FROM THE CHAIR
By Leigh Walton

The ABA’s Annual Meeting will be held in Toronto from August 5 until August 7. I trust that many of our 4,329 members will join us in person or by conference call. Our Subcommittee and Task Force meetings will be held on Friday, Saturday and Sunday, along with several excellent CLE programs. Our Committee dinner will be held on Saturday night, and our full Committee meeting will take place on Sunday afternoon.

More precisely, the full Committee meeting will be held on Sunday, from 12:30 p.m. until 3:00 p.m., in the Westin Conference Centre, Frontenac Room, Street Level. Most of our meetings will be available by conference telephone. Set forth below is the dial-in information for the full Committee meeting and the Committee Forum that follows:

US & Canada: (866) 646-6488
International: (707) 287-9583
Conference Code: 7227876294

Dial-in information for Subcommittee and Task Force meetings is included in the schedule of meetings and other activities of our Committee starting on page 31 of this issue of Deal Points.

Public Company Merger Agreement Hits the Stands

It is with pride and frankly jubilation that I announce the publication of the Model Merger Agreement for the Acquisition of a

(continued on next page)
Public Company just in time for the Annual Meeting. This work is poised to be the next in a series of seminal works by our Committee -- resources that have significantly benefited M&A lawyers and advisors as well as students of our craft (not to mention the ABA’s bottom line). For those of us motivated by giving back to the profession, the creation of this Model Merger Agreement (and its ancillary agreements) has been a worthy receptacle of our pro bono work. The Model Merger Agreement represents the cumulative efforts of many merger and acquisition practitioners from across the US and Canada who devoted thousands and thousands of hours to the creation of this sophisticated yet practical work.

The Model Merger Agreement is intended to be a reasonable buyer’s first draft merger agreement in a negotiated stock for stock acquisition of a US publicly traded corporation. Importantly, commentary is provided to explain the provisions, the perspective of the target counsel and the target, and occasionally buyer responses to target revisions. It is both a practical and a pedagogical tool. The Task Force that authored this work was created in 1994 -- giving you some sense of the time and attention that has been expended in the creation of this work.

Many people deserve much credit for this creation. None more so than Diane Holt Frankle. She was one of the founding members of the Public Companies Acquisition Task Force in 1994 and was appointed Co-Chair in 1997. Throughout her tenure, she has guided this work toward the excellence it has achieved. If we were to calculate just the number of hours she has spent on this tome times her hourly rate, you would realize the magnitude of her (and her firms’) contributions. More than just noting her many hours of service, we salute her commitment to both quality and collegiality. Along the way she built a community of deal lawyers first in the Task Force and then in the Subcommittee that enjoyed the stimulating discussions of issues raised by the Model Merger Agreement so much that they were reluctant to see the project end!

Also to be recognized are Steve Knee, Jim Griffin, Lorna Telfer, and the other members of the Editorial Board of the publication. Steve Knee was the original Chair of the Public Companies Task Force when it was created in 1994, and kicked off the project. He stuck with the project to the end and I know he celebrates this “birth” as one of the founders after all those years of service. Jim Griffin (ably assisted by Lorna Telfer) propelled the project into high gear during the last 18 months to assure that the “best was not the enemy of the good” (and along the way they assured that we got the best). Others to be congratulated (apologizing in advance for those many people I’ve missed) include Rick Alexander, Steve Bigler, Bruce Cheatham, Edward Deibert, Byron Egan, Keith Flaum, Hal Leibowitz, Jim Melville, Mark Morton, Michael O’Bryan, and Jim Walther. And special thanks also to Joel Greenberg, Eileen Nugent, and Stephen M. Davidoff, Professor at the University of Connecticut School of Law and author of the “Deal Professor,” who served as quality reviewers and made many contributions along the way to a polished end product.

We should be appropriately appreciative to all who contributed to this proud achievement.

More good news -- members of our Committee will receive a 40% discount on copies of the Model Merger Agreement, plus free shipping, for orders entered through the ABA Web Store after August 1 and before August 31, 2011. You must use the following promotional code when placing your order to receive this discount: 5070650. I know that
many of you will want to take advantage of this offer.

As a fitting benefit of her completion of the Model Merger Agreement, we are allowing Diane to take a break from her leadership responsibilities of the Subcommittee. Jim Griffin will assume the role of Chair of the Acquisitions of Public Companies Subcommittee effective at the Annual Meeting. Thanks Jim for your willingness to take on this additional leadership role.

CLE Opportunities

We are sponsoring several CLE programs in Toronto, beginning with a panel on Friday entitled “Defending the Pill: Lessons from Airgas,” chaired by Rick Alexander. Speakers include the Honorable Myron T. Steele, Chief Justice, Supreme Court of Delaware, David A. DeNunzio, Vice Chairman, Credit Suisse, New York, Kevin Shannon, and Marc Wolinsky.

We are co-sponsoring a program on Saturday entitled “Majority and Minority Investments in Canadian Businesses by US and Other Foreign Investors,” chaired by Committee member Samantha Horn, and featuring speakers Mark Jamrozinski from Deloitte, Serena Lefort from KPMG, and Fred Mifflin from Blair Franklin Capital Partners Inc.

On Sunday, we are presenting a program on “Change of Control Transactions Involving Dual-Class Share Structures,” chaired by Iain Scott. Speakers include Joel Greenberg, Charles R. Kraus, Jeffrey McIntosh, Toronto Stock Exchange and Professor of Capital Markets, Faculty of Law, University of Toronto, and Jennifer S. Muller, Managing Director, Houlihan Lokey.

We hope you will take advantage of these educational opportunities.

First Time Attendees

I frequently am asked by new Committee members how they can best get involved in Committee activities. Many report that our schedule seems daunting, and the scope of the Subcommittees and Task Forces seems somewhat overlapping. The good news is that there has never been a better time to get involved in a meaningful, substantive way in the Committee. We have recently finished several large projects, so much of our Task Force work is in the formative stages. In particular, I recommend our two newest Task Forces – the Task Force on Financial Advisor Disclosures and the Task Force on Two-Step Auctions. Additionally, what better way to get involved than to attend the meeting of our Task Force on New Projects? There you can participate in the sausage making, and select a project that interests you. Finally, don’t hesitate to ask any of our members for their advice. You’ll get plenty of (likely inconsistent) direction.

Thursday Dinners

Toronto members of our Committee have graciously offered to host small group dinners (4-6 people) on Thursday, August 4, for Committee members who will be in town. Everyone will pay his or her own way at a local neighborhood restaurant. This is a great opportunity for small group discussions, and to experience some of Toronto’s best restaurants.

While the deadline for registering your interest to participate in a Thursday dinner has passed, if your plans have changed and you are now interested in participating, please contact John Clifford (john.clifford@mcmillan.ca). It is possible that we may be able to accommodate your request. Similarly, if you signed up for a dinner but can no longer participate, please communicate with John.
International M&A Subcommittee

Let me draw your attention to the fact that (in contrast to the information in the printed brochure), the International M&A Subcommittee meeting will be held on Friday, August 5, from 8:30 a.m. until 10:30 a.m., in Pier 4, Convention Level at the Westin. As always, the meeting will be conducted by Jim Walther, along with Daniel Rosenberg (who, just this week, joined Speechly Bircham LLP in London). The meeting will include a presentation on the unique Israeli M&A market and practices by Daniel Gamulka, a partner in Gross, Kleinhendler, Hodak, Halevy, Greenberg & Co., Tel Aviv, and a presentation on recent developments in multi-jurisdiction M&A deals from a Canadian perspective by Andre Perry and John Wilkin of Blake’s and others. This meeting will also have a discussion forum for M&A developments in other jurisdictions around the world.

Task Force on Financial Advisor Disclosures

I’d like to encourage attendance at one of our newest Task Forces – the Task Force on Financial Advisor Disclosures. This group, under the guidance of Yvette Austin Smith, is poised to develop a database of case law, SEC comments and responses, and actual disclosures that pertain to financial advisors in capital markets transactions. The goal is to capture disclosures related to the following:

- Retention of financial advisors;
- Reliance by companies upon information/analysis provided by financial advisors;
- Analytical methodologies used by financial advisors;
- Payment of fees to financial advisors;
- Business relationships between companies and financial advisors; and
- Regulatory disclosures made by companies and financial advisors in connection with Reg M-A and FINRA.

Private Equity M&A Subcommittee

John Hughes, Chair of the Private Equity M&A Subcommittee, has planned a very impressive array of speakers and discussion leaders for the Private Equity M&A Subcommittee meeting. Rahul Suri, Managing Director, Mergers & Acquisitions of BMO Capital Markets, will focus on the current Private Equity and M&A landscape and PE direct investing. Sarah Alexander, President and CEO of Emerging Markets Private Equity Association, will deliver remarks on the explosion of PE in emerging markets. Jeff Davis, Vice-President and Associate General Counsel of the Ontario Teachers’ Pension Plan Board, will speak on doing PE deals as inside counsel for a major Canadian pension fund doing direct investments. Finally, Chris Young, Managing Director and Head of Contested Situations of Credit Suisse and former head of M&A Research at ISS, will direct a discussion on hostile takeover activity and shareholder activism and the impact on PE. This looks like a meeting you won’t want to miss.

Task Force on New Projects

Ideas continue to surface for exciting undertakings for the Committee that seem worthy of consideration. At our Toronto Task Force meeting, we will consider, among other topics, the following:

- Kicking off the Revised Model Asset Purchase Agreement;
- Considering a Project Management project;
- Discussing an overture from the new chair of the Section’s Corporate Governance Committee that we engage in a joint project that addresses
governance issues faced by Boards of Directors and Special Committees in the M&A context; and

- Exploration of sponsoring a “Lawyering Meet” – pitting law school teams against one another in mock M&A negotiations.

Bring your ideas to this always lively meeting.

