FROM THE CHAIR  Scott T. Whittaker

I hope that everyone had a great summer, properly balanced between work and fun. With summer officially behind us, I also hope everyone is ready to gather in Chicago for what promises to be very productive M&A Committee meetings, to be held on September 15 and 16 as part of the ABA Business Section Annual Meeting.

Our subcommittees and task forces will meet throughout the day on Friday and Saturday at the Sheraton Grand Chicago, 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 meeting: U.S. Bank and Doxly. On behalf of the Committee, THANK YOU!

In addition to our substantive subcommittee and task force meetings, the M&A Committee will present three CLE programs and co-sponsor several others. For the details please see George Taylor’s Programs Committee write-up in this issue of Deal Points. Please try to support your fellow M&A Committee members, while you earn CLE credit and stay abreast of important developments affecting your practice, by attending as many of our programs as you can.

Some additional highlights and reminders are:

**Technology Subcommittee to Launch in Chicago**

Our newly expanded Technology Subcommittee will meet for the first time in Chicago. In addition to its traditional role of administering the M&A Committee website, the Technology Subcommittee will now cover the use of technology by lawyers and others in M&A transactions. If you are interested in becoming involved, or just learning about this rapidly growing aspect of M&A practice, please join Daniel Rosenberg, Technology Committee Chair, and Vice-chair Tom Romer, at their inaugural meeting Friday afternoon.

**Market Trends Subcommittee – Leadership Change and New Study Launched**

Hal Leibowitz will conclude his tenure as Chair of the Market Trends Subcommittee following the Chicago meeting. Starting at our stand-alone meeting in Laguna Beach, Claudia Simon will step up from her Vice-chair position and become Chair. The Market Trends Subcommittee is our largest subcommittee. Its annual Deal Points Studies, which have become an integral part of M&A practice, take a lot of work by a lot of dedicated subcommittee members. Hal has done a remarkable job as Chair of the Market Trends Subcommittee. Please join me in thanking Hal for his service as Chair. We look forward to Hal’s continuing involvement in the M&A Committee, and to Claudia’s taking the baton as Chair in Laguna Beach.

Also of special note regarding the Market Trends Subcommittee is its recently released new study, titled "Impact of 'Buyer Power Ratio' on Selected M&A Deal Terms." This is a joint study, conducted in partnership with SRS Acquiom. The joint study surveys M&A transactions involving publicly traded buyers and privately held target companies, but takes a new approach to answering the question "what's market?" by adding a newly created data point to the analysis, called the "buyer power ratio." The new joint study is accessible by M&A Committee members on our Committee webpage on the ABA website. Our special thanks for this important new study goes to Rick Climan, study founder and co-chair, and Paul Koenig, study co-chair and CEO of SRS Acquiom.

**Joint Private Equity M&A Subcommittee**

Our Private Equity M&A Subcommittee will also undergo an evolution starting in Chicago. To mitigate overlap and avoid confusion, the Private Equity M&A Subcommittee will become a joint subcommittee of the M&A Committee and the Private Equity and Venture Capital Committee. M&A Committee members will see no change as a result of this transformation, as the joint subcommittee will continue to be chaired by David Albin, and will continue to meet in connection with the M&A Committee meetings. We hope to welcome many new subcommittee members from the Private Equity and Venture Capital Committee, and we look forward to collaborating with that committee on private equity M&A programs, content for subcommittee meetings, and possibly joint publications.

**Women in M&A Reception and Scholarship Recipients**

Our Women in M&A Task Force will co-sponsor the Women in Law Reception in Chicago, which will take place Friday from 5:00 pm – 6:00 pm in the Sheraton. This will also be our second M&A Committee meeting where we will have law students attending on an all-expenses paid basis, through our Women in M&A law student scholarship program. Please try to attend the reception, and try to meet and welcome our
FROM THE EDITOR  Ryan D. Thomas

“The most fertile source of insight is hindsight.”  
– Morris Kline

In this issue of Deal Points, our feature articles are rich with insight from practitioners across the country. Many thanks to each of our contributors, especially our feature article authors.

As always, please let us know if you would like to submit an article for a future issue. I look forward to seeing everyone in the Windy City.

What’s New & Trending .......................................................................................................................................................... 3

Feature Articles
Canadian M&A Activity Continues to Grow as Securities Regulators Remain Focused on Protecting Minority Shareholders ........................................................................................................ 6
When Merger Review Turns Criminal ........................................................................................................................ 10
Fiduciary Duty and Drag-Along Pitfalls and Drafting Tips .................................................................................. 12

Task Force Reports
Joint Task Force on Governance Issues Arising In Business Combination Transactions .................. 14
Task Force on Revised Model Asset Purchase Agreement .............................................................................. 14
Task Force on Two Step Tender Offers .................................................................................................................... 14
Task Force on Legal Project Management ............................................................................................................ 15
Task Force on Women in Mergers & Acquisitions .......................................................................................... 15
Task Force on Private Company Model Merger Agreement ............................................................................ 16
Joint Task Force on M&A Litigation ........................................................................................................................ 16

Subcommittee Reports
Acquisitions of Public Companies Subcommittee .................................................................................. 16
Membership Subcommittee ................................................................................................................................. 17
Programs Subcommittee ........................................................................................................................................ 17
International M&A Subcommittee ...................................................................................................................... 18
M&A Market Trends Subcommittee .................................................................................................................... 19
M&A Jurisprudence Subcommittee .................................................................................................................... 19
Private Equity M&A Subcommittee .................................................................................................................... 21

Deal People ............................................................................................................................................. 22

Committee Meeting Materials .......................................................................................................................... 23

National M&A Institute Returning to Las Vegas in November
The M&A Committee will present our 22nd Annual National M&A Institute on November 2 – 3 at the Wynn Hotel in Las Vegas. This is our premier stand-alone CLE program, which provides a basic overview of both private and public M&A practice. Additional information regarding the M&A Institute will be distributed in Chicago and sent by email. Please attend if you can and encourage your colleagues within and outside your firm to attend.

If you have any questions concerning our upcoming meeting, or anything else, please don’t hesitate to ask. I look forward to seeing many of you in Chicago.

scholarship attendees in Chicago. They are eager to learn all about how rewarding an M&A practice can be, and there are no better ambassadors for the M&A practice than you!

The M&A Committee will present our 22nd Annual National M&A Institute on November 2 – 3 at the Wynn Hotel in Las Vegas. This is our premier stand-alone CLE program, which provides a basic overview of both private and public M&A practice. Additional information regarding the M&A Institute will be distributed in Chicago and sent by email. Please attend if you can and encourage your colleagues within and outside your firm to attend.

If you have any questions concerning our upcoming meeting, or anything else, please don’t hesitate to ask. I look forward to seeing many of you in Chicago.
NEW TOOLS TO HELP RUN M&A DEALS MORE EFFECTIVELY

Byron Kalogerou – Co-chair of Task Force for Legal Project Management in M&A
McDermott, Will, and Emery LLP, bkalogerou@mwe.com

Dennis J. White – Co-chair of Task Force for Legal Project Management in M&A
Verrill Dana LLP, dwhite@verrilldana.com

The Task Force on Legal Project Management in M&A continues to move forward in developing and rolling out additional tools to help transactional practitioners run M&A deals more efficiently and effectively. The latest new tools in the works include the following:

1. **Post-Merger Integration Tool**
   Many acquisitions fall short of expectations because the buyers fail to develop and implement a plan for integrating the target into their current business operations. This tool provides a practical checklist of legal tasks that a buyer and its legal counsel should consider to facilitate integration and help ensure the acquisition is ultimately successful. This tool was discussed at the spring meeting in New Orleans. The Task Force is now seeking input from its advisory panel of in-house counsel to gain the benefit of their unique perspective.

2. **Multi-Jurisdictional Scoping Checklist**
   Given the global economy in which we live, it should come as no surprise that a substantial percentage of M&A deals involve parties that are from or operate in different countries. This useful tool lists the specific issues and tasks that should be considered in handling such multi-jurisdictional acquisitions. This tool will be discussed at the upcoming meeting of the Task Force in Chicago.

The Task Force expects that the above described tools will be posted online by year-end to the ABA website designated in the Task Force’s Guidebook on Using Legal Project Management in Merger and Acquisition Transactions. There they will join the two tools that have already been posted as electronic updates to the Guidebook: a Budgeting Tool, and a Deal Magnitude and Complexity Matrix.

The Task Force hopes to publish a new second edition of the Guidebook in 2018. The Guidebook is available to M&A Committee Members at a reduced purchased price. To order, just visit www.shopABA.org and use product code 5070698.

