FROM THE CHAIR Scott T. Whittaker

Wishing everyone a healthy, happy and deal-filled 2016!

I hope that many of you will be joining us for the stand-alone meeting of the M&A Committee to be held at the Montage in Laguna Beach, January 29 - 30. West Coast sunsets and evenings, combined with our meetings and networking with fellow M&A practitioners, will surely help all of us get 2016 off to a great start.

As in prior years, our subcommittees and task forces will meet throughout the day on Friday and Saturday, concluding with our full Committee meeting Saturday afternoon. A complete schedule is set forth at the end of this issue of Deal Points. The subcommittee and task force meetings will have many highlights, which are described in the subcommittee and task force reports below. If you are unable to attend in person, please consider participating by teleconference. You can find the dial-in information for each task force, subcommittee and the full Committee meeting at the end of this issue of Deal Points.

A special note of thanks to our sponsors for this weekend: The Brattle Group and JP Morgan Escrow Services will sponsor our reception and dinner on Friday night at Mozambique in Laguna Beach, and RR Donnelley, SRS Acquiom and Thomson Reuters-Practical Law will sponsor our reception and dinner on Saturday night in the Grand Ballroom at the Montage. On behalf of the Committee, THANK YOU!

The excitement is already building about our next meeting, which will be April 7 – 9 in Montreal, in conjunction with the ABA Business Law Section Spring Meeting. The planning is well underway for that meeting, where we will have some great programs (see George Taylor’s Programs Committee write-up in this issue of Deal Points) in addition to our substantive subcommittee and task force meetings. Our Montreal-based M&A Committee members are also helping plan some great dinners and socializing, which we will hear more about in Laguna Beach. As the Montreal meeting will be only two short months after we return from Laguna Beach, it’s not too early to start planning your attendance.
Leadership Changes

As I start my three-year term as Chair of the M&A Committee, I wanted to take a moment to thank several people who have served our Committee for a number of years in key leadership positions. First, I know I speak for everyone on the Committee when I give heartfelt thanks to Mark Morton, our immediate past Chair. Mark has been a fixture at M&A Committee meetings for many years, keeping us not just up to date, but out in front of Delaware M&A practice. As Chair, Mark has been able to continue the growth of the largest committee in the ABA Business Law Section, while enhancing the quality of its substantive programming. As importantly, Mark has preserved the collegial spirit of our Committee, which I believe is the “secret sauce” to our Committee’s success. Thank you, Mark!

We also have two subcommittee founders who are moving to other involvement with our Committee: Jon Hirschoff and John Hughes.

It has been one of the great pleasures of my involvement with the M&A Committee to have worked with Jon Hirschoff on the M&A Jurisprudence Subcommittee since its inception in 2001. Jon has held every leadership position on that subcommittee, most recently serving as Chair of the Judicial Interpretations Working Group, which created and curates our M&A Lawyers’ library. Thank you, Jon, for all you have done for the M&A Committee over the years. We look forward to your continuing involvement with the Committee.

John Hughes was the founding Chair of the Private Equity M&A Subcommittee. Under John’s leadership, the Private Equity subcommittee has become one of the most eagerly anticipated and well attended meetings at every M&A Committee gathering. Thank you, John.

Several other subcommittee and task force chairs are moving to other positions with our Committee, and deserve our thanks for the terrific work they have done in their former roles. They are:

- **Eric Klinger-Wilensky**, who will no longer serve as co-editor of *Deal Points*. During his tenure as co-editor, *Deal Points* has greatly expanded its content, and has also become more “user-friendly” through its delivery in the ePUB format.

- **George Taylor** deserves our thanks for his long service as Technology Chair, where he greatly expanded our website content, despite ABA’s less than modern technology.

- **Rick Alexander** deserves our thanks for his service as Co-chair of the Two-Step Auction Task Force. We look forward to Rick’s continued involvement with our Committee.

- **David Albin** deserves our thanks for his service as Chair of the Programs Subcommittee.

- **Jim Griffin** deserves our thanks for his services as Chair of the Public Company M&A Subcommittee.

- **Keith Flaum** deserves our thanks for his service as Co-chair of the International M&A Subcommittee.

The following individuals will take over new positions as subcommittee or task-force chair or Co-chair:

- **Mike O’Bryan** will chair the M&A Jurisprudence Subcommittee, Frederic Smith will chair the Judicial Interpretations Working Group, and Nate Cartmell will chair the M&A Survey Working Group;

- **Jennifer Fitchen** will chair the Public Company M&A Subcommittee;

- **Daniel Rosenberg** will become Technology Chair;

- **David Albin** will chair the Private Equity M&A Subcommittee;

- **Eric Klinger-Wilensky** will Co-chair the Two-Step Auction Task Force, with Mike O’Bryan as the other Co-chair;

- **George Taylor** will chair the Programs Subcommittee.

Finally, I welcome **Jim Griffin** and **John Hughes** as additional Vice-chairs of our Committee.

As much work for the Committee as these individuals do, they represent but a small fraction of our M&A Committee contributors. I have always been amazed by the number of members who give their valuable time to take part in the work of the M&A Committee. I very much look forward to working with all of you over the next three years, and continuing the great tradition of the M&A Committee as a leading force examining and shaping M&A practice throughout the developed world.

SCOTT T. WHITTAKER
CHAIR

If you have any questions concerning our meeting in Laguna Beach, please don’t hesitate to ask. I look forward seeing many of you next week.
We hope this issue of *Deal Points* finds everyone having a happy and healthy start to 2016! We look forward to seeing many of you in sunny and warm Laguna Beach for what should be a great meeting. Be sure to give Scott a warm welcome and any fresh ideas at his inaugural meeting as Committee Chair. We have a good article by John Hughes and his colleagues at Sidley Austin, regarding lessons learned from the Rural Metro case, and of course the Task Force and Subcommittee updates together with all of the agendas and dial-in information you need for the upcoming meeting. Finally, please let us know if you would like to contribute a Featured Article in a future issue, as we would like to increase the value-add content provided by *Deal Points* going forward.

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Rural Metro: Observations and Aftermath

By John K. Hughes

BACKDROP

For those involved in dealcraft -- boards, individual directors, financial advisors, deal lawyers, M&A litigators, and bidders of any stripe -- the Delaware Supreme Court’s recent ruling in RBC Capital Markets, LLC v. Jervis holds any number of teaching modules. If it needed to be boiled-down to one sentence, one candidate might be that directors involved in selling a company must maintain an active and direct role from beginning to end, mindful of potential conflicts faced by all, and that courts will review financial advisor conflicts with exacting scrutiny. But as with most things, there’s always more to it than a simple sound-bite. And here, there are any number of themes to unpack and reflect on, and to bear-in-mind in future dealmaking exercises.

The headline news has been well-reported: the Court affirmed the principal legal holdings of a number of earlier post-trial rulings of the Delaware Court of Chancery that found, among other things, that RBC Capital Markets, LLC had aided and abetted breaches of fiduciary duty on the part of former directors of Rural/Metro Corporation in connection with selling the Company to a private equity firm for $17.25 per share in 2011. As a result, RBC was liable for $76 million (plus interest).

The Chancery Court found the sale process designed and orchestrated by the Company’s conflicted financial advisor flawed and, as a result, the price obtained inadequate. The fact that the price represented a 37% premium-to-market; the sale followed a purported auction process; no onerous deal protections were present; and there had been a 90-day post-signing period during which no competing bidder emerged did not change the outcome. Throughout its ruling, the Court makes clear the evidentiary record supported the Chancery Court’s findings and rulings, and it approvingly cites any number of criticisms the Chancery Court lodged against the Company’s directors and financial advisor.

In affirming the Chancery Court’s ruling -- and perhaps speaking to future plaintiffs who may look to extrapolate general liability-generating principles from fact and circumstance-specific rulings -- the Court cautioned that its ruling was contextual and should be read narrowly based on the unique and complex facts involved. And it also reminded that aiding and abetting claims are predicated on a finding of scienter -- a not easy-to-satisfy standard.

While the Court struck a cautionary tone and noted the higher pleading standard, the ruling certainly does not take future potential aiding and abetting claims against financial advisors or others off the field. Nor does it necessarily confine such claims only to the conduct found to have occurred in Rural Metro. As a result, in the never-ending search to construct claims to attack deals, future plaintiffs no doubt will still seek to craft such claims given the potential leverage and resulting effect they can generate at different stages of the M&A litigation dynamic (e.g., motion to expedite) where different pleading standards may apply. Time will tell whether the recent fall-off in merger litigation that appears to be directly correlated to the recent crack-down on disclosure-only settlements will become the new normal and affect claim patterns regarding financial advisors.

At the time of the Court’s ruling, there were pending in Delaware Chancery Court several cases where financial advisors have been alleged to have aided and abetted breaches of fiduciary duty by directors. One of those cases is itself now on appeal to the Delaware Supreme Court. As a result, the Court (with all members sitting) will soon have an opportunity to provide further guidance on the contours and parameters of aiding and abetting claims, and perhaps address how narrowly Rural Metro should be read.

After the Court’s ruling, time did not stand still in Delaware for long. On December 15, 2015, in what appears to be been the first instance post-Rural Metro where a target’s financial advisors have been alleged to have aided and abetted breaches of fiduciary duty by directors. One of those cases is currently on appeal.

While the Court struck a cautionary tone and noted the higher pleading standard, the ruling certainly does not take future potential aiding and abetting claims against financial advisors or others off the field. Nor does it necessarily confine such claims only to the conduct found to have occurred in Rural Metro. As a result, in the never-ending search to construct claims to attack deals, future plaintiffs no doubt will still seek to craft such claims given the potential leverage and resulting effect they can generate at different stages of the M&A litigation dynamic (e.g., motion to expedite) where different pleading standards may apply. Time will tell whether the recent fall-off in merger litigation that appears to be directly correlated to the recent crack-down on disclosure-only settlements will become the new normal and affect claim patterns regarding financial advisors.