Update from ABA Publications: Sales of MSPA2 Exceed Expectations

Sales of the Second Edition of the Model Stock Purchase Agreement continue to be strong. We have to date generated revenues approaching $500,000 for the ABA. Congratulations again to Rob Harper, the Editorial Committee, and the hundreds of other practitioners from dozens of international jurisdictions and lawyers from most US states, who contributed thousands of hours to this project. We believe that this revenue data supports our assertion that the MSPA2 would benefit M&A deal professionals who structure sophisticated, often international, transactions, as well as lawyers who only occasionally engage in transactional practice and law professors desiring a comprehensive vehicle for introducing law students to the subject of business transactions.

Saturday Dinner

Our Committee Dinner will be held on Saturday night at Nota Bene, recently named one of Canada’s top 10 new restaurants. Our Toronto members have been instrumental in securing this great location. Don’t miss this one! Let me extend our appreciation to our lead dinner sponsor, J.P. Morgan Escrow Services, as well as our cocktails sponsor, Thompson Reuters. Please thank representatives from these two firms, since their participation significantly diminishes the per diner cost. And I don’t do this often enough – thanks to Wilson Chu who coordinates all our sponsorship activities.

Full Committee Meeting

We continue to work on plans for our full Committee meeting. So far, the agenda includes the following:

- A review of trends in US/Canada cross-border transactions led by Jeff Arnesen of Houlihan Lokey;
- A presentation by Kate Sampson and Craig Schioppo of Marsh Risks and Insurance Services, Inc. on reps and warranties insurance and other special products that might be useful in the M&A context;
- Chief Justice Steele will deliver his thoughts on “Eliminating Fiduciary Duties in LLC Formation Documents – Effective? Good Corporate Governance?”;
- A discussion on the new US antitrust leader and the revised HSR rules led by Claudia R. Higgins;
- “Overview of J.P. Morgan M&A Indemnification Escrow Study,” led by Kevin Ryan, Executive Director, J. P. Morgan Escrow Services; and
- “Sandbagging: Default Rules and Cost-Bearing in Acquisition Agreements,” Charles K. Whitehead, Associate Professor of Law, Cornell Law School.

To blunt the impression that many of you have that perhaps our full Committee meetings are too long and too dense, we plan to inaugurate our Committee Dessert Break during our full Committee meeting. The break is generously sponsored by Houlihan Lokey.
Committee Forum

Our Committee Forum is entitled “Shocking Selections from the M&A Lawyers’ Library,” chaired by Scott Whittaker and Jon Hirschoff. The Forum will launch a very exciting new product from the Committee’s M&A Jurisprudence Subcommittee that we believe practitioners will find extremely helpful. The presentation will include a demonstration of the features of the M&A Lawyers’ Library, covering the scope of (and excerpts from) the 12 memoranda that are included in the Library as it goes live. We believe that this Library will provide an easily accessible, invaluable source of substantive materials for our membership.

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I look forward to our Toronto meeting and hope to see many of you there! Consider bringing one of your colleagues to our Committee meeting. The best way to strengthen our membership is for prospects to see us in action.

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FEATURE ARTICLES

Doing a Deal in Canada?
10 Things You Should Know

By
John F. Clifford
and
Chris N. Germanakos

Toronto’s hosting of the 2011 ABA Annual Meeting brings a focus on Canada. Many lawyers will travel to Canada for the meeting. After passing through Canada customs and immigration, they’ll settle into their hotel and may feel like they’re in a large US city … many familiar stores and hotel names. With Toronto nestled on the shores of Lake Ontario, it might feel a bit like Chicago; some similar architecture too. A foreign country, but it might not feel too unfamiliar.

For the American deal lawyer experienced in United States-Canada cross-border transactions, Canada likely feels quite familiar. The deal culture is very similar to the US. All provinces except Quebec have the English tradition of the common law (Quebec’s legal regime is based on the civil law system) and, for the most part, the form of agreement typically used to acquire the assets or shares of a Canadian company looks and feels like a US form of agreement. Indeed, many Canadian deal lawyers find the model asset and stock purchase agreements produced by the Mergers and Acquisitions Committee of the ABA’s Business Law Section to be useful tools in their drafting toolkit.

1 Mr. Clifford and Mr. Germanakos are partners in the Toronto office of McMillan LLP, where they focus their practice on M&A transactions. Each has 20+ years experience on cross-borders deals.
But, if you’re in Toronto for the Annual Meeting and explore the city, you’ll discover points of difference which set Canada apart from the United States and Toronto apart from other large North American cities. Likewise, if you get involved in a Canadian or cross-border deal, you’ll discover that some things are done a bit differently in Canada. So, we thought we’d take this opportunity – with the ABA Annual Meeting being held in Toronto – to highlight ten things about Canadian deal practice and the legal environment that you should know if you have a deal in Canada.

**M&A Activity is Regulated at Several Levels**

M&A activity in Canada is regulated under each of the following levels:

- **Corporate Laws.** Canadian corporations may be incorporated under the federal Canada Business Corporations Act (“CBCA”) or one of the similar provincial or territorial business corporations acts. These statutes regulate a variety of ordinary and extraordinary corporate transactions (e.g., statutory amalgamations (similar to a Delaware merger) and “plans of arrangement”). Extraordinary corporate transactions must be approved by a special resolution of shareholders (typically two-thirds of the votes cast). Shareholders generally have the right to dissent from extraordinary corporate transactions and demand payment of the “fair value” of their shares (as determined by a court if necessary). Canadian courts have broad remedial powers to intervene in respect of transactions that are oppressive or unfairly prejudicial to, or that unfairly disregard the interests of, shareholders.

- **Securities Laws.** Securities regulation in Canada is the responsibility of the provinces (10) and territories (3). Each province and territory has its own legislation and securities regulatory authority that regulate, among other things, take-over bids (the Canadian version of a tender offer). The Provinces of Ontario and Quebec have additional rules (including approval by a majority of the minority shareholders and independent valuation of the subject matter of the transaction) designed to ensure fair treatment of minority shareholders in connection with certain types of transactions involving a corporation and its “related parties” (which include shareholders owning 10% or more of the voting securities of the corporation).

The provincial and territorial securities regulatory authorities coordinate their activities through the Canadian Securities Administrators (CSA), a forum for developing a harmonized approach to securities regulation across the country. The CSA has developed a system of mutual reliance pursuant to which one securities regulatory authority acts as the lead authority for reviewing regulatory filings of “reporting issuers” (e.g., Canadian public companies).

The Ontario Securities Commission (OSC) is generally regarded as the lead securities regulatory authority in Canada.

- **Stock Exchange Rules.** The two principal stock exchanges in Canada are the Toronto Stock Exchange (TSX) (senior market) and the TSX Venture Exchange (junior market). These exchanges regulate selected aspects of M&A activity.
Acquiring Control of a Public Company

Control of Canadian public companies typically is acquired through one of two structures – a take-over bid or a plan of arrangement:

- **In a take-over bid**, the acquirer offers to acquire a prescribed percentage of the target’s outstanding voting or equity securities. A “take-over bid” results when the securities subject to a bid combined with the securities owned by the bidder and parties acting jointly and in concert with the bidder constitute 20% or more of the outstanding securities of any class. The offer can be in cash, securities, or a combination of both and must be left open for at least 35 days.

  In a bid for all outstanding shares, if the bidder acquires 90% or more of the shares available, the remaining shares can be acquired through a forced statutory transaction known as a “squeeze-out.” If the bidder acquires at least 66 2/3% of the voting securities of the target, it may implement a second stage going-private transaction, for example, by way of plan of arrangement.

- **A plan of arrangement** is a one-step corporate transaction that requires approval of the target’s board, shareholders, and the court. The structure of the plan (e.g., three corner merger, capital reorganization, etc.) generally will be determined based on criteria including specific tax results desired by the acquirer, the need to deal with debt securities or convertible securities such as options and other rights, and regulatory considerations. As noted above, a plan of arrangement must be approved by two-thirds of the shareholder votes cast and shareholders generally have the right to dissent and demand payment of the “fair value” of their shares. Depending on the circumstances, Canadian securities regulation may impose a disinterested minority vote requirement.

  The *Ontario Securities Act* provides for an early warning disclosure requirement that is triggered when an acquirer (together with its affiliates, associates, or persons acting jointly or in concert with the acquirer) acquires beneficial ownership of, or the power to exercise control or discretion over, more than 10% of the voting or equity securities of any class of the target. Upon reaching the 10% level, the acquirer is obligated to immediately issue and file a press release containing certain prescribed information and file a report. The acquirer is subject to a trading moratorium ending one business day after the required report is filed.

  Further early warning disclosure requirements are imposed whenever ownership or control of securities of the target are increased by an additional 2% or more or there has been a change in the previously reported information.

Directors Owe Fiduciary Duties to the Corporation, Not Just the Shareholders

In 2008, the Supreme Court of Canada (SSC) clarified its thinking with respect to the nature and scope of directors’ duties in the context of a change of control transaction where the interests of securityholders (in that case, shareholders and debentureholders) are affected differently.

The case (*BCE Inc. v. 1976 Debentureholders*) involved a challenge by a group of Bell Canada debentureholders to the proposed acquisition of BCE Inc. by a consortium of purchasers pursuant to a plan of
arrangement. The debentureholders objected to the arrangement and, among other things, sought relief under the oppression remedy of the CBCA.

The SCC reaffirmed its earlier decision in *Peoples Department Stores Inc.* that the fiduciary duty of the directors of a corporation is to the corporation, an entity separate from its stakeholders. The SCC noted, in particular, that “corporation” does not mean “shareholders,” thereby effectively rejecting the principle in the *Revlon* line of cases in the United States that, in change of control situations, the directors have a duty to maximize shareholder value.