NEW OPPORTUNITY — SUBCOMMITTEE RELAUNCH

Daniel Rosenberg – Chair of Technology in M&A Subcommittee
Charles Russell Speechlys LLP, daniel.rosenberg@crsblaw.com

Welcome to the M&A Committee’s newest active subcommittee, the relaunched Technology in M&A Subcommittee.

What was formerly the M&A Committee’s Technology Subcommittee has significantly expanded its mission. Previously, we were a relatively inactive subcommittee that only maintained M&A Committee and subcommittee webpages. That now has changed and we are relaunching the subcommittee with a substantive mission, namely to assist all M&A Committee members in keeping up-to-date with the increasing use of technology in the practice of M&A. We will cover a range of different technologies from traditional electronic deal rooms and knowledge management software to cutting developments in artificial intelligence and blockchain. In addition, we will track and report on important legal issues and questions raised by the increased use of technology in M&A transactions. We also have a new name – the Technology in M&A Subcommittee.
This increasing use of technology is one of the most important developments for anyone involved in M&A and we warmly invite and encourage you to join our subcommittee, through the “Join a Committee” button on the Section’s main “Committees” page.

Please also come to our first meeting, which will be at the upcoming Business Law Section Annual Meeting in Chicago – we meet on the Friday afternoon, September 15, at 3:30 pm in the Chicago Ballroom VII, Ballroom Level at the Sheraton. The meeting will include:

- A presentation by Joshua Fireman of leading technology consultants Fireman & Co. on the range of technologies currently being used in M&A. This is intended to be a broad overview which will ensure that everyone involved in the subcommittee starts off on the same level of basic knowledge before we dive into specific types of technology at future meetings.
- Observations by Rich Robbins, the Director of Knowledge Management at Sidley Austin LLP (and formerly GC of Morningstar and before that a Sidley corporate partner, a software engineer with DEC and an MIT graduate).
- An overview by Will Norton of SimplyAgree on our first project, a directory of technologies currently being used by M&A practitioners that he is helping us to develop.

We have only an hour, so it should be an interesting and compact meeting!

If you have ideas for how we might take the subcommittee forward, please share them with us. Please come to our meeting in Chicago next month and if you can’t do that please email either Vice-chair Tom Romer (romert@gtlaw.com) or me (daniel.rosenberg@crsblaw.com).

Michael O’Bryan – Chair of M&A Jurisprudence Subcommittee
Morrison Foerster, mobryan@mofo.com

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 email 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!

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 on-line 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=CL56000).
- 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.

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.

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)
Canadian M&A Activity Continues to Grow as Securities Regulators Remain Focused on Protecting Minority Shareholders

By Paul Davis and Allison Marks
McMillan LLP (Toronto)

Notwithstanding the similarities between mergers and acquisitions (M&A) deal practice in Canada and the United States, there remains stark differences between our M&A landscapes.

For example, whereas securities legislation and regulators in Canada tend to focus on the protection of shareholder rights and ensuring minority shareholders have a voice in change of control transactions, U.S. courts appear to espouse a more director-centric model, which places a much greater emphasis on the role of boards. The focus on minority shareholder rights may simply be reflective of the fact that Canadian public companies are, on average, much smaller than their U.S. counterparts and are more likely to have controlling shareholders or groups of shareholders that materially affect control. As a result, transactions are more likely to be undertaken with insiders of a Canadian public company or other related parties, which could prove detrimental to minority shareholders.

The size of M&A transactions in Canada is another significant difference. Because Canadian companies are generally smaller than U.S. companies, transactions sizes are correspondingly smaller in Canada. The middle market continues to be the bedrock of Canadian M&A activity, and while the appetite for middle market deals in the United States is similarly robust, in Canada, the vast majority of M&A transactions have deal values under CDN$250 million.1

This article reviews recent trends in the Canadian M&A landscape and then highlights two regulatory developments which reflect the ongoing focus of securities regulators on the protection of the rights of minority shareholders of Canadian public companies.

M&A Trends

The overall Canadian M&A climate in the last several years has been marked by significant growth. In Q1 2017, for example, announced deals represented a five-year high or an 11% increase over the previous quarter and a 28% increase over Q1 2016.2 Most significantly, however, is the fact that the majority of the activity (91% of all transactions with reported values) came from transactions with deal values under CDN$250 million. These trends were consistent with the data for Q2 2017.3

Cross-border transactions continue to account for a considerable portion of activity, with 47% of all transactions involving either a foreign target or a foreign buyer. Despite the relatively weaker Canadian dollar, Canadian companies saw an increase in cross-border deal flow, with 152 (versus 132 in Q1 2016) inbound transactions and 207 (versus 151 in Q1 2016) outbound transactions recorded in the first quarter of 2017. Overall, however, outbound M&A continues to outpace inbound activity, with Canadian firms outnumbering the number of foreigners acquiring Canadian companies by a factor of 1.4 times.4 This is consistent with past trends whereby cross-border M&A is more weighted toward outbound investment from Canada into the United States in terms of both number and value of transactions. Indeed, the value of outbound transactions exceeded the value of inbound transactions in Q2 2017 by more than four times.5

Regulation of M&A Activity

M&A activity in Canada is regulated under provincial and federal corporate laws, provincial securities laws (in each of the 10 provinces and three territories) and stock exchange rules. The two principal stock exchanges in Canada are the Toronto Stock Exchange (TSX) (senior market) and the TSX Venture Exchange (junior market). These exchanges regulate selected aspects of M&A activity.

The provincial and territorial securities regulatory authorities coordinate their activities through the Canadian Securities Administrators (CSA), a forum for developing a harmonized approach to securities regulation across the country. The CSA has developed a system of mutual reliance pursuant to which

Changes to Take-Over Bid Legislation

On May 9, 2016, significant amendments to Canada’s take-over bid regime made by the CSA became effective. These changes provide boards of directors of target companies with significantly more time and leverage to respond to unsolicited take-over bids (or hostile tender offers as they are referred to in the United States.). Under the amended regime, take-over bids required to be made to shareholders are subject to the following requirements:

1. 50% Minimum Tender Requirement – The bidder must receive tenders of more than 50% of the outstanding securities subject to the bid (excluding securities of the bidder and its joint actors) prior to taking up any securities.

2. 10-Day Bid Extension – The bidder is required to extend the deposit period for a minimum of 10 days once the 50% minimum tender condition and all other terms and conditions of the bid are complied with or waived.

3. 105-Day Bid Period – All take-over bids are required to remain open for a minimum of 105 days unless:
   - the target board agrees to a shorter deposit period of not less than 35 days (which reduced period will apply to all competing bids), or
   - the target company announces that it intends to effect an “alternative transaction” – effectively a friendly change of control transaction that is not a take-over bid (such as an arrangement), in which case all other take-over bids will be entitled to a minimum 35-day deposit period.

Despite fears that the adoption of these amendments would have a chilling effect on unsolicited take-over bid activity, in the year following the imposition of the new regime, there appears to be very little (if any) change in activity. What is clear, however, is that success for unsolicited bidders under this new regime has proven to be very difficult without the eventual consent of the target board.

It will take some time to fully understand the impact of these new rules, but one of the key goals of regulators has been achieved: litigation before the securities commissions regarding the use of poison pills in the context of unsolicited takeover bids has been non-existent. On the other hand, securities regulators are watching closely to see if the new found power of target boards is being used to benefit their shareholders, as opposed to insiders, in a bidder’s pursuit to negotiate friendly transactions.

Fairness Opinions – Impact of MI 61-101

In Canada, five provincial securities regulators have adopted a regulation referred to as Multilateral Instrument 61-101 – Protection of Minority Security Holders in Special Transactions (MI 61-101). MI 61-101 seeks to mitigate risks to minority shareholders by imposing enhanced disclosure, valuation and majority of the minority shareholder approval requirements in respect of four forms of potential conflict of interest transactions: (1) bids made by insiders of a company (insider bids), (2) bids by companies to buy back their shares (issuer bids), (3) transactions that provide for the termination of a shareholder’s interest in a company without the shareholder’s consent (business combinations) and (4) transactions with an insider or other related party of the company (related party transactions).

On July 27, 2017, Staff of the securities regulatory authorities in each of the provinces subject to MI 61-101 published Staff Notice 61-302 (the Notice) which seeks to provide interpretive guidance and clarification on MI 61-101. Most notably, the Notice contains Staff’s positions with respect to the role of special committees and fairness opinions in “material conflict of interest transactions.” In the Notice, “material conflict of interest transactions” refers to insider bids, issuer bids, business combinations, and related party transactions that give rise to substantive concerns as to the protection of minority shareholders. The Notice confirms that Staff review material conflict of interest transactions on a real-time basis in order to assess compliance with the requirements of MI 61-101 and to determine whether a transaction raises public interest concerns. Accordingly, Staff will typically initiate a review of a transaction upon the filing of the relevant disclosure document. Where Staff identify non-compliance with MI 61-101 or potential public interest concerns, they reserve the right to take enforcement action or other appropriate orders.

