FROM THE CHAIR  Scott T. Whittaker

Wishing everyone a healthy, happy and deal-filled 2017!

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 Resort in Laguna Beach, January 27 - 28. West Coast sunsets and evenings, combined with our meetings and networking with fellow M&A practitioners, will surely help get 2017 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: Bloomberg Law, Duff & Phelps, JP Morgan Escrow Services, Kira Systems and SRS Acquiom. On behalf of the Committee, THANK YOU!

Deal Points Changes
Please check out the new section of Deal Points that is making its debut in this issue, titled, “What’s New & Trending.” This section will feature short descriptions of and/or excerpts from upcoming publications or other M&A Committee work product as well as other subcommittee or task force content that should be of interest to Committee members. Thanks to Ryan Thomas, Editor of Deal Points, for this innovation, and for all of the work he puts in on our excellent Committee newsletter. If you have any material that you want to suggest for the “What’s New & Trending” section, please let Ryan know.

Leadership Changes
We have a few Committee leadership changes that will take effect at our Laguna Beach meeting.

Leigh Walton will conclude her term as Chair of the Private Target Merger Agreement Task Force, and Melissa DiVincenzo and Amy Simmerman will step up from their Vice-chair positions to take over as Co-chairs of that task force. Leigh will continue in Committee leadership as a member of our Executive Committee.

Mireille Fontaine will conclude her term as Chair of the Membership Subcommittee, and Tracy Washburn Bradley will step up from her Vice-chair position to take over as Chair of that subcommittee. Mireille will continue in Committee leadership as Vice-chair of the Private Equity M&A Subcommittee.

Craig Menden will conclude his term as Vice-chair of the Market Trends Subcommittee, and Claudia Simon will step in to fill that Vice-chair position. Craig will continue his work with the Market Trends Subcommittee, as Vice-chair of the Private Target Deal Points Study.

On behalf of the entire Committee, I thank Leigh, Mireille and Craig for the contributions they made and will continue to make to the M&A Committee. And please join me in welcoming Tracy, Melissa, Amy and Claudia to their new positions.

Spring Meeting in New Orleans
The excitement is already building about our next meeting, which will be April 6 – 8 in New Orleans, 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 in addition to our substantive subcommittee and task force meetings. We are also planning some great dinners and socializing in my home town, which everyone will hear more about in Laguna Beach. As the New Orleans meeting will be only two short months after we return from Laguna Beach, it’s not too early to start planning your attendance.

If you have any questions concerning our meeting in Laguna Beach, please don’t hesitate to ask. I look forward to seeing many of you next week.
“The new year means nothing if you’re still in love with your comfort zone.” – Rachel Wolchin

Each new year marks the beginning of a potential fresh start. As you step into January, I hope you’ll take the opportunity to seek out new inspiration, formulate new goals and aspire to new achievements both professionally and personally. If getting more involved in the M&A Committee is one of your goals, there are numerous opportunities to get plugged in to one of the many subcommittees and/or task forces so we encourage you to reach out. Speaking of new, we are excited to announce to you a new section of Deal Points – “What’s New & Trending.” Each publication we will feature short descriptions or excerpts from upcoming publications, tout current trends and/or interesting data points from studies or upcoming/past Committee presentations and/or provide other M&A resources. This new section will be the most effective with broad participation, in addition to articles, so please feel free to reach out if you have any interesting content for this new headline section of Deal Points going forward. I hope to see you in Laguna Beach!
WORK SMARTER, NOT HARDER

Dennis J. White — Co-chair, Task Force on Legal Project Management  
Verrill Dana LLP, dwhite@verilldana.com

The Task Force on Legal Project Management in M&A has recently developed the following two new tools:

1. **Budgeting Tool.** Clients are with increasing frequency asking their deal counsel to present an estimate or even a budget for handling a particular transaction. This new tool, which is based upon the M&A Codes, provides a logical framework for generating such an estimate or budget. The tool lists the various tasks to be accomplished and the level of attorneys that will work on a particular task, along with their billing rate and the estimated number of hours they will devote to the task. As a firm generates more ample billing data from the use of M&A Codes over time, it will be better equipped to develop more accurate estimates and budgets.

2. **Deal Magnitude and Complexity Matrix.** This tool provides a methodology for generating an estimate of legal expenses for a particular transaction based upon a set of customizable elements that are likely to influence total deal costs. The tool assigns points to various items that can drive up the cost of a transaction (e.g., number of subsidiaries, number of patents, cross-border elements, etc.). The more complexity, the higher number of points and the higher the cost estimate will be. This tool works optimally with a client and law firm that handle a lot of deals together, but the elements set forth in the tool can in and of themselves make any law firm more aware of cost drivers when it comes time to generate an estimate or budget.

These tools have been or will soon be posted to the ABA website designated in the Task Force’s Guidebook On Using Legal Project Management in Merger and Acquisition Transactions. By utilizing a dedicated ABA website, the Task Force is able to introduce new tools and update existing tools online without having to wait for the release of the next hard copy edition of the Guidebook. Access to the website and online editable versions of the tools are only available to purchasers of the Guidebook. The Guidebook is available to M&A Committee members at the reduced price of $79.95. To order, just visit www.ShopABA.org and enter Product Code 5070698.

BECOME AN AMBASSADOR

Tracy Bradley – Vice-chair, Membership Subcommittee  
Fortis, tbradley@fortisrep.com

We are pleased to introduce you to the M&A Committee’s first ever ambassador program. The program was created to help first-time attendees to our meetings acclimate to the M&A Committee family and navigate through the various sessions, events and social opportunities that could be otherwise intimidating or confusing. We are looking for veteran M&A Committee members who are willing to volunteer some time to help with this program.

Upon being paired with a new attendee, the ambassador will reach out to introduce themselves and the program. Ambassadors will find out what the attendees interests are and educate them on all things related to the meeting. Once the meeting commences, the ambassador will be a point person for the first-time attendee for any questions that arise and to make sure the attendee is not alone or isolated.

This program is meant to facilitate positive experiences for first-time attendees, foster a sense of community within our committee and ultimately increase our membership numbers. If you are interested in participating in the ambassador program, please contact me. Thank you!
SNAPSHOT OF DELAWARE PUBLIC COMPANY APPRAISALS POST-CKX

Yvette Austin Smith — Co-chair, Task Force on Financial Advisor Disclosure
The Brattle Group, yvette.austinsmith@brattle.com

Following the CKx decision, Delaware Chancery Court has continued to provide strong support for the use of deal price to estimate the fair value of the equity of public companies subject to statutory appraisal proceedings.

In November 2013, the Court of Chancery of the State of Delaware found that the fair value of CKx, Inc. was equal to the deal price at which CKx had been taken private by Apollo Management in 2011. The Chancery Court opinion was affirmed by the Delaware Supreme Court in February 2015. Prior to the acquisition, CKx had traded on NASDAQ. Since that time the Chancery Court has issued seven appraisal opinions in which the target company had been publicly traded as of the contested transaction. In all but two of those seven cases the Court has found that deal price was the best estimate of fair value, though in one case the Court subtracted an estimate of synergies.

Figure 1 displays indexed deal price and fair value estimates for each of these seven transactions. Deal price is displayed at a value of 100. The two cases for which the Court found that fair value exceeded the deal price are Dell and DFC Global – both of which have been appealed to the Delaware Supreme Court. With or without merit, Dell and DFC Global may have been vulnerable to the suggestion that the stock was trading at a “depressed” level. The stocks of Dell and DFC Global were trading at 72% and 55% of 52-week highs (respectively) immediately prior to the transaction announcement. For all of the other companies, excluding Ramtron, the stocks had been trading at an average of 95% of 52-week highs.

Figure 1 also shows that notwithstanding public share prices, petitioners and respondents continue to assert widely divergent values in appraisal cases. A few other potentially interesting observations from these cases:

- Neither deal price premium (measured against stock prices one-month prior to announcement) nor transaction size is predictive of the relationship between deal price and the Court’s ultimate determination of fair value.
- Respondents have been largely unsuccessful in arguing that the value of synergies should be deducted from deal price to estimate fair value.
- Plaintiff and Respondent experts continue to rely primarily on discounted cash flow analysis to estimate fair value.
ON THE HORIZON

Patricia O. Vella — Co-chair, Joint Task Force on Governance Issues Arising in Business Combination Transactions
Morris, Nichola, Arsht, & Tunnell, LLP, pvella@mnat.com

We’re getting close! The Task Force on Governance Issues in Business Combinations is getting close to publication of its Handbook with a targeted date of early 2018. Once published, the Handbook will no doubt be a go-to resource for practitioners and board members alike, with practical discussions and insight on topics ranging from the sales process for a change in control to the role and engagement of financial advisors. The Handbook will also focus on more narrow topics such as the negotiation of NDAs and standstills and special issues in two-step transactions. While our Task Force is no longer meeting in person, rest assured the work continues!

GOT NEWS & TRENDS?

Ryan D. Thomas — Editor
Bass, Berry & Sims PLC, rthomas@bassberry.com

Are you following any new deal trends or have other news relevant to our committee? If so, we want to share your content. Simply contact us via email (dealpoints@bassberry).
This Is It! M&A Nuggets

Below a transcript from a recent webcast on DealLawyers.com (the remarks are slightly edited from what was said):

We're bringing back to life our annual signature event! A lightning round of practical advice, covering both tricks of the trade and the hot issues that you are grappling with today. No waiting through hours of conference time to glean a handful of useful tips. Our community has told us that they want more practical information - and they need it now more than ever. This easily can be the most useful (and fun) program you ever attend - as you will walk away with many practical tips!

Join these three experts:

• Rick Climan, Partner, Weil Gotshal & Manges LLP
• Joel Greenberg, Senior Partner, Kaye Scholer LLP
• Wilson Chu, Partner, McDermott Will & Emery LLP

John Jenkins, Editor, DealLawyers.com: Good afternoon. I'd like to welcome you all to today's program, "This is It! M&A Nuggets." Today, we're really excited to be bringing back to life an annual signature event that we haven't held in several years. As we've said in the promotional materials, this M&A Nuggets webcast provides a lightning round of practical advice that covers both the tricks of the trade and the hot issues that you're grappling with today on your transactions. And you don't have to waste two hours of conference time to glean a handful of useful tips.

We've got a terrific panel put together today. This is sort of our own version of a Beatles reunion. We've put together the original panelists who spoke on the first M&A Nuggets webcast back in 2005, and they definitely qualify as rock stars. Our panelists are Rick Climan, Partner in Weil Gotshal's Silicon Valley office; Joel Greenberg, Senior Corporate Partner in Kaye Scholer's New York office - his firm will be joining forces with Arnold & Porter effective January 1; and last but not least, Wilson Chu, who's a Partner in McDermott Will & Emery's Dallas office. We want these nuggets to come at you fast and furious, so I'm going to step aside and let the panel take it from here. Joel, you're up.

Closing Conditions and Named Experts

Joel Greenberg, Senior Partner, Kaye Scholer LLP: Thanks. The first topic I want to talk about quickly is closing conditions that involve opinions of named experts. Just a bit of background - those of you who have been practicing for a while will remember a time when the typical M&A deal called for opinions of counsel as closing conditions, where the buyer would receive an opinion of the seller's counsel and the seller would receive an opinion of the buyer's counsel. Both were conditions to closing.

