new products that will be rolled out to members in the near future, including a couple of applications using Sharepoint technology. This will also be an opportunity for the staff and Section officers to receive feedback from the rank-and-file as to those technology products and services we would like to see from the ABA.

The success of our web pages depends largely on the valuable content that we post there for members. Beginning in the fall, we will institute periodic email reminders to all members of our Committee alerting them to new content that is available on the website. We have a specific section that is available for posting of articles and other papers that have been produced by our members, and we encourage all of our members to give some thought to materials that could be shared through the website and to forward them to the undersigned. Our Deal Points studies have proven that valuable content is the single most important element of any website, and we hope our other subcommittees and task forces will do what they can to contribute to the content of our site.

George M. Taylor, III
Chair

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Saturday, August 1st

Editorial Committee of the Task Force on
the Model Stock Purchase Agreement
8:00 a.m. – 10:00 a.m.
Parlor E, Level Three
Sheraton Chicago

M&A Market Trends Subcommittee
10:00 a.m. – 11:30 a.m.
Parlor C, Level Three
Sheraton Chicago

Program: Don’t Fall at the First Hurdle –
Preliminary Agreements in Cross-Border
M&A
10:30 a.m. – 12:30 p.m.
Sheraton Ballroom II, Level Four
Sheraton Chicago

Editorial Committee of the Task Force on
Model Stock Purchase Agreement
11:00 a.m. – 1:00 p.m.
Parlor G, Level Three
Sheraton Chicago

Meeting of Committee Chairs and Vice
Chairs, Subcommittee, Task Force and
Working Group Chairs
1:00 p.m. – 2:30 p.m.
Mississippi Room, Level Two
Sheraton Chicago

Task Force on Acquisitions of Public
Companies
2:30 p.m. – 5:30 p.m.
Mississippi Room, Level Two
Sheraton Chicago

Committee Reception and Dinner
7:00 p.m. Reception/8:00 p.m. Dinner
Zealous
419 West Superior Street, Chicago

Sunday, August 2nd

Task Force on Dictionary of M&A Terms
9:00 a.m. – 11:30 a.m.
Mississippi Room, Level Two
Sheraton Chicago

International M&A Subcommittee
9:00 a.m. – 11:30 a.m.
Sheraton Ballroom III, Level Four
Sheraton Chicago

Editorial Working Group of the Task Force
on Acquisitions of Public Companies
11:30 a.m. – 1:30 p.m.
Mississippi Room, Level Two
Sheraton Chicago

Full Committee Meeting
2:00 p.m. – 5:30 p.m.
Sheraton Ballroom III, Level Four
Sheraton Chicago
American Bar Association, Section of Business Law, Committee on Mergers and Acquisitions. The views expressed in the Committee on Mergers and Acquisitions Newsletter are the authors’ only and not necessarily those of the American Bar Association, the Section of Business Law or the Committee on Mergers and Acquisitions. If you wish to comment on the contents, please write to the Committee on Mergers and Acquisitions, Section of Business Law, American Bar Association, 321 N. Clark Street, Chicago, Illinois, 60610.