FROM THE CHAIR  Mark Morton

Finally. Just a few more days of cold weather (and another blast of snow) before I head to Laguna Beach. I suggest many of you are also looking forward to a couple of days in a warm, sunny resort. Safe travels. When you arrive, you will find a schedule full of lively meetings, a wonderful hotel and opportunity to meet and mingle with many of the best M&A lawyers in the world. I look forward to seeing you there.

As a reminder, our meetings start bright and early on Friday (8:00 am) and they conclude Saturday afternoon at 5:30 p.m. The schedule is tight, but the meeting rooms are close so you should be able to make any meeting that interests you. One schedule change to note. The Revised Model Asset Purchase Agreement (RMAPA) Task Force no longer plans to meet on Saturday at 8:30 a.m., so I have moved the Revised Model Stock Purchase Agreement (RMSPA) Task Force meeting into that slot.

If you are unable to attend this weekend’s meeting in person, please consider joining us by phone. A complete schedule with all of the details (meeting rooms, dial in information, etc.) is set forth at the end of Deal Points.

If you have not purchased tickets to our Committee luncheons and dinners, please do so when you arrive and register at the ABA desk. We have seats available for each of the meals. On Friday, we will be returning to Mozambique, which is located at 1740 S. Coast Highway. On Saturday, we will stay on site for our reception and dinner.

A special note of thanks to CRS Corporate Risk Solutions, LLC and Marsh USA, Inc., our sponsors for Friday’s dinner and to Duff & Phelps, LLC and SRS/Acquiom LLC, our sponsors for Saturday’s dinner. If you see or meet a representative from one of our sponsors, please thank them for their continuing support of our Committee.

Full Committee Meeting
Our full Committee will meet on Saturday from 3:00 to 5:30 pm. During the meeting, we will have a number of presenters, including Andrew Capitman of Duff & Phelps, who will review their 2014 M&A Review, and Scott Whittaker, who will discuss the recent decision by the Delaware Court of Chancery in Cigna v. Audax.

Leadership Changes
If you track public company M&A, you know that Keith Flaum just finished a crazy year in which he worked on many of the year’s largest (and most interesting) deals. Coming off that run (and with an expanding family at home), Keith has decided that he should focus his Committee efforts on the International M&A Subcommittee, which he co-chairs. Keith has been a great resource for me over the past two years. Thank you, Keith.

I am excited, however, to announce that Scott Whittaker has agreed, effective January 1st, to serve as a Vice-Chair (joining Wilson Chu and Jen Muller). As many of you know, Scott has been an active member of our Committee for many years. During that time, he has served in a number of leadership positions, including his current position as Chair of the M&A Jurisprudence Subcommittee. I look forward to working with Scott over the final year of my term.

Task Force and Subcommittee Meetings
In Laguna, most of our Task Forces and Subcommittees will host substantive programs and discussions. Please see the reports in this issue of Deal Points for a full list. In addition, in Laguna we are kicking off the Revised Model Stock Purchase Agreement Task Force, chaired by Murray Perelman. Please try to attend (and participate) in as many meetings as you can.

Planning for San Francisco
As a reminder, we will be returning to California (San Francisco) for our Spring Meeting. Details to follow, but mark your calendars now. Our meetings will be held from Thursday, April 16th to Saturday, April 18th.

If you have any questions concerning our upcoming meetings, please email or call me. I look forward to seeing all of you.
FROM THE CO-EDITORS  Eric S. Klinger-Wilensky & Ryan D. Thomas

We have three fantastic articles lined up for this issue: an article by Matthew Bester and Creighton Macy addressing antitrust issues; an article by Calie Adamson, John Clifford and Brad Hanna discussing a new, important development in Canadian commercial law, and an article by Louis Hering, Melissa DiVincenzo, and Jason Tyler discussing the first opinion addressing the new Delaware statute extending the statute of limitations applicable to certain contracts. As always, we thank the authors and all of the chairs of our Task Forces and Subcommittees for their contributions. Please let us know if you would like to contribute a Featured Article in a future issue.

We hope you enjoy this issue of Deal Points and wish everyone a happy and healthy 2015.

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You've worked out the hundreds of details necessary to close an acquisition. You're getting close to the signing date. And then...your antitrust colleague asks whether you have considered the relevant antitrust issues that may stem from the acquisition.

Don’t wait until this question stops you in your tracks. To help you think through these important issues early, below is a practical guide to dealing with antitrust issues during the lifecycle of an acquisition. Think of this article as offering best practices for you and your clients to employ during any acquisition. Of course, each transaction is different and must be evaluated on a case-by-case basis, so we recommend you contact antitrust counsel early in the process so that he or she can provide proper guidance.

Before the diligence process even begins, you should discern the competitive relationship between the parties. This is a key point that directly influences the antitrust risk in the contemplated deal. Under Section 7 of the Clayton Act, 15 U.S.C. § 18, which prohibits transactions that “may be substantially to lessen” competition. In general, transactions among competitors will be viewed with more scrutiny by antitrust authorities than other transactions. To determine if your client competes with its merger partner, you should ask questions such as whether the parties have competing products or services and whether they compete for the same types of customers.

Counsel, we're ramping-up the due diligence process, are there any antitrust issues that I need to keep in mind?

Important antitrust issues arise in any due diligence process, particularly with respect to sharing competitively sensitive information (“CSI”) with your merger partner. If you determine that the parties are competitors, even in broad terms, your client must take precautions to protect the flow of CSI. Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits a “contract, combination . . . or conspiracy” that unreasonably restrains trade. Information exchanges among competitors therefore can be risky under Section 1 because they may increase competitors’ ability to collude or coordinate behavior that lessens competition between or among them. For instance, competitors exchanging price information could facilitate illegal coordination among them on price.

Enforcement bodies around the world – including the Antitrust Division of the United States Department of Justice (“DOJ”), United States Federal Trade Commission (“FTC”), and European Commission (”EC”) – will investigate the improper sharing of CSI between competitors, and the due diligence process does not provide a shield. The most “competitively sensitive” information includes nonaggregated data relating to: (i) pricing, including information related to margins, discounts, and rebates; (ii) other confidential, customer-specific data for current or potential customers (i.e., relating to product plans or terms that will be offered); (iii) detailed research and development efforts or product forecasts; and (iv) other forward-looking market-facing activities. Note that these are just examples of common categories of CSI and not an exhaustive list of information that must be monitored.

The structure of information exchanges among parties will vary on a case-by-case basis. However, given the importance of due diligence, there are standard ways of sharing CSI that can limit antitrust risk involved in this process. For instance, CSI can be shared with outside counsel and other third parties assisting in the evaluation of the transaction to prevent a direct exchange between competitors. Further, certain CSI (e.g., relating to costs and prices) can many times be shared on an aggregated and historic level. Additionally, you can establish a “clean team” consisting of a small number of individuals within the organization to evaluate the CSI. Keep in mind that clean team members may need to be screened off from certain of their day-to-day responsibilities for a period, given the sensitive information they will learn. Regardless of how CSI is shared, it should be used only for the purpose of analyzing the potential transaction. The most important thing is to establish a clear structure and to bring in antitrust counsel early.

If an antitrust enforcement body believes there may have been an improper information exchange, it will likely open a separate investigation. This will not only expose the parties to additional antitrust risk, which could include fines, it could also lengthen any investigation related to the deal itself.

Counsel, the deal is moving forward, what else should the deal team be doing?

Given that a merger filing may be necessary, as explained below, it is never too early to remind members of the business team that their correspondence (including, e-mails, instant messages, text messages, handwritten notes, standalone documents, and presentations) regarding the deal may be evaluated by antitrust regulators. It is imperative that the business team members be factual and accurate in their communications, as overstatements or hyperbole could be read literally by the antitrust regulators. Recent cases show that the government has relied heavily on the merging parties’ ordinary course documents when filing a complaint to block a transaction. For instance, in its complaint regarding CSX Holdings, Inc., the DOJ highlighted H&R Block’s internal documents to show the acquisition’s purpose was to “[a]cquire

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1 Mr. Bester is the Director of Competition Law at Accenture LLP and Mr. Macy is an associate in the Antitrust Group of Wilson Sonsini Goodrich & Rosati PC’s Washington, D.C. office. They previously worked together at the Department of Justice’s Antitrust Division. The views expressed herein are those of the authors alone and do not necessarily represent the views of their current or former employers or their clients.