That practice has largely disappeared from the M&A landscape. The one place in the M&A practice that you still have opinion requirements is on issues such as tax opinions, where it may well be a condition to closing, particularly in a deal intended to qualify as a tax-free reorganization, that one or both of the parties receive a specified tax opinion.

The one principal difference here from the old practice is that often the agreement will require that a party receive an opinion from its own counsel as a condition to going forward. That obviously presents a concern about possible client influence, and possible manipulation, if a party wants to get out of the transaction for reasons having nothing to do with the subject matter of the opinion.

In fact, that structure produced a very live litigation in the Delaware courts recently involving the Williams Companies and Energy Transfer Equity (Williams Companies, Inc. v. Energy Transfer Equity, L.P. (Del. Ch. Ct., June 24, 2016)). It was a condition to Energy Transfer's obligation to go forward that it receive an opinion of its tax counsel, Latham & Watkins, that the transaction met the requirements for a favorable tax treatment. The litigation arose because Latham advised the parties that it couldn't give the opinion. Williams argued that the motivation for getting out of the deal had nothing to do with tax, but since oil prices had collapsed, the deal had become economically disadvantageous to Energy Transfer. Litigation in the Delaware Chancery Court ensued.

Not surprisingly, the court applied the condition literally. It held that the condition to closing was that Energy Transfer receive an opinion of Latham & Watkins at a "should" confidence level that the desired tax treatment was available. The court found that Latham had concluded in good faith that it couldn't give the opinion, and that it didn't matter that the issue causing Latham to have doubts was first raised by an internal tax lawyer at Energy Transfer. Ultimately, the court concluded that Energy Transfer could walk away from the deal.

We don't know where this litigation is going to wind up. It's currently on appeal to the Delaware Supreme Court, and oral argument is scheduled for January 11. But it raises a couple of issues to consider in drafting these provisions.

One issue is whether the only source of the opinion should be the counsel to the party for whose benefit the condition exists. If the agreement had called for receipt of an opinion from a named neutral party, the Delaware court would have enforced that. The agreement could have said, as some agreements do, that if a party can't get an opinion from its own tax counsel, the
condition would nevertheless be satisfied if the counterparty produces an opinion of its own tax counsel.

Whatever approach the agreement takes, it’s important to understand as you negotiate these provisions that the court is going to give effect to the condition as written. The proposed BCE leveraged buyout in Canada, which at the time I think was the largest private equity deal in history, failed because KPMG would not deliver a solvency opinion. KPMG had been named as the sole source for that opinion in the definitive agreement. If you sole-source the condition and name the expert, you are totally stuck if the expert concludes, for whatever reason, that it can’t render the opinion.

Rick?

**Non-Reliance Clauses**

Rick Climan, Partner, Weil, Gotshal & Manges LLP: Thanks, Joel. For my first nugget, I’d like to discuss a very simple clause that appears in many acquisition agreements. That’s the so-called “non-reliance” clause.

What is a non-reliance clause? It’s a provision included in the acquisition agreement for the benefit of the sellers. In this provision, the buyer confirms that, except for the express representations contained in the “representations” section of the acquisition agreement, the buyer has not relied on any representations or other statements made on behalf of the target company or the sellers or any of their representatives. Very simple.

This is a seemingly innocuous clause which is mistakenly regarded by some practitioners as mere boilerplate. But this clause is most definitely not boilerplate. It is a potent provision that can have a significant effect on a disappointed buyer’s legal remedies. Accordingly, it must be negotiated with great care.

It’s a clause that can be particularly important in the acquisition of a privately held company. To appreciate the potential significance of a non-reliance clause, you have to think about what a disappointed buyer of a privately held company does when it feels, after the closing of the acquisition, that there were material misrepresentations made to it in connection with the acquisition. That disappointed buyer may well decide, in the grand American tradition, to sue the sellers.

The buyer will probably include in its lawsuit a breach of contract claim - a claim under the express indemnification provisions of the acquisition agreement for breaches of the contractual representations made by the sellers in that acquisition agreement. Of course, this claim will be subject to all of the caps, survival limitations and other contractual limitations on indemnification that were negotiated by the sellers in the acquisition agreement. For that reason, this contractual remedy is far from a perfect remedy for the buyer.

But our disappointed buyer may well also bring a second type of claim - tort claims for fraud against the sellers for deliberate misrepresentations made to the buyer in the context of the acquisition. These tort claims would presumably not be subject to the caps, baskets and other contractual limitations on indemnification claims.

There are two types of fraud claims the buyer can bring. The first type relates to the express representations made by the sellers in the “representations” section of the acquisition agreement itself. The buyer will claim that the sellers knew that certain of these representations were wrong and that the buyer, therefore, has the right to recover from the sellers in tort for their having defrauded the buyer. That’s one type of fraud claim. We call that fraud “inside the contract.”

The second type of fraud claim the buyer may assert is a little different. It does not tie into any of the specific representations in the acquisition agreement itself. Rather, the buyer may assert that certain statements made to it or certain documents delivered to it during the due diligence investigation of the target company’s business were fraudulent, even though those statements and documents were not specifically covered by any of the sellers’ express representations in the acquisition agreement. We refer to this type of claim as a claim for fraud “outside the contract,” or extra- contractual fraud.

An example of fraud outside the contract would be the delivery by the sellers to the buyer of fraudulent financial projections, which the sellers cooked up to deceive the buyer into buying the target company. Because the target company and the sellers typically will not make express representations in the acquisition agreement about these projections, this type of fraudulent behavior constitutes fraud outside the contract.

It is in this context - fraud outside the contract - that the presence or absence of a non-reliance clause can make a huge difference. If the sellers end up getting a good non-reliance clause in the acquisition agreement, they will be insulated from the buyer’s fraud claim regarding bad projections, at least in Delaware and certain other jurisdictions that take the same approach as Delaware. The buyer’s claim for fraud outside the contract will be dismissed because of the presence of the non-reliance clause.

What’s the reasoning here? The claim will be rejected and dismissed because one of the required elements of a successful fraud claim is reliance by the buyer. The Delaware courts take the position that if the buyer brings a claim for fraud outside the contract after specifically representing that it relied only on the representations expressly included in the acquisition agreement, then the buyer’s non-reliance representation was in fact a lie, and that should preclude the buyer from recovering on its fraud claim. On the other hand, if there’s no non-reliance clause in the acquisition agreement, the buyer should be able to maintain a fraud claim against the sellers based on the fraudulently-prepared projections.

So the practice pointer here is simple. A good non-reliance clause can actually protect the sellers against successful tort claims for fraud outside the contract.

Wilson, you are going to talk about a somewhat related topic. CONTINUED ON PAGE 23
Use of Special Escrows

By Adam Lezack
Fortis Advisors

At the closing of most private M&A transactions, a portion of the consideration is either held back by the buyer or set aside in a third-party escrow to secure the selling company’s covenants, representations and warranties. Based on data from over 500 M&A deals where we have served as the post-closing shareholder representative, 93% of such deals include either an escrow or holdback. In addition, many deals have a second “special escrow” covering specific matters or issues (as described below). Our data (available on our website) shows that 26% of all deals have at least one additional special escrow:

Special escrows that deserve particular attention are intellectual property escrows and litigation escrows.

Intellectual property escrows are included in M&A transactions to enable longer survival periods for IP representations and warranties. Often the buyer is willing to allow standard representations and warranties made by the seller to expire 12-to-18 months post-closing, at which time escrowed funds are released to the shareholders. However, the buyer may desire a longer survival period for IP representations and warranties. The IP may be fundamental to the buyer’s purchase decision, but problems with the seller’s, right, title and interest in the IP may not manifest themselves for three or more years. Buyer may insist on an extended escrow period to protect the investment in the seller’s company and IP. Rather than extending the term of the primary escrow, the buyer and seller can compromise by allowing the primary escrow to expire and be released early, with a second, longer IP escrow serving to cover IP issues.

A second common special escrow is one established to protect the buyer against a filed or threatened lawsuit known at the time of the closing. Buyer and seller typically negotiate an amount for such an escrow equal to the maximum reasonable loss on the claim (regardless of the merits), with the excess funds released to the shareholders immediately on settlement or resolution of the claim. The buyer benefits from having a dedicated amount in addition to the primary escrow to handle the matter, and the selling shareholders benefit both from immediate release of excess funds on resolution and through the ability to negotiate enhanced control rights over the defense and resolution of the claims.

However, a special escrow covering a filed or threatened claim comes with a significant downside. At closing, the merger agreement typically is provided to the selling shareholders in connection with seeking approval of the transaction. The shareholders also receive a complete description of the financial terms and flows of consideration. Thus, all the shareholders become privy to the existence of the special escrow. We have seen multiple instances where, despite confidentiality obligations, the term and amount of the special escrow has been shared with the claimant (and in some cases, the claimant is also a shareholder). This has emboldened the claimant to seek the maximum recovery, knowing money has been set aside. As a way to deal with this issue, the special escrow amount could be added to the primary escrow, and that “signaling” would not exist.
In Re Books-A-Million, Inc. Stockholders Litigation (Special Committee’s Acceptance of Substantially Lower Offer not Subjective Bad Faith)

By M&A Jurisprudence Subcommittee

In In re Books-A-Million, Inc. Stockholders Litigation, C.A. No. 11343-VCL, 2016 WL 5874974 (Del. Ch. Oct. 10, 2016), the Delaware Court of Chancery applied the “business judgment” standard of review and dismissed a complaint challenging a controlling stockholder going-private merger transaction (the “Merger”), holding that the transaction satisfied the framework of Kahn v. M&F Worldwide Corp (“MFW”) despite a third party’s 30% higher offer. The Court found no reasonable inference that the Special Committee acted in bad faith and compromised its independence because, among other things,

(i) the controlling stockholder made clear it was only a buyer, not a seller,

(ii) the Special Committee nevertheless solicited third-party offers to better assess the value of the Company and the attractiveness of the controlling stockholder’s offer,

(iii) the Special Committee negotiated a price 20% higher than the controlling stockholder’s original offer, and

(iv) the merger consideration fell within a rational range of minority-discounted value when compared to the third-party offer, which sought control.

Books-A-Million, Inc. (“BAM” or the “Company”), a Delaware corporation engaged in the retail book business, was founded in 1917 by Clyde W. Anderson and, at the time of the proposed Merger, his descendants (the “Anderson Family”) still controlled approximately 57.6% of the Company’s outstanding voting power. Between 2012 and 2014, the Anderson Family made several proposals to buy out the minority and a third-party (“Party Y”) made several proposals either to buy out the Andersons or all the stockholders; nothing came of these proposals.

In January 2015, the BAM board of directors (the “Board”) received an unsolicited proposal from the Anderson Family to buy out the minority for $2.75 per share in a negotiated transaction. The price represented a 65% premium over the average closing price for BAM’s stock for the prior 90 trading days. At the time of the proposal, the Board had five members, including two members of the Anderson Family. The proposal stated that the Anderson Family expected the Board to establish a Special Committee of independent directors and conditioned the transaction on the approval of the Special Committee and a non-waivable majority of the minority stockholder vote. The proposal further stated that the Anderson Family was only interested in acquiring the shares it did not already own and was not interested in selling its shares to a third-party.