So, while Rural Metro may be in the books, the debate swirling around some of the issues involved is far from over. As pending cases move through the litigation process and others may come online, the limits of such claims will continue to be tested and further texture added to the ruling. Also as part of its aftermath, deal planners will be looking to apply relevant teachings. But before the terrain shifts further, it’s useful to pause to look at the underlying facts and certain aspects of the Court’s ruling in somewhat more detail than is often afforded in other

1 John K. Hughes is a partner in the M&A Group at Sidley Austin LLP. He currently serves as a Vice Chair of the ABA’s M&A Committee. The views expressed here are his own and are not attributable to his firm, its partners, or its clients. This article is adapted from an earlier client bulletin more briefly summarizing aspects of the Delaware Supreme Court ruling referenced here. Nothing here represents legal advice applicable to a particular matter. Sidley Austin represented an amicus in the Rural Metro case before the Delaware Supreme Court.


3 See Matthew D. Cain & Steven Davidson, Solomon, “Takeover Litigation in 2015” (Jan. 14, 2016), available at https://ssrn.com/abstract=2715890 (supplementing authors’ prior research tracking M&A litigation since 2005, and reporting that, in the aftermath of the Delaware Chancery Court’s rejection of a number of disclosure-only settlement cases during Q2-Q4 2015, only 21.4% of completed and uncompleted transactions experienced litigation, whereas overall, 87.7% of completed deals in 2015 experienced litigation (down from 94.9% in 2014). See also Liz Hoffman, The Judge Who Shoots Down Merger Lawsuits, Wall St. J., Jan. 10, 2016; Allison Frankel, After Chancery Crackdown on M&A Settlements, Shareholder Fileds Drop Off, Reuters, Nov. 16, 2015 (reporting decline in litigation to approximately 30% of transactions).


formats, and organize some (but not all) themes flowing from the ruling into separate modules as pertain to boards and financial advisors.

**RURAL METRO: BASIC FACTS**

**Generally.** The Court’s Opinion runs 105 pages, with the first 50 detailing the facts found by the Chancery Court in two years of litigation. The Court adopted that record essentially without modification. The full narrative arc of the record is far too layered and nuanced to review in full. But it’s useful to list key details to give greater context to some of the rulings.7

**Early Chronology; EMS; RBC Engagement.** The fact pattern stretched back to 2010, when the Company hired a new President/CEO to pursue strategic and organic growth strategies, and the Company began looking at possibly pursuing its primary competitor, American Medical Response, Inc., a subsidiary of Emergency Medical Services Corp. But AMR was not interested.

Thereafter, in early December 2010, EMS was rumored to be in play. The Chancery Court had noted RBC surmised that private equity firms looking to acquire EMS might also look to buy Rural Metro to create a larger, pure-play portfolio company, and it further understood that, if Rural Metro engaged in a sale process with RBC as its sell-side financial advisor, that might assist RBC in getting on buy-side financing trees for various private equity firms looking to bid for EMS and seeking an “angle” for pursuing their investment thesis as to Rural Metro. The Chancery Court determined RBC saw this angle as a means to maximize fees. At the time, the Rural Metro Board, unaware of all this maneuvering but in light of news about EMS being in play, authorized a special committee to proceed to engage an advisory team and pursue an in-depth analysis of alternatives.

On December 14, 2010, EMS confirmed it was exploring strategic alternatives and began a sale process. On December 23, 2010, Rural Metro’s special committee interviewed three potential financial advisor candidates, and selected RBC. RBC expressed interest in offering stapled financing to potential buyers of the Company (if a sale occurred). That led to the Company engaging RBC as what the committee chair referred to as “primary” advisor and engaging another financial advisor as what it referred to as “secondary” advisor.8

**Sale Process Started.** The Chancery Court had determined that, although the Board had only authorized the special committee to retain an advisor to analyze strategic alternatives and to make a recommendation to the Board, the special committee chair, President/CEO, and RBC appeared to pivot quickly into a sale process-mode. RBC designed a process to run in parallel with the EMS process and aimed at attracting the same private equity firms looking at EMS, notwithstanding the Chancery Court determined the flaws with that construct should have been foreseeable by RBC and the special committee should have been given to the Board, the special committee chair, President/CEO, and RBC appeared to pivot quickly into a sale process-mode. RBC designed a process to run in parallel with the EMS process and aimed at attracting the same private equity firms looking at EMS, notwithstanding the Chancery Court determined the flaws with that construct should have been foreseeable by RBC and the special committee should have been made aware of them.

After 28 potential bidders were contacted and 21 private equity firms received bid packages in January 2011, six parties submitted indications of interest (from $14.50 to $19.00), including the private equity firm that would ultimately win the bidding (which firm had already dropped from the EMS process). The Chancery Court also found a number of potential bidders had provided negative feedback on the timing and design of the sale process.

The Chancery Court found the special committee (but not the Board) met on February 6, 2011, to review the indications of interest, but no materials on valuation or the quality of the bids was provided. It met again on February 22, 2011, with its financial advisors, but again did not receive valuation metrics. They also discussed whether to allow the private equity firm that, by that time, had already won the EMS auction to participate in the Company’s process given competitive and confidentiality concerns. This, notwithstanding RBC’s sale process design, was premised on whomever won EMS would be the best buyer of the Company. The special committee also set March 21, 2011, as the bid deadline. As that date approached, the EMS winner suggested it could bid other financial sponsors based on potential synergies, and it asked for a bid deadline extension so that it could formulate a bid for the Company while working to close its EMS deal.

The Chancery Court had found that, on March 15, 2011, the Board met for the first time since December 6, 2010. Again, no valuation metrics were provided. This was about a month after the Chancery Court had issued its ruling in Del Monte.9 The Chancery Court noted the Board minutes for the meeting describing the sale process were “false,” and that the Board adopted resolutions ratifying the special committee’s earlier actions related to starting the sales process. The Chancery Court interpreted the minutes as seeking to fix the authority matter by giving to the special committee after-the-fact the authority the special committee chair and RBC had assumed for themselves. The Board also decided not to extend the bid deadline for the winning bidder in EMS.

**Stapled Financings; Final Bid; Financial Analyses.** The Court also reviewed RBC’s efforts to secure a buy-side financing role on a sale of the Company; its engagement letter provisions regarding providing such financing; its interactions with the private equity firm to obtain a buy-side financing role; which included delivering signed commitment papers and lobbying for the work; and its efforts to obtain buy-side financing on the EMS deal.

On March 22, 2011, the lead private equity firm bidder submitted a $17.00 per share bid (not using RBC’s stapled financing package), as did the private equity firm that had won the EMS auction, but the latter indicated its bid was subject to further diligence and it could not fully commit to a transaction until it closed the EMS transaction.

On March 23, 2011, the special committee (with Board members attending) met to discuss the offers. The special committee decided to end discussions with the EMS winner (as it had committed financing and had not provided merger agreement comments)10. The Board

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7 While some of the factual background is set out here in narrative form, liberties have been taken in omitting footnotes that cite to one or another ruling as the source of the facts referenced so as to avoid a large number of footnotes.

8 The primary/secondary nomenclature also extended to how various transaction-related fees would be split between the two financial advisors with RBC entitled to 60% of most of the fees and the “secondary” financial advisor entitled to 40% of such fees. Certain other fees were split 50%/50%. The nomenclature aspects are discussed further infra.


10 One item apparently not explored in Chancery Court proceedings was why, if RBC was keen to provide stapled financing to prospective purchases, no one raised that point when the winning bidder for EMS indicated when it submitted its bid for Rural Metro that it did not have a financing package in place to support its bid. One would have thought the committee, Board, or RBC would have raised whether RBC could address that.
M&A Litigation Disruption

John K. Hughes

Developments continue to swirl around M&A litigation. The latest is the release of preliminary data from an annual survey looking at trends in the area for the prior year. The report is from one of the two recognized groups that publish separate annual surveys on trends in the area.

The 2015 survey uses the same sample criteria as in past years (public deals completed in prior year; $100MM-plus in value), which yielded a sample size of 73 deals (137 in 2014). The findings reveal that 87.7% of the deals experienced litigation, down from 94.9% in 2014. Complaints-per-transaction fell to 3.6, down from 4.4 in 2014. Deals with multi-state litigation fell to 23.4%, from 36.2% in 2014. Delaware attracted 52.9% of all litigation that could conceivably go to Delaware, down from 63% in 2014, with 31.8% of those settling, down from 40% in 2014. The disclosure-only settlement fee award average fell to $362,000, compared to $390,000 in 2014; $1,152,000 in 2009. The survey also predicts financial advisors will continue to be litigation targets.

The authors’ data set typically only includes transactions completed during the prior year. To capture whether Delaware Chancery Court’s rejection of a number of disclosure-only settlement cases during Q2-Q4 2015 affected M&A litigation patterns, the survey notes that, in the aftermath of the judicial rulings, only 21.4% of completed and uncompleted transactions experienced litigation (although the number could rise given not all deals have closed). Other recent media reports had pegged the number in the 30% range. The report also references a number of previously agreed-to, but-yet-to-be-Court-approved disclosure-only settlements that were withdrawn in the aftermath of the Chancery Court rejecting several settlements.

The survey’s data puts a light on what appears to be the changing face of an ever-changing component of the M&A machine, and one where the pace of change may be accelerating. The Chancery Court’s recent rulings and other statements on disclosure-only settlements clearly appear to be having the intended disruptive effect. Whether the data provides a true window on a future new normal remains to be seen. Some, including (surprisingly) defense counsel, have commented that, while the old-world order had its issues, it was at least predictable and navigable, whereas the new-world order is creating uncertainty; making it more difficult to provide guidance to deal actors on what to expect. Change is inherent in all ecosystems, and this part of the M&A system is recalibrating to adjust to a new environment. There no doubt will be more change along the way.