The SCC went on to say, however, that in considering what is in the bests interests of the corporation, directors may look to the interests of, among others, shareholders, employees, creditors, consumers, governments, and the environment to inform their decisions. So, while directors of Canadian corporations are obligated to act in the bests interests of the corporation, and not of any particular group of stakeholders, as a practical matter, in change of control circumstances, they make shareholders and shareholder value their primary focus since shareholder approval is critical to whether a change of control transaction will or will not proceed.

**Some Investments Are Subject to Federal Government Review**

The *Investment Canada Act* requires that any non-Canadian that acquires control of a Canadian business (whether or not that business is controlled by Canadians prior to the acquisition) must file either a notification or an application for review. For the purposes of the Act, a non-Canadian includes any entity that is not ultimately controlled or beneficially owned by Canadians.

If an investment meets the financial thresholds for review, a review application must be filed and a determination made by a Minister of the Federal government whether the transaction is of “net benefit to Canada.” The review thresholds are complex. Generally, a direct investment (i.e., the acquisition of the shares or assets of a Canadian corporation) by a WTO Investor (i.e., controlled by persons from countries that are members of the WTO) is reviewable if the target has assets equal to or exceeding C$312 million in 2011 (adjusted annually). Indirect investments by WTO Investors are not reviewable, except as noted below.

Special rules and significantly lower thresholds apply, however, in respect of direct and indirect acquisitions of so-called “cultural” businesses (e.g., broadcasting, film, video, audio, books, and magazines). Special rules also permit a national security review, without regard to the value of the target’s assets.

An investment that is not reviewable must be notified. Notification is made by completing a simple two-page form which can be filed any time prior to or within 30 days of the closing.

**Employees Are Not Employed “At Will”**

There is no employment “at will” in Canada, so it can be costly to restructure a business or otherwise terminate employees.

Each province in Canada has employment standards legislation that sets out the minimum amount of notice that an employer must provide to an employee in order to dismiss the employee without cause. In most provinces, one week per year of service must be provided, up to a maximum number of weeks. For example, Ontario’s employment standards legislation provides for a maximum of eight weeks of notice, or pay in lieu of notice. Ontario’s legislation also requires most employers to provide severance pay in the amount of one week of pay per year of service,
up to a maximum of 26 weeks. No other province provides for severance pay.

However, the entitlements to notice of termination and severance pay established by legislation are minimum standards only – greater obligations may be imposed by the terms of an employment agreement or, in the absence of an agreement, by common law. If there is no written employment agreement, an employee is entitled to reasonable notice at common law, which is usually in excess of the statutory minimum entitlements to notice and severance pay. The determination of reasonable notice varies from case-to-case and is dependent upon a number of factors including the employee’s age, position and responsibilities, length of service, and remuneration. Reasonable notice at common law can be very long and because there is no set formula, difficult to quantify in a transaction. A 24-month “cap” on notice has been tacitly acknowledged by some courts and is rarely exceeded. This level of award is generally reserved for employees with long service, who are at a professional or managerial level.

In a share transaction, the responsibility for notice and severance will remain with the acquired company and, therefore, pass to the purchaser who will be responsible for an employee’s previous service with the acquired company. In an asset transaction, an employee’s employment typically is terminated on closing and the vendor remains responsible for notice and severance costs. However, it is common for asset purchasers to offer employment to the vendor’s employees and, if that offer is accepted, the purchaser becomes liable for notice and severance obligations. The rules are different and more complex in a unionized environment.

**Deal Terms May Differ**

When negotiating a purchase and sale agreement involving Canadian parties, US deal lawyers will confront many of the same issues arising in a US transaction, whether the negotiations relate to the scope of the representations and warranties and the use of materiality and knowledge qualifiers, the conditions precedent to closing, or the procedures for dealing with post-closing adjustments to the purchase price and delivery of closing financial statements.

Where you are likely to see differences, however, are in the following areas:

- Indemnity caps are typically higher in Canada than in the US. It’s not uncommon for Canadian purchasers to insist on a cap in excess of 50% of the purchase price and in many cases up to 100% of the purchase price.
- Holdbacks in support of indemnity claims are not common in Canadian deals. In many cases, vendors require the purchaser to rely on the vendor’s unsecured covenant to indemnify, sometimes supported by a related party guarantee in appropriate cases.
- Exceptions to the foregoing often involve Canadian private equity investors, who, like their US counterparts, understand the need for low indemnity caps (perhaps 10-15% of the purchase price), supported by holdbacks deposited in escrow, thereby permitting a private equity vendor to disburse sales proceeds to its limited partners immediately following closing with little or no risk of a clawback.
- General survival periods for representations and warranties are longer in Canada (often 18-24 months)
and it is not uncommon to have three to five year survival periods for specific matters such as pensions and environmental claims and even longer periods for claims relating to title.

- Earnouts are used much less frequently in Canadian deals, although in the writers’ experience, they do show up, particularly in private equity deals, if the parties are having trouble bridging the gap on price.

- Transaction legal opinions, once a standard closing condition in Canadian M&A transactions and often the subject of heated negotiation between legal counsel, are becoming less and less common in Canada.

These and other trends are detailed in the 2010 Canadian Private Target M&A Deal Points Study produced by the Mergers and Acquisitions Committee of the ABA’s Business Law Section.

**Some Acquisitions Require Clearance of Tax Authorities (or Partial Hold-Back of the Purchase Price)**

Where a non-resident of Canada disposes of “taxable Canadian property” (“TCP”), certain obligations are imposed on the vendor and purchaser under section 116 of the *Income Tax Act* (Canada). The non-resident vendor is generally required to obtain a compliance certificate from the Canada Revenue Agency (“CRA”) in respect of the subject disposition. Under section 116, if a compliance certificate is required and the purchaser does not make any withholdings, the purchaser is generally liable to pay the Minister an amount equal to 25% (e.g., in the case of shares and other non-depreciable assets) or 50% (e.g., in the case of depreciable property or real property inventory) of the purchase price. These provisions are designed to ensure that the non-resident vendor pays Canadian income tax resulting from the disposition.

The section 116 rules are complex and a number of exemptions are provided. Notably, shares of private Canadian companies are generally not TCP provided the shares have not, at any time during the 60 months preceding the relevant disposition, derived more than 50% of their value from one or any combination of (i) real or immovable property situated in Canada, (ii) Canadian resource properties, (iii) timber resource properties, and (iv) options or interests in property described in (i) - (iii).

A purchaser is generally responsible for withholding and remitting the appropriate amount of tax on a purchase of TCP from a non-resident, even where, for example, the purchaser incorrectly determines that the shares are not TCP. To manage the risk, a purchaser can perform due diligence, engage a valuator, and/or obtain appropriate representations, warranties and indemnities, or can eliminate the risk by requiring a section 116 certificate from the vendor.

**Antitrust Notification May Be Required and There May Be a “Second Request”**

The *Competition Act* contains a robust pre-merger notification regime. Generally, the acquisition of voting shares of a Canadian operating business (or of a corporation that controls a Canadian operating business) will be notifiable if the following three tests are satisfied:

- A “size-of-the-parties” test, which requires that the parties to a transaction, together with their worldwide affiliates have assets in Canada or annual gross revenues from sales in, from, or into Canada exceeding C$400 million.

- A “size-of-transaction” test, which requires that the target (or entities
controlled by the target) have assets in Canada or annual gross revenues from sales in or from Canada exceeding C$73 million in 2011 (adjusted annually).

- An ownership test, which requires that following completion of the transaction, (a) the acquirer (and its affiliates) will own more than 20% of the target’s voting shares, if the shares are publicly traded (35% in the case of a private company) or (b) if more than 20% (public company) or 35% (private company) of the target’s voting shares already are owned by the acquirer (and its affiliates), the acquirer (and its affiliates) will own more than 50% of the voting shares.

Similar thresholds are applicable to asset transactions, amalgamations (similar to Delaware mergers) and combinations.

Much like in the US, notifiable transactions are subject to a 30-day no-close waiting period, which can be extended by the Commissioner of Competition issuing a supplementary information request requiring that the parties provide additional information.

**Tax Rules Impact the Investment Structure**

When structuring a Canadian acquisition, a foreign buyer should bear in mind the following three tax issues:

- **First**, when acquiring shares in a Canadian target, the foreign buyer will generally want to incorporate a Canadian acquisition vehicle so that the full purchase price can be repatriated to the foreign jurisdiction free of Canadian withholding taxes. Corporations can easily be formed under Canadian Federal law or the law of any province. In some jurisdictions, at least 25% of the directors must be residents of Canada.

- **Second**, if the foreign buyer wants to have a flow-through tax entity, Canada does not have the concept of a limited liability company. Instead, the choices for flow-through entities are either a partnership (typically a limited partnership) or an unlimited liability company (“ULC”). ULCs often are used as a vehicle for US entities to make investments in Canada because the entity is treated as a corporation for Canadian tax purposes but a check-the-box, flow-through entity for purposes of US income tax laws. Thus, from a US perspective, any losses of the ULC could be used to off-set any income of the US parent for US tax purposes. The 2010 amendments to the Canada-US tax treaty have complicated the use of ULCs for US investors.

- **Third**, a foreign buyer must be mindful of complying with Canada’s thin capitalization rules which require a debt-equity ratio of not more than 2:1. Otherwise, a component of the intercorporate interest expense will be disallowed in computing the income of the Canadian subsidiary.

**Special Considerations for Pension Plans**

Although Canada has a government-funded pension plan, benefits under the plan are limited so many employers offer participation in private plans to their employees. But, unlike ERISA in the US which provides one uniform set of rules for all pension plans, company sponsored pension plans in Canada are primarily subject to regulation by the federal *Income Tax Act* and provincial minimum pension standards legislation. These two
primary sources of regulation and the policies and technical interpretations that support them create significant complexity which makes administration of Canadian pension plans onerous.