The Board formed a Special Committee, which selected financial and legal advisors, evaluated alternative transaction structures and solicited offers from three other parties (Parties X, Y and Z) that had previously expressed an interest in the Company. Party Y submitted an indication of interest to acquire all of the Company’s shares for $4.21 per share subject to due diligence, financing and other conditions. In response, the Anderson Family said it would only buy and not sell, and Party Y said it was not interested in less than control.

After additional inquiries, the Committee decided the best course was to negotiate with the Anderson Family. After several offers and counteroffers, the Anderson Family increased its offer to $3.25 a share. Meanwhile, Party Y reiterated its interest at $4.21 per share, but only if it could acquire 100% of the shares. Following presentations to the Committee (including a fairness opinion and a solvency opinion), the Committee approved the Merger with the Anderson Family at $3.25 per share. Holders of approximately 66.3% of the shares not affiliated with the Anderson Family or senior management voted to approve the Merger.

Challenging the squeeze-out merger, the plaintiffs argued that the defendants breached their fiduciary duties and the Board’s decision should not be reviewed under the “business judgment” rule because (i) one of the Board members, who initially was a member of the Special Committee but resigned, was not independent and tainted the independence of the Committee by sitting in on the fairness opinion presentation to the Committee and (ii) the members of the Special Committee approved the Merger in bad faith, thereby displaying a lack of independence in fact, since the directors did not accept Party Y’s substantially superior offer.

The Court disagreed, holding that the allegations did not support a reasonable inference that any of the MFW conditions were unmet or that the Merger constituted waste. The Court noted that the Anderson Family offer from the outset included the dual conditions of MFW – approval by a special committee plus a non-waivable approval of a majority of the minority. Thus, the business judgment rule would apply unless plaintiffs’ complaint created a reasonable inference that the transaction did not in fact satisfy the remaining elements of MFW.

The Court reviewed at great length the independence of the Special Committee, which it determined the core of the plaintiffs’ complaint. The Court commended the Board member who resigned from the Committee at an early stage after self-identifying social and civic relationships with the Anderson Family. The Court noted that even though the Board member subsequently attended the fairness opinion presentation so as to avoid the need of the Committee’s financial advisor to make multiple presentations, he was excused before deliberations began, and the Committee deliberated and ultimately voted to accept the Anderson Family offer without the Board member present. Notably, however, the Court cautioned that under
different circumstances the presence of a director whose independence was compromised might be problematic.

Leaning heavily on the 1994 Chancery decision of Mendel v. Carroll, the Court dismissed plaintiffs’ contention that the independent directors acted in bad faith by recommending the Anderson Family offer and elevating the interests of the Anderson Family over those of the minority stockholders. The plaintiffs argued that it is not rational for a director to accept a lower-priced offer when a comparable higher priced offer is available -- the directors must have had some ulterior motive for not pursuing Party Y’s higher offer. While the Court noted that subjective bad faith is theoretically a viable means of attacking MFW’s requirement that the Special Committee be “independent,” the Court analyzed the issue in the context of the circumstances facing the Committee. The Court found that the Committee’s actions of (i) exploring third-party offers to assess the value of the Company and the attractiveness of the Anderson Family’s offer and (ii) assessing whether the Anderson Family’s bid was so low that it should be rejected outright, supported an inference of good faith.

The Court also did not consider the two offers “comparable”: Party Y’s offer sought to acquire control of the Company whereas the Anderson Family, which already owned “control” of the Company, merely sought to purchase the minority shares. The Court noted that the Anderson Family’s offer fell within a rational range of discounts and premiums, and that under the MFW framework the transaction would not close unless a majority of minority stockholders approved it. (The Court also observed that the Special Committee rationally could have believed that minority stockholders aggrieved over price could protect themselves by pursuing appraisal rights – the valuation would exclude any minority discount, and in the event sufficient shares exercised such right, could cause a failure of a closing condition and thus influence the outcome of the transaction.) Moreover, the Court recognized that (i) the Anderson Family, given its controlling stake, could block, and as a fiduciary matter the Anderson Family had no obligation to accept, Party Y’s offer, and (ii) because the Anderson Family offer was at a substantial premium to market and conditioned on the MFW framework, it was not seeking to exploit the minority stockholders. As a fiduciary matter, therefore, the Committee was not in a position to take action against the Anderson Family to facilitate Party Y’s offer.

This case demonstrates yet again the advantage for a controlling stockholder requiring at the outset of a squeeze-out transaction the dual conditions of (i) the approval of a sufficiently independent and adequately empowered special committee and (ii) an un-coerced, informed majority-of-the-minority stockholder vote. It also reemphasizes that, in reviewing fundamentally different offers, boards and special committees should focus not merely on the price per share of each offer but also the extent to which each offer falls within a rational range of discounts and premiums. This is particularly important when the lower bid is from a controlling stockholder -- the independence of a special committee accepting such bid (and with it application of the business judgment rather than entire fairness standard of review) is vulnerable to challenge as “bad faith” in the event the offer is grossly inadequate or the minority discount is extreme.
JOINT TASK FORCE ON
GOVERNANCE ISSUES ARISING IN BUSINESS
COMBINATION TRANSACTIONS

Our Task Force is preparing a handbook covering the governance issues that arise in business combination transactions. This is a joint project of the Corporate Governance Committee and the M&A Committee. We started this project in the fall of 2011 and are now getting close to the finish line, with a targeted publication date of early 2018. 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.

Topics include, spotting and anticipating conflicts of interest; engagement and use of financial advisors; the use of special committees; Section 203 issues; and private company issues, to name a few. We are making steady progress toward the publication of our Handbook. Out of 18 chapters, we have drafts of all but three, and we expect those first drafts shortly. We are well into the editorial process and the Task Force Co-chairs have had multiple editorial conference calls since the Boston meeting to help get this across the finish line.

The Task Force Co-chairs will be meeting in Laguna Beach to discuss our plans for completing the handbook by mid-2017; our full task force will not meet as we are focused now on the editorial process, but all authors who have outstanding chapters should be getting those completed as soon as possible – ideally by the end of January 2017. We are very excited by the content we have received to date, and based on what we have seen thus far from our authors, we believe this handbook will be a significant resource for all deal participants seeking to navigate the governance issues that confront us during the course of a deal. If you have questions or want to get involved, contact any of our four co-chairs, either at the meeting. We look forward to seeing you all in Laguna Beach!

DIANE H. FRANKLE, CO-CHAIR
MICHAEL J. HALLORAN, CO-CHAIR
LAWRENCE A. HAMERMESH, CO-CHAIR
PATRICIA O. VELLA, CO-CHAIR

TASK FORCE ON REVISED
MODEL ASSET PURCHASE
AGREEMENT

The Revised Model Asset Purchase Agreement Task Force continues its progress towards completion. The Task Force met at the Annual Meeting in Boston where we discussed the indemnification provisions for the agreement, including whether to add an exclusive remedy provision to the draft and the requirements for the assumption of the defense of third party claims. We also received updates from several of the working groups on the status of their various drafting projects.

Our Task Force will be meeting in Laguna Beach. Our goal is to finalize drafts of the commentary from the remaining working groups and begin the work of consolidating the various provisions. We can always use additional volunteers interested in working on the Task Force, especially anyone interested in working on the commentary on privilege issues. Please contact either of the co-chairs if you are interested.

TASK FORCE ON FINANCIAL ADVISOR
DISCLOSURE

The Financial Advisors Task Force will meet on Saturday, January 28 at 1:00 pm in the Grand Ballroom. We will begin the meeting with a discussion of the goals and objectives of the task force. During the substantive portion of the meeting, we will discuss (1) the emerging disclosure litigation paradigm and its impact on financial advisor disclosures and (2) market trends related to board disclosure of financial advisors’ industry relationships and engagements.

STEPHEN M. KOTTRAN, CO-CHAIR
YVETTE AUSTIN SMITH, CO-CHAIR

ED DEIBERT, CO-CHAIR
JOHN CLIFFORD, CO-CHAIR
TASK FORCE ON LEGAL PROJECT MANAGEMENT

At the Annual Business Law Section meeting in Boston this past September, we discussed the successful launch of our new book “Using Legal Project Management in M&A Transactions – A Guidebook For Managing Deals Efficiently and Effectively.” To date, the ABA has sold more than 500 copies. We would again like to extend our sincere thanks to all who contributed to making the publication a reality.

Members of the Task Force continue to actively promote the new Guidebook by writing articles and appearing in programs and webinars. For example, an article by Co-chairs Byron Kalogerou and Den White featuring The Guidebook appeared in the November/December edition of the ABA’s Law Practice Magazine. Byron and Den also appeared in a webinar in December entitled “Unlocking Checklists, Forms and Other Tools in M&A Transactions” sponsored by Attorneys’ Liability Assurance Society (ALAS), a major legal malpractice insurer. At the Boston meeting, Byron also moderated a panel of general counsel who extolled the benefits of utilizing legal project management.

The Task Force has recently posted to the designated Guidebook website the following two new LPM tools for review and consideration:

1. Budgeting Tool (this tool provides a logical framework for generating a legal budget for handling a transaction using the M&A Task Codes); and

2. A Deal Magnitude and Complexity Matrix Tool (this tool provides a methodology for generating an estimate of legal expenses for a transaction based upon a set of customizable elements that can influence deal costs).

Our Task Force will hold its next meeting in person and by teleconference at the upcoming Stand Alone Meeting on Friday, January 27 from 1:00 pm – 2:00 pm at the Montage Laguna Beach in Laguna Beach, California.

We will be discussing among other things:

- Experience of Task Force members in using the tools;
- New tools under development (a post-merger integration checklist), suggestions for additional tools and adoption of certain of the tools for use in public M&A, and in joint ventures;
- Challenges and approaches to implementing legal project management within an organization;
- Additional ways to promote the Guidebook and the work of the Task Force; and
- Ideas for future programs on legal project management.

For those who cannot attend in person, the dial-in information for the meeting is included in the schedule at the end of this issue of Deal Points.

BYRON S. KALOGEROU, CO-CHAIR
DENNIS J. WHITE, CO-CHAIR
AILEEN LEVENTON, PROJECT MANAGER

TASK FORCE ON WOMEN IN MERGERS & ACQUISITIONS

Since our last meeting in Boston, the Task Force has made significant progress on its primary initiatives. We assembled women in M&A lawyers from across the country to speak at the law schools of Columbia, Harvard and the University of Toronto to encourage women law students to pursue a career in M&A; we updated our 2014 survey on the percentage of women in M&A at the top law firms in North America; and created a steering committee of senior women in M&A from law firms and investment banks to lead a networking group in New York.

At our upcoming Task Force meeting in Laguna Beach, our primary presentation will focus on one of our four key initiatives: specific actions that law firms can take to increase the level of participation and retention of women in M&A at their firm. The presentation will contain actual steps that law firms can take, commentary on what has worked and what has not worked, a list of law firm guest speakers and references to studies that support the recommended actions. We will also present and distribute the results of our updated survey, discuss some ideas about how we can recognize and celebrate women in M&A and announce a new program to increase participation by female law students at ABA M&A Committee meetings that will be launched at the New Orleans meeting in the Spring.