TaxAct and eliminate the brand to regain control of industry pricing and avoid future price erosion.\(^3\)

**Counsel, we’re negotiating the merger agreement, what about antitrust related provisions in the agreement?**

There are several antitrust-related deal points that can be addressed in the merger agreement itself, particularly where the deal carries antitrust risk. If the parties expect a lengthy regulatory review resulting in a divestiture or lawsuit to block the merger by an antitrust regulator, they can negotiate certain terms to alleviate some of that risk. For example, a “hell or high water” provision can be included that requires the parties to see the regulatory review process through a certain stage of the review or litigation with the agencies and to use all or best efforts to get a deal cleared; a “divestiture” provision can be included that requires the buyer to divest certain assets in order to alleviate regulators’ concerns; or a “termination fee” provision can be included in the event that one or both of the parties decide against completing the acquisition because of regulatory concerns. Finally, and particularly for deals that may not close for an extended period of time due to antitrust scrutiny, your client should consider timing provisions, which specify a date the deal must be closed by.

**Counsel, it’s now time to file merger control forms, do we need to take these filing requirements seriously?**

Yes! It is important to evaluate whether any antitrust-related filings are necessary as the deal progresses. In the U.S., a deal can trigger a Hart-Scott-Rodino (“HSR”) filing obligation that requires the acquirer to pay a filing fee and provide certain documents to antitrust regulators. The HSR filing requirements depend primarily on the value of the transaction and the size of the merging parties. Filings may also be required in many other jurisdictions around the world, with different filing tests or thresholds. Antitrust counsel should be consulted early to manage the jurisdictional filing analysis.

Failure to comply with antitrust regulatory requirements can result in substantial fines. For instance, the EC has the authority to impose fines up to 10% of the aggregate worldwide turnover of the parties for failing to make a merger notification. If a party is found in violation of the HSR Act, 15 U.S.C. § 18a, in the U.S., it can be fined up to $16,000 per day. Other jurisdictions (including Brazil, China, Canada, and Germany among others) have a varying range of penalties for violation of applicable merger notification laws.

Finally, as noted above, some jurisdictions require the production of documents as part of the filing. For instance, the U.S. antitrust bodies and EC require the production of certain deal-related documents prepared by or for any officer or director. Failure to adhere to this requirement can result in the company being penalized. For instance, in 2007 the DOJ imposed a $550,000 fine against Iconix Brand Group for failure to provide required documents, even though the DOJ ultimately found that the deal did not pose any substantive antitrust issues.\(^4\) This case provides an important reminder that filing requirements must be taken very seriously.

**Counsel, we’ve now signed, are there preclosing issues that we should be aware of?**

Many of the questions we get from our clients relate to the scope of proper conduct after the deal has been signed, but before regulatory approval and closing. At a high level, the rule is that the two merging parties are still separate companies and must act accordingly. That means that they cannot go to customers jointly and sell products of the future, combined company. They cannot exchange CSI without proper safeguards in place, integrate research and development efforts, or make any public statements (in press releases or to investors) that would imply that the two companies are one. There is, however, some preclosing conduct that is permissible. For instance, it is permissible for your clients to tout to customers or investors the benefits of merging the two companies, and to begin to plan for day one of the merged company, including discussions on how to combine corporate functions. But it is not permissible to actually combine them.

The merging parties have every incentive to start selling the benefits of the deal to clients and investors as soon as it is signed. But antitrust regulators will focus on improper conduct in combining the two merging parties, known as “gun jumping,” before they have received a chance to review the acquisition. A recent example of improper preclosing conduct is demonstrated by the DOJ’s $5 million settlement with Flakeboard, Arauco, Inversiones Angelini, and Sierra Pine for improper coordination while the DOJ’s investigation was ongoing. At issue was the closure of one of the seller’s facilities, and movement of that facility’s customers to the buyer before the mandatory HSR waiting period had expired. The settlement arose from the DOJ’s allegations that the companies, who ultimately abandoned the transaction, violated both Clayton Act Section 7(a) and Sherman Act Section 1.\(^5\)

One way to address preclosing issues, in addition to the continued assistance by outside counsel and other third-parties, is to have an isolated “integration” clean team that has no market-facing responsibilities in either company. These clean teams have the ability to plan for integration but are not exposed to CSI from either of the merging parties. This best practice allows the parties to structure the interim period between signing and closing in a way that prevents CSI from ever traveling from one party to the other.

Finally, your clients will often be very eager to announce the acquisition for a whole host of strategic reasons. In those instances, it is important to make clear in any public statement that regulatory approvals are pending and that closing will occur only after those approvals are obtained. This rule applies to shareholder calls and any other public forum where executives may be talking about the acquisition.

**Counsel, we’ve got approval from the regulators, what’s next?**

Once you receive approval from all necessary regulatory agencies, no further antitrust obstacles prohibit you from closing, so close! Often, regulatory approval is the last hurdle before an acquisition can close, so it is not difficult to convince clients to do everything they need to

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do in order to complete this step. While limited, there is a small bit of antitrust risk while the companies are still separate even after antitrust regulators have cleared the deal. Once they have merged operations, however, the two companies are now one and cannot be liable under the antitrust laws aimed at illegal agreements between competitors.

Let’s Be Honest, eh: The New Canadian Duty of Honesty in Contractual Performance
Calie Adamson, John Clifford and Brad Hanna¹

In November 2014, the Supreme Court of Canada issued a landmark decision that dramatically impacts the obligations of parties to commercial contracts governed by Canadian law.

In Bhasin v Hrynew, a unanimous Supreme Court of Canada recognized that good faith contractual performance is a “general organizing principle” of Canadian common law, and that parties to a contract are under a duty to act honestly in the performance of their contractual obligations. The case is the first in which our highest court has considered whether the common law imposes a duty of good faith in contractual performance. (Note that the ruling does not affect contracts governed by the Civil Code of Québec, which already recognizes a duty of good faith in performance, which would include a duty of honesty.)

The Facts

The appellant, Harish Bhasin, sold investment products for Can-Am. Their relationship was governed by a dealership agreement that automatically renewed for successive three year terms unless either party gave notice to the contrary at least six months prior to the expiry of any term.

There was a history of animosity between Bhasin and Larry Hrynew, another Can-Am dealer who was one of Bhasin’s key competitors. Hrynew wanted to capture Bhasin’s niche market, and proposed a merger with Bhasin. When Bhasin rejected his proposal, Hrynew pressured Can-Am to force the merger. Can-Am proceeded to design a restructuring plan that would have involved merging Bhasin’s agency under Hrynew’s agency. However, Can-Am denied to Bhasin that any such plans had been made.

At about the same time, the Alberta Securities Commission required Can-Am to appoint an officer to review its dealers for compliance with securities laws. The role would require the officer to conduct audits of Can-Am’s dealers. Can-Am appointed Hrynew, with the result that he would audit his competitors’ agencies, including Bhasin’s, and have access to their confidential business information. When Bhasin complained about the conflict of interest in Hrynew being both a competitor and an auditor, Can-Am misled Bhasin about how and why Hrynew was selected for the role and repeatedly told Bhasin that Hrynew was bound by duties of confidentiality in that role (when, in fact, this was not the case).

When Bhasin refused to allow Hrynew to audit his records, Can-Am gave notice of non-renewal. Bhasin commenced this litigation in response.

The Supreme Court concluded that Can-Am acted dishonestly toward Bhasin in exercising the nonrenewal provision, because it misled Bhasin about its proposed agency restructuring and Hrynew’s role as auditor. Can-Am’s dishonesty was directly and intimately connected with its performance of the agreement and its exercise of the non-renewal provision. Accordingly, the Court found that Can-Am breached the dealer agreement, and its duty to perform the agreement honestly.