In the context of an M&A transaction, the complexities of the Canadian pension regulatory regime are brought into sharp focus. Through minimum pension standards legislation, the federal and provincial jurisdictions stipulate different requirements in the context of a sale of a business. These include rules relating to recognition of past service, vesting and benefit entitlements, terminations of plans, and transfers of assets. Recent judicial decisions regarding the potential liability associated with funding deficits, prior plan terminations, and asset movements have added complexity, making the coverage of pension plan arrangements a significant feature of deal documents.

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**Post Closing Indemnification Claims: Bridging the Gap to Pre-Closing Practices and Transaction Documents**

By
Sean Arend
and
Christopher Letang

In private company acquisitions, buyers often require that a portion of the purchase price be set aside in an escrow fund. The purpose of the escrow fund is to serve as security for the satisfaction of potential indemnification claims that a buyer may assert post-closing based on breaches of representations and warranties by the selling company or other specific matters subject to buyer’s indemnification rights. Until the recent publication of the *2011 SRS M&A Post-Closing Claims Study*, there has been little, and mostly just anecdotal, information about what really happens post-closing with these escrows in terms of what to expect, how often claims are brought, or how the eventual payout of escrow funds to stockholders is impacted. According to the SRS study, 56% of deals surveyed from 2007 to 2010 received some type of claim against the escrow, and in those deals, claims were made against an average of 51% of the escrow. Some of these claims related to working capital or similar adjustments, while many of these claims related to breaches of representations and warranties.

The SRS study reveals a recurring subset of representations and warranties that are the subject of common claims. Deal parties can use this information to understand where best to focus negotiation efforts and due diligence efforts in transactions, and to be proactive in terms of pre-closing practices that can prevent certain post-closing indemnification claims from arising. Both sides have an interest in identifying and resolving issues in advance. According to the SRS claims study, indemnification claims took an average of eight months to resolve, and 4% of the deals with

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1 Mr. Arend is Executive Director, Corporate Development at Shareholder Representative Services LLC. Mr. Letang is Director of Claims Management at Shareholder Representative Services LLC.


3 This article does not address working capital or similar purchase price adjustment claims where the transaction consideration is adjusted shortly after closing in accordance with a specified financial metric. These adjustment mechanisms have their own host of issues and are outside the scope of this article. This article focuses on indemnification claims based on alleged breaches of representations and warranties.
claims went to litigation or arbitration. This requires deal parties to expend significant time and resources after closing, distracting from the management of the business. By focusing on these recurring problem areas pre-closing and during document negotiations, the parties may be able to avoid common indemnification disputes.

**Tax Claims**

Given the multitude and complexity of domestic and international tax laws, it should not come as a surprise that tax claims arise frequently and can be some of the more complicated and time-consuming types of claims to resolve. The SRS study found that 16% of deals with expired escrows had a tax claim, accounting for an average of 17% of the escrow fund. Tax claims can be especially difficult to address because they often can be asserted after the release of the escrow fund since representations and warranties related to tax matters typically have longer survival periods than those related to other matters.

Claims related to state sales and use tax matters are a common and complex form of tax claim. These claims usually relate to allegations that the selling company failed to collect sales tax in jurisdictions where they were obligated to do so, usually as a result of having a presence in that state. While there are various actions that can be taken to mitigate the potential liability (e.g., contacting customers to see if they self-assessed and paid the corresponding use tax, or utilizing state voluntary disclosure programs, which can often result in a reduction in interest and/or penalties), the process for dealing with such claims is often long and costly. For this reason, companies should take steps to examine and resolve any potential sales and use tax issues before closing of a merger. Such steps would include reviewing the target’s operations to determine the jurisdictions in which it may have nexus, and entering into voluntary disclosure arrangements with states if any exposure is identified. Having done the nexus analysis alone will be very helpful when the buyer inquires about this before or after closing. Companies should also review the target’s customer contracts to see whether they provide that the customer is responsible for (and will indemnify the target for) all taxes and will provide upon request copies of receipts for taxes paid or of reseller or similar exemption certificates. This is a common term addressed in customer contracts, and this clarity will benefit both the buyer and seller in determining who is responsible for such taxes.

The parties should also consider whether they want to state in the acquisition agreement that the buyer will use reasonable efforts to mitigate damages related to claims. In the context of the sales tax issue, this clarifies that the buyer should interact with the customers who are responsible for such taxes (to enforce contractual rights or request self-assessed tax receipts, for example) before making a claim against the escrow. Those contractual arrangements with customers benefit the buyer as part of acquiring the target company, so the buyer should reasonably utilize the rights provided as part of the ongoing business, rather than risking a dispute over the escrow that could deplete it unnecessarily.

Another tax dispute commonly seen post-closing is how to treat the employer portion of taxes owed on merger consideration paid to company employees. Are those taxes the responsibility of the buyer, or should they reduce the purchase price? The merger agreement is often not clear, which may result in an indemnification claim that could have been avoided. Similarly, how to handle income tax issues related to pre-closing periods is another issue that can create unnecessary disputes. At a minimum, the acquisition agreement should provide the shareholder
representative with the ability to review any tax returns prepared by the buyer that relate to pre-closing tax periods so that any misunderstandings or differences in opinion can be resolved before the returns are filed.

**Financial Statement Claims**

Another common type of indemnification claim is related to alleged inaccuracies in a selling company’s financial statements, which the SRS study identified in 16% of deals. These claims tended to be relatively large, accounting for an average of 32% of the escrow fund.

Financial statement claims are asserted most frequently in deals with a transaction value of less than $100 million. This suggests that smaller companies are more likely to have fewer financial controls and procedures in place. Given the relatively high propensity for claims of this type, it may be worth the cost for even small companies to reduce the risk of inaccuracies in their financial statements by having them audited prior to the transaction. This step will make it more likely that any potential issues will be surfaced prior to closing so they may be discussed with the buyer before rising to the level of a dispute. Having audited financial statements may also bring the added benefit of a higher valuation multiple based on the perceived higher quality of the reported financial numbers.

Even if a company does have its financial statements audited, it is still certainly possible that the buyer will identify potential issues post-closing. For this reason, it is also important that the parties discuss and agree upon how damages related to any inaccuracies are to be calculated. In the absence of such limitations, a buyer that used a multiple of revenues or earnings may attempt to apply that multiplier when calculating the impact of any alleged inaccuracies. The use of a multiplier can obviously make the amount of damages claimed by the buyer skyrocket. This can cause the parties to be far apart when attempting to resolve claims of this type, leading to disputes that are not resolved as quickly as they could have been.

**Undisclosed Liability Claims**

The third most frequent claim, according to the SRS study, is based on the selling company’s representation regarding undisclosed liabilities. Although these claims were common, they accounted for an average of only 7% of the escrow fund. Historically, deal professionals have been concerned that this representation could be used as a catch-all for making claims based on some large unknown or contingent liability not otherwise specifically covered by the other representations and warranties in the agreement. The SRS study, however, shows that this representation is actually being used to make smaller claims, most commonly a claim that the selling company did not disclose outstanding obligations to a vendor, supplier, or other partner.

This phenomenon is driven largely by how the representation is drafted in acquisition agreements. A 2010 study of deal terms of private company acquisition transactions showed that 97% of deals surveyed contained this representation and in 73% of those deals, the representation was written in a manner to cover all liabilities and not just GAAP

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4 These claims are based on the seller’s alleged failure to disclose a liability in the disclosure schedules. The undisclosed liabilities representation is sometimes used as a catch-all for unexpected third party claims that do not fit under the financial statements or material contracts representations.

5 2010 SRS M&A Deal Terms Study, published by SRS | Shareholder Representative Services.
The difference in formulation makes a big difference in the claim activity a deal can expect post-closing related to this representation.

If deal parties want to limit the claim activity for claims of this type, they should consider drafting this representation to cover just GAAP liabilities, rather than the broader universe of possibilities associated with running a business. Additionally, a representation containing an “all liabilities” formulation will likely create more work prior to closing by giving rise to the practice of highly detailed disclosure in disclosure schedules.

**Customer Contract Claims**

Claims regarding the selling company’s customer contracts were asserted in 14% of deals with expired escrows, according to the SRS study. These claims accounted for an average of 18% of the escrow fund.

Customer contract claims often can be mitigated or avoided both through drafting and through diligence practices. Limiting this representation to cover just the largest customers or material contracts based on an annual revenue threshold is an easy way to curtail its scope. Also, representations about expected future business from customers have a high risk of disputes given the difficulty of predicting future performance. If included at all, the parties should draft it narrowly based on executive-level actual knowledge obtained from receipt of written notices from material customers within a recent time period. Otherwise, requiring sellers to guarantee future customer relationships is arguably unreasonable, especially given the unpredictability regarding how customers may react to the acquisition and the buyer itself.

Additionally, both sides can be proactive by conducting diligence activity in a manner to flush out any issues in advance. This can be done through “reference” calls made by the buyer to customers pre-signing (without mention of the pending transaction, if possible), or by coordinating pre-closing key customer calls involving the buyer where specific integration and customer relationship matters can be discussed openly after the deal has signed and announced. Any uncovered issues hopefully can then be resolved in advance. Again, if issues are identified, both parties should prefer to deal with those proactively rather than dealing with surprises and disputes later.

**Intellectual Property Claims**

Intellectual property disputes can be a fact of life in the world of emerging growth technology companies and life sciences companies. In the context of post-closing indemnification claims, intellectual property claims are usually asserted against the seller due to third party claims asserted against the buyer after the transaction closes. The SRS claims study found that 9% of deals with expired escrows received an intellectual property claim.
property related claim, accounting for an average of 30% of the escrow fund.