JENNIFER MULLER, CHAIR
RITA-ANNE O’NEILL, VICE-CHAIR
TASK FORCE ON PRIVATE COMPANY MODEL MERGER AGREEMENT

The Task Force to Prepare a Model Private Company Merger Agreement is off to an excellent start, and we hope that you will join us for our meeting in Laguna Beach. The goal of the Task Force generally is to produce a merger agreement with commentary that will be a practical resource for practitioners and highlight the key issues that arise primarily in the private company merger context. The draft will be a reasonable buyer’s first draft. The Task Force held a very successful meeting in Boston. The meeting featured a discussion led by Paul Koenig from SRS Acquiom regarding the treatment of the attorney-client privilege in a private company acquisition, as well as a discussion about the status of the Task Force’s work on the model agreement. We also reviewed the underlying factual assumptions for the model agreement, as we continue to move toward a final refinement of those assumptions.

At the upcoming meeting in Laguna Beach, we expect to continue our traditional meeting format of reviewing recent Delaware case law relevant to private company acquisition issues and discussing the development of our model agreement. In particular for the upcoming meeting, we anticipate discussing recent case law on anti-reliance language and on the possibility of obtaining a disinterested vote of stockholders, and we will also have some of the authors of chapters of our model agreement lead a discussion about important drafting issues. We hope you will join us in person or by phone at our meeting in Laguna Beach.

LEIGH WALTON, CHAIR
MELISSA A. DEVINCENZO, VICE-CHAIR
AMY SIMMERMAN, VICE-CHAIR

M&A LITIGATION TASK FORCE

On Friday, January 27 at 11:00 am – 12:00 pm please join a discussion hosted by the M&A Litigation Task Force: Public Company Appraisal Cases in Delaware, Post CKx. The discussion will take place as part of the Mergers & Acquisitions Committee Meeting in Laguna Beach. We will review the fair value determinations of the seven public company appraisals since CKx, including the two cases on appeal to the Delaware Supreme Court. We will also discuss the evolving academic literature and recent amicus brief in DFC Global on the pros and cons of relying upon deal price as an estimate of fair value.

YVETTE AUSTIN SMITH, CO-CHAIR
MICHAEL A. PITTENGER, CO-CHAIR

TASK FORCE ON TWO STEP TENDER OFFERS

The Two-Step Tender Offer Task Force will not hold a general meeting at Laguna Beach. Instead, Eric and Mike will continue to work through the current draft and contact editors individually. If you have questions, though, please feel free to contact either of us.

MICHAEL G. O’BRYAN, CO-CHAIR
ERIC S. WILENSKY, CO-CHAIR
M&A MARKET TRENDS SUBCOMMITTEE

At our last meeting in Boston we reviewed the status of recent and pending publications; Jennifer Muller (Houlihan Lokey, San Francisco, CA) reviewed the state of the M&A market; Rita-Anne O’Neill (Sullivan & Cromwell, Los Angeles, CA) shared a preview of a new Deal Points study on divisional carve out transactions; Claudia Simon (Schulte Roth & Zabel, Washington, DC) shared new data on voting agreements in public company M&A deals; John Mark Zeberkiewicz (Richards Layton & Finger, Wilmington, DE) made a presentation on developments and market trends in respect of appraisal rights; and Paul Koenig (SRS Acquiom, Denver, CO) and Rick Climan (Weil, Redwood Shores, CA) shared an analysis of certain key Deal Points based on the size of the buyer.

Our next meeting will be held on Saturday, January 28, 2017 at the stand alone meeting in Laguna Beach. The meeting will take place from 9:00 - 10:30 am. The agenda includes:

• A review of recent and pending publications
• An update on the state of the M&A market

ACQUISITIONS OF PUBLIC COMPANIES SUBCOMMITTEE

Many thanks to all of you who attended our Subcommittee meeting in Boston. Particular thanks to our panelists Chief Justice Strine, Vice Chancellor Laster, Ted Yu, Melissa DiVincenzo and John Hughes. They, and we, covered a lot of ground, including a look at KKR and Corwin post-Trulia, appraisal actions, the latest from the SEC’s Office of Mergers and Acquisitions and 203 issues in practice.

Given that our Laguna Beach gathering is our stand-alone meeting, it seemed a good time for the Acquisitions of Public Companies Subcommittee meeting to act as a forum for our members to share their perspectives on the practice, raise questions for the group and engage in the sort of vibrant discussion that only people who get together for a weekend of M&A can have! We will start with Jen Muller’s annual review of the state of M&A deal-making. We will then move to a Q&A with Chief Justice Strine – if there are topics you know you’d like him to cover, please let me know, though questions from the floor are not only welcome but expected. Finally, we will be looking at trends in public company M&A, both as reported in the Deal Points Studies and as our members are seeing in their own practice.

As we go into our first meeting of the New Year, it’s worth reflecting on the fact that it is our members that make the Committee, and this Subcommittee, so strong and our collaboration at these meetings that often changes the practice of M&A. Let’s all resolve to contribute to maintaining our great tradition of sharing our experiences and engaging in spirited debate. If you’re seeing something new or different, or have an issue you’d like the group’s views on, I encourage you to use this forum to speak up. The rest of us will rise to the occasion!

Our subcommittee will meet on Friday, January 27 from 1:00 pm – 2:30 pm in the Grand Ballroom. For those who cannot attend in person, the dial-in information for the meeting is included in the schedule at the end of this issue of Deal Points.

Happy New Year, safe travels and see you in Laguna Beach.

JENNIFER F. FITCHEN, CHAIR
TRICIA VELLA, VICE-CHAIR
JIM MELVILLE, VICE-CHAIR
INTERNATIONAL M&A SUBCOMMITTEE

The International M&A Subcommittee met from 10:30 am to 12:00 pm on Friday, September 10, 2016, in connection with the ABA Business Law Section Mergers & Acquisitions Annual Meeting in Boston, Massachusetts.

I. Introductions

- The Co-chairs of the Subcommittee, Freek Jonkhart and Franziska Ruf, introduced themselves and welcomed the participants. The individual introductions by each of the participants were skipped in order to provide the panelists with maximum time to present their topics.

II. R&W Insurance

- Cameron Rusaw (Davies Ward Phillips & Vineberg LLP, Toronto, Canada) chaired a panel comprised of Richard Silberstein (Gómez-Acebo & Pombo, Barcelona, Spain) and Ashley Parsa (Marsh, New York, NY). All participants acknowledged that R&W insurance is more and more prevalent in transactions in North America (thereby catching up to Europe), particularly in private equity deals, as a result of either a sell-side request, an auction process dynamic or the desire to submit an attractive buyer bid proposal. As a result of the increased use of R&W insurance, policies have become much better aligned with the transaction agreements, the process has become faster and the cost of coverage has become less expensive. Ashley Parsa presented a number of interesting statistics in support of the foregoing and then proceeded to an overview of certain of the principal terms and conditions of this type of insurance, including (i) an explanation as to the difference in buy-side and sell-side policies, (ii) the types of representations and warranties that are typically excluded from insurance, (iii) typical survival periods, (iv) the cost of R&W insurance, (v) the payment terms, (vi) matters relating to the definition of knowledge for purposes of the coverage, (vii) matters pertaining to retention and (viii) the concept of materiality scrape. Ashley also explained the process and timing surrounding the quoting and underwriting phases of obtaining such insurance.

III. What U.S. and International M&A Lawyers need to know about Brexit

- Jennifer Muller (Houlihan Lokey, San Francisco, CA) and Daniel Rosenberg (Charles Russell Speechlys LLP, London, UK) co-chaired the panel which was also comprised of Hermann Knott (Luther Law Firm, Cologne, Germany) and Albert Garrofé (Cuatrecasas, Gonçalves Pereira, Barcelona, Spain). Daniel Rosenberg commenced the presentation by providing some background on the current status of the process triggered by the Leave vote in June 2016. For now, it is business as usual in the UK and all EU and other laws in force remain applicable and the UK has a two-year period within which to renegotiate its relationship with the EU. Different models can be considered, such as the Norwegian model, the Swiss model, a customs union type of arrangement or a bespoke model. Some of the foregoing would require the acceptance of a number of items that are unlikely to be acceptable to the leavers. Jennifer Muller then proceeded to a review of the impact of Brexit on M&A activity to date, including the impact on GDP forecasts and exchange rate forecasts. Finally, the panelists reviewed a number of typical deal terms that are of may be affected by Brexit, including (i) the freedom of establishment, (ii) anti-trust and merger control considerations, (iii) governing law, jurisdiction and enforceability of judgment clauses, (iv) material adverse change and force majeur clauses, (v) references to the EU and to English law in agreements and (vi) potential issues relating to insolvency situations.

IV. Subcommittee Website

- Our website at http://apps.americanbar.org/dch/committee.cfm?com=CL560002 contains:
  - Presentation by Marsh on Transactional Risk Insurance – Using Transactional Risk Solutions to Close the Deal.
  - Presentation by Jennifer Muller (Houlihan Lokey, San Francisco, CA) on Brexit Fallout: Macroeconomic and M&A Implications.
  - Details of the Subcommittee’s publications, future meetings, other work-in-progress and other past program materials.

V. Next Meeting

- The Subcommittee’s next meeting will be held on Saturday, January 28 from 10:30 am – 12:00 pm, in connection with the stand-alone meeting of the ABA Business Law Section, Mergers and Acquisitions Committee, in Laguna Beach, California.
The M&A Jurisprudence Subcommittee will meet on Friday, January 27 from 9:00 am – 10:30 am in the Grand Ballroom. 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
- topics under review by the Judicial Interpretations Working Group

A summary of *In re Books A Million* is on page 9 and will be discussed at the Subcommittee meeting and, if appropriate, presented to the full Committee.

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. Our Subcommittee includes:

- 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 in *The Business Lawyer*. The Annual Surveys also are posted in the online M&A Lawyers’ Library, which Committee members can access from the Committee’s home page on the ABA website (http://apps.americanbar.org/dch/committee.cfm?com=CL54000).

- 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 cases and also examining the deeper body of case law. The Working Group produces memoranda summarizing our findings, which are circulated to Subcommittee members and, when finished, posted in the M&A Lawyers’ Library.

- 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 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 M&A Committee members to join our Subcommittee. The 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.

We need cases!

We ask all members of the M&A Committee to send us judicial decisions they think would be of interest to M&A practitioners. Submissions can be sent by e-mail either to Nate Cartmell at nathaniel.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 rely on members to help identify important cases from all jurisdictions, so 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@bradley.com.

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

Michael G. O’Bryan, Subcommittee Chair
Nathaniel M. Cartmell, Chair
Annual Survey Working Group
Frederic L. Smith, Jr., Chair
Judicial Interpretations Working Group
Project Group Chairs:
Rikki L. Bagatell
Library Index Project
Brian S. North
Publication Project
Lisa J. Hedrick
Damages Project
Our last meeting was in Boston, Massachusetts on September 19, 2016. Following our format of prior meetings, our Private Equity Nuts and Bolts series continued with “After the Escrow – Enforcing Claims against a Private Equity Seller After all Escrows and Holdbacks are Extinguished.” Tarik Haskins (Morris Nichols, Arsht & Tunnell, Wilmington, DE) joined me in this presentation to review and discuss the legal ability of a buyer to effectively enforce a claim against a private equity portfolio seller after the seller has been liquidated and the escrows and holdbacks extinguished, as well as how these issues factor into the drafting and negotiation of a purchase agreement. In our Recent Developments in Private Equity M&A segment, Daniel Rosenberg (Charles Russell Speechlys LLP, London, England) discussed “The Effects of Brexit on Private Equity,” and my partner, Reed Balmer (Finn Dixon & Herling, Stamford, CT) discussed “What M&A Lawyers Need to Know about Current Regulatory Issues Facing Private Equity Funds.” In our Investment Banker Series, our Vice-chair, Mireille Fontaine (BCF, Montreal, Quebec) and Dennis White (Verrill Dana LLP, Boston, MA) joined two in-house private equity lawyers – Daniel Weintraub (Audax Group, Boston MA) and Thomas Lough (Berkshire Partners, Boston, MA) – for an enlightening panel discussion on “What Private Equity Firms Really Want From Their M&A Counsel.”