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1 John K. Hughes is a partner in the M&A Group at Sidley Austin LLP. The views expressed here are his own and are not attributable to his firm, its partners, or its clients. Nothing here represents legal advice applicable to a particular matter.


Our Task Force is preparing a handbook covering the governance issues that arise in business combination transactions. We started this project in the fall of 2011 and are getting close to the finish line with a projected completion in late 2017. 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.

Based on our current plan, we will have a handbook with 19 chapters, although there may be some consolidation as we work on the editing of the chapters. We have drafts of all but six chapters and those authors are hard at work! We had hoped to have all content submitted by year-end and made good progress on that score, but have some additional submissions expected. We are aiming to have all content in by the Laguna Beach meeting.

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 the board’s consideration of the application of Section 203. As we move toward the editorial process, there is room for more help in research, writing and polishing. Please let us know if you would like to get involved!

Our meeting in Laguna Beach will be our last Task Force meeting at which we will convene the entire Task Force. Starting with the spring meeting in Montreal, we will plan to use our meeting time for the chairs to discuss the draft and to meet by phone or in person with individual authors to finalize the draft chapters.

At our Laguna Beach meeting, we will discuss our plans to complete the handbook. We will also discuss recent case law developments that impact the current drafts of our chapters, and take suggestions for possible topics for a substantive ABA program for 2017 in conjunction with publication.

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

DIANE H. FRANKLE, CO-CHAIR
PATRICIA O. VELLA, CO-CHAIR

The Task Force on Legal Project Management in M&A Transactions held an interesting and interactive session at the Business Section Spring Meeting in Chicago. The meeting featured a presentation by Stewart Landefeld of Perkins Coie on M&A Deal Management. Stewart described an approach to managing deals that his firm and firm client, Microsoft, have jointly developed to bring predictability and efficiency to the deal process and to facilitate clear communication amongst the key players. He shared with the attendees a “Deal Pricing Matrix tool” that the deal team uses to budget, resource and track transactions.

Jack Bostelman reported on the status of the review by the LEDES Oversight Committee (“LOC”) of the M&A Codes that the Task Force has developed and which are now available for public comment. The LOC works with vendors and in-house legal departments to set standards for e-billing and codes sets.

At the January 2016 meeting in Laguna Beach, we will discuss the following:

2. Update on the status of the LOC of the M&A Codes.
4. Discuss future work of the Task Force, including:
   • Adoption of new LPM tools and approaches;
   • Use of LPM in M&A education and training; and
   • Use of LPM tools for other types of transactions.

We welcome your suggestions on additional matters that might be worth sharing with the Task Force. Finally, we want to welcome Scott Whittaker, the new M&A Committee Chair; we look forward to working with him.

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

BYRON S. KALOGEROU, CO-CHAIR
DENNIS J. WHITE, CO-CHAIR
AILEEN LEVENTON, PROJECT MANAGER
JOINT TASK FORCE ON M&A LITIGATION

The Joint Task Force on M&A Litigation is a collaborative project between the M&A Committee and the Business and Corporate Litigation Committee. The purposes of the Joint Task Force include facilitating programs, projects and interactive dialogue on matters of interest to M&A deal lawyers, litigators and members of the judiciary. The Joint Task Force seeks to facilitate a better understanding on the part of our transactional lawyer members of various aspects of M&A litigation that affect their practice, to provide litigators with a better perspective on deal dynamics, and to assist both in gaining a better understanding of judicial perspectives on M&A.

During the Section of Business Law’s Annual Meeting in September, our Joint Task Force joined with the Financial Advisor Task Force to present a panel presentation on recent developments in disclosure-only settlements in stockholder M&A litigation. At our upcoming Joint Task Force meeting in Laguna Beach, we plan to host an interactive discussion of how those and other recent M&A litigation developments will affect not only the future of M&A litigation but also the future of how M&A deal lawyers advise boards. In addition to further developments that likely mean the end to disclosure-only settlements as we have known them, the Delaware Supreme Court has issued two landmark opinions over the past several months. In Corwin v. KKR Financial Holdings LLC (Oct. 2, 2015), the Supreme Court held that if a merger is not subject to entire fairness review, an uncoerced, fully informed stockholder vote in favor of the merger will invoke the business judgment rule and likely be outcome-determinative, even if enhanced scrutiny review under Revlon might have applied before the vote. In RBC Capital Markets, LLC v. Jervis (Rural/Metro)(Nov. 30, 2015), the Supreme Court affirmed the Court of Chancery’s decision that a financial advisor was liable to Rural/Metro’s stockholders for nearly $76 million for aiding and abetting director breaches of the fiduciary duty of care. The Supreme Court’s rulings and views on numerous issues addressed in the Rural/Metro decision are of great practical interest to M&A practitioners.

We hope you will be able to join us for what we anticipate will be a lively dialogue.

MYRON T. STEELE, CO-CHAIR
MICHAEL A. PITTENGER, CO-CHAIR

TASK FORCE ON TWO-STEP AUCTIONS

As announced, we’ve moved into our editorial phase, and now have several persons leading revisions on the various parts of the Model Agreement with the goal of completing the Model Agreement as soon as possible. We’ll go over recent edits and the timeline for further edits. Eric also will discuss potential issues in the statute.

MICHAEL G. O’BRYAN, CO-CHAIR
ERIC S. WILENSKY, CO-CHAIR

TASK FORCE ON PRIVATE COMPANY MODEL MERGER AGREEMENT

The Task Force to prepare a model private company merger agreement with commentary held its first meeting in Chicago. The goal of the task force is to produce a merger agreement with commentary that will be a practical resource for practitioners and that will highlight the key issues that arise primarily in the private company merger context. The meeting in Chicago was well attended and a number of participants volunteered for the project both during and after the meeting. During the meeting, we had a good discussion of the underlying factual scenario for the merger agreement and we will continue to consider the appropriate factual background for the merger agreement at the meeting in Laguna Beach. The Task Force is still getting underway and there are a number of opportunities for additional volunteers. We hope you will join us in person or by phone at our meeting in Laguna Beach.

LEIGH WALTON, CHAIR
The Task Force on the Revised Model Asset Purchase Agreement continues to make significant progress on its project, having had a very full agenda at the Annual Meeting of the Business Law Section in Chicago in September. Our goal is to have a full first draft of the revised agreement with commentary by the time of the spring meeting in Montreal in April.

The Task Force will be meeting at the Committee’s stand-alone meeting in Laguna Beach. We expect to have presentations from several of the small groups that are drafting specific sections of the updated model agreement and related commentary on the status of their work.

We are still looking for volunteers. Specifically, we are looking for help with the following three areas: earn-out provisions, included related commentary, commentary on privilege issues and indemnification. If interested, please feel free to contact either of the co-chairs.

Edward A. Deibert, Co-Chair
John Clifford, Co-Chair

Task Force on Women in Mergers & Acquisitions

We had a productive discussion at our prior meeting at the Hyatt Regency in Chicago where we interviewed Dr. Arin Reeves about her book, One Size Never Fits All: Development Strategies Tailored for Women (and Most Men). Complimentary copies of her book were also provided. In furtherance of our law school initiative, several task force members (Rita-Anne O’Neill, Samantha Horn, Pam Millard and Jennifer Muller) also spoke on a panel at Northwestern Law School regarding Women in M&A. Following the Task Force meeting, Houlihan Lokey hosted a reception for Women in M&A where Dr. Reeves continued to answer questions and sign books.

At our upcoming Task Force meeting, we will hear a report on our recent Women in M&A presentation at Stanford Law School and our plan for upcoming law school presentations. We will also get a report on various networking events held since our last meeting. Our guest speaker will be Bobbie McMorrow of McMorrow Consulting. Bobbie provides, among many other things, consulting and coaching to women in law firms and will be providing us with insights on how women can take steps to be more successful. She will describe the universal challenges that she hears about from her clients and how women can conquer them.

Jennifer Muller, Chair

Our Subcommittee meeting in Chicago during the ABA Annual Meeting was well attended. We were fortunate to have Chief Justice Leo Strine join us to discuss his views on the role of advisors in the deal process as referenced in his article “Documenting the Deal: How Quality Control and Candor Can Improve Boardroom Decision-making and Reduce the Litigation Target Zone.” Jim Griffin, Joel Greenberg and Jay Bothwick led a discussion on “Recent Deal Point Negotiations in Public Company M&A” focusing on some novel negotiating points that have come up in recent public company transactions. Having run short on time in Chicago, we will pick up that discussion where we left off when we meet in Laguna Beach. Another topic to look forward to at our Laguna Beach meeting is Jennifer Muller’s take on the record-breaking public company deal-making that occurred in 2015. As members of our Subcommittee were involved in some of the notable mega-deals, we can anticipate an insightful roundtable discussion about what changes when the dollar value goes up. This past year also brought us important new decisions that change the M&A landscape both for deal-makers and litigators; Mark Morton and Patricia O. Vella will examine the effect those cases will have on our practice. Finally, we will hear from the leaders of our various Task Forces as to the status of their projects. I look forward to seeing many of you in Laguna Beach.

Jennifer F. Fitchen, Chair
Jim Melville, Vice-Chair
Patricia O. Vella, Vice-Chair
The International M&A Subcommittee met from 12:30 pm to 2:00 pm on Saturday, September 19, 2015 in connection with the ABA Business Law Section Mergers & Acquisitions Committee Annual Meeting in Chicago.

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.

Update on Status of Current Projects
Franziska Ruf provided a brief update on the status of the public company takeover questionnaire project, indicating that most of the submissions were presently undergoing second reviews.