The Decision

In its unanimous decision, the Supreme Court embarked on a detailed survey of the law of good faith in Canada (and elsewhere). It noted that Canadian law has been reluctant to consistently impose a stand-alone duty of good faith. This resistance has largely been attributable to concerns that such a duty would invite courts to interfere with the express terms of a contract, disrupt commercial certainty, and undermine freedom of contract.

Canadian courts have nevertheless infused their analysis of contractual disputes with concepts of good faith. However, their means of applying the concept to their analysis have been far from universal: “it is often unclear whether a good faith obligation is being imposed as a matter of law, a matter of implication or as a matter of interpretation.”

Indeed, the law of good faith contractual performance has evolved in a ‘piecemeal’ fashion, where courts enforce a duty of good faith in a variety contractual contexts. For example, franchise legislation imposes a statutory duty of good faith and fair dealing. Insurers are required by law to deal with their insureds’ claims fairly and in good faith; likewise, insureds are required to act in good faith by disclosing to their insurer all facts that are material to the insurance policy. The law requires good faith bargaining in the labour context and good faith termination of employment by employers. Considerations of good faith also permeate doctrines that evaluate the fairness of contractual bargains, such as unconscionability and those dealing with power imbalances between contracting parties.

This ‘piecemeal’ approach has resulted in a lack of consistency, certainty, and coherence, and brought the law out of step with the reasonable expectations of commercial parties.

¹ Calie Adamson is an associate and Brad Hanna is a partner in the Litigation Group at McMillan LLP. John Clifford is a partner in McMillan’s M&A Group. All of them are located in McMillan’s Toronto office.
The “General Organizing Principle” of Good Faith

To remedy these inconsistencies and bring Canadian common law in line with parties’ reasonable expectations, the Supreme Court in Bhasin recognized what it called a “general organizing principle” of good faith.

The Court was clear that this organizing principle does not constitute a “free-standing rule,” the breach of which is enforceable in and of itself. Instead, it forms a standard that manifests itself in other recognized, enforceable doctrines where the law already requires honest, candid, forthright, or reasonable contractual performance. The Court also left the door open to novel claims, noting that the list of applicable doctrines based in good faith “is not closed” and that the organizing principle “should be developed where the existing law is found to be wanting.”

Anticipating concerns that an organizing principle of good faith will lead courts down the rabbit hole of precluding legitimately self-interested commercial conduct, the decision confirms that parties remain free to pursue their own individual economic interests. Causing loss to another party in the pursuit of business objectives is not necessarily contrary to good faith. The Court was quick to caution against applying the organizing principle to engage in judicial moralism or scrutinize the motives of contracting parties.

However, the reasonable expectations of contracting parties nevertheless include a level of honesty and good faith in contractual dealings. While this expectation does not go so far as to automatically render the parties fiduciaries to one another, “a basic level of honest conduct is necessary to the proper functioning of commerce.”

The Duty of Honesty in Contractual Performance

Accordingly, in addition to affirming the general organizing principle of good faith, the Court held there is a general duty of honesty in contractual performance. The Court noted that this new duty does not arise as a result of an implied contractual term. Rather, it stands as a general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance. This duty precludes contracting parties from lying or otherwise knowingly misleading each other about matters directly linked to the performance of the contract.

Importantly, the Court stated that a duty of honesty does not impose a duty to disclose or any fiduciary responsibility, and it limited the scope of the duty of honesty as follows:

It does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one’s contractual performance.

And, the Court clarified that there is a distinction between not disclosing a material fact (even the intention to terminate an agreement) and actively misleading or deceiving a contractual counter-party.

The Court also pronounced that, because the duty of honest contractual performance is a “general doctrine of contract law that applies to all contracts,” the parties are not free to exclude it (and that the duty is not negated by the existence of a generically worded entire agreement clause). That said, the Court acknowledged that the scope of this duty may be relaxed in certain contexts, and even limited by express contractual terms so long as those terms respect minimum core requirements. In short, the Court would permit parties to define the precise content of honest performance and the standards by which that performance is to be measured in their agreement, provided that the language chosen is not manifestly unreasonable.

Implications

The Supreme Court expressly noted that while longer term contracts “clearly call for a basic element of honesty in performance,” so too do “transactional exchanges.” So, the performance of obligations under M&A agreements will be subject to the principles enunciated by the Court and the anticipated fall-out from the decision.

While the Court embarked on its analysis with the admirable intention of enhancing commercial certainty, the decision is likely to have the opposite effect on the predictability of contract law. Future courts will now have to grapple with what, exactly, “honest performance” entails, and the extent to which that duty may be modified by express contractual terms. For example, might the duty of honesty extend to the parties’ precontractual negotiations and discussions?

Bhasin makes it clear that the precise scope of what constitutes ‘appropriate regard’ for another’s interests will vary with the circumstances, and it will be up to subsequent litigants to test what those circumstances are and when the duty may be relaxed. By way of example, the decision makes a distinction between long-term contracts and those of a transactional nature, inviting future litigants to flesh out if and how the former should be held to a higher standard than the latter.

Attempting to limit the scope of the duty by way of express contractual terms may be appropriate in the context of certain business relationships. Indeed, putting fresh eyes on the terms of existing commercial contracts—and the means, methods and rationale for their performance—might be warranted. However, this case also drives home the message that duties and obligations under a contract can extend far beyond the words written on the page.

Parties wanting to benefit from the duty also should generously ask questions of their contracting counter-parties, since a dishonest answer could give rise to a cause of action.

As both the spectrum of this organizing principle and the precise scope of this duty are interpreted by lower courts, parties to Canadian contracts—including M&A agreements—should be on their best behaviour. Prudent parties will ensure they live up to their best practices of acting with honesty, candour, and transparency in their dealings with their contractual partners. Businesses should be mindful of the fact that not only their conduct, but also their intentions, will be examined under a microscope when contractual relationships turn sour.
Delaware Court of Chancery Holds Newly-Enacted 20-Year Statute of Limitations for Certain Contracts Applies Retroactively

Louis G. Hering, Melissa A. DiVincenzo & Jason S. Tyler

In 2014, Section 8106(c) of Title 10 of the Delaware Code was enacted to permit contracting parties to specify a contractual limitations period of up to twenty years in written contracts involving at least $100,000. In the absence of such specification, a three-year statute of limitations applies to most contract claims. In the first judicial opinion to interpret the new statute, Bear Stearns Mortgage Funding Trust 2006-SL1 v. EMC Mortgage LLC, the Delaware Court of Chancery held that Section 8106(c) applies retroactively to contracts entered into before the statute took effect on August 1, 2014. The Court also provided important guidance regarding claim accrual and the application of Delaware’s borrowing statute.

Background

Bear Stearns involved allegations that EMC, which had sold mortgage loans to a securitization trust in 2006, breached its obligations under the purchase agreement. In relevant part, the purchase agreement provided that:

- The representations and warranties as to the loans survived closing;
- The trust’s sole remedy in connection with a breach of the loan representations was EMC’s obligation to cure the breach, repurchase the nonconforming loans, or substitute new loans (the “Repurchase Provision”);
- Causes of action for breach of the loan representations would accrue upon (i) discovery of the breach and (ii) failure by EMC to perform under the Repurchase Provision (the “Accrual Provision”); and
- The agreement would be governed by New York law.

After EMC failed to repurchase the nonconforming loans in 2011, the trust commenced litigation in Delaware in July 2012.

Procedural Posture

Among the noteworthy features of the decision is its procedural posture: the granting of a motion for reargument under Court of Chancery Rule 59(f). The Court had issued a bench ruling on August 19, 2014, dismissing the trust’s claims as untimely under Delaware’s three-year statute of limitations. The trust moved to reargue based on (1) controlling Delaware Supreme Court authority interpreting Delaware’s borrowing statute; (2) recent Delaware trial court decisions interpreting contractual language similar to the Accrual Provision, and (3) the fact that Section 8106(c) had become effective. The recent opinion granted the motion for reargument for those three reasons, finding each to have been an alternative, independent basis to find the trust’s claims timely and resulting in a reversal of the earlier bench ruling.