We are scheduled to meet in Laguna Beach, California on Friday, January 27 from 10:30 am – 12:00 pm. Once again, we will try to jam as much content into our meeting as is possible so that the 90 minutes we have to discuss Private Equity M&A can be one of the more entertaining and informative portions of the M&A Committee meetings.

This meeting will proceed somewhat differently than our prior meetings in that the main presentation, which will take up most of our time, will blend elements of Recent Developments, Nuts and Bolts and listening to panels of investment bankers and other non-M&A lawyers provide us with information, and I’m very excited about the presentation. In the over 30 years in which I have been practicing, I don’t know that I have ever seen as fast and important a change in how we do business as private equity M&A attorneys as we have seen with the practice of obtaining representation and warranty insurance in private equity transactions. Literally, within two years, R&W insurance has gone from a tool that we knew was available but was rarely used, to almost the default practice in the sale of PE companies that are being auctioned off by investment bankers. I will be joined on a panel to discuss this hot new topic by Nathaniel Doliner (Carlton Fields, Tampa, FL) – a former M&A Committee Chair, Bill Monat (Willis Towers Watson, Chicago, IL) – an insurance broker, and Michael McElhenney, (Houlihan Lokey, Los Angeles, CA) – an investment banker. In the panel discussion, we hope to: (i) discuss what has now happened in terms of the use of R&W Insurance for private equity deals, and how the market of buyers accepted it so quickly and thoroughly; (ii) have a mock negotiation of certain terms of a purchase agreement by a buyer and seller in a deal where the buyer is obtaining R&W Insurance, and show how the negotiation might vary from a non-insured deal; (iii) have a mock negotiation between the buyer and an insurer as to the terms of the R&W Policy itself; and finally (iv) discuss whether the reliance on R&W insurance is likely to continue, and what other changes to how we negotiate M&A deals it might lead to. We may also reserve some time to discuss any new and interesting cases of interest to Private Equity M&A lawyers and/or to discuss our Subcommittee generally.

As I’ve stated before, I remain interested in YOUR feedback as to how you like the meetings, what you would like to have covered at the meetings and what activities you would like to see our committee perform between meetings. I also would love to hear ideas for programs you would like to be a part of, or developments you would like to present, or even that you would like to speak at a future meeting but you don’t have a particular topic you want to speak about. Please don’t be shy – I promise you that I am not spending too much time between meetings having these discussions with other members.

I look forward to seeing many of you in sunny Laguna Beach. Again, if you are a new member of our Subcommittee and we have not personally met yet, I would love it if you would come up at some point over the weekend and introduce yourself to me as well.

DAVID I. ALBIN. CHAIR
MEMBERSHIP SUBCOMMITTEE

We are pleased to report that the M&A Committee continues to be the largest committee of the Business Law Section, now comprised of 5,033 members, a 7% decrease from August 2016.

The most dramatic increase in membership belongs to the Women in M&A Task Force co-chaired by Jennifer Muller and Rita-Anne O’Neill. The Task Force experienced a whopping 34% jump in numbers, rising from 78 to 139 in a matter of months. Their initiatives, events and topics are geared towards both men and women and we are very proud of what these women have accomplished. If you haven’t had a chance to sit in on one of their meetings, please join them on Friday, January 27 from 2:30 pm – 3:30 pm.

The largest subcommittee continues to be M&A Market Trends led by Hal J. Leibowitz which is down from 2,112 members to 1,776, a 16% decrease from the Annual Meeting. The Private Equity M&A Subcommittee led by David I. Albin is a close second to Market Trends and experienced a 10% bump in membership climbing from 1,532 to 1,710. The third most active subcommittee is the International M&A Subcommittee, which is co-chaired by Freek Jonkhart and Franziska Ruf, saw an almost 12% growth in numbers from 1,013 members to 1,147.

The Task Force on Governance Issues in Business Combinations (co-chaired by Diane H. Frankle, Patricia O. Vella, Lawrence A. Hamermesh and Michael J. Halloran) increased to 372 members (up 17%). Joint Task Force on M&A Litigation (co-chaired by Myron T. Steele and Michael A. Pittenger) increased to 199 members (up 22%) and Task Force on Two-Step Auction (co-chaired by Michael G. O’Bryan and Eric S. Wilensky) increased to 179 members (up 15%).

Here are a few other subcommittees and their membership results as of December 2016:

- Acquisitions of Public Companies From 921 to 1,031 members (+ 11%)
- Technology From 341 to 390 members (+ 12%)
- Membership From 221 to 259 members (+ 14%)
- M&A Dictionary From 663 to 757 members (+12%)

2017 is going to be an exciting year for the committee. We will be launching a few new membership initiatives and we would love your support and participation as we move through them. Please reach out to us with any questions and we look forward to seeing you in Laguna Beach!
The M&A Committee thanks our sponsors.

We could have just relied on deals we'd done in the past, but we chose Bloomberg Law® instead. We quickly identified market standard language, reliable precedent agreements, and the latest news and analysis to draft the perfect terms. By having market-tested options at our fingertips, we were able to get the best outcome for our client. And that… matters. www.bna.com/bloomberglaw
In the time it takes you to read this, Kira could have summarized 100 contracts.

Get back to lawyering.

Faster and more accurate due diligence

Our proprietary machine learning technology is powerful, flexible and easy-to-use. Kira automatically highlights and extracts provisions that are important to you and helps you organize your data for analysis.

Contact us
kirasytems.com
info@kirasytems.com
+1.888.710.3454

For the second year in a row, Duff & Phelps has ranked as #1 provider of fairness provider in the U.S. and globally, according to Thomson Reuters’ “Mergers & Acquisitions Review - Full Year 2016”.

Duff & Phelps is honored to be recognized as the undisputed market leader for fairness opinions. We thank our clients for trusting our independent financial advice. We look forward to continue helping companies make sound decisions in the year ahead.

DUFF & PHELPS
RANKED #1 FOR U.S. AND GLOBAL FAIRNESS OPINIONS IN 2016
The New “John Tales” Blog on DealLawyers.com!

Education by entertainment! The new blog on DealLawyers.com - “John Tales” – will teach you the kinds of things that you don’t learn at conferences, nor in treatises or law firm memos. John Jenkins is a 30-year vet of the deal world & he brings his humorous stories to bear on this new “long-form” blog.

When you check out “John Tales” – located at the top left corner of the DealLawyers.com home page - insert your email address when you click the “Subscribe” link if you want these precious tales pushed out to you!

Bonus! “Broc Tales” is coming to TheCorporateCounsel.net in January!
COMMITTEE MEETING MATERIALS
Dial in information for Committee & Subcommittee Meetings
MONTAGE LAGUNA BEACH  |  LAGUNA BEACH, CA, USA  |  JANUARY 27-28, 2017

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

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

Thursday, January 26, 2017

3:00 pm – 5:00 pm
Meeting Registration

Friday, January 27, 2017

8:00 am – 5:00 pm
Meeting Registration

8:00 am – 10:00 am
Continental Breakfast
***Included in registration fee for registered Meeting Attendees. Guest passes are available for purchase.

9:00 am – 10:30 am
M&A Jurisprudence Subcommittee
Chair: Michael O’Bryan

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

11:00 am – 12:00 pm
M&A Litigation Task Force
Co-chairs: Michael A. Pittenger and Yvette Austin Smith

12:00 pm – 1:00 pm
Buffet Luncheon
***Included in registration fee for registered Meeting Attendees. Guest passes are available for purchase.

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

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

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

22
### Saturday, January 28, 2017

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>8:00 am – 5:00 pm</td>
<td>Meeting Registration</td>
<td>Grand Ballroom</td>
</tr>
<tr>
<td>8:00 am – 10:00 am</td>
<td>Continental Breakfast</td>
<td>Outdoor Courtyard</td>
</tr>
<tr>
<td>9:00 am – 10:30 am</td>
<td>Market Trends Subcommittee</td>
<td>Grand Ballroom</td>
</tr>
<tr>
<td>10:30 am – 12:00 pm</td>
<td>International M&amp;A Subcommittee</td>
<td>Grand Ballroom</td>
</tr>
<tr>
<td>12:00 pm – 1:00 pm</td>
<td>Buffet Luncheon</td>
<td>Studio</td>
</tr>
<tr>
<td>1:00 pm – 2:00 pm</td>
<td>Financial Advisor Disclosure Task Force</td>
<td>Grand Ballroom</td>
</tr>
<tr>
<td>2:00 pm – 3:00 pm</td>
<td>Private Company Model Merger Agreement Task Force</td>
<td>Grand Ballroom</td>
</tr>
<tr>
<td>3:00 pm – 5:30 pm</td>
<td>Mergers and Acquisitions Full Committee Meeting</td>
<td>Grand Ballroom</td>
</tr>
<tr>
<td>7:00 pm – 10:00 pm</td>
<td>Reception &amp; Dinner</td>
<td>Outdoor Courtyard &amp;</td>
</tr>
</tbody>
</table>

***Ticket Required. Buses depart from Main Lobby at 6:45 pm***
CONTINUED FROM PAGE 7

Fraud Exceptions in Non-Reliance Clauses

Wilson Chu. Partner, McDermott Will & Emery LLP: You are right. Thanks, Rick. And thank you, John, for following Broc’s customary age-before-beauty batting order.

I’d like to follow up on Rick’s point about non-reliance disclaimers. Assuming seller successfully negotiated and drafted an ironclad non-reliance disclaimer, how much should buyer insist on three simple words - “except for fraud”?

As you know, fraud is a common exception to the exclusive remedies clause buried deep down in customary indemnification provisions. But does fraud also have a home as an exception to the non-reliance disclaimer?

Let’s start with the running dialogue I’ve had over the years with Glenn West, a friend of mine as well as Joel’s and Rick’s. For the three or so of you in the audience who don’t know who Glenn is, he’s Rick’s partner at the Dallas office of Weil Gotshal, just across the street from me, whose influential writings on topics like consequential damages, sandbagging, and, of course, fraud exceptions have a Strine-ian knack of changing the way we do deals.

Here’s a fun fact. If you want to see Glenn’s head explode, ask him what he thinks about adding a fraud exception to the non-reliance clause. Glenn will expertly school you on the conventional wisdom that a fraud exception has no logical place in this context because it’s completely contrary to the fundamental bargain - that buyer agreed that it is not relying on any representations outside the four corners of the agreement.

Le me offer a contrarian view, using an all-too-common situation in today’s seller’s market, one in which a hot auction boxes buyer into accepting a purchase agreement with a very skinny set of seller-friendly representations on, of course, a ridiculously compressed diligence timeline. When combined with an ironclad non-reliance disclaimer, buyer’s remedies are effectively limited to those skinny representations rather than your usual full metal jacket buyer-friendly representation package. My question - is it fair or reasonable for seller to have the unfettered ability, without recourse, to say anything to induce buyer to enter into an agreement that severely limits buyer’s remedies?