Because these claims against the seller are usually brought due to third party claims, the issue of how third party claims are handled in the acquisition agreement becomes important. A third party claim generally should be defined as a live lawsuit or specific threat seeking damages, not just an inquiry that is answered without any subsequent communication. Also, some recent acquisition agreements have provided for the concept of “stale” third party claims. If a threat is received, but nothing more happens for a certain period of time, then the claim is deemed stale and can no longer be submitted or retained. These concepts are particularly relevant in light of so-called patent trolls or similar fishing tactics in the world of intellectual property. Providing for these concepts in the acquisition agreement can help determine the allocation of risk between the buyer and seller and hopefully ensure that escrow funds are not unjustifiably tied up indefinitely. The SRS claims study found that 34% of deals had some portion of their escrow released late due to pending claims (based on all claims, not just intellectual property claims), so this issue of late releases occurs frequently.

One other matter to consider is how that third party claim relates to the buyer’s intellectual property versus just the seller’s intellectual property. The buyer’s intellectual property may also be implicated in the third party claim, which then raises the issue of how damages should be allocated. Consideration should also be given to whether any modification of seller’s products by the buyer or combination of seller’s products with buyer’s products has caused the basis for the third party claim (and whether that actually constitutes a breach by the seller of the representation as written).

**Capitalization Claims**

Capitalization claims were another common claim type, occurring in 9% of deals with expired escrows surveyed in the SRS claims study, but accounting for an average of just 3% of the escrow fund. These claims typically are not subject to any basket limitation (see below), so even very small claims must be dealt with and paid if meritorious.

An obvious way to avoid receiving these claims is to have prudent capitalization table (including stock options) management practices. Most of the claims we see relate to shares or options that were verbally promised to an employee or consultant but never formally issued. Promises of equity ideally should always be clearly subject to and conditional upon board approval, and companies should clean up all equity issues as part of investor diligence at the time of each financing round, formalizing the termination of any concluded consultant relationships and documenting releases with employees for equity grants. Many companies, however, will still have certain capitalization issues fall through the cracks, so make sure to specifically discuss this issue of verbal or incomplete grants with the seller’s management prior to closing an M&A transaction to see if they recollect anything along those lines.

A similar problem is that many companies are not diligent about formalizing consultant terminations or term end dates, especially when the consultant had previously

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8 These claims are typically made because an individual has claimed that they are entitled to additional deal consideration based upon inaccuracies in the closing capitalization and/or consideration spreadsheet. This includes former and current employees or consultants of the company that claim they are due additional consideration based on options or similar equity-based pay.
been used periodically or as needed. They simply stop using the person’s services but forget to do a formal termination of vesting of the associated equity grant, which can result in claims by the consultant that he continued to vest in granted options and never had an exercise deadline.

Companies also should be very careful about granting equity rights to anyone based on formulas rather than a specific share number. Formula-based equity terms are problematic because they can be subject to debate and interpretation later.

Impact of Baskets

According to the SRS claims study, indemnification claims were rarely reduced by the application of a basket. This would imply that baskets generally are better at deterring claims than reducing claim amounts. However, deals with “first dollar” baskets received more than twice as many claims per deal than deals with “deductible” baskets. In first dollar baskets, there is more incentive to stockpile claims and exceed the threshold in order to recover back to the first dollar, while the prospect of recovering only an incremental amount after the deductible may be more effective to deter various small claims from being brought at all. This means that the parties should consider impact of the terms of a basket not only on deal economics, but also on anticipated post-closing workload. If the parties agree to a first dollar basket, the buyer and shareholder representative should anticipate a higher likelihood of claims that will require their attention.

Establishing an Expense Fund

A full 72% of deals surveyed in the SRS claims study established a separate expense fund at the closing of the transaction, and 67% of those deals ultimately used some portion of that fund. In those deals where a portion of the expense fund was used, the average amount of the expense fund used was 8%.

Even if only a small portion of the expense fund is ultimately used, the availability of such a fund ensures that the shareholder representative can respond to claims effectively and within the mandated response period. It is never pleasant to have to make the choice between foregoing legal advice to help with the resolution process and “passing the hat” among the shareholder group to cover such expenses. The availability of an expense fund helps avoid making that choice and also ensures that all shareholders bear their pro rata share of such expenses, rather than only the largest shareholders having to bear the full burden. Also, the mere existence of an expense fund may be enough to deter frivolous claims, since buyers will know that the shareholder representative has the wherewithal to defend against claims that have little or no merit.

For the same reason, it is better to have more money than needed in an expense fund than to have insufficient money. Having too much money just means that a small portion of the overall funds were delayed in disbursement, but having too little means that the shareholders

9 The basket is the threshold loss amount that must be reached before the seller becomes liable for the buyer’s losses. Typically, baskets function in one of two ways. Under a “deductible” basket, the seller is only liable for damages in excess of the threshold amount. If the agreement includes a “first dollar” basket, the seller is liable for all damages once the threshold amount has been reached.

10 An expense fund is a separate fund that is created to set aside money to pay for legal fees or other costs or expenses the former stockholders may have to incur in defending against claims or otherwise protecting their rights following closing of the transaction.
must grapple with the issues they were seeking to avoid in setting up the fund in the first place.

**Conclusion**

Most parties to merger agreements want to avoid disputes if possible. The transaction is forming a new partnership, and it is best for everyone involved to avoid beginning the relationship with a fight. Using real data that is now available regarding what really happens after closing with respect to escrow claims, deal professionals can focus their efforts on the provisions of the transaction agreements that tend to be highest risk and can advise their clients regarding proactive practices to avoid post-closing claims.

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**TASK FORCE REPORTS**

**Task Force on Distressed M&A**

The Task Force on Distressed M&A held a successful meeting at the Spring Meeting in Boston. Peter Fishman from Houlihan Lokey discussed the pending 2011 Deal Point Study of Sales Under Section 363 of the United States Bankruptcy Code. Jennifer Muller, also of Houlihan Lokey, provided an update on the state of the distressed M&A market. We featured a presentation titled “Making Sense of the Current Restructuring Market” by Alan D. Holtz and Spencer Ware of Alix Partners. In addition, Hank Baer of Finn Dixon presented on “Intercreditor Agreements: Is a Sale Process Different from the Sale?” The presentation centered on the Delaware Bankruptcy Court’s decision in American Safety Razor, and its finding that a prohibition on objecting to a 363 sale does not prohibit objecting to a 363 sale process. Hank also provided an update on the sale of Blockbuster.

Since the Boston meeting, we have started work on the 363 Deal Point Study. We plan to have a robust discussion on distressed dealmaking at our meeting on Saturday, August 6, from 8:30 a.m. until 9:30 a.m., in Toronto.

The dial-in information for our meeting is as follows:

US & Canada: (866) 646-6488  
International: (707) 287-9583  
Conference Code: 4597613352

We will also be discussing the 363 Study and opportunities to become involved.

The Task Force now boasts a membership number of 361. I hope to see you in Toronto.

Hendrik Jordaan  
Chair

**Task Force on Financial Advisor Disclosures**

I hope to see many of you at the second meeting of the Task Force on Financial Advisor Disclosures in Toronto. We’ve made some progress since the last meeting that I hope to share with you. As a reminder, our meeting is scheduled to be held on Saturday, August 6, from 9:30 a.m. until 10:30 a.m., in the Metropolitan Grand Ballroom East, Conference Centre, 2nd Level, The Westin Harbour Castle.

The dial-in information for our meeting in Toronto is as follows:

US & Canada: (866) 646-6488  
International: (707) 287-9583  
Conference Code: 4597613352

Thank you to all who attended the inaugural meeting of our Task Force in Boston and to those with whom I had prior and subsequent conversations regarding participation in our Task Force. Below, I have
summarized the key points of our last meeting and our resulting “next steps” for Toronto.

**Initial Goals**

At the Boston meeting, we further discussed the initial goals of our Task Force. There was broad agreement to begin the development of a database of case law, SEC comments/responses, and actual disclosures that pertain to financial advisors in capital markets transactions. We intend to capture disclosures related to the following:

- Retention of financial advisors;
- Reliance by the company upon information/analysis provided by financial advisors;
- Analytical methodologies used by financial advisors;
- Payment of fees to financial advisors;
- Business relationships between companies and financial advisors; and
- Regulatory disclosures made by companies and financial advisors in connection with Reg M-A, FINRA, etc.

Next steps at our Toronto meeting in addressing these initial goals are as follows:

- Review proposed list of fields/database structure in Toronto;
- Discuss hosting issues for the database; and
- Distribute preliminary list of initial cases and solicit additional suggestions from Task Force members.

**Additional Goals**

At the inaugural meeting, we also discussed additional goals of our Task Force. One identified goal is to develop practice tools, primarily for attorneys who advise companies and financial advisors on disclosure issues. The group did not reach agreement on the exact nature of such tools. Some expressed the opinion that our Task Force should avoid having such tools perceived as normative standards of disclosure.

Next step at our Toronto meeting in addressing this issue is as follows:

- Discuss proposed tools (in addition to database).

**Additional Members**

A third topic of discussion was the inclusion of additional Task Force members. Specifically, it was proposed that the membership of our Task Force will consist of:

- M&A and corporate attorneys who advise companies on issues related to financial advisor disclosures;
- Legal counsel (both external and GCs) who advise financial advisors on disclosures;
- Financial advisors (especially those who focus on special committee advisory and/or opinion committees); and
- Delaware counsel.

Next steps at our Toronto meeting for addressing membership are as follows:

- Circulate a list of current members; and
- Discuss who else we want to target and how.

I look forward to seeing you in Toronto.

Yvette R. Austin Smith
Chair

_The Task Force on New Projects will meet again at the Annual Meeting in Toronto. Our meeting will be held on Saturday, August_
6, from 10:30 a.m. until 11:30 a.m., in the Metropolitan Ballroom East, 2nd Level, The Westin Harbour Castle.

The dial-in information for our meeting is as follows:

US & Canada: (866) 646-6488
International: (707) 287-9583
Conference Code: 4597613352

New projects suggested by our Task Force and already well underway include the Task Force on Two-Step Auctions, which is co-chaired by Michael O’Bryan and Rick Alexander, and the Task Force on Financial Advisor Disclosures, which is chaired by Yvette Austin Smith.