CONTINUED ON PAGE 27
Lessons Learned from Autopsies of Earn-Out Disputes
Earn-Out Provisions – The Next IP Battleground?

By A. Vincent Biemans and Diego E. Gómez-Cornejo

Earn-out arrangements are often a crucial element in bridging price expectations between buyer and seller and getting a deal to the closing table. Unfortunately, earn-out provisions are also a common source of post-closing disputes between seller and buyer.

This article discusses an issue on the edge of quantifying the earn-out metric that can easily be overlooked – the exchange of trade secrets or other confidential business information between the target company and its new parent company. When encountered in practice, the financial impact on the earn-out metric of recognizing the shared confidential information can be large and unexpected.

Earn-Outs: Background, Implementation and Common Disputes

At its core, the value of a business derives from its ability to generate future earnings for its owners. Those future earnings can be relatively stable or more uncertain. In the latter situation, an earn-out can be a valuable tool in bridging the seller’s (optimistic) expectations and the buyer’s (risk focused) view. Earn-outs allow the parties to the transaction to keep part of the purchase price flexible by making it contingent on future events. That can be useful in many different situations, for example:

1. The target company manufactures and sells medical devices. It has several mature products as well as an additional product nearing the end of development. The company’s ability to generate future earnings depends, in part, on it obtaining FDA approval for its new device. The earn-out payment can be defined as a lump-sum that is payable if the target company achieves FDA approval for its new product by a certain date.

2. A financial buyer is purchasing a business with stable (percentage-)margins that has grown significantly over the course of the last few years. The owner-operator expects the sales growth to continue, while the buyer is skeptical. The parties can agree to an earn-out based on the target company’s revenue growth exceeding a certain tier.

3. A strategic buyer seeks to acquire a company that complements its existing business extraordinarily well. It expects the acquisition to allow it to penetrate new geographic and functional markets as well as complement its existing product mix. The much smaller seller believes it can profitably expand the business on its own and wants the purchase price to reflect that. The parties can agree to a staged earn-out structure based on the target company’s adjusted EBITDA over the next few years.

As illustrated above, earn-outs can be tailored to the specific facts and circumstances of the transaction at hand to facilitate the needs of the parties. Notwithstanding this customization, earn-out provisions generally have in common that they define an earn-out performance metric and its measurement (whether financial or based on milestones) as well as the rights and obligations of the parties toward achieving that performance post-closing.

Not surprisingly, earn-out disputes generally fall into two categories. First, many disputes relate to the measurement of the financial or operational performance of the target company and effectively boil down to accounting questions. For example, a dispute can center on how revenue from a project should be recognized over time in accordance with U.S. GAAP. Second, if the earn-out targets are not met, the parties may disagree on the genesis of the failure and accuse the counterpart of not meeting its contractual obligations or acting in bad faith. For example, the seller may accuse the buyer of failing to provide the contractually agreed upon back-end infrastructure, which seller contends caused the company’s performance to fall short of the earn-out target. Precise drafting of the contractual earn-out provisions in the purchase agreement is a good way to minimize earn-out disputes, but deftly negotiating the rights and obligations of each party when it comes to calculating the earn-out targets and making the earn-out payments can prove critical, especially when it relates to the transfer of trade secrets and other intellectual property.

Providing for Separate Accounting of the Target Company Post-Closing to Facilitate the Calculation of the Earn-Out

In addition to establishing targets and metrics, earn-out arrangements typically provide for a variety of other elements to fully set the stage for the earn-out and future performance. Those other elements can also be customized to fit the situation at hand. For example, the medical device/FDA approval earn-out referenced above could be accompanied by an obligation of the new parent company to make funds available for animal testing and to cover other development expenses. It may also come with a contractual obligation of the parent company to bring the product to market in accordance with an existing business plan (as it may become in the parent company’s best interest to discontinue sales of the new product in favor of its other, functionally overlapping, devices).

---

1 A. Vincent Biemans is a managing director of Berkeley Research Group, LLC and the coauthor of M&A Disputes: A Professional Guide to Accounting Arbitrations (Wiley). Diego E. Gómez-Cornejo is a partner of McDermott Will & Emery LLP. The views expressed herein are the authors’ own and are not attributable to their firms, those firms’ members/partners, or their clients.

2 Although the issues and examples herein are inspired by practice, the examples are simplified to illustrate specific concepts, are fictitious, and are not meant to capture the full nuance of real-world matters.
An important consideration in conceiving the earn-out is to what degree the acquired company will remain separate from its new parent/corporate group during the earn-out period. The seller generally wants to guard against losing the earn-out payments in the proverbial mix, while the buyer wants to start receiving the benefit of the synergies resulting from its acquisition as soon as possible. Historically, it was not uncommon to have the newly acquired company operate as a standalone business during the earn-out period. In the context of strategic acquisitions, however, that may undesirably limit the ability of the buyer to realize the strategic benefits and synergies that it seeks to gain from the transaction and for which, in today’s M&A environment, it may have paid a significant amount of money (earn-out or not). Indeed, it appears such arrangements have become less common in recent years.3

If the target business is not operated in accordance with its past businesses practices post-closing, its activities generally at least have to be separately accounted for in order to calculate the earn-out payments based on, for example, the company’s adjusted EBITDA. The purchase agreement may, for example, provide for the adjusted EBITDA to be determined based on a separate accounting for the company post-closing that is to be performed in accordance with U.S. GAAP as historically applied by the company.

To facilitate a truly separate accounting, that approach may be supported by a provision in the purchase agreement that any intercompany transactions and transfers between the new corporate group and the target company are to be accounted for at arm’s length terms. In the absence of a strict continuance of the business in accordance with past business practices, such a provision can prevent financial leaks from the target company to the parent, which, if not prevented, could result in the failure of the target company to meet the earn-out target. The contractual earn-out language can be further refined with a variety of customizations. For example, if the target company is a supplier of the buyer, a pricing table or formula may be attached to the purchase agreement for its products or services. The earn-out provision can also be refined by addressing transactions and transfers that would be in the equity sphere, such as agreed upon capital contributions or dividends, or that should be accounted for other than at arm’s length terms, such as a cost allocation for shared corporate services and overhead expenses. The provision can also be accompanied by an acceleration of the earn-out upon the occurrence of any number of acceleration events, such as a large transfer of assets out of the target company that exceeds a defined threshold or a material breach by the purchaser of any of the earn-out covenants in the purchase agreement.

As an aside, a provision requiring a separate accounting may prove unexpectedly difficult to implement for the parent corporate group as it may take more out of the group’s processes and procedures than generally required in its regular course of business. External financial reporting often largely takes place on a consolidated group basis. Therefore, the intercompany transactions may otherwise receive limited attention from the accounting department and the auditor. Of course, the parent corporate group may already be set up to carefully account for all intercompany transactions at market-conform transfer prices in order to, for example, comply with tax obligations.

“At Arm’s Length” as the Contractual Anchor of IP Driven Earn-Out Disputes

At arm’s length accounting for transactions and transfers between the target company and its new corporate group, with perhaps some customized exceptions, can appear uncontroversial as it can be perceived to naturally hand-in-hand with the separate accounting provision in the purchase agreement. In practice, that uncontroversial appearance can — dependent on how transactions and transfers are defined in the agreement — drive significant earn-out payments and disputes based on the flow of confidential information between the target company and its new corporate group.

As the target company gets adopted into the new corporate group, there are many potential occasions for the disclosure of otherwise confidential information between the target company and its new corporate group, for example:

1. The target company may give its new owners an extensive, in-depth tour of it most modern plant. Perhaps, the corporate group adopts some of the company’s best practices in its plants.
2. The target company may present its business plan and budget to group management. Perhaps, the corporate group adopts part of the sales approach or otherwise uses the included commercial information in its broader business.
3. After closing, the target company integrates its systems with those of its new corporate group. With that integration, the corporate group obtains access to the target company’s contact management data, account information and other financial data.
4. A key member of the target company’s sales management team gets promoted to a sales position at the corporate group level during the earn-out period. Outside of the group relationship, the change in positions would have been in violation of the team member’s non-compete agreement.

Of course, the flow of information can go both ways. The target company may directly benefit from being able to plug into the knowledge base of its new corporate group in many different ways. In any event, without contractual language to the contrary, the at arm’s length pricing of the sharing of confidential information can have a significant impact on the earn-out metric. We further illustrate this issue with a case study.

CONTINUED ON PAGE 27

3 See e.g. 2015 Private Target M&A Deal Points Study (ABA), at p. 18, which reflects the decline of covenants to run the business consistent with past practice from 27% (2010) to 3% (2014).
When Merger Review Turns Criminal

By Craig Lee and Creighton Macy

Baker McKenzie (Washington, D.C.)