There’s a reason why some people call the non-reliance disclaimer a license to lie. If a buyer can prove the seller fraudulently induced buyer to agree to that non-reliance, shouldn’t it be - and this is my tribute to this crazy election season - a trump card? If you need more convincing, go read RAA Management v. Savage, and then ask if buyer would have fared differently if the agreement had included a fraud exception.

As many of you know, the ubiquitous ABAM&A Deal Points Study, which I started back in 2000 - the turn of the century - does a really good job at spotlighting trends well before they reach the customary practice realm. For our current Private Target Study, we found only one fraud exception to non-reliance clause, a finding so statistically insignificant that we decided not to publish it. On the other hand, the current Public Target Study found that, of the subset of deals with non-reliance clauses, 7% included a fraud exception. That’s statistically relevant enough for you to say, “Hmm.”

Is this a bridge too far on the cranky contrarian scale? I don’t think so.

Here’s an example. Remember way back when conventional wisdom thought that a seller’s “no other representations” representation was just as good as a proper non-reliance disclaimer?

My view was that it didn’t work. Virtually everyone, including some very smart Delaware lawyers, wanted some of whatever I was smoking because they thought I was so wrong. But in February last year, the shoe dropped in FDG Logistics v. A&R Logistics, where a Delaware court held that a “no other representations” representation was not an effective disclaimer.

My takeaway here - if you’re a buyer who must cave to a non-reliance disclaimer, try insisting on a fraud exception. It may be a minority view today, but tomorrow, you may look prescient. In the meantime, you’re going to enjoy the spectacle of exploding heads.

Over to you, Joel.

Greenberg: Thanks, Wilson. Before we go on to the next point, I want to note that what you’re saying is that if you wind up as a buyer agreeing to a non-reliance clause, you can get a second bite of the same apple in the negotiation by saying, “I’ll give you your non-reliance clause, but I’m going to neuter it by adding a fraud exception,” and assume that that’s almost as good as not having the non-reliance clause there in the first place.

Chu: Yes, Joel. I think you’re right.

Greenberg: People negotiate agreements that way all the time on both sides. You try to get at the same point multiple ways.

Negotiating Acquisitions with Antitrust Risk

Greenberg: I’m going to talk about a slightly different subject now - a topic that runs through three or four different provisions of a typical acquisition agreement. And that is dealing with antitrust risk in a transaction where there is a meaningful risk of a substantive challenge by the U.S. or foreign antitrust authorities.

Those provisions find their way into a series of places. The first and most obvious is there will a set of covenants in the agreement that deal with how the parties address the antitrust authorities and challenges to the deal. Those provisions will, among other things, specify the level of efforts that the buyer has to engage in to get clearance. A buyer’s draft will often start with something like “commercially reasonable” efforts. Sellers will push for “best efforts” to try to get the buyer to commit to a greater degree of effort.

The covenant will then get more granular and address whether
the buyer is or is not obliged to actually litigate with the antitrust authorities. In other words, do the required efforts end when you fail to prevail administratively? Or do you have to be prepared to go to court, which can be a protracted and very expensive process when you’re litigating an antitrust case with the United States of America.

Beyond that will be the question of what divestiture obligations the buyer has committed to. This can be a very tricky topic, because you can be looking at a situation where the pre-deal analysis suggests that this transaction may be able to get clearance only if the combined company would divest a particular asset. A seller who’s anxious to get deal certainty is going to push very hard for the buyer to commit to make such a divestiture. The buyer initially will probably take the position that it wants an express carveout from its efforts covenant to the effect that it does not have to make divestitures. This is often a very contentious negotiation.

There is often a question of how to define the required divestiture, if there is going to be one. For example, an agreement could say that the buyer has to make any divestiture that would not have the effect of materially impairing the value of the acquisition to the buyer. Or it could say that the buyer has to make any divestiture that does not have a material adverse effect on the combined company, in an effort to invoke the very strict standards of at least the Delaware case law of when something has reached a level of severity sufficient to constitute a material adverse effect.

Some agreements, instead of these subjective approaches, specify very objective criteria - e.g., the buyer must be willing to divest a specified asset, or to divest assets that generate no more than a specified amount of EBITDA. In some industries, potential divestitures may be defined differently. In an airline merger, for example, the agreement might say that the parties have to be willing to divest a certain number of landing slots at a particular airport and associated gates.

Whenever one negotiates divestiture covenants, some lawyer on the transaction will raise the concern that they are giving the agencies a roadmap as to what remedy they can get just for asking. That’s a real concern, because you have to file the deal documents with the agencies under Hart-Scott-Rodino. I don’t think it works to put such an agreement in a side letter and not file it; that results in an incomplete filing. So by virtue of a complete HSR filing, you will have given the agencies a roadmap.

Now, any lawyer who has worked in an antitrust enforcement agency will tell you that the roadmap doesn’t matter, because the agencies don’t bring cases just because the parties have signaled their willingness to divest at a certain level. The agency staff has to justify bringing the case on the merits internally without regard to those provisions. I accept that. But I have to believe that, as a matter of basic psychology and human nature, in the close case where the staff of the antitrust division is deciding whether to bring a case against a merger seeking divestiture, it probably influences their thinking, at least a little bit, that they know from reading the merger agreement that if they bring the case, the parties are going to fold, because they’ve contractually agreed to do so.

Beyond the covenants, you have to make sure that the rest of the agreement is in sync. For example, in the closing conditions, should there be a litigation out, or is there simply an out for an injunction? If you’ve agreed that the parties are obligated to litigate the matter to conclusion with the antitrust authorities, it’s appropriate to say that the presence and pendency of that litigation by itself does not cause a condition to fail.

On the other hand, if the business agreement is that there is no need to litigate, then it’s logical to say that if there is a pending antitrust litigation at the time set for closing, the parties are excused from closing. Similarly, the “drop dead” date needs to be negotiated with a view to allowing enough time for whatever process is contemplated by the parties to play its way to the end.

Finally, there is a totally different kind of contractual solution to sharing antitrust risk. Some agreements, instead of, or in addition to, defining levels of efforts and levels of divestiture, provide for a financial remedy, a so-called reverse breakup fee, where the buyer will agree that if the deal fails because of an antitrust challenge, for example, it will pay the target company a defined fee. In order of magnitude, that fee is often 6-8% of the deal value, sometimes more, sometimes less.

The breakup fee is an attempt to give the target some compensation for having gone through the process, only to have the transaction fail. It also provides some assurance to a target that the buyer won’t just walk away from a challenge, because it’s going to be very expensive for it to do so.

You also will see reverse breakup fees very commonly utilized when there are competing bidders for the same property, and one presents more antitrust risk than the other. The buyer presenting the greater antitrust risk may very well say that the way they can compensate the target and encourage the target to take their deal is to agree to pay a reverse breakup fee.

Rick, I think you’re up with respect to indemnification.

The Word “Indemnify” May Be Ambiguous

Climan: Yes. Thank you, Joel. As M&A lawyers, we tend to use a fair amount of jargon, both when we speak to each other and when we draft legal documents. We throw around a fair number of terms that have specialized meanings. The problem is that not all people, and more importantly not all judges and juries, can be counted on to assign the same meanings to these terms as we do. So for my next nugget, I’d like to shine the spotlight on a term that commonly appears in definitive agreements for acquisitions of privately held target companies. And that term is “indemnify.”

The vast majority of agreements for the acquisition of a privately held company contain so-called “indemnification” provisions, which allow the buyer to get some money back after the closing if the sellers’ representations turn out to have been inaccurate. The typical indemnification provision says that the sellers will indemnify the buyer against all losses and damages the buyer incurs as result of inaccurate representations of the sellers. That’s the word we use, “indemnify.”

Many, if not most, M&A lawyers would tell you that the word
“indemnify,” when used in that context, means essentially the same thing as the word “pay.” What they’re intending to say when they use the term indemnify is that the sellers will pay to the buyer the amount of all losses and damages suffered as a result of inaccuracies in the sellers’ representations.

Let’s take a quick example. If the sellers make a representation in the acquisition agreement stating that all the equipment in the target company’s factories is in good and safe condition, and if that representation turns out to be inaccurate because some of the equipment was in fact in horribly bad and dangerous condition, and that bad equipment explodes and turns into a pile of rubble shortly after the closing, we expect the buyer to be made whole under the indemnification provision. So if it costs the buyer, say, $10 million to buy new equipment to replace the equipment destroyed in the explosion, then we expect the buyer to be able to recover that $10 million under a standard indemnification clause.

But not so fast. If all the buyer included in the agreement was the naked term “indemnify,” it’s not at all clear that the buyer can recover that $10 million. Why is that? Because some people and, more importantly, some courts construe the term “indemnify” to cover only third-party claims, such as claims by target company employees who got hurt when the machine exploded, but not first-party damages, like the cost of replacing some now worthless equipment.

At the very least, these courts consider the term indemnify ambiguous, as a relatively recent California case, the Zalkind case, decided in 2011, suggests. I suggest that all of you in the audience take a look at that case. It might scare you a little.

So what’s the practice pointer here for M&A practitioners who represent buyers? When you’re representing a buyer, do not rely on the naked term “indemnify.” Make it crystal clear in the agreement that first-party damages as well as third-party damages are recoverable.

Let me give you some language that makes it clear that both third-party and first-party damages are recoverable by the buyer: “The sellers shall indemnify the buyer against and shall pay, compensate, and reimburse the buyer for any damages suffered by the buyer as a result of breaches of the sellers’ representations regardless of whether those damages relate to a third-party claim.” This is the type of verbiage that a buyer’s lawyer should use. If you don’t word your indemnification provision this way when you represent the buyer, you may be asking for trouble.

Over to you, Wilson. Tell us about placeholder claims.

**Placeholder Claims**

**Chu:** Thanks, Rick. Let me start out this way. Picture this - things are going well post-closing until your client, the buyer, receives a letter from target’s major customer. Let’s call that customer Godzilla. The letter says that Godzilla now suspects that the target [now owned by buyer] may have been overcharging it before and after the closing. Of course, that would be a practice in breach of target’s contract with Godzilla, which is a material contract.

Godzilla’s little soft-touch love letter doesn’t really threaten a lawsuit. Instead, it seeks target’s cooperation to investigate a possible problem. But if it’s true, target would be in material breach of a key provision of its contract with Godzilla. To make matters worse, target has included the same provision in its contracts with other customers.

“No sweat,” you tell the buyer, “we’ll just lob over an indemnification claim for breach of the Stock Purchase Agreement’s all-encompassing material contract representation to the effect that buyer may incur losses as a result of Godzilla’s possible claim, and significant possible losses may also be incurred because of possible claims by other customers in the same boat as Godzilla. And no worries about the Stock Purchase Agreement’s survival period expiring on 12/31, because a broad placeholder notice will preserve buyer’s claims. The escrow agent will hold the money until the problems have been resolved after expiration of the survival period.

Now, to your dismay, seller points out that, by its terms, the Stock Purchase Agreement is silent about buyer’s ability to bring a so-called placeholder claim that essentially alleges that facts have come to the buyer’s attention that may result in a future breach. Instead, according to the seller, to properly make an indemnification claim under the Stock Purchase Agreement, the buyer must allege an actual breach of the representation, not just a mere possibility that there may be a breach.