As indicated in Leigh Walton’s Letter from the Chair, many excellent ideas continue to be presented at each Task Force meeting for exciting new projects for our Committee. At our Toronto Task Force meeting, we will consider, among other topics:

- Officially designating a new task force to update the Model Asset Purchase Agreement;
- Establishing a new task force on Project Management, which has been discussed at our last two meetings;
- Discussing a proposal from the new chair of the Section’s Corporate Governance Committee that our Committee engage with the Corporate Governance Committee in a joint project to address governance issues faced by Boards of Directors and Special Committees in the M&A context; and
- Exploring sponsoring events in which law school teams compete against one another in mock M&A negotiations, judged by our Committee members (akin to a moot court for transactional lawyers).

As we do at all of our meetings, there will be time allocated for consideration of new ideas. So, if you have ideas for projects to pursue, this is your opportunity to be heard.

We look forward to seeing you in Toronto.

Bruce Cheatham
John Clifford
Co-Chairs

Task Force on Two-Step Auctions

Our Task Force is currently scheduled to meet on Sunday, August 7, from 9:30 a.m. until 10:30 a.m., in Toronto.

Members of our Task Force are editing a form of tender offer agreement to make it a sell-friendly form, suitable for a seller to use at the beginning of an auction. Prior to the meeting, we will distribute the edited agreement to Task Force members. At the meeting, we will identify text in the agreement that needs additional fine tuning to get to the right starting point. After that, we will start working through the agreement to identify the kinds of changes that a buyer might propose, and how a seller could respond. We will also start discussing the issues underlying the buyer’s and seller’s differing perspectives on the text and the commentary that we will add to the agreement. We will need volunteers to keep revising the text and prepare the commentary, so come early to sign up for your favorite issue.

We look forward to seeing you in Toronto.

Michael G. O’Bryan
Rick Alexander
Co-Chairs
Our Subcommittee meeting is currently scheduled to be held on Saturday, August 6, from 1:30 p.m. until 2:30 p.m., in the Metropolitan Ballroom East, 2nd Level, The Westin Harbour Castle. I am excited about our program for the Subcommittee meeting – Franziska Ruf, Nick Dietrich, and Jay Lefton will be presenting a very informative panel discussion of how to acquire a Canadian public company! I appreciate their efforts and look forward to lots of interesting comparisons with US practice. I think it is great to give them this chance to tell us how they do these deals, given how many discussions about acquisitions of US companies they have participated in during their tenure on our Subcommittee and prior Task Force!

We are expecting to have our Model Agreement and Ancillary Agreements available for purchase at the Annual Meeting. We are just completing the review of the galleys and we are very proud of our soon-to-be published work! We look forward to celebrating the publication with you all at the Annual Meeting.

For those of you who are going to be in Toronto on the Thursday of the Annual Meeting (August 4), Jay Lefton (who, in keeping with our Committee’s recent trend of members changing firms, has recently joined Borden Ladner Gervais’ Toronto office) has arranged for reservations at Canoe, which is on the 54th Floor of one of the downtown office towers overlooking the harbor (or, if you’re Canadian, “harbour”):


Reservations have been made for 6:30 p.m. If you are interested in attending the dinner, please let Jay know. His email address is JLefton@blg.com.

Our traditional Subcommittee dinner will be on Friday, August 5, with cocktails starting at 7:00 p.m. Many thanks to Iain Scott, who secured a wonderful venue. The Friday night dinner will take place at the Royal Canadian Yacht Club, which is situated on the Toronto islands immediately opposite the downtown core. It has a beautiful old clubhouse in a tranquil setting with an impressive view of the city. Access is by private launch leaving from the downtown waterfront (150 Cherry Street), which will take you over to the Island Clubhouse. A launch leaves every 30 minutes. Below is a link to the RCYC site:

http://www.rcyc.ca.

We estimate the cost for this dinner to be $160/person. The launch charge will be included. Please send an email to Iain Scott (icscott@mccarthy.ca) if you are planning to attend this dinner.

I hope you are having a great summer, and hope to see you in Toronto!

Diane Holt Frankle
Chair
Jim Griffin
Lorna Telfer
Vice Chairs

International M&A Subcommittee

The International M&A Subcommittee met on Friday, April 15, in connection with the Spring Meeting of the Business Law Section in Boston.
Trends in Cross-Border M&A
The meeting began with a presentation by Stephen McGee, the National Practice Leader for Corporate Finance at Grant Thornton, Boston on Trends in Cross-Border M&A based on a recent report published by Grant Thornton. The presentation was followed by a Q&A session.

Public Company Takeovers Project
Daniel Rosenberg summarised the current status of the Subcommittee’s Public Company Takeovers Project that he is leading with Franziska Ruf.

International JV Agreement Project
Freek Jonkhart and Mireille Fontaine summarised the current status of the Subcommittee’s International JV Project that they are leading.

Other Current Projects
Jim Walther summarised the current state of play on the Subcommittee’s current Foreign Direct Investment Laws and Post-Closing Dispute Resolution projects.

M&A in the Nordic Countries
Kimmo Mettälä gave a presentation on M&A in the Nordic countries, which was followed by a Q&A session.

Daniel Rosenberg provided an update on the ABA Business Law Section’s Global Business Law Forum that will take place in London in September 2011. The conference will be similar in format to the conference run by the Business Law Section in Frankfurt in May 2008 and Daniel will be co-chair of the conference alongside former Section chair Charlie McCallum. Daniel reported that the Subcommittee was well represented both on the Planning Committee for the Forum and on the five programs (one-third of the total content) that our Committee is presenting at the conference.

Programs and Projects
There was no time for a discussion on the Subcommittee’s future programs and projects, but it was noted that Daniel Rosenberg was due to give a presentation the following day at our Committee meeting on forthcoming changes to the UK regime for public company takeovers. It was also noted that the Subcommittee would present a program at the Annual Meeting in Toronto.

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. Points raised included:

- Andrew Saul updated the meeting on the forthcoming changes to the UK public company takeover regime which are intended to redress the balance away from the current tactical advantages which a hostile bidder is considered to hold over a target company.
- Nicholas Dietrich commented on issues arising in relation to the proposed merger between the London and the Toronto Stock Exchanges. He also commented on the final decision given by the Ontario Securities Commission in the Magna case, including on the issues a special committee needs to consider when it considers a transaction involving elimination of a dual class of voting stock arrangement and the price the holder of the higher voting class proposed to extract from the company.
Francesco Portolano commented on the Italian Government’s recent intervention in the stakebuilding in Parmalat by Groupe Lactalis of France, as well as the recent announcement of the acquisition of leading Italian soccer club AS Roma by a consortium headed by Thomas DiBenedetto, a partner of the New England Sports Ventures group which owns English soccer club Liverpool and the Boston Red Sox.

Michael Bernasconi discussed issues arising on Swissgrid’s acquisition of Switzerland’s high-voltage electric grid from 25 owners.

Kevin Kyte referred to the Ontario Court of Appeal’s recent decision in the Indalex case where it held that, on the wind-up of a defined benefit pension plan, a constructive trust was deemed to exist over the employer’s assets in the amount required to fund the plan deficit. He commented that this is regarded by the Canadian bar and financing community as a startling development that would affect the ability of companies with pension deficits to raise funds through traditional debtor-in-possession financing.

Subcommittee Website

The Subcommittee’s website can be accessed at the following address: http://apps.americanbar.org/dch/committee.cfm?com=CL560016. The website contains the following information:

- Presentation notes of Stephen McGee on Trends in Cross-Border M&A and the report on which it was based.
- Presentation notes of Kimmo Mettälä on M&A in the Nordic countries.
- The latest materials from the Subcommittee’s Foreign Direct Investment Project and International Dispute Resolution Project.
- Presentation notes of Daniel Rosenberg from his presentation to the M&A Committee meeting on the forthcoming changes to the UK public company takeover regime.
- Client advisory by Andrew Saul expanding on his comments to the Subcommittee meeting on the forthcoming changes to the UK public company takeover regime.
- Note by Nicholas Dietrich expanding on his comments on the proposed merger between the London and the Toronto Stock Exchanges and article provided by Nicholas Dietrich on the final decision given by the Ontario Securities Commission in the Magna case.
- Details of the Subcommittee’s publications, future meetings, other work-in-progress, and other past program materials.

Next Meeting

The Subcommittee’s next meeting will be held in connection with the Annual Meeting and will take place at The Westin Harbour Castle in Toronto. Please note that, due to an ABA scheduling conflict, the International M&A Subcommittee meeting has been moved from its originally scheduled Sunday morning time to Friday, August 5, from 8:30 a.m. until 10:30 a.m., in Pier 4, Convention Level, The Westin Harbour Centre Hotel.

See you – bright and early – in Toronto.

Daniel P. Rosenberg
James R. Walther
Co-Chairs
Membership Subcommittee

We are pleased to report that our total Committee membership, as of July 1, 2011, was at 4,122 members. This is an increase from the 3,946 members our Committee boasted as of March 30, 2011. Our focus remains on programs and events that will keep our members engaged and attract new ones.

Since March 2011, our membership is still in 49 states and throughout 51 countries. But we are happy to report a 5% increase in our in-house counsel members from 368 to 386, as well as a 4% increase in our “associate” members (non-lawyers) which went from 325 to 339. We focused on those members as we believe they add positively to our Committee and we remain engaged in seeing these numbers continue to rise! Canadian members have also increased from 179 to 186, up 4%! A good sign for cross-border deals?

As you know, the Membership Subcommittee has been formally expanding its ties with the Association for Corporate Growth (ACG) and the Diversity Subcommittee has been very active creating opportunities for young lawyers and other minority members of the Bar to join and get to know our Committee. Efforts have paid off as we have seen an increase in the membership including a 7% increase of women members, one of the top priorities of the Membership Subcommittee.