BEPS for M&A Attorneys
The panel presenting this topic was composed of Daniel L. Gottfried (Hinckley Allen, Hartford, CT) and Michiel van Kempen (Loyens & Loeff, New York). The panelists explained the background to the discussions among governments around the globe that are presently focused on the complicated structures used by multinational businesses to reduce or eliminate corporate taxes in the countries in which they carry on business, also known as Base Erosion and Profit Shifting or BEPS. The trend of ensuring that each corporation and business pays its “fair share” of taxes is gaining momentum worldwide, after large well-known companies such as Amazon, Apple, Google and Starbucks have attracted attention to the practice. The issues arise as a result of the different bases for taxation depending on the jurisdiction. For example, the United States looks to the jurisdiction of incorporation to determine taxation, such that if an entity is incorporated under the laws of Ireland, it would not be subject to U.S. taxation. Other jurisdictions look to mind and management, so an Irish company headquartered in the U.S. would not be subject to Irish taxation. BEPS is therefore the resulting exploitation of loopholes or mismatches between the different bases of taxation in different countries. The OECD has adopted 15 action items, including China, are participating. BEPS is therefore important to M&A practitioners, both from a due diligence perspective in order to focus on historic risks, as well as in connection with the establishment of the appropriate acquisition structure.

A Comparison of Appraisal Rights in Germany, Japan and Delaware
This panel was moderated by Jennifer Muller (Houlihan Lokey, San Francisco, CA) and comprised of Takashi Toichi (Anderson Mori & Tomotsune, Tokyo, Japan) and Elena Norman (Young Conaway Stargatt & Taylor LLP, Wilmington, DE). The panelists compared and contrasted certain aspects of appraisal in their respective jurisdictions. Although the goal in all cases is to establish the “fair value” in the context of corporate actions or transactions, the basis for such valuation differs from one jurisdiction to another. In Delaware, the fair value is based on the going concern value, with no consideration given to any synergies that may arise; whereas in Japan and in Germany, the fair value tends to be based on the deal price and other process considerations (in public deals) and on independent valuations with no majority premiums or minority discounts (in private deals). The panelists also touched on who can exercise appraisal rights and in what circumstances.

Subcommittee Website
Our website at http://apps.americanbar.org/dch/committee.cfm?com=CL560002 contains:

- BEPS in Cross-Border M&A Deals.
- 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 Laguna Beach, CA in connection with the stand-alone meeting of the ABA Business Law Section, Mergers and Acquisitions Committee.
So, we can proudly say that 2016 is off to a great start, but we need your help in recruiting new members and there is room for new ideas, publications… Please get involved, you are welcomed!

We thank you for your involvement and look forward to seeing you all in Laguna Beach. Stay tuned for the planning of the Montréal meeting (April 2016)!

MIREILLE FONTAINE, Chair
TATIANA PATERNO, Vice-Chair

Our Annual Survey for cases in late 2014/most of 2015 has been submitted to The Business Lawyer and is almost complete. We’re on to next year’s Survey!

The M&A Jurisprudence Subcommittee will meet in Laguna Beach. Dial-in information for the meeting is included in the Schedule at the end of this issue of Deal Points.

At the meeting we will discuss as many recent court decisions as we can get to in our allotted time. One of the cases, Fox v. CDX Holdings, Inc., is summarized below for your reference and convenience. We will also discuss the process for updating already completed Judicial Interpretations Working Group memoranda for the M&A Lawyers’ Library Publication Projects.

More generally:
For those of you who don’t know us, the M&A Jurisprudence Subcommittee keeps its members and the Committee up to date on judicial developments relating to M&A. It is 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 M&A, which is published annually in The Business Lawyer. After publication, the Annual Surveys are posted in an online library, called the M&A Lawyers’ Library, which members of the Committee can access from the Committee’s home page on the ABA website (http://apps.americanbar.org/dch/committee.cfm?com=CL560000).

- The Judicial Interpretations Working Group examines and reports to the Committee on judicial interpretations of specific provisions of acquisition agreements and ancillary documents, looking for recent M&A cases of special interest and 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 the M&A Lawyers’ Library. Currently, the Library contains 15 memoranda, and we expect to post several more to the Library in the near future.

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

- 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 Lawyers’ Library Publication Project Group is compiling the contents of the M&A Lawyers’ Library into an ABA Publication.
We welcome all interested M&A Committee members to join our Subcommittee. The M&A Jurisprudence Subcommittee is a good way to become involved in the Committee, especially for younger Committee members, because extensive M&A transactional experience is not necessary. Not only can our working groups and project groups use additional help on current projects, but we also have a virtually unlimited pool of topics to work on in the future.

We are also asking all members of the M&A Committee to send us significant judicial decisions for discussion at our meetings and possible inclusion in the Survey. Submissions can be sent by email either to Nate Cartmell at nathanial.cartmell@pillsburylaw.com or to Mike O’Bryan at mobryan@mofo.com. Please state in your email why you believe the case merits inclusion in the survey. We need you to help identify cases.

To be included, a decision must:

1) 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.

2) (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.

In addition, the Judicial Interpretations Working Group is actively soliciting suggestions for topics for new memoranda for the M&A Lawyers’ Library and seeking volunteers to research and draft memoranda. If you have ideas for new topics or would like to work on a memorandum, please contact Frederic Smith at fsmith@babc.com.

To join the M&A Jurisprudence Subcommittee, please email any of us, or simply come to the next Subcommittee meeting.

Court of Chancery Holds that Option Plan, not Merger Agreement, is Operative Contract Governing Treatment of Optionholders

In Fox v. CDX Holdings, Inc., the Delaware Court of Chancery considered whether holders of options cashed out in a merger received adequate value for those options. The court held that the option plan, which required payment of “Fair Market Value” (as determined by the board) less the exercise price, and not the merger agreement, was the operative contract for such determination. Since the definition of “Fair Market Value” made no allowance for escrow holdbacks, the court found that the board’s acceptance of the merger agreement’s requirement that option holders contribute to an escrow fund breached the target’s contractual obligation under the plan. Moreover, the plan required that “Fair Market Value” be determined by the board, and that the exercise price of the options be appropriately adjusted by the board to reflect the spinoff of two businesses immediately prior to closing. Because the value assigned the spun off companies was not only materially but intentionally understated, and because in any event the board never made either determination, the court found the target in breach of its contractual obligations on these grounds as well.

Caris Life Sciences, Inc., a privately held Delaware corporation (“Caris”), operated three business units. In a complicated spin/merger transaction, Caris’ spun off two of those units to its stockholders (the “Spinoff”) and then, still owning the third, sold itself in a reverse triangular cash merger to Miraca Holdings, Inc.

Caris had two principal stockholders: the founder, CEO and controlling stockholder, who owned 70.4%, and a private equity fund that owned 26.7%, of Caris’ fully diluted equity. Each received a proportionate equity stake in the spinoff companies, as well as a proportionate share of the $725 million paid by Miraca for what remained of Caris.

Most of the remaining 2.9% of Caris’ fully diluted equity took the form of stock options that were cancelled in the connection with the merger. Under the terms of the stock option plan, each holder was entitled to receive for each underlying share the amount by which the “Fair Market Value” of the share exceeded the exercise price. The plan defined Fair Market Value as an amount determined by the Caris board of directors (the “Board”). The plan also required the Board to adjust the exercise price of the options to account for the Spinoff. Under the terms of the plan, the Board’s good faith determinations were conclusive unless arbitrary and capricious.

The merger agreement provided that the option holders would receive the difference between $5.07 per share and the exercise price of the options, less 8% that would be contributed to the escrow account established in connection with the indemnification obligations under the merger agreement. Of the $5.07, $4.46 represented the per share merger consideration being paid under the merger agreement, and the remaining $0.61 purported to represent the value attributable to the spinoff companies.

The court found that completion of the merger was effectively dependent on ensuring that no tax would be payable by Caris in connection with the Spinoff. The court further found that Caris’ CFO and controlling stockholder engaged in an exercise of undervaluing the spun off businesses so as to achieve such result. The CFO informed Caris’ tax advisor of the targeted valuation, and supplied the advisor with reduced projections for the two businesses to support that target. As the court observed, the CFO once committed to undervaluing the businesses for tax purposes could not then value them fairly for the option holders. Even though the tax advisor’s analysis did not value the spun off businesses as growing concerns, and even though the $65 million

valuation resulting from that analysis conflicted with the belief of the CFO, Caris’ principal stockholders and Caris’ financial advisors’ believed that the businesses were worth far more; the CFO recommended and the controlling stockholder approved using the $65 million valuation as the amount by which the fair market value of the Caris common stock had decreased as a result of the Spinoff. Although the plan required that the Board proportionately adjust the option exercise prices to reflect the Spinoff, and that the Board determine the Fair Market Value of a share of Caris’ common stock, the Board did neither. The CFO, with the blessing of the controlling stockholder, made such determinations.

The court ruled that Caris had breached its contractual obligations to the option holders in numerous respects. As to the escrow contribution, the court held that the relationship between Caris and its option holders was contractual in nature, and governed by the option plan, not the merger agreement. The plan gave the Board discretion as to whether to cancel options in the event of a merger, but in such event the plan required that the option holders receive “the difference between Fair Market Value and the exercise price” -- the plan did not permit any holdback for an escrow. While section 251(b) of the Delaware General Corporation Law permits the terms of a merger agreement to convert shares into the right to receive consideration incorporating an indemnification arrangement, options are not shares. Accordingly, by deducting the escrow amount, Caris breached that obligation.

As to the Spinoff adjustment to the exercise price and the determination of “Fair Market Value,” not only did the Board fail to make either determination required under the plan, but those determinations that were made – not by the Board, but by the CFO and the controlling stockholder – violated the plan’s requirements that they be made in good faith and not be arbitrary and capricious. (The court also found that the CFO’s and controlling stockholder’s actions supported a finding of subjective bad faith.)