If my long-winded set-up has you sweating about survival of claims, let me direct you to three relatively recent cases that are worth reading: IMx Information Management Solutions v. Multiplan, C.A. No. 7786-VCP (Del. Ch. Ct. March 27, 2014); Albert A. Gore v. Al Jazeera America Holdings, C. A. No. 10040-VCG (Del. Ch. Ct. Aug. 13, 2015); and Prairie Capital III, LP v. Double E Holding Corp., C. A. No. 10127-VCL (Del. Ch. Ct. Nov. 24, 2015). The upshot to these cases that I see is that placeholder claims which are, as defined by the Gore case, a demand for indemnification that does not arise from a hard third-party demand made during the escrow period, are hardly no-brainers.

John’s going to give me the hook if I try to fully unpack the nuanced challenges of a placeholder claim. So let me just focus on three tips.

One, if you want the ability to bring a placeholder claim, then say so and say it clearly. For example, try saying something like, “a representation survives to the extent a timely claim notice is given in good faith based on facts reasonably expected to establish a valid claim,” or maybe something like, “indemnifiable losses include those that buyer expects in good faith that it could reasonably be expected to incur.”

Number two, as always, words matter. Words like “may incur” really do mean something different from “will incur,” especially in the placeholder claim context.

And number three, take care to clearly define what constitutes an indemnifiable claim, and especially allow for the possibility of third-party claims when the survival clock is ticking or when Godzilla is about to go on the rampage. For example, instead of
the plain-vanilla indemnification for a breach of representation, how about seller indemnifying for any third-party claims that, if true, would constitute a breach of the representation? Or simply language like, “Seller indemnifies for all third-party claims”? If you’re on the buy side, a placeholder claim is a beautiful thing, if you know what to ask for, both before and after closing.

Joel, over to you.

**Sandbagging - Silence Is Not Golden**

**Greenberg:** Thanks, Wilson. My next nugget relates to a topic that sellers’ lawyers tend to refer to as “sandbagging,” and buyers’ lawyers tend to refer to as “the benefit of the bargain.” What it involves is a very simple fact pattern. Assume that, in the definitive acquisition agreement, a seller has made a representation as to the absence of indebtedness at the target company. Following the closing, buyer brings a claim alleging that there was indebtedness, the target company had to pay it, and the buyer and the target company were clearly damaged by the amount of the debt.

There is no question that there has been a breach of the representation. There is no question that the indebtedness was not on the closing schedule. The key question in this situation is - what happens if the buyer finds out about this indebtedness prior to the closing? Can it simply remain silent and, as a seller would say, just “lie in wait” and “sandbag,” by bringing the claim after the closing? Or is it required to invoke its closing condition as to the accuracy of the reps and say it wants an adjustment to the price now, otherwise it won’t pursue the acquisition? If the latter is the case, if the buyer does close, it has effectively waived the claim and can't bring it.

Sellers will often try to include in their forms of agreement a so-called “anti-sandbagging” clause, saying that it is a defense to a claim for indemnification if the buyer knew of the facts giving rise to the indemnifiable loss prior to the closing. Buyers will in turn often seek to include a so-called “pro-sandbagging” or “benefit of the bargain” clause, saying that the fact that the buyer knew or should have known about a breach of a representation is irrelevant to the indemnification claim, which can be brought regardless of the buyer’s knowledge.

It’s perhaps an over-generalization, but I believe the current state of the law is that, in most U.S. jurisdictions, a properly-drafted clause in either direction will be given contractual effect. A good anti-sandbagging clause will operate to cut off a claim, and a good pro-sandbag or benefit of the bargain clause will operate to preserve the claim, with perhaps some ambiguity in the Eighth Circuit as a result of a fairly old decision called *Hendricks v. Callahan*, 972 F.2d 190 (8th Cir. 1992).

If you look at the statistics in the Deal Points Study that Wilson referred to earlier, where the ABA Mergers & Acquisitions Committee has studied publicly filed agreements for the acquisition of private companies, you would find that the presence or absence of these provisions breaks down into three categories. Anti-sandbagging provisions - provisions that deny the claim if the buyer had knowledge before the closing - appear in approximately 9% of the transactions. Pro-sandbagging or benefit-of-the-bargain provisions appear in roughly 35% of the agreements.

Simple arithmetic will tell you that the most prevalent treatment of this issue is to go silent and to not say anything in the agreement as to whether or not knowledge possessed by the buyer prior to the closing is a defense to a claim. I find that to be a very odd result. This is a real issue which has major business and economic effect, both on the merits of a claim and the fact that an anti-sandbagging provision or similar legal principle that says that knowledge is a defense, any claim for indemnification will automatically be met by a defense that the buyer knew about it. Of course, the seller would seek to establish that knowledge by appropriate discovery which turns even a clear breach into a factual dispute in litigation. So going silent means basically ignoring a very significant issue. Yet according to the Deal Points Study, it happens in more than half the agreements.

I think in some cases, the reason is that counsel doesn’t fully understand what it takes to write a good benefit-of-the-bargain or pro-sandbagging provision. You will see provisions in agreements that say that the buyer’s investigation is not relevant in determining its ability to bring a post-closing claim, and don’t address knowledge obtained in the investigation. We wouldn’t count that as a pro-sandbagging clause.

I also think that the agreement sometimes is silent on this issue because the lawyers representing one or both of the parties have a perhaps overly optimistic view as to the clarity of the law of the jurisdiction in which they’re making the deal. For example, New York is a jurisdiction in which there are a fair number of pro-sandbagging, benefit-of-the-bargain decisions in the courts. In fact, the seminal case on this issue, *CBS, Inc. v. Ziff-Davis*, 75 N.Y.2d 496 (N.Y. 1990) was decided by the New York Court of Appeals. This decision holds that the proper analysis of a claim for indemnity is not whether the buyer relied on the accuracy of the facts represented to it, but whether it relied on the contractual promise to make good through an indemnity if the representation was untrue.

I know a number of people who will tell you that the New York law is that silence is pro-sandbagging. Unfortunately, it’s not quite that clear. In fact, New York law recognizes an exception from the general rule that pre-closing knowledge is not a defense to a claim for indemnity, knowledge is a defense if the source of the information that tells the buyer that the representation is untrue is the seller.

The source of the information may be very clear if the seller simply shows up at the closing and says, “Before you close I want to tell you about this variation from the representations,” or even puts the disclosure in the closing certificate. It’s not quite as clear that the seller was the source of the information if something came up during the diligence process, for example if the source was something the seller said in the diligence presentation. Consequently, I think the buyer who relies on the underlying law to function as a pro-sandbagging provision makes a serious mistake. That’s because the first thing you’re going to have to do is to litigate what the underlying law is and, in New York for example, you’re not necessarily going to like
the result, since you will then need to litigate the source of the information.

The relatively recent decision of the Southern District, Powers v. Stanley Block & Decker, 137 F. Supp. 3d 358 (S.D.N.Y. 2015), the court held New York law to be that information that the buyer acquired from the sellers is a defense to an indemnity claim unless there's a properly worded pro-sandbagging clause, something along the lines that the right to indemnification or other post-closing remedy based on a breach of a representation or a warranty shall not be affected by any knowledge acquired or capable of having been acquired by the buyer at any time, whether prior to or after the execution or delivery of the agreement or the closing. In that case, the court gave effect to a properly drafted pro-sandbagging clause.

I suggest to you that if you care about this issue as a buyer - and you should care about it - silence in this area is not a satisfactory solution. This is an issue worth arguing about and getting clear in the contract.

Rick, you have another indemnity topic, I believe.

The Word "Survive" May Be Ambiguous

Climan: Yes, I do. In my last nugget I explained why the commonly used term “indemnify” could be ambiguous when used in the M&A context. I'd like to talk now about another potentially ambiguous term, and that's the term "survive."

“Survive” is also a word that appears in many agreements for the acquisition of a privately held company. Unlike in a public company acquisition, where the target’s representations die at the closing, in a private company acquisition, the representations survive the closing and provide the basis for the buyer's post-closing indemnification remedy, which we've already talked about.

One of the most hotly negotiated issues for the parties is how long these representations stay in effect or, more precisely, how long the buyer has to assert post-closing indemnification claims for breaches of these representations. I’d venture to say that when most practitioners insert verbiage into the agreement specifying how long the sellers’ representations survive, that is exactly what they intend to address. They intend to establish a contractual statute of limitations for bringing post-closing indemnification claims.

So when they say the sellers’ representations will survive the closing for one year, what they mean is that the buyer cannot validly make an indemnification claim against the sellers more than a year after the closing based on inaccuracies in the sellers’ representations. But take a look at the Western Filter decision, which is a Ninth Circuit decision from less than a decade ago, holding that language to be ambiguous.

There's a lesson here, particularly for M&A lawyers who represent sellers. When you're trying to establish a contractual statute of limitations, do it clearly. Do not rely on the naked term “survive,” which can be inherently ambiguous. Say something more than simply, “The sellers' reps will survive for a year.” Gild the lily.

Once again let me read you the type of language that you should be using on the sell side: “The parties, intending to contractually shorten the applicable statute of limitations, agree that the target company’s representations will expire on the first anniversary of the closing date and that all liabilities of the sellers, and all remedies exercisable by the buyer, with respect to those representations will terminate on that first anniversary.” That is the way you should be drafting your survival clause if you represent the sellers.

Wilson, you’re next. Educate us on attorney-client privilege carveouts.

Attorney-Client Privilege Carveouts

Chu: I love that term “gilding the lily,” Rick. My next nugget, like Rick said, is about negotiating the attorney-client privilege carveout. In its late 2013 ruling that the attorney-client privilege passes in a Delaware law merger from the acquired corporation to the surviving corporation, the Great Hill court noted that concerned parties can always contractually carve out premerger attorney-client privileged communications from assets transferred to the surviving corporation.

Since that decision, the attorney-client privilege carveout has been all the rage. The carveout, which is usually buried way back in the merger agreement, goes something like this: “all communications between sellers’ or target’s counsel, on one hand, and sellers and target, on the other, regarding the negotiation, documentation, and consummation of the deal will be deemed to be attorney-client privileged, and post-closing will be owned by and controlled by seller.”

Way back in 2014 and 2015, when these carveouts began proliferating, the typical response by buyer’s counsel was, “Great Hill says that the parties can do it, so what’s the harm?” In my opinion, plenty. For today, let’s think about this one client retention example. If, after closing, buyer stumbles on to the smoking gun e-mail conclusively proving that seller defrauded buyer, who wants to be the lawyer on buyer’s legal team who tells the buyer’s general counsel that buyer cannot use that e-mail because it’s a privileged communication that we happened to give away simply because everyone was doing it?

Of course, there are many other substantive, procedural, and practical considerations to think about when negotiating the carveout. For example, do you treat communications differently when it’s between target’s regular company counsel versus target’s special acquisition counsel? Who gets access to the communications that are relevant to post-closing litigation with third parties? Should buyer impose restrictions on seller’s ability to disclose privileged communications with third parties?

One thing is certain - the trend is toward more pushback by more thoughtful buyers and their counsel. To me, the simplest and cleanest pushback for buyer is just to say, “No.” or maybe, “No thanks,” just to be nice. Why should buyer give away an important asset that it paid real money for and that Delaware law says buyer gets by default? By the way, Joel can always tell you about the default rule being different in New York.

If seller is so concerned about being able to communicate fully,
frankly, and freely with its counsel, then maybe sellers should have engaged separate counsel rather than allowing the more common arrangement where sellers’ counsel acts both for target and the selling stockholders.