Borrowing Statute

The timeliness of the trust’s claims turned, in part, on the operation of Delaware’s borrowing statute, which provides that, for claims based on non-Delaware law, “an action cannot be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the [jurisdiction] where the cause of action arose . . . .” 10 Del. C. § 8121. The Court relied on Supreme Court precedent to find that the statute’s intent to deter forum shopping makes it applicable only ‘when a party seeks to take advantage of a longer Delaware statute of limitations to bring a claim that would be time-barred under the law of the jurisdiction governing the claim.’ The Court did observe, however, that contrary Court of Chancery precedent authored by then-Chancellor, and now Chief Justice, Strine “better reflects the plain language of the Borrowing Statute.” Nevertheless, because the trust brought its claim within New York’s longer limitations period (six years), the borrowing statute did not apply to require application of Delaware’s shorter limitations period (three years).

After determining that the borrowing statute did not apply, the Court then analyzed the question of which state’s statute of limitations applied to the claims. Interestingly, the Court determined to apply New York’s six-year statute of limitations based on a conflicts of laws analysis and the “most significant relationship” test (e.g., the location of the underlying loan documents, the parties’ places of business in New York, and the choice of New York law to govern the contract); the Court did not treat the statute of limitations as procedural and thus governed by the law of the forum, as many Delaware cases have done. The Court found that the trust’s claims were not time barred under this analysis because the claims were filed within six years of closing.

Claim Accrual

As an alternative basis for its conclusions regarding the timeliness of the trust’s claims, the Court assumed that Delaware’s three-year statute of limitations period applied and found that the Accrual Provision tolled the accrual of the trust’s claims until EMC failed to comply with the Repurchase Provision. The Court noted that, despite the fact that claims for breaches of representations and warranties typically begin to run at closing, numerous Delaware decisions treat “a contractual accrual provision as a condition precedent to a plaintiff’s ability to sue such that the statute of limitations does not begin to run until the condition precedent is met.” Thus, the Accrual Provision “postponed the point when a claim arose and the statute of limitations would begin to run” until EMC failed to comply with the Repurchase Provision, after which the trust timely filed its complaint.

1 Mr. Hering and Ms. DiVincenzo are partners, and Mr. Tyler is an associate, at Morris, Nichols, Arsht & Tunnell LLP. The views expressed herein are those of the authors alone and do not necessarily represent the views of Morris Nichols or its clients.
Retroactive Application of Section 8106(c)

Most significantly, the Court, again assuming application of Delaware’s limitations period, held that Section 8106(c) applied to the agreement, despite the fact that Section 8106(c) took effect eight years after the contract was signed.2 Because “a modification of a limitations period is a procedural matter,” “[o]rdinary presumptions against retroactivity do not apply, and the modification applies to ongoing suits absent a showing of manifest injustice.” According to the Court, retroactive application was not unjust in this case because the complaint was filed within New York’s six-year limitations period, the case was pending when the statute took effect so it did not revive extinguished claims, and EMC contractually agreed that the Repurchase Provision and Accrual Provision were binding.

Applying Section 8106(c) to the agreement, the Court reasoned that the Accrual Provision’s deferral of accrual of a cause of action until a breach was discovered and EMC refused to take remedial action “constituted a period of time defined by reference to the occurrence of some other event or action that is a sufficient ‘period specified’ for purpose of Section 8106(c).” Thus, the Accrual Provision “operated to extend the statute of limitations to the statutory maximum of twenty years.”

Other Points of Note

After disposing of the statute of limitations defense, the Court addressed for the first time EMC’s other arguments to dismiss the trust’s claims. Among other claims, the trust sought to recover against the defendants under a contractual indemnification provision requiring EMC “to indemnify [the trust] and to hold [the trust] harmless against any loss, liability of expense . . . related to [EMC]’s failure to perform its duties in compliance with this Agreement . . . .” The Court ruled that the trust could not recover under this indemnification provision because “the indemnification provision contemplates indemnification for third-party action” and “New York courts interpreting indemnity provisions that contemplate third-party actions presume that the provisions do not apply to intra-party disputes absent ‘unmistakably clear’ language to the contrary.”

Takeaways

Bear Stearns reflects the first judicial application of Section 8106(c), which was intended for private M&A agreements that often provide for representation and warranty survival periods in excess of three years. The Bear Stearns Court’s discussion of Section 8106(c), accrual concepts and the borrowing statute highlights the many issues that drafters must consider when negotiating complex commercial contracts.

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2 We note that in cases where Section 8106(c) applies, it expressly takes precedence over the borrowing statute.
JOINT TASK FORCE ON
GOVERNANCE ISSUES IN BUSINESS COMBINATIONS

Our Task Force is preparing a handbook covering the governance issues that arise in business combination transactions. Our goal is to provide practical advice for all deal participants (counsel, bankers, management and boards) about the most common governance issues that arise in deal-making and mitigate risks from governance problems.

As of publication, we plan a handbook with 22 chapters, with drafts of 10 chapters in hand in various stages of editing, and also detailed outlines of another 10 chapters. We are looking for one or two co-authors, so let us know if you want to take on this role.

Topics include practical issues like the issues boards confront in the use of an NDA or standstill, the negotiation of deal lockups, the issues boards should think about in the engagement of bankers, and practical issues that come up regarding the application of Section 203.

There is always room for more help both in drafting and in the editorial process. Please let us know if you would like to get involved!

Our Task Force meetings are now devoted to discussing current governance issues and the practical concerns that are arising for us as practitioners in understanding and implementing key decisions.

At our meeting in Chicago on September 12, Steve Bigler discussed Section 203 issues that arise in deal making, and Tricia Vella and Nick Dietrich lead a lively discussion on the various governance issues that arise in connection with rights plans, including amendments to the pill regarding a particular merger agreement, whether a buyer should insist on a target implementing a pill, the power to just say no under Air Products and the use of a board regarding an activist under the recent Third Point v. Sotheby’s case.

In Laguna we have a full agenda:

- Frederic Smith will lead a discussion about the definition of “minority stockholders” in connection with his work on Chapter 20, Majority of Disinterested Stockholder Vote;
- Pam Millard will discuss the lessons from the recent decision, C&J Energy Services v. City of Miami, including the use of the one bidder strategy and the viability of injunctions regarding buyer contractual remedies post C&J;
- Ryan Thomas, Bass Berry & Sims, will lead a discussion of the draft of Chapter 6, “Unsolicited Approaches and Pressure to Sell – Deciding to Explore A Sale,” prepared by Ryan and Tatjana Paterno, with a focus on the key issues a target board should consider at the beginning of a sales process;
- Nate Cartmell will discuss the recent Nine Systems case and its relevance to Chapter 24 on Private Company Issues; and
- We will have an update on the status of the Handbook.

Please join us whether to learn or to offer your own experiences—it all goes into the mix!

We hope to see you all in Laguna!

ANNUAL MEETING INFORMATION
Friday, January 30, 2015 ● 2:30PM - 3:30PM
Laguna Beach, CA, Grand Ballroom
(866) 646-6488 (US and Canada) (707) 287-9583 (International)
Conference Code: 5842737852
Co-Chairs: Diane Holt Frankle and Patricia O. Vella

TASK FORCE ON THE
REVISED MODEL STOCK PURCHASE AGREEMENT

How time flies! It will soon be five years since we published the second edition of the Revised Model Stock Purchase Agreement. There have been a number of developments over the past five years, many of which would have been reflected in MSPA if we were doing it today. Just think about how the courts have been dealing with the lawyers’ privilege issue for example. Although it is far too early to think about a third edition, our Committee leadership agreed with my suggestion that we prepare a supplement.

Although some organizational work has already begun, our inaugural Task Force meeting will take place at our Committee’s Laguna Beach stand-alone meeting. Our intention is to produce our product quickly, with a view to having it published by the Fall of 2016. For those of you new to our Committee, this is a perfect opportunity to get involved with a brand new project. For those of you already working on other projects, you too are welcome to join our Task Force. Finally, even if you choose not to work on the Task Force, we welcome any input any of you might offer on developments we should consider including in the supplement (legal, practice or otherwise).