Of all the ways that a merger can go wrong, it is hard to think of a worse scenario than the deal falling apart and the parties being subject to a criminal investigation. Lawyers are constantly tracking and negotiating terms in an effort to close the deal. And in this push to finalize the transaction and meet the expectations of clients and various regulatory agencies, practitioners can be faced with potential ramifications far more serious to the business than what they ever would have expected (or, at least, had hoped not to expect).

At its surface, antitrust can neatly be divided into civil and criminal matters. Civil matters involve merger review, civil non-merger conduct review, and civil litigation. Criminal matters generally consist of investigating violations of price fixing, bid rigging, and market allocation. Two U.S. agencies, the Federal Trade Commission (FTC) and the U.S. Department of Justice Antitrust Division (Antitrust Division) are responsible for enforcing federal antitrust laws. While the FTC is solely civil, the Antitrust Division is separated into civil and criminal enforcement sections. The Antitrust Division’s offices responsible for criminal enforcement are located in Washington, DC; San Francisco; Chicago; and New York. Although these criminal offices have assigned territories, they are not bound by geography, as investigations often take place across the country and the globe. The six civil sections of the Antitrust Division are all located in DC and divided by subject matter expertise.

But that separation of criminal and civil enforcement sections at the Antitrust Division does not create walls or silos. The different criminal offices often work together on large investigations and trials. Similarly, the size of many civil investigations requires pulling resources from the various civil sections, as well as the Antitrust Division’s Appellate, Foreign Commerce and Legal Policy sections. But the collaboration does not end there. Coordination between the civil and criminal sections is the norm. Management from the sections meet regularly to discuss matters and often consult on an informal basis. Cross-pollination occurs at the trial attorney level as attorneys are detailed to other sections for specific matters or periods of time. And understanding this collaboration between the civil and criminal sections is vital to attorneys and their clients subject to the merger review process. A recent case shows not only how in sync the Antitrust Division’s criminal and civil sections are, but also highlights the implications of that collaboration.

In December 2014, two packaged seafood companies announced their proposed merger. As customary to the review process, the parties submitted documents to one of the Antitrust Division’s civil sections. What followed was anything other than routine. But based on the level of collaboration within the Antitrust Division, should not have been unexpected.

The Antitrust Division’s civil attorneys reviewed the documents submitted by the parties and uncovered information that raised concerns of price-fixing. When the parties walked away from the deal on December 3, 2015, then Assistant Attorney General Bill Baer’s statement in the press release made a veiled reference to their problematic documents. He said, “Our investigation convinced us – and the parties knew or should have known from the get go – that the market is not functioning competitively today, and further consolidation would only make things worse.”

The parties’ abandonment of the deal did not end the Antitrust Division’s investigation. Instead, the civil attorneys conducting the merger review shared their findings with their criminal counterparts. A criminal section proceeded to open a price-fixing investigation based on the shared materials. That investigation has born fruit and is ongoing. To date, three individuals and one company have been charged for participation in a price-fixing conspiracy. Criminal antitrust violations, such as price fixing,
have serious implications. Not only are the criminal penalties substantial,6 companies can be subject to civil suits with treble damages.7

While it is not public what specific information was contained in the documents that raised the attention of the reviewing attorneys, or exactly how the process happened, the Antitrust Division did state that the criminal investigation was triggered by “information and party materials produced in the ordinary course of business.”8 Until more information is revealed, several questions remain, including whether similar criminal investigations based on documents submitted for merger review could be waiting to surface.

The packaged seafood matter is not the first criminal case to stem from a civil investigation and likely will not be the last. The hand-in-hand coordination between the civil and criminal sections of the Antitrust Division will continue. Companies need to be increasingly aware of risks ordinary course documents present, not just in impacting merger approval but also the criminal implications. Merger review does not exist in a vacuum. Once documents fall into the Antitrust Division’s (or FTC’s) hands, parties can expect that they will be closely reviewed with an eye toward both civil and criminal actions. Documents always tell a story — and attorneys need to be sure that the story told is one to support a proposed deal and not a criminal investigation.

Similarly, the FTC and Antitrust Division share a close working relationship. We will continue to explore and monitor the collaboration between those two agencies, as well as, with state attorneys general. We also plan to address the collaboration among competition agencies around the world. Stay tuned.

Fiduciary Duty And Drag-Along Pitfalls And Drafting Tips

By Neil Ruben and Austin Pendleton

Recent developments in Delaware case-law demonstrate (1) the risks associated with the conflicts of interest faced by private equity and venture capital-controlled boards of directors and (2) the potential of post-closing litigation against a board of directors after private equity and venture capital investors have exited a majority investment.

Drag-along provisions, when properly drafted and executed, can help to mitigate these risks. In light of recent Delaware case law, drag-along provisions should be re-examined to ensure their enforceability and effectiveness. Practitioners should carefully draft such provisions with an eye to their client’s future exit and, in certain situations, should consider utilizing such provisions upon their client’s exit in order to protect their clients from costly and time-consuming litigation involving appraisal rights, claims of fiduciary duty breaches, and other objections to sale transactions. This article will first give a brief overview of recent Delaware case law that stimulated this topic and then describe drafting tips that can be gleaned from such caselaw.

Recent Delaware Case Law

A. Fiduciary Duty Issues: Conflicting Loyalties

The board of directors of a Delaware corporation owes fiduciary duties to the corporation and its stockholders. However, although preferred stock provides its holders with special rights (i.e., voting, information), preferences (i.e., payments that the preferred stockholders are entitled to receive upon a liquidation or change of control before the common stockholders receive any return) and privileges which are enforceable (as agreed to in the certificate of incorporation and stockholders’ or other equity related agreements), it does not provide such stockholder any special rights over the board of directors or any preferred stockholder owes any special fiduciary duty to any preferred stockholders. Thus, the directors do not have a duty to maximize the return on the preferred stockholders’ investment, but rather to act for the benefit of the common stockholders as the residual claimants on the profits of the corporation. This dynamic between the control and special rights that a majority stockholder has over a corporation and the independence that a board of directors is expected to act under can put the boards of private equity and venture capital-backed companies in a tenuous position. Often, such boards have board members who are closely affiliated with the fund (and, sometimes, such board members even owe separate fiduciary duties to the fund and its limited partners in addition to the fiduciary duties such board members owe to the portfolio company and its stockholders). This structure increases the potential for allegations that the affiliated directors sought to maximize the internal rate of return for the investors of their private-equity or venture-capital fund by virtue of increasing the internal rate of return of the preferred stock indirectly held by such investors at the expense of the consideration to be received by the common stockholders. This dynamic can also be further complicated by the nature of private equity and venture capital backed investments in which most investing firms have a four to ten year timeline for the acquisition and exit of the investment.

B. Trados Highlights Fiduciary Duty Claims

This dynamic came up in a 2013 Delaware Court of Chancery case, In re Trados Incorporated Shareholder Litigation, in which the venture capital stockholders of Trados, Inc. (Trados) initiated a sale of Trados by merger. Management (pursuant to an incentive plan) and the preferred stockholders received consideration in the sale while the common stockholders received nothing. A common stockholder sued the board of directors for breach of fiduciary duties on the grounds that the board approved the merger for the benefit of the preferred stockholders and management instead of trying to maximize the value of the corporation for the benefit of the common stockholders. Although the court ultimately ruled in the board’s favor, it noted that the venture capital investors that structured the Trados sale transaction didn’t “attemp to incorporate any mechanism for side-stepping fiduciary duties (such as a drag-along right if the VC funds sold their shares),...” This dicta has led many practitioners to suggest that properly drafted drag-along provisions in deal documents may be a way to “side-step” fiduciary duties and protect directors in the private company sale context. Furthermore, the In re Trados line of cases led the National Venture Capital Association to revise its model form documents to include certain “sale rights” provisions (to be exercised concurrently with a drag-along) designed to more fully protect the board of directors in transactions that cannot be structured to avoid board approval. Drag-along provisions may...
be especially important when, due to capital and board structure (or the interplay of the relevant constituent personalities), cleansing acts, such as special committee approval or majority of minority stockholder approval, are not feasible (as is often the case in private equity and venture capital deals).8 Ultimately, the In re Trados decision highlighted the fiduciary duty conflicts that sometimes arise in private equity and venture capital deals and suggested that a properly tailored drag-along provision may help to reduce the potential for fiduciary duty claims that arise in a sale process as a result of that conflict.9

C. Cigna Highlights Other Potential Minority Stockholder Litigation Issues

Along with potentially “side-stepping” fiduciary duties, the exercise of a drag-along provision in a sale transaction can also serve as a safe-guard against time-consuming negotiation or costly post-transaction litigation with minority stockholders, who may otherwise refuse to agree to the same terms as the majority stockholders or exercise statutory appraisal rights. In a 2014 Delaware Court of Chancery case, Cigna Health & Life Insurance Company v. Audax Health Solutions, Inc., the court, among other things, found that certain indemnification obligations (which were included in the merger agreement and enforceable against all consenting stockholders) were unenforceable against stockholders that did not consent to the merger or sign the merger agreement. Just as with In re Trados, Cigna elucidates another instance in which it is beneficial for private-equity and venture capital-backed corporations to appropriately draft and properly rely on drag-along provisions. In Cigna, the merging entity (Audax Health Solutions, Inc. (Audax)) failed to ascertain whether there was a minority stockholder that posed a risk in terms of holding up the transaction and to either (1) use a drag-along provision or (2) otherwise strike a deal with such minority stockholder to convince them to sign necessary agreements and consent to the merger prior to the closing. A well-drafted and properly-executed drag-along provision in Audax’s stockholders’ agreement could have forced each minority stockholder to consent to the merger agreement and sign all required documentation and thereby agree to the same obligations as all other stockholders.