The court awarded the option holders the difference between what the court concluded the Board should have determined in good faith to be Fair Market Value and the amount those holders actually received.

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**M&A MARKET TRENDS SUBCOMMITTEE**

At our last meeting in Chicago we reviewed the status of recent and pending publications; Jennifer Muller reviewed the state of the M&A market; Melissa DiVincenzo led a discussion of the practice implications of the Delaware Chancery Court’s decision in *Halpin v. Riverstone National, Inc.*; and Paul Koenig made a presentation on the management of third party claims and the impact of catch-all representations (including 10b-5 reps) on indemnification claims.

Our next meeting will be held in conjunction with the stand alone meeting in Laguna Beach. The agenda includes:

- A review of recent and pending publications
- An update on the state of the M&A market
- Highlights from the 2015 U.S. Private Target *Deal Points* Study
- Highlights from the 2015 U.S. Strategic Buyer / Public Target *Deal Points* Study
- Highlights from the 2015 Canadian Public Target *Deal Points* Study
- Highlights from the 2015 European Private Target *Deal Points* Study

I look forward to seeing you in Laguna Beach.

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**PRIVATE EQUITY M&A SUBCOMMITTEE**

When John Hughes was made the initial Chair of the Private Equity M&A Subcommittee I was not sure how successful he would be at redefining our Subcommittee and giving it direction. After all, there already was both a separate Venture Capital and Private Equity Committee, and our full Mergers and Acquisitions Committee, with all of its other task forces and subcommittees, dealing with all types of issues that private equity M&A lawyers deal with on a daily basis. And yet, under John’s stewardship, the Private Equity M&A Subcommittee constantly grew both in terms of the size of its membership and the quality of its meetings. John will be a very tough act to follow and I hope for all our sakes that he remains an active member of our Subcommittee going forward. That having been said, with the help of Mireille Fontaine of Gowlings, Montreal, who has agreed to serve as Vice Chair of our Subcommittee, I look forward to being able to continue the quality of programming that John had started while, at the same time, trying to continue to grow our Subcommittee in both size and breadth.

Towards that end, when we meet in Laguna Beach as part of the M&A Committee’s standalone meeting at the end of January we will have two panel presentations. One of the directions I intend to take the Subcommittee is to regularly have programs where we discuss some portion of the nuts and bolts of private equity M&A, and lay out for M&A lawyers who may have limited experience in the private equity world some area in which private equity M&A may differ from other types of M&A practice. Our Nuts and Bolts series will start in Laguna Beach with a mini-program entitled “Tax Issues in Private Equity M&A.” We will be joined by two M&A tax lawyers for this program – Patrick J. McCurry of McDermott Will & Emery in Chicago, and Michael P. Spiro of Finn Dixon & Herling in Stamford, Connecticut.

HAL J. LEIBOWITZ, CHAIR
Our Subcommittee historically has been strengthened by the quality of the investment bankers we have had come to our meetings and their frequent participation in our programming. I would like to continue this tradition, but in a slightly different manner. I welcome any investment banker who has market studies to contact me in advance of a meeting, and I’m happy to put out the materials and, where appropriate, have someone speak briefly about one or two key trends in their reports. However, I think we can do better at using the expertise of our Subcommittee’s investment bankers – hopefully alongside private equity principals who are either part of our Subcommittee or willing to participate – to share their insights as to skills they bring to private equity M&A and how they work with counsel in utilizing them. Our “Investment Banker Speaks” series will commence in Laguna Beach with a program entitled “Dealing with Recalcitrant Management in Private Equity M&A.” We will be joined for this program by Brooks Dexter, a Managing Director at Duff & Phelps, Los Angeles, and by Craig Dupper, a partner in the San Diego office of Solis Capital Partners. Messrs. Dexter and Dupper, along with members of our Subcommittee, will discuss how private equity attorneys and their clients manage management teams that may have their own agendas through the purchase and sale process.

In addition to the two programs described above, in Laguna Beach we will cover any caselaw, regulatory or drafting developments that come to our attention, and will spend some time talking about what types of projects and activities this Subcommittee should be engaged in between our three meetings a year.

Finally, I want to emphasize that this is YOUR Private Equity M&A Subcommittee. Not mine, and not Mireille’s and not leadership’s generally. Whether you come to all three meetings a year, or only come occasionally, or never come but participate by teleconference, we want to hear from you so we can make this Subcommittee more useful to you. Just because this Subcommittee has been a great success to date does not mean we can’t strive to make it better and more useful to its membership. So if you have any ideas for the Subcommittee, if you have a program or an issue to discuss, if you want to volunteer to speak on some topic at a future meeting (whether or not you have an idea), or if you want the Subcommittee to start some between meetings projects such as the Acquisitions of Public Companies Subcommittee and the International M&A Subcommittee are constantly doing, I WANT TO HEAR FROM YOU. So send me an email. Give me a call. Talk to me in Laguna Beach. This Subcommittee is full of hardworking and outstanding lawyers who practice in our field, and the more ideas and volunteers we get, the more this Subcommittee can achieve.

For those of you coming I look forward to seeing you in Laguna Beach. For those of you dialing in, I look forward to your participation. Let’s see if, together, we can somehow accomplish in the next few years even more than the Subcommittee has accomplished to date.

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David I. Albin, Chair

The Private Equity M&A Subcommittee met in Chicago on September 18, 2015, in conjunction with the M&A Committee’s meetings being held there as part of the ABA Business Law Section’s Annual Meeting. At the session, the Subcommittee reviewed recent trends and developments in Private Equity occurring since the Subcommittee last gathered in January 2015, including with respect to the evolving market environment for Private Equity and M&A and legal developments. The Subcommittee session included the following segments:

A Look at the Latest Data: Current Market Environment for Private Equity and M&A. A review in greater detail the then-current market environment and the drivers behind the sustained M&A market activity during 2015, and to put the latest data and observations in perspective, discuss how the trends were affecting dealmaking, and look at what to expect for the remainder of 2015. The Subcommittee received a report from Michael Macakanja, Managing Director in the M&A Group at J.P. Morgan (Chicago) on latest deal market data.

Delaware Judiciary Matters. In light of Vice Chancellor Parson’s public announcement that he planned to step down from the Delaware Chancery Court at the end of his term in October after serving 12 years in that position, two practitioners who regularly practice before the Chancery Court, John P. DiTomio, Partner at Morris, Nichols, Arsh & Tunnell LLP (Wilmington, DE), and Randy Baron, Partner at Robbins Geller Rudman & Dowd LLP (San Diego, CA), interviewed the Vice Chancellor about his time on the bench; his take on various legal, market and deal-related developments as they have evolved during his tenure; and the legal issues that the Delaware courts may confront going forward.

Current State of M&A Litigation – Plaintiff’s Counsel Perspective. With M&A litigation continuing as a regular feature in public company transactions, the Subcommittee heard from an experienced plaintiff’s counsel, Randy Baron, Partner at Robbins Geller Rudman & Dowd LLP (San Diego, CA), who specializes in challenges to mergers and acquisitions and breach of fiduciary duty actions and who has been involved in a number of significant stockholder plaintiff cases resulting in instrumental rulings, on the current state of M&A litigation and dealmaking processes from his perspective, and to hear how such counsel approaches a number of questions involved in evaluating such litigation.

The Subcommittee meeting was well-attended, and we thank all participants and Subcommittee members for contributing to the session.

The Chicago meeting marked my final session serving as Chair. Since co-founding the Subcommittee in 2006, it’s been a pleasure to have served as Vice-chair, Co-chair and Chair. We sought to run the Subcommittee as a salon series, inviting a range of speakers and presenters to engage with the Subcommittee on developments and issues-of-the-day with the goal of providing members with the broadest possible exposure to various elements and aspects of this part of the M&A ecosystem. Guests included senior M&A, financial sponsor, leveraged finance, or raid defense bankers at leading investment banks; other M&A and Private Equity lawyers; Private Equity firm professionals, including Private Equity firm general counsels; members of the Delaware judiciary; the heads of industry trade groups; and others. We hope members found the information helpful in their own practices and for those of their firms, and we look forward to seeing the Subcommittee continue to evolve as an integral part of the M&A Committee.

John K. Hughes, Past Chair
PROGRAMS
SUBCOMMITTEE

The Programs Subcommittee is pleased to announce the involvement of the Committee in five presentations at the Montreal meeting. The two seminars being sponsored principally by the Committee are an offering by Michael O’Brien on “Cases that Matter” and a panel headed by Den White to present the new Legal Project Management Guidebook, which will be rolled out just prior to the Montreal meeting. In addition, the Committee is co-sponsoring three additional programs ranging from M&A tax to cyber security. The Program Subcommittee will be meeting in Laguna Beach to discuss a more systematic approach to the content that we present at the spring and fall meetings. Please feel free to submit your program ideas either to the undersigned or to any of the other subcommittee members, Sophie LaMonde, Michael Pittinger and Daniel Rosenberg.