A word on our Subcommittees -- the M&A Market Trends Subcommittee is still our largest group with 1,474 members and it has increased by 4% since March 30, 2011. But all of our subcommittees have seen an increase in membership of at least 3% and in general of 6%! Below is a list of some of the other larger subcommittee membership numbers:

<table>
<thead>
<tr>
<th>Subcommittee</th>
<th>Members</th>
</tr>
</thead>
<tbody>
<tr>
<td>Private Equity M&amp;A</td>
<td>1,290</td>
</tr>
<tr>
<td>International M&amp;A</td>
<td>849</td>
</tr>
<tr>
<td>Acquisitions of Public Companies</td>
<td>817</td>
</tr>
<tr>
<td>M&amp;A Jurisprudence</td>
<td>691</td>
</tr>
</tbody>
</table>

Also worth mentioning is the Task Force on Distressed M&A with 361 members and the M&A Jurisprudence Subcommittee with 326 members, an increase of 7%!

We cannot stop our efforts to attract new members and are working at new events, associations, and programming to keep you interested and involved. Please share your ideas with us.

Indeed, the Programs Subcommittee will welcome them. They are very active and growing in membership seeing an increase of 8% from 218 members to 236. Needless to say, all efforts are put forth to grow and respond to our members needs.

We thank you for your involvement and hope to see you all very soon.

Mireille Fontaine
Ryan Thomas
Tracy Washburn
Co-Chairs

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 on-line library, designated as the M&A Lawyers’ Library, which our Committee members can access through the Committee website.

The Annual Survey Working Group will meet in Toronto on Saturday, August 6, from 10:30 a.m. until 11:30 a.m., in the Pier 9 Room on the Convention Level at The Westin Harbour Castle. The Judicial Interpretations Working Group will meet immediately thereafter, from 11:30 a.m. until 1:00 p.m., in the same room. Dial-in information for the meetings will be sent to members of the Subcommittee.

**Annual Survey Working Group**

The eighth Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions was published in the February 2011 issue of *The Business Lawyer*. We thank all Committee members who participated in that effort. At the Committee meeting in Toronto, we will discuss the *Ventas* case, summarized below. At the Working Group meeting we will continue our efforts to select cases for inclusion in the 2011 annual survey.

We are asking all members of the Committee to send us significant judicial decisions for possible inclusion in the survey. Submissions can be sent by email either to Jon Hirschoff (jhirschoff@fdh.com) or to Michael O’Bryan (mobryan@mofo.com). You may fax cases to Jon at (203) 325-5001 or to Michael at (415) 268-7522. 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 (i) 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), (ii) 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), (iii) pertain to a successor liability issue, or (iv) 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 send an email to Jon Hirschoff (jhirschoff@fdh.com) or to Michael O’Bryan (mobryan@mofo.com), or simply attend the working group meeting in Toronto.

**Decision to be Discussed at the Toronto Committee Meeting**


The Sixth Circuit Court of Appeals, in *Ventas, Inc. v. HCP, Inc.*, affirmed a district court’s rulings against a purported topping bidder in connection with a $101 million jury award for tortious interference with prospective advantage. The topping bidder eventually withdrew its bid, but the buyer had to increase its offer price to get approval from the target’s
unitholders, and the jury required the topping bidder to pay the buyer for the aggregate increased price. The court stressed the need to be “circumspect” in reviewing tortious interference claims between competitors, but noted that “the public interest in full and fair competition is furthered by imposing liability … for fraudulently leveraging a public market to sabotage a competitor ….”

The court also reversed the district court’s ruling that the buyer could not also seek punitive damages, exposing the topping bidder to additional damages.

Background

The suit arose from an auction for Sunrise, a Canadian REIT. Ventas and HCP each signed a standstill agreement prohibiting bids outside the auction process for 18 months following completion of the auction. As a practical matter, each bidder had to reach an agreement with Sunrise’s long-term manager, Sunrise Senior Living, Inc (“SSL”), before it could make a final bid for Sunrise. Ventas reached an agreement with SSL, but HCP could not. Sunrise eventually accepted Ventas’ offer of $15 per share. The price represented a “record-breaking” 50% premium, and unitholder approval “seemed to be a foregone conclusion.” The Ventas purchase agreement included a no-shop provision and required Sunrise to enforce existing standstill agreements.

One month later, HCP announced, via a press release, a new offer of $18 per share. HCP told Sunrise, but did not disclose publicly, that the bid in fact was subject to reaching an agreement with SSL. Sunrise issued its own press releases noting HCP’s undisclosed condition of reaching an agreement with SSL. Ventas also issued a press release, noting that HCP’s bid was in breach of the standstill agreement and was conditional.

Ventas and Sunrise brought actions in Canada with respect to HCP’s standstill agreement. The court there held that the standstill agreement precluded HCP from submitting its topping bid and that Sunrise must enforce the standstill agreement against HCP (Ontario Superior Court, March 5, 2007, affirmed by Ontario Superior Court, March 26, 2007). The Canadian court also found that Sunrise had “acted reasonably in designing and conducting the auction process so as to maximize value.” HCP then withdrew its bid.

Ventas was unable to close the acquisition on its original terms, however, as Sunrise unitholders rejected the $15 bid. Ventas responded with a new offer of $16.50, which the Sunrise unitholders approved.

Following the closing, Ventas brought an action in Kentucky, alleging tortious interference with contract and tortious interference with a prospective advantage. The district court dismissed the former claim, but allowed the latter to proceed to trial. A jury found that HCP’s actions amounted to tortious interference, with damages equal to the difference between the $15 and $16.50 offers, for an aggregate of $101 million. The district court ruled out punitive damages, however.

Opinion

Improper Interference. The court noted that Kentucky law generally follows the Restatement (Second) of Torts. Under the Restatement, as cited by the court, intentional interference arises when one “intentionally and improperly interferes with another’s prospective contractual relation …” (Sec. 766B), and, to determine whether that interference is improper, “consideration is given to [among other things] … the actor’s motive….” (Sec. 767). The court noted that the Kentucky Supreme Court had summarized the test for improper interference as requiring a
showing of “malice or some significant wrongful conduct.”

The court also noted that claims between competitors require a “more exacting standard.” In particular, the Restatement provides that competition alone does not constitute improper interference, and that improper interference between competitors will not be found where, among other things, “the actor does not employ wrongful means” (Sec. 768). The court thus approved the district court’s instruction to the jury that in order to find “improper interference” it must find that HCP employed “significantly wrongful means,” which includes “conduct such as fraudulent misrepresentation, deceit and coercion,” and that to do so the jury could consider “the parties’ conduct, motive and the circumstances of the transaction….”

The court found that the evidence was sufficient to support a finding that HCP’s “improper interference” caused injury to Ventas, despite HCP’s arguments that Ventas had not separated the impact of any misrepresentations by HCP from the impact of HCP’s truthful statements. HCP’s press release announcing its offer did not say that the offer was conditional on reaching agreement with SSL or that HCP had failed to reach an agreement with SSL during initial auction process; in fact, HCP’s press release stated that the terms of the topping bid were “identical to the transaction entered into by Ventas” and that it had a “greater certainty of completion.” HCP never sent Sunrise a signed, unconditional offer, despite verbal assurances by HCP’s CEO that a signed agreement had been sent. HCP had indicated that it was interested in “moving on to other things,” and in the midst of its topping bid for Sunrise had made a $3.1 billion offer for a different company. Sunrise’s investor base also changed after HCP announced its topping bid, with new unitholders who “were largely arbitrageurs from the United States [who] had little incentive” to accept Ventas’ original bid even after HCP withdrew the topping bid.

**Breach of Standstill.** The court affirmed the district court’s decision to allow the jury to give some, though not decisive, weight to HCP’s breach of the standstill agreement. The district court instructed the jury that the breach “alone is not sufficient to establish tortious interference” but “may be considered along with the other evidence in determining whether HCP engaged in improper interference.” The court rejected HCP’s challenge to the jury instructions, noting that the breach “illuminates [HCP’s] anti-competitive activities” and “is central to an understanding of Ventas’ allegations of fraud and deception.”

**Punitive Damages.** The court reversed the district court’s holding that Ventas could not seek punitive damages from HCP. Under Kentucky law, punitive damages can be available where a defendant “act[s] toward [a] plaintiff with oppression, fraud, or malice.” Here, Ventas was claiming fraud, which Kentucky law defined as “an intentional misrepresentation, deceit or concealment of a material fact known to the defendant and made with the intention of causing harm to the plaintiff.”

In this case, the court stated, “a reasonable jury could conclude that HCP engaged in its fraudulent conduct with the intention of inflicting harm on Ventas.” In addition to the misrepresentations by HCP as noted above, the court noted that HCP’s conduct suggested that “its purported offer was not genuine,” given, among other things, that the initial proffered agreement was unsigned, that the CEO then stated that he had sent a signed copy to Sunrise when he in fact had not, and that HCP seemed to be moving “on to other things” with its potential acquisition of another company.
**Conclusion**

*Ventas* reiterates the strong public interest in competition. However, it also reminds us that claims of tortious interference, even though subject to “heightened scrutiny” when made between competitors, may be supported if a topping bidder is not motivated by a genuine desire to actually acquire the target and uses wrongful conduct. A genuine, bona fide bid, even if it breaches a standstill agreement, may benefit shareholders in some ways and does not necessarily support tort claims against the topping bidder. But a bid that is accompanied by misrepresentations and breaches a standstill agreement, and is made primarily to hurt a competitor, may amount to the kind of “wrongful conduct” that supports a claim of tortious interference, and makes the awarding of substantial damages a very real possibility.