D. Halpin Highlights Drag-Along Enforcement Issues

Last, a 2015 Delaware Court of Chancery case, Halpin v. Riverstone National, Inc.,11 analyzed a drag-along provision and elucidated the fact that a drag-along provision is not an implicit agreement from minority stockholders to always consent to a sale transaction but rather must be carefully drafted, negotiated and exercised. In Halpin, the court found the exercise of a drag-along provision unenforceable because the controlling stockholder (which sent notice of a merger and the exercise of the drag-along in connection therewith after the consummation of the merger) failed to exercise it in accordance with the express terms of the company’s stockholders agreement, which on its face allowed for the majority stockholder to exercise the drag-along only prior to a change of control transaction. The result was that the minority stockholders were free to exercise their statutory appraisal rights. Although the Halpin decision was ultimately an interpretation of a contract (the relevant stockholders agreement), it provides important instruction as to the interpretation of drag-along provisions and the uncertainties under Delaware law as to the enforceability of drag-along provisions in the context of a merger (the court chose to assume the drag-along provision was enforceable without actually ruling on whether (if it were at issue) it would be enforceable against minority stockholders).12 Ultimately, Halpin emphasizes the need for a practitioner to carefully draft drag-along provisions with unambiguous enforcement mechanisms, meticulously follow such

CONTINUED ON PAGE 28


8 See generally in re Trados, 73 A.3d at 36 (‘The standard of review may change further depending on whether the directors took steps to address the potential or actual conflict, such as by creating an independent committee, conditioning the transaction on approval by disinterested stockholders, or both.’).

9 It should be noted that since 2013 other Delaware cases have been decided that also highlight the need to insulate a board of directors from fiduciary duty claims. Most recently, in April 2017, the Delaware Court of Chancery, in Frederick Hsu Living Tr. v. ODN Holding Corp., CV 12108-VCL, 2017 WL 1437308, at *6 (Del. Ch. Apr. 14, 2017), as corrected (Apr. 24, 2017), refused to dismiss a claim that a board of directors breached its fiduciary duties by selling off assets to redeem a controlling stockholder’s preferred stock despite the fact that such redemption was fully within such stockholders contractual rights under the corporation’s governing documents. Specifically, the court noted that the board’s fiduciary duties to the corporation and all stockholders were not suspended by the contractual obligation owed to the preferred stockholder and that, under the doctrine of efficient breach, the board may have been able to determine that a breach of the preferred stockholder’s rights was most advantageous to the corporation (and therefore required by the board’s fiduciary duties to the corporation and its stockholders). As with In re Trados, this case highlights the fiduciary duty conflicts that can arise in a preferred stockholder exit and the need to “side-step” those duties/controls.

10 107 A.3d 1082 (Del. Ch. 2014).


12 Halpin, 2015 WL 854724, at *1 (‘The rights of holders of preferred stock are largely contractual, and this Court has found that such stockholders may waive appraisal rights ex ante by contract. However, the relationships between the common stockholders (the residual owners of the corporation), the directors (the fiduciaries managing the corporation on those owners’ behalf), and the majority stockholders – if any – having voting control over the corporation (who also stands as a fiduciary to the minority stockholders in certain situations) are in the main governed by the Delaware General Corporation Law and the common law of fiduciary relationships. The question of whether common stockholders can, ex ante and by contract, waive the right to seek statutory appraisal in the case of a squeeze-out merger of the corporation is therefore more nuanced than is the case with preferred stockholders. That question has not yet been answered by a court of this jurisdiction.’).
JOINT TASK FORCE ON GOVERNANCE ISSUES ARISING IN BUSINESS COMBINATION TRANSACTIONS

Thanks to the hard work of our many authors, we are moving closer to publication of our handbook covering the many governance issues confronted by boards of directors engaged in an M&A transaction. At our Chicago meeting, we are offering a “sneak preview” of one of the chapters in our handbook, along with an entertaining (we hope!) look at the types of issues a board must consider as a target company considering an acquisition proposal.

Please plan to attend our Task Force program, entitled “Spotting Traps and Tripwires in the M&A Sales Process – M&A Governance Handbook Comes to the Rescue” on Friday, September 15, from 2:30 pm - 4:00 pm! Our panelists are our Task Force Co-chairs, Larry Hamermesh, Michael Halloran, Patricia Vella, and Diane Frankle, along with Task Force member Richard DeRose of Houlihan Lokey.

We are working hard on content delivered by our authors and thank you if you have submitted chapters for our review. Several authors have chapters pending and we would like to get all of the remaining chapters submitted no later than Thanksgiving, to allow us time to complete editing and publish in 2018. If you owe us a chapter, please let us know your plans for completion as soon as possible.

We look forward to seeing many of you at our program, and at our M&A Committee meetings in Chicago!

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

At the Business Law Section Spring Meeting in New Orleans, the Task Force on the Revised Model Asset Purchase Agreement received final (or close to final) reports from the small groups that have been drafting specific sections of the updated model agreement and related commentary.

The Task Force has now moved to the editorial stage. A group of Task Force members will now consolidate the work on the small groups and begin their review of the draft updated model agreement and commentary. Because of this, the Task Force will not be meeting in Chicago.

If you are interested in working on the editorial working group, please let either of us know. Also, we are looking for someone who could take-on preparing commentary on privilege issues in asset transactions. We’d be interested in hearing from you if you have an interest in contributing that commentary.

JOHN CLIFFORD, CO-CHAIR
ED DEIBERT, CO-CHAIR

TASK FORCE ON TWO STEP TENDER OFFERS

We continue to refine the text of the Model Tender Offer Agreement. We have added to the Model an annotated form of Letter of Intent, to fill a seeming hole in the “contract” between the buyer and the target stockholders. Michael Duncan of Computershare will provide logistical and practical comments on the LT.

Given the stage of drafting, the Two-Step Tender Offer Task Force will not hold a general meeting in Chicago. Eric and Mike will meet and continue to work through the current draft and contact editors individually.

If you have comments, though, please feel free to contact either of us.

MICHAEL G. O’BRYAN, CO-CHAIR
ERIC S. WILENSKY, CO-CHAIR
TASK FORCE ON **LEGAL PROJECT MANAGEMENT**

Our April meeting in New Orleans featured a discussion regarding a draft Post-Merger Integration Tool intended to provide a helpful checklist to identify and facilitate the integration of a target after the deal closes. We have asked our in-house counsel user group to provide their feedback on that tool given that it will be particularly helpful to in-house counsel who play such a critical role in integration.

Our Task Force on Legal Project Management in M&A will hold its next meeting in person and by teleconference on Friday, September 15, from 1:00 pm - 2:00 pm at the Sheraton Grand Chicago, Wrigleyville, Lobby Level. See schedule on page 23 for details. Also, details may be found online at the website for the Annual Meeting of the Business Law Section.

At the Chicago meeting, we will be discussing a draft Multi-Jurisdictional Scoping Checklist. This Legal Project Management tool is supplemental to Pre-Deal Document No. 1 - The Acquisition Task Checklist, and lists additional issues to consider in a transaction that crosses borders. This tool has been prepared by Task Force members Dr. Rainer Loges of Munich, Germany, and Dag Fredlund of Goteborg, Sweden, and we will ask them to speak to it at the Chicago meeting.

We will also seek your input on a new communication tool that seeks to memorialize key matters from diligence to representations and warranties, to Disclosure Schedules to post-merger integration. Specifically, matters are identified in due diligence that will be the subject of reps and warranties, will be disclosed in the Disclosure Schedules and will be the subject of integration after the deal closes. The question we are debating is whether we can develop a communication tool that can memorialize and track the material matters for the team through the deal cycle; we believe that such a tool may be particularly valuable for larger and more dispersed deal teams.