GEORGE M. TAYLOR III, CHAIR
COMMITTEE MEETING MATERIALS
LAGUNA BEACH, CA  |  JANUARY 29 & 30, 2016
Please note that times listed are in PACIFIC TIME

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<th>Meeting Room</th>
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<td>Grand Ballroom</td>
<td>(866) 646-6488</td>
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<td>Gallery I &amp; II</td>
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Friday, January 29, 2016

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

8:00 am – 10:00 am
Continental Breakfast
***Included in registration fee for registered meeting attendees.
Guest passes are available for purchase.
Outdoor Courtyard

9:00 am – 10:30 am
M&A Jurisprudence Subcommittee
Chair: Michael G. O’Bryan
Gallery I & II

10:30 am – 12:00 pm
Private Equity M&A Subcommittee
Chair: David I. Albin
Grand Ballroom

12:00 pm – 1:00 pm
Task Force on Revised Model Asset Purchase Agreement
Co-chairs: Edward A. Delbert and John Clifford
Gallery I & II

12:00 pm – 2:00 pm
Buffet Luncheon
***Ticket Required
Studio

1:00 pm – 2:00 pm
Legal Project Management Task Force
Co-chairs: Byron S. Kalogerou and Dennis J. White
Gallery I & II

1:00 pm – 2:30 pm
Acquisitions of Public Companies Subcommittee
Chair: Jennifer F. Fitchen
Grand Ballroom

2:30 pm – 3:30 pm
Women in M&A Task Force
Chair: Jennifer Muller
Gallery I & II

2:30 pm – 4:30 pm
Task Force on Two Step Tender Offers
Co-chairs: Michael G. O’Bryan and Eric S. Wilensky
Gallery I & II

4:30 pm – 5:30 pm
Meeting of Committee Chair and Vice-chairs, Subcommittee and Task Force Chairs
Chair: Scott T. Whittaker
Grand Ballroom

7:00 pm – 10:00 pm
Reception & Dinner
Sponsored by:
The Brattle Group and J.P. Morgan
***Ticket Required
Mozanbique
1740 S. Coast Highway
Saturday, January 30, 2016

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<td>8:00 am – 5:00 pm</td>
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<td>Outdoor Courtyard</td>
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<tr>
<td>9:00 am – 10:30 am</td>
<td>M&amp;A Market Trends Subcommittee • Chair: Hal J. Leibowitz</td>
<td>Grand Ballroom</td>
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<tr>
<td>10:30 am – 12:00 pm</td>
<td>International M&amp;A Subcommittee • Co-chairs: Keith A. Flaum, Freek Jonkhart and Franziska Ruf</td>
<td>Grand Ballroom</td>
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<tr>
<td>12:00 pm – 1:00 pm</td>
<td>Task Force on M&amp;A Litigation • Co-chairs: Myron T. Steele and Michael A. Pittenger</td>
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<td>12:00 pm – 2:00 pm</td>
<td>Task Force on Private Company Model Merger Agreement • Chair: Leigh Walton</td>
<td>Grand Ballroom</td>
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<td>12:00 pm – 2:00 pm</td>
<td>Buffet Luncheon • ** Ticket Required</td>
<td>Studio</td>
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<td>1:00 pm – 2:00 pm</td>
<td>Joint Task Force on Governance Issues in Business Combinations • Co-chairs: Diane H. Frankle and Patricia O. Vella</td>
<td>Grand Ballroom</td>
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<td>3:00 pm – 5:30 pm</td>
<td>Mergers and Acquisitions Full Committee • Meeting Chair: Scott T. Whittaker</td>
<td>Grand Ballroom</td>
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<td>7:00 pm – 10:00 pm</td>
<td>Reception &amp; Dinner • Sponsored by Practical Law, RR Donnelley and SRS</td>
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The Mergers and Acquisitions Committee would like to thank the following for sponsoring the Meeting:

- RR Donnelley
- Practical Law
- J.P. Morgan
- SRS Acquiom
- Brattle
also directed the financial advisors to engage in final price negotiations with the remaining bidder. Again, the Board received no valuation material beyond a one-page summary comparing the metrics implied by a $17.25 per share offer compared to the Company’s closing market price of $12.38 one day prior. RBC bankers evidently debated internal-ly whether to provide such materials, with one banker voicing concern they might be asked about valuation at the meeting.

On March 25, 2011, the remaining private equity firm increased its bid to $17.25 per share (again with no RBC financing). The Chancery Court found that, following the submission, and without any disclosure to the Board, senior representatives of RBC were pressing the private equity firm to find ways to participate in financing its purchase, and in that course RBC committed $65 million to a revolving credit facility for a different portfolio company.

The Chancery Court also found that, on March 26, 2011, RBC’s fairness opinion committee (which it observed did not have many protocols) met to review the bid as part of RBC’s internal approval process for its fairness presentation and opinion. The Chancery Court found, however, that during that day, RBC’s deal team re-worked the financial analyses to make the bid look more attractive, noting the final fairness presentation contained materially different analyses from those contained in RBC’s December 2010 pitch book — the only prior valuation material provided (and only to the special committee). The Board received valuation materials at 9:45 pm on March 27, 2011, shortly before a 11:00 pm Board call to consider the bid, and it approved the deal after midnight.

Proxy Statement. The Chancery Court also found the Company’s proxy statement distributed two months later on May 26, 2011, contained false and materially misleading disclosures on RBC’s financial analysis and on its incentives and conflicts related providing buy-side financing to the Company and firms bidding for EMS.

Initial Litigation and Disclosure-Only Settlement Rejected; Pre-Trial Settlements. After a one-week delay, the Board directed the financial advisors to engage in final price negotiations with the remaining bidder. The Company’s “secondary” financial advisor agreed to settle the company’s “secondary” fairness opinion agreement to settle the claims against that advisor for $5 million. A few days later, on April 29, 2013, stockholder plaintiff and the Company and the individual directors agreed to settle all claims for $6.6 million. As sole remaining defendant, RBC promptly sought a continuance. But the Chancery Court denied it (noting possible settlements are an ever-present reality in multi-party litigation).

CHANCERY COURT RULINGS

In post-trial opinions dated March 7 and October 10, 2014, the Chancery Court ruled that (i) Rural Metro’s directors had breached their fiduciary duties by failing to properly monitor the sale process and by including false disclosures in the Company’s merger proxy; (ii) RBC had aided and abetted those breaches through various means; and (iii) stockholders had suffered $4.17 per share in resulting damages. RBC’s $76 million liability represented 83% of the total damages of approximately $91 million found to have been sustained by the class, with the remaining 17% attributable to two settling defendants who the Chancery Court determined had breached their duty of loyalty. RBC appealed various aspects of the ruling.

SUPREME COURT’S KEY RULINGS AND KEY LESSONS

In its ruling, the Court analyzed in detail each of RBC’s six arguments on appeal, as well as plaintiff’s cross-appeal on fee shifting. The Court’s ruling echoes teachings from the growing canon of Delaware cases involving flawed sales processes and financial advisor conflicts, such as Del Monte and El Paso, among others. It also must be read in conjunction with other recent rulings of the Court to put it in context.

Another factor to bear-in-mind when assessing the ruling and its aftermath is that the underlying facts involved here occurred in 2010-11.

RURAL METRO: OBSERVATIONS AND AFTERMATH CONTINUED...

As the January 17, 2012, settlement hearing approached, one of the stockholder plaintiffs, in a rare move, filed an objection asserting valuable claims were being forfeited for disclosure of questionable value, and that lead counsel had not prosecuted the case vigorously. About one week before the hearing, then-Vice Chancellor Strine (to whom the case was initially assigned), transferred it to Vice Chancellor Laster. In the hearing, Vice Chancellor Laster rejected the settlement and replaced lead counsel. The case then headed toward trial in May 2013. In the intervening period during which discovery ensued, the aiding and abetting claim against the private equity firm was dropped, but a similar claim was added against Rural Metro’s two financial advisors.

Pre-Trial Settlements. On April 25, 2013, about one week before trial and after all pre-trial briefing was complete, stockholder plaintiff and the Company’s “secondary” financial advisor agreed to settle the claims against that advisor for $5 million. A few days later, on April 29, 2013, stockholder plaintiff and the Company and the individual directors agreed to settle all claims for $6.6 million. As sole remaining defendant, RBC promptly sought a continuance. But the Chancery Court denied it (noting possible settlements are an ever-present reality in multi-party litigation).

CHANCERY COURT RULINGS

In post-trial opinions dated March 7 and October 10, 2014, the Chancery Court ruled that (i) Rural Metro’s directors had breached their fiduciary duties by failing to properly monitor the sale process and by including false disclosures in the Company’s merger proxy; (ii) RBC had aided and abetted those breaches through various means; and (iii) stockholders had suffered $4.17 per share in resulting damages. RBC’s $76 million liability represented 83% of the total damages of approximately $91 million found to have been sustained by the class, with the remaining 17% attributable to two settling defendants who the Chancery Court determined had breached their duty of loyalty. RBC appealed various aspects of the ruling.

SUPREME COURT’S KEY RULINGS AND KEY LESSONS

In its ruling, the Court analyzed in detail each of RBC’s six arguments on appeal, as well as plaintiff’s cross-appeal on fee shifting. The Court’s ruling echoes teachings from the growing canon of Delaware cases involving flawed sales processes and financial advisor conflicts, such as Del Monte and El Paso, among others. It also must be read in conjunction with other recent rulings of the Court to put it in context.

Another factor to bear-in-mind when assessing the ruling and its aftermath is that the underlying facts involved here occurred in 2010-11.
Since then, influenced by the Chancery Court’s earlier rulings in the case and still other rulings in the genre, market practices around certain topics at issue here have already shifted and continue to evolve in the never-ending quest to develop best practices. The following looks briefly at only certain aspects of the Court’s ruling and some resulting takeaways for boards and financial advisors.19

FOR TARGET COMPANY BOARDS

1. Triggering of Revlon is Fact-Based. The Chancery Court reviewed the directors’ conduct under the enhanced scrutiny standard articulated in Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.20 To eliminate the underlying breach on which the aiding and abetting claim was predicated, RBC did not dispute Revlon applied; just when it applied temporally. RBC argued Revlon did not apply to the December 2010 time-frame when the Board or committee were “merely exploring strategic alternatives,” and that it was triggered only when “the sale of the Company became inevitable,” which in RBC’s view was in March 2011 when the auction was coming to an end.