See you in Laguna Beach.

Murray J. Perelman
Chair

ANNUAL MEETING INFORMATION
Saturday, January 31, 2015 ● 8:30AM - 9:30AM
Laguna Beach, CA, Gallery I & II
(866) 646-6488 (US and Canada) (707) 287-9583 (International)
Conference Code: 7184872096
Chair: Murray J. Perelman
**TASK FORCE ON LEGAL PROJECT MANAGEMENT**

The Task Force on Legal Project Management in M&A Transactions held a lively session in conjunction with the ABA’s Annual Business Section meeting in Chicago in the Fall. The Task Force discussed a variety of projects, including the Acquisition Task Checklist, the Deal Issues Negotiating Tool, the Post-Deal Assessment Checklist, and a menu of alternative billing arrangements for M&A deals.

Our upcoming Stand Alone Meeting at Laguna Beach will feature a special program along with updates on various ongoing projects.

**Special Program:** Our special program is entitled “Navigating New Normal—Budgeting 101” and will feature guest speaker Holly Montalvo, Director of Analytics at TyMetrix. When a client makes the simple request of “send me a legal budget for a transaction,” many a deal lawyer is like the proverbial deer caught in the headlights. This informative program is intended to provide an introduction on how best to respond to such requests in a thoughtful and consistent manner.

**Recent Developments:** We will also be providing updates on several existing projects, as well as a number of new projects, including:

- The latest update to the Deal Issues Negotiating Tool—the tool intended to highlight and facilitate the negotiation of significant legal issues often not addressed in an LOI.
- Due Diligence Deal Killers—a checklist of issues that prospective buyers should prioritize in diligence, as they can often spell death for any deal at an early stage.
- The recent formation of an in-house counsel “User Group”—Task Force Co-chairman Byron Kalogerou formed this group of interested GCs to provide input on our various Task Force tools. We are reaching out to this group, which met in person at the Association of Corporate Counsel Annual Meeting in October 2014 in New Orleans, for feedback on the various tools and for support of the efforts of the Task Force.
- Pursuing endorsement of our phase-billing codes by LEDES (Legal Electronic Data Exchange Standards) Oversight Committee (“LOC”), an organization comprised of legal industry representatives that creates and maintains open standard formats for the electronic exchange of billing and other information between corporations and law firms. LOC leads the industry in creating and updating task-based billing schemes. Any law firm or corporate legal department may join those already participating as noted on LOC’s website at http://ledes.org/loc-member-organizations/. Aileen Leventon is coordinating the effort of the Task Force.

As always, if you utilize any of the Task Force tools in actual transactions, please be sure to share any suggestions with us as to how they might be improved.

We look forward to seeing many of you in Laguna Beach.

**ANNUAL MEETING INFORMATION**

**Saturday, January 31, 2015 • 1:00PM - 2:00PM**

Laguna Beach, CA, Gallery I & II

Conference Code: 7184872096

Co-Chairs: Byron Kalogerou, Dennis J. White

Project Manager: Aileen Leventon

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**TASK FORCE ON WOMEN IN MERGERS AND ACQUISITIONS**

Our kick off meeting in Chicago during the ABA Fall Business Section Meeting started by defining the primary goal of the Taskforce, which is to increase the participation and retention of women in M&A. During our meeting, we also outlined four key initiatives to enable our goal:

(i) work with law schools to educate women law school students about the profession;
(ii) increase awareness at law firms;
(iii) promote networking and provide business development tools; and
(iv) provide avenues of communication among the Taskforce members to enable the sharing of materials, experiences and best practices.

Our Subcommittee meeting in Laguna Beach during the M&A Committee’s Stand-Alone meeting is currently scheduled for Friday, January 30, 2015 from 1:30pm to 2:30pm in Gallery I & II. This meeting will be a working session to solicit feedback on our specific action items for each initiative and share experiences thus far. We will also discuss the April meeting in San Francisco, which will have a more formal format. For those of you unable to attend the meeting in person, the dial in information for the Taskforce meeting is below.

**ANNUAL MEETING INFORMATION**

**Friday, January 30, 2015 • 1:30PM - 2:30PM**

Laguna Beach, CA, Gallery I & II

Conference Code: 7184872096

Co-Chairs: Jen Muller, Leigh Walton

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**TASK FORCE ON TWO-STEP AUCTIONS**

The Task Force on Two-Step Auctions will meet on Saturday, January 31, in the Grand Ballroom, at 2:00 (California time). Revised text will be distributed before the meeting and will be discussed. We’ll also check in on other drafting and set a schedule.

We’ve got a lot of text in or underway, so it’s time to get it edited and finished. If you’d like to help complete the project please come to the meeting or let us know.

See you in Laguna Beach!

**ANNUAL MEETING INFORMATION**

**Saturday, January 31, 2015 • 2:00PM - 3:00PM**

Laguna Beach, CA, Grand Ballroom

Conference Code: 5842737852

Co-Chairs: Rick Alexander, Mike O’Bryan
TASK FORCE ON THE REVISED MODEL ASSET PURCHASE AGREEMENT

At the Business Law Section Annual Meeting in Chicago, the Task Force on the Revised Model Asset Purchase Agreement (MAPA2) received reports from the small groups that are drafting specific sections of the updated model agreement and related commentary. The Task Force also discussed inclusion of an earn-out provision and a two-step working capital adjustment mechanism in the model agreement.

The working groups continue to make excellent progress and are on track for drafting of text and commentary to be substantially completed in 2016. Currently, most of the working groups are developing text and none of them have updated text or completed commentary to present at the Stand-Alone Meeting in Laguna Beach. Instead, the working groups will use the scheduled time to get together and advance their work. We will meet again as a full Task Force at the Spring Meeting in San Francisco.

JOINT TASK FORCE ON M&A LITIGATION

The Joint Task Force on M&A Litigation will not be meeting at the Laguna Beach meeting.

ACQUISITIONS OF PUBLIC COMPANIES SUBCOMMITTEE

Our Subcommittee meeting in Chicago during the ABA Fall Business Section Meeting was well attended (as was our Subcommittee dinner at Mastro’s). During our meeting, Eric Klinger-Wilensky discussed with us some statistics on the use of Section 251(h) of the DGCL in two-step transactions, and reviewed with us the statutory revisions to Section 251(h) recently adopted by the Delaware General Assembly. We were also fortunate to have in attendance Michele Anderson, Chief of the Office of Mergers and Acquisitions of the SEC, who discussed with us various issues being focused on by the OMA Staff in the context of public company acquisitions.

Our Subcommittee meeting in Laguna Beach during the M&A Committee’s Stand-Alone meeting is currently scheduled for Friday, January 30, 2015 from 3:30pm to 5:00pm in the Grand Ballroom. We have a pretty full agenda for our meeting. Jay Lefton will review with us some key trends in public company M&A deal terms noted in the recently-released Strategic Buyer/Public Company Target Deal Point Study prepared by the Market Trends Subcommittee. Tricia Vella will update the Subcommittee on a number of recent Delaware court decisions that are important to public company M&A practitioners. Mike O’Bryan, Eric Klinger-Wilensky and Brad Davey will also be presenting on “Appraisal Rights – What Public Company M&A Lawyers Need to Know,” which will highlight a number of current issues around appraisal rights (and related litigation) in Delaware. Given the recent litigation over these issues, this topic is very timely. We will also hear from the leaders of our various Task Forces – Financial Advisor, Corporate Governance in M&A Transactions, and the Two-Step Task Force – as to the status of their projects. For those of you unable to attend the meeting in person, the dial in information for the Subcommittee meeting is below.

For those of you unable to attend the meeting in person, the dial in information for the Taskforce meeting is below.