We are happy to report that we have begun discussions with the ABA’s publishing division on creating and publishing an updated second edition to our Guidebook On Using Legal Project Management in Merger and Acquisition Transactions. The Guidebook has been a highly successful publication for the ABA and the first of its kind to enable purchasers to download and customize the various tools contained in the Guidebook. The Guidebook is available to M&A Committee members at the reduced price of US$79.95. To order, just visit [www.ShopABA.org](http://www.ShopABA.org) and enter Product Code 5070698.

In addition to enhancements to the existing tools, we are targeting the addition of at least five additional tools to the second edition, including the following:

- M&A Deal Magnitude and Complexity Tool (already available online)
- Budgeting Tool (already available online)
- Post-Merger Integration Checklist introduced (as noted above, discussed at our April meeting)
- Multi-Jurisdictional Scoping Checklist (to be discussed in Chicago)
- Carveout Transactions Scoping Checklist (a coming attraction)

We are beginning to develop an editing and publication schedule and are targeting a release of the second edition in the spring of 2018. We welcome your feedback on the existing tools and any suggestions for, and contributions of, other legal project management tools you may be using in your transactional practice.

We are looking forward to seeing many of you in Chicago.

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

---

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

Our upcoming Task Force meeting is scheduled for Friday, September 15, from 2:30 pm - 3:30 pm at the Sheraton Grand Chicago. At the meeting, we will hear from a panel of GCs and other procurers of M&A legal services. They will discuss their views on hiring women and promoting diversity and make suggestions on what women at law firms can do to improve their relationships with clients and enhance business generation. The panel will represent private equity and corporate users of M&A legal services and we expect a variety of views on the matter.

We hope you will also attend our meeting to support our Women in M&A scholarship program. We are hosting one Harvard student and two NYU Law students at the conference. Please come meet and welcome our scholarship recipients. Please also join us for drinks and light appetizers at our Women in M&A Reception from 5:00 pm - 6:00 pm that evening in the Missouri Room on the Sheraton’s Meeting Room Level.

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 continues to add volunteers to our project and we hope that you will join us for our meeting in Chicago. The goal of the Task Force is to produce a merger agreement with commentary that will be a practical resource for practitioners and highlight the key issues that arise primarily in the private company merger context. The draft will be a reasonable buyer’s first draft. At the meeting in New Orleans, we discussed different approaches to creating a “reasonable” first draft and determined to include various provisions in the body of the agreement rather than in the commentary — even in circumstances where inclusion of the provision makes the agreement slightly less buyer friendly, e.g., an exclusive remedy provision.

At the upcoming meeting in Chicago, we will have some of the authors of sections of our model agreement lead a discussion about drafting issues they are confronting as their drafting gets underway. We also expect to continue our traditional meeting format of reviewing any recent Delaware case law relevant to private company acquisition issues that might affect the drafting of our agreement. We hope you will join us in person or by phone at our meeting in Chicago.

MELISSA A. DIVINCENZO, CO-CHAIR
AMY SIMMERMAN, CO-CHAIR
TATJANA PATERNO, VICE-CHAIR

ACQUISITIONS OF PUBLIC COMPANIES SUBCOMMITTEE

We had a great meeting in New Orleans. Eric Talley, Isidor & Seville Sulzberger Professor of Law, Columbia Law School, discussed his paper “Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers” that he co-authored with Gabriel Rauterberg, University of Michigan Law School. He led a lively discussion on the increased use of corporate opportunity waiver provisions for public corporations. We also discussed the Delaware Supreme Court’s decision in The Williams Companies, Inc. v. Energy Transfer Equity, L.P. In connection with that discussion, subcommittee members shared their varied experiences in dealing with tax opinion conditions.

For Chicago, we have some great panels lined up. For the latest case law developments from Delaware, we will turn to Tricia Vella of Morris, Nichols and Brad Davey of Potter Anderson. Joining us by phone to talk about the latest out of the SEC and answer questions from our members will be Ted Yu, Chief of the SEC’s Office of M&A. Because Ted will not be able to join us in person, we are going to try to submit our questions in advance in order to limit technical difficulties with microphones, etc. So, if you have questions for Ted, please email them to me at jfitchen@sidley.com by September 12. Finally, we will be joined by Stacia Sowerby, Deputy Director in the Office of Investment Security of the Treasury Department and Farhad Jalinos of White & Case for a panel on CFIUS led by Jim Mendenhall of Sidley Austin.

Safe travels and see you in Chicago. Our upcoming Task Force meeting is scheduled for Friday, September 15, from 1:00 pm - 2:30 pm.

JENNIFER F. FITCHEN, CHAIR
PATRICIA O. VELLA, VICE-CHAIR
JIM MELVILLE, VICE-CHAIR

JOINT TASK FORCE ON M&A LITIGATION

Join the Task Force to discuss two M&A litigation trends. First, we’ll discuss the outlook for appraisal litigation in Delaware, following recent guidance from the Delaware courts, including the opinion from the Delaware Supreme Court in DFC Global. What do these opinions suggest regarding the Court’s reliance on deal price and market data in determining fair value? Second, we will summarize and discuss the current state of affairs for federal disclosure litigation. To what extent, and under what circumstances, are these cases migrating from Delaware to District Court? Has the outcome of these cases changed?

LEWIS H. LAZARUS, CO-CHAIR
YVETTE AUSTIN SMITH, CO-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 5,087 members, a 20% increase from April 2017.

The most dramatic increase in membership belongs to the Private Equity M&A subcommittee which more than doubled their numbers in a matter of months! Well done David Albin. The numbers went from 1,254 members to 2,746 members which now makes this the largest subcommittee.

M&A Market Trends continues to recruit new members via strong programs by Hal J. Leibowitz. The numbers went from 1,542 members to 1,731 members. The third most active subcommittee is the International M&A subcommittee, which is chaired by Franziska Ruf, saw a growth in numbers from 822 members to 895 members.

Governance Issues in Business Combinations (co-chaired by Diane H. Frankle, Patricia O. Vella, Lawrence A. Hamermesh and Michael J. Halloran) increased to 275 members, M&A Litigation (co-chaired by Lewis H. Lazarus and Yvette Austin Smith) increased to 146 members from 129 members, and, Two-Step Auction (co-chaired by Michael G. O’Bryan and Eric S. Wilensky) increased to 138 members from 118 members.

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

- Acquisitions of Public Companies from 752 to 827 members
- Technology from 279 to 315 members
- Membership from 173 to 193 members
- M&A Dictionary from 539 to 549 members

We launched our ambassador program at the stand alone meeting in January and continued the initiative for this meeting in Chicago. We are always looking for volunteers to participate in this and other efforts we will be making in 2017, including a new members reception in conjunction with the Women in M&A subcommittee. Please reach out to me at tracy.bradley@citi.com if you are interested. Thank you!

TRACY W. BRADLEY, CHAIR

PROGRAMS SUBCOMMITTEE

The M&A Committee is sponsoring three major presentations at the Chicago meeting. A complete listing is elsewhere in this publication. One deals with the impact of blockchain technology on law and business; one is a presentation based on our newly-published governance handbook; and one focuses on rep and warranty insurance, particularly in international transactions. We have good variety and accomplished speakers and are looking to making a solid contribution to the CLE offerings at the Chicago meeting. Please do your best to support these members by attending their presentations.

In developing ideas for future meetings, our subcommittee continues to follow a matrix that calls for presentations in four different categories.

The categories are: (1) M&A basics, (2) advanced M&A topics, (3) general topics of interest outside the M&A area but geared for the M&A practitioner (labor, tax, regulatory, etc.), and (4) international. We also have an omnibus category which would include areas not normally covered in any of the Business Law Section areas. This category would include topics such as business development for M&A lawyers. We are also looking at a periodic (every two years) program in which we survey recent developments in M&A law, which program would leverage off of the work of our M&A Jurisprudence Subcommittee. We need to immediately begin the process of identifying and developing topics for the Spring meeting (no CLE at Laguna). If you have a topic to propose, please contact me or one of our subcommittee members.

In proposing panels for the Business Law Section meetings, we are particularly mindful of our charge to promote diversity. The diversity effort not only accomplishes its intended purpose (i.e. diversity) but has also pushed us to reach beyond the usual suspects (i.e. those who do so much of the regular and recurring work of our Committee) to add to our panels. In that regard, please give thought to those in your firm who are not active in our Committee but who may make great speakers.