The Court disagreed, noting as a factual matter the Board and special committee never really considered strategic alternatives since the committee set out on an unauthorized sale process from the start, and hired RBC to sell the Company without proper authorization. In its analysis, the Court reaffirmed its holding in Lyondell that enhanced scrutiny does not arise simply because a company is in play, but rather as a consequence of directors negotiating a sale.21 The Court noted the “unusual” situation where the special committee chair and RBC initiated a sale process in December 2010 that was not authorized, but that the actions were -- by RBC’s own arguments -- later ratified by the Board on March 15, 2011, undercutting RBC’s own argument. What the ruling underscores for boards is that there is no bright-line test on when Revlon’s enhanced scrutiny is triggered, and it’s a facts and circumstances analysis.

2. Revlon Reasonableness Can be Undercut by Conflicts. The Court also agreed that the reasonableness of initiating a sale process in tandem with the EMS auction, absent conflicts of interest, “would be one of the many debatable choices that fiduciaries and their advisors must make . . . and it would fall within the range of reasonableness.” But the Court found that, where undisclosed conflicts exist, decisions around what is reasonable are viewed more skeptically, and the Board’s overall course of conduct failed Revlon scrutiny given the solicitation process was structured and timed in a manner that impeded interested bidders from presenting potentially higher value alternatives and that it was so structured by RBC’s motivation to obtain financing fees from the EMS transaction.

The Court also determined RBC’s undisclosed conflicts (and the Board’s failure to uncover them) undermined RBC’s assertion that the post-passive majority market check further evidenced the Board had met its Revlon obligations. The Court determined a market check under those circumstances was no panacea. The ruling highlights that, while Delaware courts have noted repeatedly that there is no single blueprint for how a board should maximize value, if a board is not aware of certain key facts and is not advised as to the resulting implications, it will impact the analysis around the reasonableness of the board’s action.

3. Active, Informed and Mitigating Conflicts v. “Searching” Diligence. The Court noted a board may be free to consent to certain conflicts, and has the protections of 8 Del. C. § 141(e) (allowing directors to rely on experts selected with reasonable care). But one of the overarching takeaways from the ruling is the Court’s reminder that directors must maintain an active and direct role in the sale process from beginning to end; and that includes acting reasonably to identify and respond to actual and potential conflicts -- a statement that applied not only to financial advisor conflicts but to other directors and an officer who were found to have had conflicts inclining them toward a near-term sale.

But while the Court noted a board must be active and informed, it also stated “a board is not required to perform searching and ongoing due diligence on its retained advisors in order to ensure [they] are not acting in contravention of the company’s interests, thereby undermining the very process for which they have been retained.” The Court acknowledged where the line is in this process for a board may be unclear since the board may not be able to see conflicts as they arise. In that regard, the Court noted that because the conflicted advisor may, alone, possess information relating to a conflict, “the board should require disclosure of, on an ongoing basis, material information that might impact the board’s process.”

This language raises such questions as:

- Is that prescription now a requirement in all circumstances?
- What benefits does a Board receive if it places such an obligation on an advisor or if it does not?
- What judgment calls might be involved as part of the process of assessing whether certain facts may “impact the board process” and under what standard will those determinations be reviewed?
- What results may flow if a board does not impose such an affirmative obligation on an advisor or if the advisor does not so inform a board of any such matters in a timely fashion?

4. Being Informed on Alternative Values. The Court agreed that “RBC’s faulty design prevented the emergence of the type of competitive dynamic among multiple bidders that is necessary for reliable price discovery.” The Court also agreed the Company’s directors were not adequately informed as to the Company’s value, including the value of not engaging in any transaction at all, and that the financial advisors’ failure to provide valua-

19 Again, liberties have been taken in omitting footnotes citing to the Court’s statements.
20 506 A.2d 173 (Del. 1986).
tion materials until just hours before the Board approved the deal, and RBC’s manipulation of its financial analyses, contributed to the Board being uninformed on valuation matters.

The takeaway is that, when assessing a sale of a company or other significant alternative corporate action, a board must have an appreciation of the valuation implications associated with those actions, including remaining independent, as well as whether there are marketplace impediments impacting value determinations (such as other competing transactions). The ruling highlights that board action around such transactions may not survive Revlon scrutiny if it has failed to obtain an ongoing basis valuation-related materials from its financial advisor. If a board for some reason is not itself asking for such information, counsel should.

5. Guarding Against Inadequate Disclosure. The Court agreed RBC aided and abetted the Board’s breach since the proxy statement contained false and misleading information about RBC’s incentives and conflicts (on stapled financing, financing for EMS bidders, and last minute lobbying of the private equity bidder) and the financial analyses contained in its financial presentation.

The Court agreed such disclosure was imperative for stockholders to adequately assess what factors might influence the financial advisor’s analytical efforts. As such, the ruling reminds of the importance of the Background of the Merger section (often the first item read by jurists and plaintiffs counsel alike) and the Opinion/the Financial Advisor section of a merger proxy, and the care and critical eye with which those sections should be drafted for completeness and consistency to create a fair summary.

6. Advisor Conflicts. Rural Metro is the latest flash-point in the ongoing debate around how boards should best address financial advisor conflicts in M&A situations. The ruling once again underscores the need for boards to adequately vet potential financial advisors (at the firm level and individual deal team level) as part of the engagement process (and at different junctures during the deal process as events transpire) so the board is aware of actual and potential conflicts the advisors may have with transaction parties, potential bidders or otherwise. That teaching is not new; prior precedents (De/ Monte and El Paso among others) taught that lesson earlier.

It’s also not to suggest that all conflicts are disabling. Indeed, quite the opposite.22 Equally important is that a board’s efforts to identify and evaluate relevant information should be captured in minutes or other record-keeping and be referenced in the Background of the Merger section of the merger proxy or the Opinion of Financial Advisor section, as appropriate.

The ruling suggests at the same time that a board that knows its advisor has a conflict appears to have a greater responsibility to monitor that advisor given the Court’s statement that “[a] board’s consent to the conflicts of its financial advisor necessitates that the directors be especially diligent in overseeing the conflicted advisor’s role in the sale process.”

Again, its important to bear in mind that the underlying facts in Rural Metro occurred in 2010-11. Market practice has evolved since then in terms of how and at what juncture(s) and in what form boards obtain relevant information so that they are fulfilling their duties about being informed on such matters. But debate continues over how boards should handle this aspect of the dealmaking process.

Some have suggested that perhaps one way for boards to better vet potential conflicts and better position themselves in the event conflicts arise is to treat financial advisors on a more arms-length basis, and include various representations, covenants and remedies on conflict matters in financial advisor engagement letters. As recognized by the Court in footnote 191, the banker-client relationship is grounded in contract. But including static, one-size-fits-all provisions in an engagement letter on conflict matters may fail to take into account the inherently organic and multi-dimensional nature of transactional dynamics as they evolve, and be a poor substitute for meeting the Court’s prescription for directors to be active and provide ongoing oversight of developments. It would also appear the last person a board would want to keep at arm’s length during dealmaking processes is its financial advisor.

7. Special Committees. The Court’s ruling holds any number of lessons related to special committees. The scope of any special committee’s mandate must be clear and understood by special committee members (and any financial advisor); boards should monitor special committee processes to, among other things, ensure compliance with the parameters of that authority and ensure information flows are adequate. For example, the Court highlighted the finding that another financial advisor that had not been retained by the Company, but that had made a presentation to Rural Metro’s President/CEO suggested the Company should continue to execute on its growth plan over the next year as changes in the healthcare market played out, fundamentally challenging the “sell now” thesis RBC had advocated. The President/CEO, however, limited distribution of the presentation to the special committee chair and lead RBC banker; none of the other members of the committee or the Board ever had the benefit of it.

FOR FINANCIAL ADVISORS

1. Potential Aiding and Abetting Claims Remain. In its ruling, the Court affirmed the “narrow holding” of the Chancery Court that “[i]f the third party knows that the board is breaching its duty of care and participates in the breach by misleading the board or creating the informational vacuum, then the third party can be liable for aiding and abetting.” As is plain from the ruling, a financial advisor -- or a bidder or other third party -- can be subject to an aiding and abetting claim even where the directors who breached the duty are themselves exculpated. Although the undefined phrase of “fraud upon the board” is sometimes used as the test-case example of where an aiding and abetting claim could be found to exist (as the Chancery Court found here), this portion of the Court’s ruling (running only four pages) does not limit possible aiding and abetting claims only to that situation.

In analyzing whether all the elements necessary to establish an aiding and abetting claim had been satisfied, the Court reiterated the traditional stringent requirements for establishing “knowing participation,” including but not limited to scienter:

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22 See Documenting the Deal at 617-18 (“some conflicts will be inevitable because advisors with the necessary expertise -- e.g., daily knowledge of financing markets -- will have worked with many other clients. Companies cannot afford to pay pet advisors to stay on the shelf for their episodic, exclusive use”).
The aider and abettor must act “knowingly, intentionally, or with reckless indifference” ... that is, with an “illicit state of mind.” To establish scienter, the plaintiff must demonstrate that the aider and abettor had “actual or constructive knowledge that their conduct was legally improper.”

To support a finding of “knowing participation” here, the Court focused on certain RBC actions: (i) its failure to disclose its interest in obtaining a buy-side financing role in the transaction and how it planned to use its engagement by the Company to capture that work; (ii) its knowledge that the Board and special committee were uninformed about the Company’s value; (iii) its back-channel communications with the private equity firm where confidential Board-level communications were divulged; (iv) its failure to disclose to the Board its ongoing interest in providing buy-side financing and its eleventh-hour attempts to secure that role while simultaneously leading final price negotiations, and (v) its modification of its financial analysis to make the winning private equity firm’s bid more attractive. In one of the key passages from the ruling, the Court indicated that “[p] ropelled by its own improper motives, RBC misled the Rural directors into breaching their duty of care, thereby aiding and abetting the Board’s breach of its fiduciary obligations.”