ANNUAL MEETING INFORMATION

Saturday, January 31, 2015 • 11:00AM - 12:00PM
Laguna Beach, CA, Gallery I & II
(866) 646-6488 (US and Canada) (707) 287-9583 (International)
Conference Code: 7184872096
Co-Chairs: Yvette R. Austin Smith and Stephen M. Kotran

ANNUAL MEETING INFORMATION

Saturday, January 31, 2015 • 3:30PM - 5:00PM
Laguna Beach, CA, Grand Ballroom
(866) 646-6488 (US and Canada) (707) 287-9583 (International)
Conference Code: 5842737852
Chair: Jim Griffin
Vice Chairs: Jen DiNucci, Jim Melville
International M&A Subcommittee

The International M&A Subcommittee met from 12:30 p.m. to 2:00 p.m. on Saturday, September 13, 2014, in connection with the inaugural Business Law Section Annual Meeting in Chicago, Illinois.

Introductions
The two of the three co-chairs of the Subcommittee present at the meeting, Freek Jonkhart and Franziska Ruf, introduced themselves, welcomed the participants and passed along the regrets of the third co-chair, Keith Flaum, for not being able to attend the meeting. The Subcommittee members then proceeded to introduce themselves. Over 65 participants from various parts of the world were present.

Non-Competition Covenants in M&A Transactions
The panel presenting this topic was composed of Kevin Kyte (Stikeman Elliott, Montreal), Jim Doub (Miles & Stockbridge, Baltimore) and Robert Wethmar (Taylor Wessing, Hamburg). Kevin Kyte briefly described the fact pattern upon which the presentation was based and Jim Doub took on the role of in-house counsel in the context of an international transaction involving, among others, businesses in Canada and in Germany. Outside counsel from Canada and Germany reviewed the principal distinctions applicable in both jurisdictions between an employment law situation and the scenario involving the sale of a business or any other regular commercial relationship. The maximum duration and territory, the scope, additional considerations regarding intellectual property rights and the enforceability generally of non-competition clauses were discussed and contrasted with non-solicitation provisions.

Alternative Fee Arrangements in M&A
This panel was chaired by Byron Kalogerou ( McDermott Will & Emery, Boston) and comprised Jie Chen (Jun He, Beijing), Jorge Yáñez (Hogan Lovells, Mexico City) and George Maziotis (McCarthy Tétrault, Montreal). It was acknowledged that more and more clients are seeking alternative fee arrangements, in an effort to achieve transparency, predictability, certainty and accountability. The discussion covered various types of value-based fee arrangements, including, among others, discounts, success fees, broken-deal discounts, portfolio (or volume) discounts and post-deal assessment/fee holdbacks. The panel also discussed the requirements to have a clear work plan and assumptions agreed to by the client at the outset and to precisely establish the scope of work at the time of budgeting for fees.

News from Italy
Francesco Portolano (Portolano Cavallo, Milan) provided a brief update on the subject of corporate migration, illustrated by the recent move by FIAT of its headquarters to the Netherlands.

New Projects
Freek Jonkhart described a new project to the participants of the meeting, which will involve an update to the international questionnaire that accompanied the Model Asset Purchase Agreement published by the Subcommittee several years ago. Volunteers were sought to participate in this new project.

Mark Morton also invited the members of the Subcommittee to participate in the development of the new Delaware Rapid Arbitration Act set to commence in the near future.

Subcommittee Website
Our website at http://apps.americanbar.org/lch/committee.cfm?com=CL560002 contains:
- The fact pattern and presentation notes by Kevin Kyte and by Robert Wethmar on Non-Competition Covenants in M&A Transactions.
- Details of the Subcommittee’s publications, future meetings, other work-in-progress and other past program materials.

ANNUAL MEETING INFORMATION
Friday, January 30, 2015 • 10:30AM - 12:00PM
Laguna Beach, CA, Gallery I & II
(866) 646-6488 (US and Canada) (707) 287-9583 (International)
Conference Code: 7184872096
Co-Chairs: Keith Flaum, Freek Jonkhart, Franziska Ruf

Membership Subcommittee

Membership numbers increased across the board over the past 3 months (since September 30, 2014) but for a decrease in our “students” members from 211 to 207 (-1.8%). Nonetheless, an increase of 2.2% in our category “lawyers” as well as a 4.1% in our “associates” show that our subcommittees and the ABA Membership team as a whole have done good work and were able to maintain our membership relatively stable notwithstanding this decrease in our “students” participation.

We wish for their continued involvement and even increase and we will therefore be looking for new ideas to attract our students. Please do not hesitate to contact us, we would certainly welcome the help!

A word on our Subcommittees: The M&A Trends Subcommittee is still our largest group with 1,635 members followed by the Private Equity Subcommittee with 1,424 members. Both remained stable since September 30, 2014.

The Diversity and Women in M&A Task Force continues to climb with numbers increasing 200% in the past six months!

The Model Stock Purchase Agreement Revisions’ Task Force is at 738 members, a notable increase because of the stability in its members falling in the “students” category. The same goes for “Programs” (254 members) and “Two-Step Auction” (115 members). Another notable increase can be found within the Law Project Management Task Force, which saw a steady increase from 102 to 114 members (despite an 18% decrease from “students”), and the Governance Issues in Business Combinations Task Force rising from 240 members to 245 members (despite a 24% decrease from “students”).

Here are some of the other numbers showing a slight decrease:

- Acquisitions of Public Companies 853 (down one)
- M&A Jurisprudence 764 (down three)
- International M&A 950 (down nineteen)
- Dictionary of M&A Terms 640 (down one)
- M&A Jurisprudence 764 (down three)
- International M&A 950 (down nineteen)
- Dictionary of M&A Terms 640 (down one)
- M&A Jurisprudence 764 (down three)
- International M&A 950 (down nineteen)
- Dictionary of M&A Terms 640 (down one)

It certainly looks like we have our work cut out for us and need to be innovative to continue to attract new members which should not be so difficult considering the wide number and variety of subcommittees and all the great events and task forces being put in place.

We thank you for your involvement and look forward to seeing you all in San Francisco.

Tracy Washburn Bradley
Mireille Fontaine
Tatjana Paterno
Co-Chairs
**M&A JURISPRUDENCE SUBCOMMITTEE**

The M&A Jurisprudence Subcommittee is currently comprised of the following two working groups and three project 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*. After publication, the Annual Surveys are posted in an on-line library, called the M&A Lawyers’ Library, which members of the Mergers and Acquisitions Committee can access from the Committee’s home page on the ABA website (https://apps.americanbar.org/dch/committee.cfm?com=CL560000). The thirteenth Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions will be published in the February 2015 issue of *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 memora summarizing our findings regarding these acquisition agreement provisions and M&A issues. The memora are posted in the M&A Lawyers’ Library. Currently, the Library contains fourteen memoranda, and we expect to post several more to the Library in the near future. The most recent addition is the memo by Satira Nair on Enforceability of Letters of Intent, dated June 19, 2014.

- The Library Index Project Group is creating a topic index for the M&A Lawyers’ Library, which will allow on-line visitors to the library to search the material in the Library by topic.

- The Jurisdictional Project Group is creating a chart, with supporting analysis, comparing the jurisprudence in the federal and state courts of Delaware, New York, California and Texas, concerning some of the more commonly litigated topics in M&A jurisprudence. We believe this will be a very instructive and useful tool for M&A practitioners who are involved in multi-jurisdictional transactions.

- The Damages Project Group is preparing a comprehensive analysis of the types of damages that are recoverable in common M&A litigation contexts, and the methods that courts have used, or allowed the parties to use, to calculate damage awards.

The M&A Jurisprudence Subcommittee will meet in Laguna Beach on Friday, January 30, from 8:00 to 9:00 a.m. in Gallery I & II at the Montage. Dial-in information for the meeting is included in the Schedule at the end of this issue of Deal Points.

At our meeting in Laguna Beach, we plan to discuss as many recent court decisions as we can get to in our allotted time, including the recent decision of the Delaware Court of Chancery in *Cigna Health and Life Insurance Company v. Audax Health Solutions, Inc.* (C.A. No. 9405- VCP, Delaware Court of Chancery, November 26, 2014).