**Judicial Interpretations Working Group**

After years of effort, the Judicial Interpretations Working Group is ready to launch its online research library of memos on acquisition agreement provisions and M&A issues. The M&A Lawyers’ Library will go live prior to our meeting in Toronto, and will be the subject of the Committee Forum following the full Committee meeting on Sunday afternoon. The initial content of the library will be memoranda summarizing the judicial interpretation of the following: (1) financial statement representations, (2) no undisclosed liabilities representations, (3) full disclosure (“10b-5”) representations, (4) material adverse change clauses, (5) survival clauses and contractual statutes of limitations, (6) attorney-client privilege and conflicts issues in M&A transactions, (7) best efforts/reasonable efforts clauses, (8) earn-out provisions (9) exclusivity and no-shop provisions/agreements, (10) bringdown conditions, (11) no third-party beneficiaries provisions, and (12) dispute resolution clauses in purchase price adjustment provisions. Additional content will be added to the library on a continuous basis. For example, prior to the winter meeting, we plan to add all of the case summaries we have published in the Annual Survey of M&A Jurisprudence (assuming we get permission from the ABA), with a topical index and, hopefully, the cases themselves.

We have working group teams in various stages of preparation of memoranda regarding additional acquisition agreement provisions and M&A issues, and we have a virtually unlimited pool of topics to work on in the future. We welcome all interested Committee members to join our Working Group. The Judicial Interpretations Working Group is a good way to become involved in the Committee, especially for younger Committee members because extensive M&A transactional experience is not necessary.

The Judicial Interpretations Working Group met during the Committee’s meeting in Boston. During the meeting we had a spirited discussion of the memo on dispute resolution clauses in purchase price adjustment provisions, prepared by Alan Sachs, and the memo entitled “Time Limitations on Post-Closing Recovery for Breaches of Representations and Warranties: Survival Clause as a Contractual Statute of Limitations,” authored by Bob Copeland and Melissa DiVincenzo.

As indicated above, the Toronto meeting of the Judicial Interpretations Working Group will be held on Saturday, August 6, from 11:30 a.m. until 1:00 p.m., in the Pier 9 Room, Convention Level, The Westin Harbour Castle, immediately following the Annual Survey Working Group meeting. We plan to discuss (i) the M&A Lawyers’ Library, (ii) the memo on the measure of damages for breach of M&A agreements being prepared by Lisa Hedrick and Jennifer Becker, and (iii) the memo on
“Important Jurisdictional Differences in M&A Jurisprudence” being prepared by Brian North.

To join our working group, please send an email to either Scott Whittaker (swhittaker@stonepigman.com) or Jim Melville (jcm@kskpa.com), or simply attend the working group meeting in Toronto.

Jon T. Hirschoff
Subcommittee Chair

Michael G. O’Bryan
Chair - Annual Survey Working Group

Scott T. Whittaker
James C. Melville
Co-Chairs - Judicial Interpretations Working Group

M&A Market Trends Subcommittee

At our meeting in Boston, we heard from the following: (i) Rick Lacher on updated data on the state of the M&A market; (ii) Bill Anderson of Goldman Sachs on deals in the private equity and hostile activity areas; (iii) Steve Kotran discussing the Practical Law Company study of remedies in public company deals; and (iv) our study chairs Jay Bothwick, Hal Leibowitz, and Wilson Chu on the status of the next iterations of the Private Equity Buyer/Public Company Target M&A Deal Points Study (which will compare deal points in transactions from 2007 through 2010 to what we saw in the study looking at 2005 and 2006 agreements), the Strategic Buyer/Public Company Target M&A Deal Points Study (which will compare deal points in transactions from 2010 to what we saw in prior iterations of the study), and the Private Target Deal Points Study (which will compare deal points in transactions from 2010 to what we saw in prior iterations of the study), respectively.

Our next meeting is in Toronto on Saturday, August 6, from 2:30 p.m. until 4:00 p.m. local time. At that meeting, we will hear from the following:

- Jen Muller of Houlihan Lokey will update us on the M&A Market from the banker’s perspective and will discuss Houlihan Lokey’s recently released 2010 Transaction Termination Fee Study;
- Mark Danzi and Claudia Simon will conduct a mock negotiation on “sandbagging” provisions, moderated by Craig Menden;
- Professor Charles Whitehead of Cornell Law School will discuss his upcoming essay for the *Delaware Journal of Corporate Law* entitled “Sandbagging: Default Rules and Cost-Bearing in Acquisition Agreements”;
- We will discuss the “sandbagging” data collected to date for the in-progress 2011 Private Target Deal Points Study; and
- In recognition of our host country, John Clifford will report on recent M&A happenings in Canada.

We will also get updates from Hal Leibowitz on the next iteration of the Strategic Buyer/Public Company Target M&A Deal Points Study to be published in 2011 and from Wilson Chu on the next iteration of the Private Target Deal Points Study to be published in 2011.

The dial-in number and passcode for the meeting for those of you who cannot attend in person is as follows:

US & Canada: (866) 646-6488
International: (707) 287-9583
Conference Code: 4597613352
We look forward to seeing you in Toronto.

Jim Griffin
Jessica Pearlman
Co-Chairs

Private Equity M&A Subcommittee

The Private Equity M&A Subcommittee met in Boston on Friday, April 16, as part of the Spring Meeting of the Business Law Section of the ABA. At the gathering, the Subcommittee received materials and discussed events and developments related to the Private Equity and M&A markets generally since the Subcommittee gathered in Miami in January. Also at the session, a panel discussion was held reviewing possible considerations and themes that transaction participants may want to keep in mind in the aftermath of several recent Delaware decisions (e.g., Del Monte, Atheros) and transactions (e.g., JCrew) that have involved Private Equity and strategic buyers and where M&A sales processes and proxy statement disclosure around potential conflicts of interest have been scrutinized. The panel included Delaware Supreme Court Chief Justice Myron T. Steele, Mark Morton, Ron Barusch, author of the Dealpolitik column for The Wall Street Journal and former Skadden, Arps M&A partner, and the Chair. The Subcommittee meeting was well-attended, and the Subcommittee thanks all attendees and participants for contributing to the session.

John K. Hughes
Chair

* * *
Task Force on Financial Advisor Disclosures
9:30 a.m. – 10:30 a.m.
Westin Conference Centre
Metropolitan Ballroom East, 2nd Level
Domestic: (866) 646-6488
International: (707) 287-9583
Passcode: 4597613352

Task Force on New Projects
10:30 a.m. – 11:30 a.m.
Westin Conference Centre
Metropolitan Ballroom East, 2nd Level
Domestic: (866) 646-6488
International: (707) 287-9583
Passcode: 4597613352

Program – Majority and Minority Investments in Canadian Businesses by US and Other Foreign Investors
10:30 a.m. – 12:30 p.m.
Westin
Piers 2 & 3, Convention Level
Co-Sponsored with Private Equity and Venture Capital Committee

Annual Survey Working Group of the M&A Jurisprudence Subcommittee
10:30 a.m. – 11:30 a.m.
Westin
Pier 9, Convention Level
Domestic: (866) 646-6488
International: (707) 287-9583
Passcode: 4472600718

Judicial Interpretations Working Group of the M&A Jurisprudence Subcommittee
11:30 a.m. – 1:00 p.m.
Westin
Pier 9, Convention Level
Domestic: (866) 646-6488
International: (707) 287-9583
Passcode: 4472600718

Private Equity M&A Subcommittee
12:30 p.m. – 2:30 p.m.
Westin Conference Centre
Marine Room, Main Lobby
Domestic: (866) 646-6488
International: (707) 287-9583
Passcode: 4597613352

Acquisitions of Public Companies Subcommittee
1:30 p.m. – 2:30 p.m.
Westin Conference Centre
Metropolitan Ballroom East, 2nd Level
Domestic: (866) 646-6488
International: (707) 287-9583
Passcode: 4597613352

M&A Market Trends Subcommittee
2:30 p.m. – 4:00 p.m.
Westin Conference Centre
Metropolitan Ballroom East, 2nd Level
Domestic: (866) 646-6488
International: (707) 287-9583
Passcode: 4597613352

Task Force on Revised Asset Purchase Agreement
3:30 p.m. – 4:30 p.m.
Westin
Pier 9, Convention Level
Domestic: (866) 646-6488
International: (707) 287-9583
Passcode: 4472600718
Meeting of Committee Chair and Vice Chairs, Subcommittee, Task Force and Working Group Chairs

4:30 p.m. – 5:30 p.m.
Westin Conference Centre
Metropolitan Ballroom East, 2nd Level
Domestic: (866) 646-6488
International: (707) 287-9583
Passcode: 4597613352

Committee Dinner
Nota Bene Restaurant
180 Queen St. W.
Toronto, Canada
416-977-6400

Sponsored by
J.P. Morgan Escrow Services and
Thompson Reuters

Reception: 7:00 p.m.
Dinner: 8:00 p.m.

Sunday, August 7, 2011

Task Force on Dictionary of M&A Terms

8:30 a.m. – 9:30 a.m.
Westin Conference Centre
Frontenac Room, Street Level

Domestic: (866) 646-6488
International: (707) 287-9583
Passcode: 7227876294

Task Force on Two-Step Auctions

9:30 a.m. – 10:30 a.m.
Westin Conference Centre
Frontenac Room, Street Level

Domestic: (866) 646-6488
International: (707) 287-9583
Passcode: 7227876294

Program – Change of Control Transactions Involving Dual-Class Share Structures

10:30 a.m. - 12:30 p.m.
Westin
Salon C, Convention Level

Full Committee Meeting

12:30 p.m. – 3:00 p.m.
Westin Conference Centre
Frontenac Room, Street Level

Domestic: (866) 646-6488
International: (707) 287-9583
Passcode: 7227876294

Committee Forum – Shocking Selections from the M&A Lawyers’ Library

3:00 p.m. – 4:00 p.m.
Westin Conference Centre
Frontenac Room, Street Level

Domestic: (866) 646-6488
International: (707) 287-9583
Passcode: 7227876294
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