GEORGE M. TAYLOR, CHAIR
INTERNSATIONAL M&A SUBCOMMITTEE

The International M&A Subcommittee met from 10:30 am - 12:00 pm on Saturday, April 4, in connection with the ABA Business Law Section Spring Meeting in New Orleans.

1. Introductions
The Chair of the Subcommittee, Franziska Ruf, and the Vice-chair of the Subcommittee, Rick Silberstein, introduced themselves and welcomed the participants. The Subcommittee members then proceeded to introduce themselves.

2. Impact of Trump Administration’s Proposed Policies on International M&A – Continued
Robert G. Rosenberg (Managing Director, Houlihan Lokey, New York, NY) gave a very interesting update on the impact of the Trump presidency to date on M&A activity. In general, the stock markets have reacted quite favourably so far, the VIX Index has remained stable, financial exchange rates have not moved much and interest rates have not (yet) increased. But many of these reactions seem to be based less on the fundamentals of the economy or of businesses and appear to have more to do with the “financial engineering” or political measures proposed by the Trump administration, such as the promise of lower tax rates and of less regulation in the securities sector (with the proposed amendments to the Frank Dodd Act), in healthcare (with the proposed replacement of Obamacare), in anti-trust and other matters (with less DOJ intervention in merger transactions). There have not been any major increases in earnings over the first quarter of 2017, but what seems to be changing are rather the multiples. The potential changes to taxation, such as the border adjustment tax and other fundamental tax measures, did however have a chilling effect on some of the mega-deals, which are on hold and in a bit of a wait-and-see mode pending the end of the current uncertainty.

3. Locked Box or Closing Accounts
The panel presenting this topic was moderated by Ashley Hess (Baker Hostetler, Cincinnati), with the participation of Jessica Pearlman (K&L Gates, Seattle) and Steve Wilson (Osborne Clarke, London, UK). Jessica was “defending” the typical North American way of doing a deal, with post-closing purchase price adjustments based on working capital, debt or some other metric, and where the purchase price is not definitely determined until some-time after the closing date. In contrast, Steve was presenting the arrangement often used in Europe based on the locked-box mechanism, where the purchase price is determined on the basis of financial statements dating back to some period ended prior to the closing date, with the risk of performance of the business after this date passing to the purchaser (subject to any permitted “leakage”). A lively “mock” negotiation ensued between Jessica, who represented a large U.S. buyer in the technology space, keen on a typical transaction with post-closing adjustments, and Steve, who represented a private equity seller based in the UK intent on reducing risk and proceeding by way of locked box.

4. Update on Brexit
Daniel Rosenberg (Charles Russell Speechly LLP, London, UK) provided an update on the Brexit process, although there had been relatively little concrete changes since the previous meeting in Laguna Beach. Although the notice had been provided by Britain to the EU to commence the two-year withdrawal process, the discussions regarding the terms to be negotiated, including the payments owed to the EU and trade terms, had not commenced. Out of the four fundamental freedoms guaranteed to members of the EU, the freedom of movement of people is likely to be the most problematic, although those relating to the freedom of movement of goods, services and capital do have to be dealt with as well. In summary, there is a lot of uncertainty as to the outcome of these discussions and whether or not it will end up being a soft or hard Brexit.

5. Subcommittee Website
Our website at http://apps.americanbar.org/dch/committee.cfm?com=CL560002 contains:
- Presentation by Houlihan Lokey on Impact of the Trump Administration.
- Details of the Subcommittee’s publications, future meetings, other work-in-progress and other past program materials.

Next Meeting
The Subcommittee’s next meeting will be held on Saturday, September 16, from 10:30 am - 12:00 pm, in connection with the annual meeting of the ABA Business Law Section, Mergers and Acquisitions Committee, in Chicago.

FRANZISKA RUF, CHAIR
RICHARD SILBERSTEIN, VICE CHAIR
M&A MARKET TRENDS SUBCOMMITTEE

At our last meeting in New Orleans we reviewed the status of recent and pending publications; Richard De Rose (Houlihan Lokey, New York, NY) reviewed the state of the M&A market; Kevin Kyte (Stikeman Elliot, Montréal, Québec) shared highlights from the 2016 Canadian Private Target Deal Points Study; and Ashley Hess (Baker Hostetler, Cincinnati, KY) and Tatjana Paterno (Bass Berry & Sims, Nashville, TN) led a Tales from the Trenches discussion (including a mock negotiation) of provisions regarding the bring down standards for closing conditions.

Our next meeting will be held on Saturday, September 16, at the ABA Business Section Annual Meeting in Chicago. The meeting will take place from 9:00 am - 10:30 am.

The agenda includes:
- A review of recent and pending publications
- An update on the state of the M&A market
- Additional highlights from the 2016 U.S. Strategic Buyer / Public Target Deal Points Study and a preview of new data points for the 2017 Study
- Tales from the Trenches presentations

I look forward to seeing you in Chicago.

HAL J. LEIBOWITZ, CHAIR

M&A JURISPRUDENCE SUBCOMMITTEE

The M&A Jurisprudence Subcommittee will meet soon in Chicago:

Friday, September 15
9:00 am – 10:30 am

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, including the updated sandbagging memo and the current version of the successor liability memo.

A summary of the recent EMSI opinion, dealing with the scope of liability for fraud in the face of disclaimers of reps outside the agreement (a la Abry, but with both passive and management selling stockholders rather than just one PE seller), is attached below.

The cases and other materials will be distributed by email. If you don't get the email, but would like to, please let one of us know.

Two “Notwithstandings” Don’t Make a Right:

EMSI Acquisition, Inc. v. Contrarian Funds, LLC, et al.

A number of recent Delaware cases have considered under what circumstances buyers can successfully pursue fraud claims against sellers outside of the indemnification limitations contained in the acquisition agreement. Often, the fraud in question relates to extra-contractual misrepresentations or omissions, with sellers arguing that any fraud exception to an “indemnification is the exclusive remedy” provision applies only to the express representations contained within the agreement – particularly when the buyer has disclaimed reliance on statements outside the four corners of such agreement. In EMSI Acquisition, Inc. v. Contrarian Funds, LLC, et al., C.A. No. 12648-VCS (Del. Ch.), however, the institutional (non-management) stockholders found themselves making the opposite argument: in arguing for a favorable interpretation of very “inelegant drafting,” they took the position that the fraud carveout to the exclusive remedy provision was limited to extra-contractual fraud, and that claims based on fraudulent representations within the agreement made by the company and not by or with the knowledge of the institutional holders had to be brought contractually under and subject to the liability cap of the indemnification provisions.

At issue in EMSI was whether the buyer could avoid contractual limits on recovery for indemnification claims against the selling stockholders of EMSI when the claims were based on fraudulent representations in the stock purchase agreement (SPA) made not by the sellers but by EMSI itself. The “inelegant drafting” in question related to conflicting indemnification provisions that created ambiguities as to whether such sellers could be liable for EMSI’s fraudulent representations and warranties. After considering the parties’ competing interpretations of such provisions, Vice Chancellor Slights concluded both parties’ positions could be reasonably supported and that the matter could not be resolved on the sellers’ motion to dismiss.

Following a forensic investigation initiated during the post-closing working capital adjustment process, the buyer had brought suit against the sellers alleging fraudulent accounting practices and seeking to recover the losses incurred. The SPA provided two avenues for such a recovery: the working capital adjustment itself, and indemnification for breach of financial statement and related representations. Recoveries under both avenues, however, were capped at the escrow amount, an amount already exceeded by the independent auditor’s adjustment determined pursuant to the working capital dispute process. The buyer advanced two arguments as to why it should nevertheless be awarded the full amount of the working capital adjustment: first, the SPA’s indemnification provisions contained a broad exception to such cap for claims “based upon fraud,” and second, the independent auditor’s determination of the amount due buyer under the working capital adjustment process was an arbitration award that should be confirmed and
made binding on the sellers under the Delaware Arbitration Act. The sellers countered that the buyer’s recovery under the SPA was limited to the now-exhausted escrow amount and that the independent auditor’s findings did not constitute such a binding award.

In considering the merits of the parties’ respective interpretations of the SPA’s indemnification scheme, the court was faced with two conflicting provisions each purporting to “override” the other.

• One was Section 10.4(d), setting forth the SPA’s cap on damages:
  “Notwithstanding anything to the contrary in this [SPA], ... the Buyer Indemnified Parties shall only be entitled to indemnification...in respect of the representations and warranties...to the extent of, and exclusively from, any then-remaining Escrow Funds” (emphasis supplied).

• The other was Section 10.10(b), the exception to the SPA’s exclusive remedies provision:
  “Notwithstanding anything in this [SPA], to the contrary (including...any limitations on remedies or recoveries...), nothing in this [SPA] (or elsewhere) shall limit or restrict (i) any Indemnified Party’s rights or ability to maintain or recover any amounts in connection with any action or claim based upon fraud in connection the transactions contemplated hereby...” (emphasis supplied).