The first criterion for inclusion is that the decision must involve a merger, an equity sale of a controlling interest, a sale of all or substantially all assets, a sale of a subsidiary or division, or a recapitalization resulting in a change of control. The second criterion is that the decision must (a) interpret or apply the provisions of an acquisition agreement or an agreement preliminary to an acquisition agreement (e.g., a letter of intent, confidentiality agreement or standstill agreement), (b) interpret or apply a state statute that governs one of the constituent entities (e.g., the Delaware General Corporation Law or the Louisiana Limited Liability Company Law), (c) pertain to a successor liability issue, or (d) decide a breach of fiduciary duty claim. We are currently excluding cases dealing exclusively 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.

**Decision to be Discussed at the Laguna Beach Committee Meeting**


**Background:**

Optimum Services, Inc. acquired Audax Health Solutions, Inc. by means of a cash merger. The merger agreement contained indemnification provisions requiring the stockholders of Audax to indemnify Optimum against breaches of the representations and warranties made by Audax in the merger agreement, up to the full amount of the merger consideration received by each stockholder. The agreement provided for a survival period of either 18 or 36 months for most of the representations and warranties, but stated that certain “fundamental” representations and warranties survived indefinitely. The merger agreement further appointed Shareholder Representative Services, LLC ("SRS"), an independent third party, as the representative of the Audax stockholders, with authority, among other things, to represent the Audax stockholders with respect to any claims made by Optimum under the indemnification provisions contained in the merger agreement.

Following execution of the merger agreement, several Audax stockholders executed support agreements and approved the merger by written consent. The support agreements contained a general release of all claims against Optimum and Audax, together with agreements to be bound under the indemnification provisions of the merger agreement as well as the provisions appointing SRS.
The merger agreement required each Audax stockholder, as a condition to receiving the merger consideration, to execute a letter of transmittal reasonably acceptable to Optimum, pursuant to which the Audax stockholder would, among other things, agree to the Indemnification Obligation. The form of letter of transmittal sent to Cigna and other stockholders required that the stockholders agree to the indemnification provisions of the merger agreement (the “Indemnification Obligation”), the appointment of SRS (the “Stockholders’ Rep Obligation”), and also contained a general release (the “Release Obligation”).

Cigna held preferred stock of Audax, and was entitled to over $46 million in merger consideration. Cigna was also a competitor of Optimum. Cigna did not sign a support agreement and did not vote in favor of the merger. Following the closing, Cigna refused to sign the letter of transmittal and demanded its merger consideration, alleging that (i) the Indemnification Obligation violated Section 251 of the Delaware General Corporation Law (the “DGCL”), (ii) the Stockholders’ Rep Obligation was invalid because it was “inextricably entwined” with the indemnification obligation and (c) the Release Obligation was unenforceable because it lacked consideration.

The Court:

The court held that the Indemnification Obligation was unenforceable because it violated Section 251 of the DGCL, which requires merger consideration to be determinable from the merger agreement. According to the court, although under Section 251 merger consideration can be determinable from facts ascertainable outside of the merger agreement, “the manner in which such facts shall operate ... [must be] clearly and expressly set forth in the agreement.” The court reasoned that, because the Indemnification Obligation placed potentially all of the stockholder’s merger consideration at risk for an indefinite period of time, a stockholder might never know the value of its merger consideration, which is impermissible under DGCL Section 251. The court rejected Optimum’s argument that the Indemnification Obligation was economically equivalent to an escrow structure, which the court said was “widely understood to be permissible” under Delaware law.

The court specifically stated that its decision does not address the question of either (a) whether an indemnification obligation/Section 251 price adjustment amount that is capped at 100% of the merger consideration may be determinable from facts ascertainable outside of the merger agreement, “the manner in which such facts shall operate ... [must be] clearly and expressly set forth in the agreement.” The court reasoned that, because the Indemnification Obligation placed potentially all of the stockholder’s merger consideration at risk for an indefinite period of time, a stockholder might never know the value of its merger consideration, which is impermissible under DGCL Section 251. The court held that the release obligation was unenforceable for lack of consideration. Cigna argued that, because the merger consideration vested as a matter of law when the merger was consummated, there was no consideration for the Release Obligation. The court agreed, noting that the Release Obligation, unlike the Indemnification Obligation, was not mentioned in the merger agreement. According to the court, the merger agreement "provided no indication to stockholders that they might have to agree to a release, let alone the sweeping release called for in the Letter of Transmittal."

The court did not rule on the enforceability of the Stockholders’ Rep Obligation, holding that the factual and legal record did not allow for such a ruling. According to the court, Cigna had only tangentially challenged the Stockholder’s Rep Obligation, arguing that it was unenforceable because it was “inextricably intertwined with the Indemnification Obligation.” The court noted that, given the holding that the Indemnification Obligation was unenforceable, the challenge to the Stockholders’ Rep Obligation would “seem to fall away.” Interestingly, the court noted that “[t]he propriety of stockholder representatives under the DGCL is the subject of active and ongoing debate.”

Implications:

Although the decision leaves open the possibility that indemnity obligations can be imposed on target company stockholders by means of a post-closing letter of transmittal, if the duration of the obligation is limited and/or the obligation is limited to a portion of the merger consideration, the limits of the enforceability of such structures is left to future decisions. Therefore, it can be expected that the Cigna Health decision will result in increased reliance by acquirors on escrows and holdbacks to fund post-closing indemnification obligations. For obligations that survive the duration of the escrow or holdback period, the decision may result in acquirors requesting that controlling stockholders who sign support or joinder agreements agree to pay more than their pro rata share of any such obligations.

Conversely, Cigna Health can be cited by target companies as recognizing the enforceability of properly drafted (i.e. limited) provisions imposing indemnity obligations on nonsignatory stockholders through post-closing letters of transmittal. Therefore, target companies may increasingly argue for such a structure, as Audax successfully did, in lieu of an escrow or holdback.

Cigna Health also serves as a reminder to practitioners of the necessity of specifying the consideration for ancillary obligations such as stockholder releases. Finally, Cigna Health is a reminder that there remain unresolved legal issues surrounding the use of a stockholder representative to act on behalf of nonsignatory stockholders with respect to post-closing matters, and, therefore, acquisition agreement provisions regarding stockholder representatives should be carefully considered.

To join the M&A Jurisprudence Subcommittee, please email either Scott Whittaker at swhittaker@stonepigman.com, Jon Hirschoff at jhirschoff@fdh.com, or Mike O’Bryan at mobryan@mofo.com, or simply come to the Subcommittee meeting in Laguna.
M&A MARKET TRENDS
SUBCOMMITTEE

At our last meeting in Chicago we reviewed the status of recent and pending publications; Jennifer Muller of Houlihan Lokey reviewed the state of the M&A market; Melissa DiVincenzo of Morris Nichols led a discussion of the practice implications of Delaware Code Section 8106(c); and Paul Koenig of SRS led a “Tales from the Trenches” presentation regarding issues associated with post-closing purchase price adjustments and information rights of former shareholders.

Our next meeting will be held on Saturday, January 31, 2015 at the stand alone meeting in Laguna. The meeting will take place from 9:30 - 11:00 am (local time). The agenda includes:

- A review of recent and pending publications;
- An “instant poll” question;
- An update on the state of the M&A market;
- Highlights from the 2014 Canadian Private Target Deal Points Study;
- Highlights from the 2014 U.S. Strategic Buyer / Public Target Deal Points Study; and
- A preview of the 2015 European Private Target Deal Points Study.

I look forward to seeing you in Laguna.

PRIVATE EQUITY M&A
SUBCOMMITTEE

The Private Equity M&A Subcommittee met in Chicago, Ill. on Friday, September 12, 2014. The meeting was held in conjunction with the other sessions of the ABA M&A Committee and its subcommittees that took place as part of the ABA Annual Business Law Section Meeting.

At the session, the Subcommittee reviewed Private Equity and broader M&A matters from different perspectives in terms of both market and legal trends and developments during the past five months since the Subcommittee’s previous gathering. The Subcommittee also heard from the following on the referenced topics:

- Given the significant growth in M&A markets during 2014, the Subcommittee received a presentation from James Glerum, Senior Managing Director and Chairman, North America Regional Banking, of Citigroup Global Markets, on the current state-of-play and the drivers behind the changing market conditions in M&A and Private Equity. Mr. Glerum put the latest data in perspective and context, discussed how the trends were affecting dealmaking techniques, and looked at what the remainder of 2014 might bring.