But what if it’s a hot auction and buyer doesn’t have the luxury of saying, “No way”? If buyer had to give something on this carveout, what would it be?

To help think through the different options that a buyer could offer up to show movement without giving the farm away, I cooked up a carveout cheat sheet. It’s essentially a negotiation continuum with seller’s wish list positions on one end and the most buyer-friendly positions on the other end. My cheat sheet is posted under “Course Materials” on the page where you accessed this webcast.

While there are many issues to work through, the cheat sheet focuses on three key issues. One, what communications are covered? Only communications related to the deal, i.e. deal communications, or any and all communications between the client and its counsel? Second, who controls the privilege, for example, when litigating third-party claims or responding to government subpoenas? And third, who has access to the privileged communications - the buyer only or do you want a common interest agreement with equal rights and access subject to some restrictions against the parties’ use of the privileged communications against each other? You can even try a “my server/your server” approach, where seller keeps all the communications on seller’s and its counsel’s servers, while buyer keeps all communications on target servers.

The clear trend among sophisticated parties and their counsel is that that attorney-client privilege carveout is no longer a binary, “in or out” issue. There’s much more to unpack when “just say no” is not an option.

Lastly, remember that this carveout is often the last provision in an agreement, just before the “In witness whereof.” When negotiating that provision, my tip is to be sure to take a seventh-inning stretch. You’re going to be tired. And bring a good litigator in as your relief pitcher.

Joel, over to you for another twist on privilege.

Greenberg: Thanks, Wilson. Before I talk about the second privilege topic, I have to observe that I don’t think it’s at all a stretch for sellers to say that they want to preserve the privilege with the counsel representing the sellers and the target company in the deal, whether it’s special deal counsel or historic counsel, and not have the privilege waived on the closing simply because counsel represented the target company as well as the sellers. In most cases it’s going to be very hard to unpack what privilege belongs to the target company and what privilege belongs to the sellers. For example, all the data that goes into defining the reps and the disclosure schedules will be coming from the target company. So to say that it’s almost the natural rule that the buyer should be able to rummage through all those communications with counsel after the closing is one that I find a little bit troublesome.

Certainly, when I’m representing sellers, I tend to say this provision is definitely worth focusing on. It isn’t binary, but it is also one which I think the sellers have a pretty good case.

Climan: Joel, I agree with you on that point. Wilson, I would say that in most cases the notion of having separate counsel for the sellers as a group and for the target company is just not practical in today’s world.

Chu: We’ve been involved with cases where unpacking this crazy thing after giving it over to seller is just a tremendous mess. My point here is that people should really think twice about knee jerking yes or no on this. You want to give it some thoughtful consideration with a litigator at your side.

Greenberg: And that’s a proposition that’s hard to argue with.

Diligence and the Attorney-Client Privilege

Greenberg: The second privilege issue comes slightly earlier in the process, not after the closing but during the due diligence process.

It addresses two kinds of issues that often arise as the parties work toward an agreement. One is some kind of legal problem at the target company that the buyer needs to understand for purposes of its diligence - for example, a pending governmental investigation or the validity of a patent-related private lawsuit - where there has been a history of target company counsel advising the target company on that matter. Or two, there is a legal issue arising out of the transaction that the parties want to coordinate. Maybe they are trying to decide whether this transaction will violate the rights of a third party or will require a certain kind of regulatory clearance. In any event, they wish to coordinate their legal analysis.

Whatever a situation like that comes up, at some point a buyer is going to say that they want to talk to the target’s litigation counsel or regulatory counsel, so they can analyze the issue. They may say that they recognize that this kind of information may be privileged and suggest a so-called “common interest agreement” or “joint defense agreement,” under which the parties agree that certain information is disclosed for purposes of pursuing the parties’ common legal interest and disclosure is therefore not a waiver of privilege.

At least in my practice, there’s always been doubt as to how effective this technique is, or whether the privilege is lost by disclosure. Nevertheless, people often enter into these so-called common interest or joint defense agreements.

Earlier this year, the New York Court of Appeals, which is the highest court in New York, decided to bring some unfortunate clarity to the situation. The case was one involving Bank of America’s acquisition of Countrywide - Ambac Assurance Corp. v. Countrywide Home Loans (New York 2016). A third-party plaintiff wanted access to privileged communications which had been shared in the course of the diligence and planning process under a carefully-drafted common interest agreement. The third party asserted that the privilege was nevertheless waived when Countrywide disclosed the information to Bank of America, which subsequently acquired Countrywide.
The Court of Appeals, after some historic analysis of the common interest exception, held that the common interest exception to privilege waiver only applies when the common interest is the defense, essentially as co-defendants, of a pending or reasonably anticipated litigation. Economic common interest is not sufficient. The fact that the party to whom the information is disclosed will shortly own the company that’s the subject of a claim and will therefore bear the economic risks of the matter is not sufficient.

In essence, the court took the world back to the traditional common law view of the privilege waiver. It noted that the common interest exception to waiver was intended originally only for common criminal defendants in a single proceeding, and that the great liberalization in New York had been to extend it to common defendants in civil litigation. The court wasn’t prepared to go any further than that, notwithstanding that fact that, as it recognized in its opinion, quite a number of jurisdictions take a more liberal view.

What does this mean as a practical matter if you’re negotiating acquisitions? Can you avoid the problem simply by selecting a governing law for your agreement other than New York and a forum for disputes other than New York?

The unfortunate fact is you cannot. Privilege is an evidentiary rule as to which the governing law is not entirely clear. It may be the law of the forum, or the law of some other jurisdiction that the forum court determines has a greater interest in the matter or as to which the parties reasonably relied.

The case in which the waiver is going to be asserted isn’t likely to be a case under the acquisition agreement, or a case in which the acquisition agreement’s venue provisions or choice of forum provisions control. It’s going to be, as was the case in Countrywide, a third-party claim, whether a governmental claim or a private claim. If that claim is brought in New York, the court may well apply the Ambac decision.

There are a couple of things you can do to reduce risk. One, if this is a diligence issue and maintaining the privilege is important, try to recreate the legal advice. If the contingency you’re trying to examine is a governmental investigation, provide another expert regulatory counsel retained by the buyer all the non-privileged information that’s been generated in the course of the matter - all the communications with the government, all the facts provided by the company to its counsel - and let that counsel come up with its own view.

Obviously, this approach has the potential to be very expensive and time-consuming. It may be, in the case of a longstanding matter, totally impractical. But it may be an alternative.

Another option is available if the issue involved is one that arises from the particular transaction, such as possible violation of the rights of a third party or the antitrust laws. The Court of Appeals expressly recognized in its Ambac opinion that the privilege is protected if the parties engage common counsel to review the matter. You could engage a neutral law firm to analyze, for example, the transaction from an antitrust perspective. That law firm can collect information from both parties, write a report that analyzes the transaction and give it to both parties. The parties can then negotiate the deal on the basis of the conclusions that are reached in that report.

That’s perhaps somewhat more practical than recreating a new analysis of an old issue. It’s still expensive and introduces a third party. But sometimes it’s appropriate. In fact, even before the Ambac decision, it was a course of action I had taken a couple of times in transactions where the parties wanted to have, for both of their benefits, a thorough analysis of the antitrust aspects of a proposed transaction. They wanted to make sure they were both receiving the same advice so they can have a business discussion based on it.

So there are things you can do to mitigate the effect of the Ambac decision. But it’s not one that you can draft around or opt out of. I think it’s critically important for any deal lawyer to know that these common interest agreements don’t necessarily work to preserve privilege, and that there’s a real issue if the parties to the agreement are subject to being sued in New York in some unrelated matter.

Rick, on to you. I think you’re going to talk about consequential damages.

**Consequential Damage Exclusions**

Climan: That’s right. My final nugget today relates to a provision I see sellers requesting frequently in acquisitions of privately held companies. That provision is an express exclusion of so-called “consequential damages” from the damages that the buyer is entitled to recover from the sellers under the post-closing indemnification provisions that we’ve been talking about today.

The sellers sometimes attempt to justify this requested exclusion of consequential damages by pointing out that exclusions or waivers of consequential damages are customary in many other types of commercial agreements. But when I’m representing the buyer, I steadfastly resist the sellers’ request for a consequential damages exclusion, for a number of reasons.

First, I’m quick to point out that in other types of agreements where consequential damages exclusions are commonplace - for example, in agreements contemplating the performance of consulting or other services - there could be a reasonable justification for excluding consequential damages. In the consulting contract example, the potential damages to which the consultant would be exposed if the consultant were liable for consequential damages could be disproportionately high when compared to the relatively small amount of the fees that the consultant receives for its services. So there’s a certain fairness to limiting the consultant’s indemnification exposure in that scenario.

But that is not a persuasive rationale in the M&A context, where the buyer is presumably paying and the sellers are receiving a full price for the target company’s business and for the related representations and warranties of the sellers. And because U.S. courts award consequential damages, I’m really not sure how the sellers can justify artificially limiting the damages that a
Second, sometimes consequential damages are the only meaningful damages associated with the breach of the sellers’ representations. Take the case where the sellers represent in the acquisition agreement that the target company has all governmental permits necessary to operate its business. Suppose in fact the target company is missing a key permit and, right after the closing, the relevant governmental authority comes in and shuts down the target company’s factory for six months while the process of obtaining that missing permit runs its course. And suppose the fee payable for the needed permit is $10,000, while the lost profits and other damages to the buyer associated with the plant shutdown are $15 million. It seems inappropriate that the sellers should be able to get away with paying only $10,000 by characterizing the other damages - the lost profits - as unrecoverable consequential damages.

Finally, I’m always reluctant to agree to an exclusion that I don’t fully understand. There appears to be a fair amount of confusion and inconsistency in the jurisprudence addressing what constitutes consequential damages and what doesn’t. A couple of years ago, in the Biotronic case, New York’s highest court, the Court of Appeals, split 4-3 on the question of whether lost profits constitute consequential damages. And in a Delaware case in 2011, the Pharmaceutical Product Development case, then Vice-Chancellor and now Chief Justice Leo Strine said, “The laundry list of precluded damages might have been put in the merger agreement by lawyers who themselves were unclear on what those terms actually mean. This is not surprising, in light of the amorphous state of the law and its confusing efforts to clearly delineate the difference between general damages on the one hand and consequential or special damages on the other.”

I should point out that at least one recent study, the Private Target M&A Deal Points Study prepared by the M&A Committee of the American Bar Association’s Section of Business Law, reports that sellers succeed in winning a consequential damages exclusion about half the time. But even putting aside my strong aversion to the practice of basing negotiating positions on market studies rather than logic, I feel compelled to point out that those study results may be somewhat biased.

That Deal Points Study only surveys deals for which the acquisition agreements have been filed with the SEC. The publicly traded buyers that file their acquisition agreements with the SEC tend to be smaller buyers, because the private company acquisitions that bigger buyers do tend not to be material enough to those buyers to require filing the agreements with the SEC. When you look at statistics relating to deals done by larger buyers, you find that consequential damages exclusions are not so common. Anyone who would like to see some preliminary statistics that we’ve started to compile on this should feel free to reach out to me.

The bottom line, in my view, is that it’s a bad idea for a buyer to agree to exclude consequential damages from the damages it can recover from the sellers.

Wilson, I think you’re going to wrap things up. What do you have for us?