But while as noted the Court cautioned its ruling should be read narrowly, there are concepts within this portion of its ruling that are not narrow ones. For example, how should “constructive knowledge” be interpreted in this context? It’s also unclear how “legally improper” should be or could be interpreted, raising questions of how or where those not trained as lawyers (or even lawyers) should draw the line in assessing what is and is not “legally improper.” As an example, the Court’s ruling provides that, while boards do not have an affirmative obligation to conduct searching due diligence on advisor conflicts, they should require advisors to disclose conflict situations that only they may know about. If a board does not make such a request of an advisor, would a financial advisor be presumed to know that a board perhaps not making that request, or an advisor not providing such information, might be engaging in conduct that is “legally improper” under the ruling?

2. Internal Reporting Systems. A topic not specifically addressed in the Court’s ruling, but nevertheless tied to the ability of financial advisors to provide client boards with real-time information in fast moving situations about the advisor’s relationships and interactions with transaction parties and potential bidders, is the internal data management systems at those firms from whence such information is needed. Again, it’s important to remember that the underlying facts in Rural Metro occurred in 2010-11. Systems are in a never-ending state of technological improvement. It also may be easier for banking boutiques to generate certain reports as opposed to global, universal banks. But the ability to provide accurate and reliable data at key intervals will only be as good as the systems designed to capture and retrieve it, recognizing it also necessitates reaching across a multitude of business platforms inside global financial firms (e.g., advisory, capital markets, trading, derivatives, corporate banking) that may have unique confidentiality restrictions, information barriers and regulatory compliance protocols.

3. Financial Advisors and Not “Gatekeepers.” One focus of industry and press attention in the aftermath of the Chancery Court’s initial ruling was that court’s characterization of financial advisors as “gatekeepers.” In dictum, the Chancery Court had used broad language suggesting financial advisors had extra-contractual and quasi-fiduciary responsibilities to monitor their client boards to ensure they were both adequately informed and exercising due care in their deliberations and decisions. The Court in a long footnote rejected that view of the financial advisor’s role, affirmatively recognizing the essentially contractual nature of the financial advisor-board relationship.

23 The Court’s determination in this regard should effectively eliminate the use of the term to describe financial advisor activities. It should also severely limit – if not eliminate – the ability of future litigants to claim that financial advisors have diffuse and undefined responsibilities to monitor the conduct of their client boards in seeking to impose potential liability.

4. Proximate Cause and Secondary Advisors. RBC had asserted the Chancery Court erred in concluding that, but for RBC’s actions, the Board would not have breached its duty of care and stockholders would not have been harmed. It claimed the second financial advisor, in negotiating with the private equity buyer and providing its own financial analyses and fairness opinion, cut the causal link and cleansed RBC’s conflicts.

The Court disagreed, noting the Board would not have breached its fiduciary duties but for RBC’s actions, and that the second financial advisor’s financial analyses and opinion did not sever or cleanse RBC’s improper conduct since stockholders voted on a deficient proxy statement due to RBC’s actions. The Court referred to the second financial advisor as “only a secondary actor in the valuation process.” It further noted that, like RBC, it was compensated for its advisory role on contingent basis.

Some have raised whether the Court’s comments somehow limit the value of engaging a second financial advisor unless that advisor is paid on a non-contingent basis. The Court specifically acknowledged that obtaining the advice of a second bank is a common practice and that contingent compensation arrangements “can have a salutary effect on a sale process” by

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21 Rural Metro, at 191 ("In affirming the principal legal holdings of the trial court, we do not adopt the Court of Chancery’s description of the role of a financial advisor in M&A transactions. In particular, the trial court observed that “[d]irectors are not expected to have the expertise to determine a corporation’s value for themselves, or to have the time or ability to design and carry out a sale process. Financial advisors provide these expert services. In doing so, they function as gatekeepers”... Although this language was dictum, it merits mention here. The trial court’s description does not adequately focus certain RBC actions: (i) its failure to disclose its interest in obtaining a buy-side financing role in the transaction and how it planned to use its engagement by the Company to capture that work; (ii) its knowledge that the Board and special committee were uninformed about the Company’s value; (iii) its back-channel communications with the private equity firm where confidential Board-level communications were divulged; (iv) its failure to disclose to the Board its ongoing interest in providing buy-side financing and its eleventh-hour attempts to secure that role while simultaneously leading final price negotiations, and (v) its modification of its financial analysis to make the winning private equity firm’s bid more attractive. In one of the key passages from the ruling, the Court indicated that “[p] ropelled by its own improper motives, RBC misled the Rural directors into breaching their duty of care, thereby aiding and abetting the Board’s breach of its fiduciary obligations.”

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aligning the interests of the advisor with those of its client in attempting to obtain the best value. But it also noted that there could be misalignment over whether to take a deal in the first instance, and divergence could arise over how to proceed during final negotiations.

Delaware courts on any number of occasions have upheld as routine the use of contingent payments as part of a financial advisor’s fee structure, so it’s unclear what impact the Court’s ruling may have on that line of cases (other than in conflict situations). It is not uncommon that two or more financial advisors are engaged, with each providing financial analyses and opinions, and each receiving contingent compensation. In other instances, a second financial advisor may be engaged solely to provide a fairness opinion, and the advisor may be compensated on a flat-fee basis. Leaving aside that the Chancery Court has sometimes questioned that latter practice in the past, that does not appear to have been the situation here as both advisors appear to have been retained as joint advisors, although the record evidently suggested the special committee or the Board may have treated them differently.

At a minimum, it appears ill-advised for boards or a committee engaging financial advisors to be designating or referring to them as “primary” and “secondary.” That nomenclature may have substantive repercussions and unintended consequenc-es. If, however, a second advisor is engaged to help “cleanse” a conflict situation, then it would be appropriate to assess what compensation arrangement may be best-suited to accomplish that goal. Moreover, it appears that, depending on the facts, a board’s retention of a second financial advisor may not be sufficient to cleanse defects in the sale process, particularly if the board views the second financial advisor’s involvement and advice as “secondary.” It further appears doubtful that, even if the second financial advisor’s compensation here had not been contingent, it would have changed the Court’s analysis regarding whether RBC’s actions were the proximate cause of the Board’s breach.

5. Pitch Materials. The Chancery Court looked closely at the financial advisor selection process and the pitch materials each financial advisor had presented, and how each financial advisor presented not only itself in terms of its qualifications, but also whether it advocated a particular course of action it thought the Company should take -- before it was engaged and before which it had full information on which to base any assessment.

The Chancery Court found that, unlike the other firms, RBC devoted the bulk of its presentation to a sale transaction and recommended coordinating that effort with the EMS sale process timetable as it asserted “the ... time to sell is ... now.”

The Chancery Court had further determined that when RBC prepared its financial analyses to support its fairness opinion in March 2011 when the Board approved the sale, RBC took positions in that analysis that were inconsistent with its analyses contained in its December 2010 pitch materials.24 These and other related aspects of the ruling highlight that information contained in pitch materials, viewed in hindsight, can have implications and exhibit a predisposition toward a certain course of action before appropriate review and decision-making has taken place on a chosen path by those with responsibility to do so.

6. Buy-Side Financing Roles. Buy-side financing issues permeated the record in Rural Metro. They were, in one form or another, at the core of what led to RBC being found liable. The Chancery Court first discussed the advisability and risks associated with financial advisors providing buy-side financing in Toys “R” Us25 and it has come up in other rulings since then. Again, it’s important to remember the facts in Rural Metro occurred in 2010-11. The Chancery Court’s ruling in Del Monte (where buy-side financing also figured prominently) was February 2011. Practices and markets have changed.

But if a financial advisor intends to or is asked to provide buy-side financing in a transaction (or a related transaction), the parameters of any understanding on such matters, including as to timing and scope, should be discussed in advance with the board or committee engaging the advisor along with counsel, and specifically agreed. If it is involved, boards should closely monitor the advisor’s interaction with any bidder on such matters. While RBC’s engagement letter granted it the exclusive right to offer stapled financing to a potential purchaser, the letter did not address the ability to use its position as the Company’s advisor to offer buy-side financing to the private equity firms bidding for EMS, nor were other aspects covered.

7. Presenting Valuation Materials on Ongoing Basis. The Court agreed with the Chancery Court’s finding that, throughout a process running from December 2010 to late March 2011, neither the special committee nor the Board had received valuation materials from their financial advisors (beyond a one-page summary comparing the metrics implied by a $17.00 per share offer to those implied by the Company’s market price ($12.38) one day prior, and an LBO analysis that had been provided solely to the President/CEO and that was not shared with any others). While the facts appear to have been highly aberrational, financial advisors are reminded that the timing, content, internal consistency, and updating as to changes of valuation-related analytics along the pathway of a deal process will continue to be analyzed rigorously in deal litigation.

8. Internal Communications and Discovery Implications. The Court noted that the Chancery Court found that there were a series of internal RBC communications and communications from within the private equity firm illustrating that RBC was trying to stage manage the process and Board members so as to orchestrate the Board’s approval of a transaction with the private equity firm. Early in the proceedings, there was a trial-within-the-trial related to efforts to obtain discovery of all internal banker communications that was hard-fought. The ruling reminds financial advisors that litigation discovery can surface all communications and banker chatter, which rightly or wrongly can result in damages -- both monetarily and, perhaps more importantly, reputationally.

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24 See also, n. 12 supra and accompanying text.
CONCLUSION

The foregoing are just a few areas for consideration flowing from the Court’s ruling. As noted at the outset, that ruling may have allayed some concerns of financial advisors that plaintiffs will have an easy path in asserting aiding and abetting breach of fiduciary duty claims. But it may not have allayed other concerns. As noted, the debate around these and other related issues will continue. Change is inherent in all ecosystems, and this part of the M&A dynamic will continue to evolve as all interested parties seek to make the deal process all the more efficient. The one thing that is certain is that there will be more change along the way.