- As members of the M&A Committee are well aware, there have been a number of recent transitions at the Delaware Supreme Court, where a number of Justices have stepped down who have sat on the bench during the past 25 years -- a watershed period in terms of the development and evolution in M&A Law, with many of the rulings from this period establishing the centrifugal forces of responsibilities, duties, obligations, and rights that swirl around the intricacies of dealmaking to this day. To get a perspective on this period from those who were in the middle of the legal developments shaping the world in which practitioners practice today, in the second segment of the meeting two Delaware practitioners, Greg V. Varallo, Richards, Layton & Finger, and Peter J. Walsh, Jr., Potter Anderson & Corroon interviewed former Delaware Supreme Court Chief Justice Myron Steele (now at Potter Anderson) and former Delaware Supreme Court Justice Jack Jacobs (now at Sidley Austin), both of whom also served on the Court of Chancery. The former justices discussed their time on the bench, their take on what it was like from their perspective as the law, the markets, and tactics evolved, how they view the way things turned out doctrinally, what role the courts play on this area, and what challenging issues the Delaware courts may face in the future.

The Subcommittee meeting was well-attended, and the Subcommittee Chair thanks all participants and Subcommittee members for contributing to the session.
To kick-off 2015, Deal People is profiling one of the M&A Committee’s newest members—Gina Conheady—who started off 2014 training with a circus and ended the year by being admitted to the partnership of Matheson, Ireland’s largest law firm.

Gina has a love for adventure and travel, which might be one of the reasons she has ended up settling in the San Francisco Bay area as resident counsel at Matheson’s Silicon Valley office. She’s been scuba-diving in Egypt, hiked through deserts and river canyons in Jordan and kayaked the “calanques” (sea inlets) off the Mediterranean coast outside Marseille.

Since moving to the Bay Area in 2013, she has tried to see as much of the US as possible—some of her more recent trips have included a road trip through cowboy country in Texas, hiking in the national parks in Utah and a road trip down the Blues Highway from Tennessee through Mississippi and into Louisiana.

Gina also loves yoga and cycling ... which has led her to the trapeze! One of her most unforgettable moments in the last couple of years was cycling with a group through the Red Rock Mountain in Utah and stopping off as the sun went down for a vinyasa yoga class on the side of the mountain. Figuring it could help take her yoga practice to a “higher” level, she recently started trapeze classes at the local circus arts center in San Francisco. Gina observes that physically being on a trapeze is a lot tougher and more challenging than she ever would have anticipated, but it’s a lot of fun and she says it’s always fascinating to watch the seasoned acrobats and contortionists (and, if she’s really lucky, the clowns!!) honing their craft.

When not swinging on a trapeze, Gina practices Irish corporate law and focuses primarily on advising US clients on inward investment into Ireland, international corporate reorganizations, strategic restructurings, integration and consolidation projects, spin-out transactions, tax planning reorganizations and cross-border mergers and acquisitions.

Please take a moment to welcome Gina to the M&A Committee.

About Deal People

Deal People is a feature in Deal Points that highlights members of the Mergers and Acquisitions Committee and things that interest them, other than doing deals. Ideas for future features in Deal People are welcomed.
COMMITTEE MEETING MATERIALS
Dial in information for Committee & Subcommittee Meetings
LAGUNA BEACH, CA | JANUARY 30 & 31, 2015

Please note that times listed are PACIFIC TIME dial in numbers are meeting-room specific. Please be conscientious of start and end times. Leader pin numbers will be distributed to chairs on site.

<table>
<thead>
<tr>
<th>Meeting Room</th>
<th>Toll-Free US Number</th>
<th>International Number</th>
<th>Conference Code</th>
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</thead>
<tbody>
<tr>
<td>Grand Ballroom</td>
<td>(866) 646-6488</td>
<td>(707) 287-9583</td>
<td>5842737852</td>
</tr>
<tr>
<td>Gallery I &amp; II</td>
<td>(866) 646-6488</td>
<td>(707) 287-9583</td>
<td>7184872096</td>
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</tbody>
</table>

Friday, January 30, 2015

8:00 am – 5:00 pm
Meeting Registration
Grand Ballroom Foyer

8:00 am – 10:00 am
Continental Breakfast
**Registered Meeting Attendees
Outdoor Courtyard

8:00 am – 9:00 am
M&A Jurisprudence Subcommittee
Chair: Scott T. Whittaker
Gallery I & II

9:00 am – 10:30 am
Private Equity M&A Subcommittee
Chair: John K. Hughes
Grand Ballroom

10:30 am – 12:00 pm
International M&A Subcommittee
Co-Chairs: Franziska Ruf, Keith Flaum and Freek Jonkhart
Gallery I & II

12:00 pm – 1:30 pm
Buffet Luncheon
***Ticket Required
Pacific Lawn

1:30 pm – 2:30 pm
Women in M&A Task Force
Co-Chairs: Jen Muller and Leigh Walton
Gallery I & II

2:30 pm – 3:30 pm
Joint Task Force on Governance Issues in Business Combinations
Co-Chairs: Diane Holt Frankle and Patricia O. Vella
Grand Ballroom

3:30 pm – 5:00 pm
Acquisitions of Public Companies Subcommittee
Chair: James R. Griffin
Grand Ballroom

5:00 pm – 5:45 pm
Meeting of Committee Chair and Vice Chairs, Subcommittee and Task Force Chairs
Chair: Mark A. Morton
Grand Ballroom

7:00 pm – 10:00 pm
Reception & Dinner
Sponsored by: CRS Corporate Risk Solutions, LLC and Marsh
***Ticket Required \| Buses depart from Main Lobby at 6:45 pm
Mozambique
1740 S. Coast Highway
### Saturday, January 31, 2015

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
<th>Location</th>
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<tbody>
<tr>
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<td>8:00 am – 10:00 am</td>
<td>Continental Breakfast ***Registered Meeting Attendees</td>
<td>Outdoor Courtyard</td>
</tr>
<tr>
<td>8:30 am – 9:30 am</td>
<td>Revised Model Stock Purchase Agreement Chair: Murray Perelman</td>
<td>Gallery I &amp; II</td>
</tr>
<tr>
<td>9:30 am – 11:00 am</td>
<td>M&amp;A Market Trends Subcommittee Chair: Hal J. Leibowitz</td>
<td>Grand Ballroom</td>
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<tr>
<td>11:00 am – 12:00 pm</td>
<td>Task Force on Financial Advisors Co-Chairs: Yvette R. Austin Smith and Stephen M. Kotran</td>
<td>Gallery I &amp; II</td>
</tr>
<tr>
<td>12:00 pm – 1:00 pm</td>
<td>Buffet Luncheon ***Ticket Required</td>
<td>Pacific Lawn</td>
</tr>
<tr>
<td>1:00 pm – 2:00 pm</td>
<td>Legal Project Management Task Force Co-Chairs: Dennis J. White and Byron Kalogerou</td>
<td>Gallery I &amp; II</td>
</tr>
<tr>
<td>2:00 pm – 3:00 pm</td>
<td>Task Force on Two-Step Auctions Co-Chairs: Michael O’Bryan and Rick Alexander</td>
<td>Grand Ballroom</td>
</tr>
<tr>
<td>3:00 pm – 5:30 pm</td>
<td>Mergers and Acquisitions Full Committee Meeting Chair: Mark A. Morton</td>
<td>Grand Ballroom</td>
</tr>
<tr>
<td>7:00 pm – 10:00 pm</td>
<td>Reception &amp; Dinner Sponsored by: Duff &amp; Phelps and SRS</td>
<td>Acquiom ***Ticket Required</td>
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The Mergers and Acquisitions Committee would like to thank the following for sponsoring the Laguna Meeting:

- CRS CORPORATE RISK SOLUTIONS, LLC
- DUFF & PHELPS
- MARSH
- SRS|ACQUIOM