Before turning to its analysis of the conflicting provisions themselves, the court noted that the SPA contained a “straight forward” non-reliance provision in which the buyer had specifically disclaimed any reliance on extra-contractual representations, and that the buyer was also bound both by the SPA’s separation of the representations and warranties of the sellers from those of EMSI itself and the express statement in the SPA that the former were the only representations and warranties being made by the sellers. The court observed in light of the foregoing that under Abyr,4 its progeny, absent a “contractual portal,” the buyer could not reach the sellers on an indemnification claim beyond the escrow amount unless it could demonstrate that the sellers acted an “illicit state of mind” or “knew that the Company’s representations and warranties were false.”

The sellers maintained that no such “contractual portal” existed. Despite the presence of the non-reliance provision,5 the sellers argued that the fraud exception in Section 10.10(b) was intended only to remove the limitations on liability for extra-contractual fraud claims, and that the cap still applied to claims based on fraud by EMSI to the extent the claim arose from misrepresentations within the contract and the sellers were unaware of the falsity. Not surprisingly, the buyer argued, first, that the specific “notwithstanding” clause in Section 10.10(b), which disclaimed all limitations on recoveries for fraud, should prevail over the more general “notwithstanding” clause in the preamble of 10.4, which was not specifically tied to the indemnification limits of Section 10.4(b); and second, that the fraud carveout contained in Section 10.10(b) permitted the buyer to recover from the sellers beyond the cap for any indemnification claim “based upon” a fraudulent rather than innocent misrepresentation by the Company – whether the sellers had knowledge was irrelevant.

Finding that each party had advanced a “reasonable” interpretation of the competing “notwithstanding” clauses, and in addition that it could not glean as a matter of law whether “based upon fraud” was intended to remove limits on the sellers’ liability for “any” claim based upon fraud, including where EMSI was the lone actor, the court determined that extrinsic evidence was required and denied sellers’ motion to dismiss buyer’s indemnification claim.6

In addition, noting that the SPA explicitly provided that the independent auditor would resolve disputes over the working capital adjustment “acting as an expert and not an arbitrator;” the court found that the independent auditor’s determination clearly was not an arbitration award that could be confirmed as a final judgment under the Delaware Arbitration Act, and granted sellers’ motion to dismiss buyer’s request for confirmation.

The opinion leads to a few drafting pointers, both involving (as do many drafting pointers) the need for clarity:

• First, don’t rely on “notwithstanding” (or “subject to” or “in no event” or ...) clauses without making sure they don’t create circularity. (Hint: Do you have more than one?)

• Second, as discussed in the context of many prior cases, be precise about the fraud covered by the exception: if the intent is to limit it to fraud in the inducement, say so (as opposed to collateral fraud that results in a misrepresentation, which is suggested by “based upon”). And be clear as to whose fraud is being covered by the indemnity—only the person making the rep, or anybody (again, the problem with the ambiguous “based upon”).

1 Abyr Partners V, L.P. v. F&W Acquisition LLC, 891 A.2d 1032 (Del.; Ch. 2006)
2 The opinion makes no mention of the sellers addressing this issue. The court, however, in separate footnotes observed (i) that such an indemnification scheme would be outside of Abyr, in which a non-reliance clause was held to preclude claims for extra-contractual fraud, but (ii) the breadth of the fraud exception could be read to allow extra-contractual claims notwithstanding the non-reliance provision.
3 The sellers had also challenged whether the buyer had adequately pled fraud, arguing for application of the heightened pleading standard under the federal securities laws. The court declined to require a showing of scienter by the corporate agents responsible for making EMSI’s representations. The court observed that, under Delaware law, “a plaintiff adequately pleads knowledge in the context of fraud when he pleads facts that allow a reasonable inference that the false representation was ‘knowable and [the defendants were in a position to know it.’ Since under Delaware principles of agency courts will impute the knowledge of corporate actors to its corporate employer so long as the agent was acting within the scope of such agent’s authority, the court held that Delaware law simply required the buyer to plead that EMSI’s employees had knowledge of the fraud.
PRIVATE EQUITY M&A SUBCOMMITTEE

First, a warm welcome to all the members of the Business Law Section’s Private Equity and Venture Capital Committee who are now receiving this for the first time in Preferred Returns. For those of you who do not know, the Private Equity M&A Subcommittee is now a subcommittee of both the M&A Committee and the Private Equity and Venture Capital Committee. I look forward to the participation in our Subcommittee of members of the PE/VC Committee who are interested in private equity M&A, and I hope to see new faces in the room in Chicago on September 15.

For those of you who weren’t with us in New Orleans in April, we continued our Nuts and Bolts Series with a program entitled “The Application of Delaware Governance Principles to Private Equity Deals.” I was joined by the former Chief Justice of the Delaware Supreme Court, the Honorable Myron T. Steele (Potter Anderson Corroon LLP, Wilmington, DE) and Melissa DiVincenzo (Morris, Nichols, Arsht & Tunnell LLP, Wilmington, DE), in a discussion that focused on how various Delaware corporate governance issues come into play in the sale of a private equity portfolio corporation. We continued our “The Experts Speak” series with Martin Rubio (Duff & Phelps Securities, LLC, Houston, TX) joining me for a discussion on “How to Get the Most Value From Your Investment Banker Prior to the Solicitation of Offers.” Finally, we concluded with our Recent Developments segment in which Lisa Hedrick (Hirschler Fleischer, Richmond, VA), discussed In re Metrologic Instruments, Inc. Shareholders Litigation and George M. Taylor III (Burr & Forman LLP, Birmingham, AL), discussed SRS v Gilead.

In addition to the normal Private Equity M&A Subcommittee Meeting, the New Orleans meetings also included a CLE Program that I chaired, and that I know many subcommittee members were able to attend, entitled “The Nuts and Bolts of Private Equity M&A – What Makes PE Deals Different.” I was joined on the panel by Sophie Lamonde (Stikeman Elliott LLP, Montréal, Québec), Russell Light (Kirkland & Ellis, New York, NY) and Neal Reenan (Kirkland & Ellis, Chicago, IL) and Martin Rubio Rubio (Duff & Phelps Securities, LLC, Houston, TX). For those who missed the program, I’m sure the program is available through the Section and it should prove to be a useful listen for those of your colleagues who practice in the field but don’t attend our meetings.

Our subcommittee will meet in Chicago on Friday, September 15, from 10:30 am to 12:00 pm. For those of you on the PE/VC Committee, that seems to be our regular time. In keeping with our tradition, we intend to pack as many presentations and as much information into our 90 minutes as we possibly can. We will start with our usual “The Experts Speaks” segment with Jeff Hoffmesiter (Managing Director, Morgan Stanley, New York, NY), discussing “Private Equity M&A in the Trump Administration.” I will then be joined by our former M&A Committee Chair, Mark Morton (Potter Anderson, Wilmington, DE), for our Recent Developments segment focusing on The Frederick Hsu Living Trust v ODN Holding Corporation, et. al., an April decision by Delaware Vice Chancellor Laster. Finally, our program will conclude with our Nuts and Bolts Segment, which will consist of a panel put together by our Subcommittee’s Vice-chair, Mireille Fontaine (BCF, Montréal, Québe), discussing “Cross-Border and Other Hot Topics in Private Equity M&A.” The panel will be chaired by Jake Bullen (Cassels Brock, Toronto, Ontario). Jake will be joined on the panel by Kimberly Smith (Katten, Chicago, IL), Bryan Bylica (McGuire Woods, Chicago, IL), Phillip D. Bronsteatter (Pfingsten Partners, Chicago, IL), Jeffrey Kolke (Monroe Capital, Chicago, IL) and Michael Norton (Houlihan Capital, Chicago, IL).

Especially with the reorganization discussed above, I cannot emphasize enough how important it is that you provide me with YOUR feedback as to the meetings and the Subcommittee, either by talking to me in Chicago or reaching out to me afterwards. There is only so much I can tell from body language in the room while I’m running the meeting as to what is more interesting to our membership and what is of less interest. We are always looking for ideas for future programs, presentations and projects, as well as volunteers for all of them.

Finally, as I’ve said before, if you don’t know me and you are at the Chicago meetings, please come by and introduce yourself. I’d like to meet as many of you as possible.

I look forward to seeing many of you in Chicago in September.

DAVID I. ALBIN, CHAIR
MIREILLE FONTAINE, VICE-CHAIR
The Deal Krewe

In this issue of Deal People, we celebrate the M&A Committee deal krewe that organized a parade at the ABA Business Law Section 2017 Spring Meeting in New Orleans!

Wikipedia tells us that “the holiday of Mardi Gras is celebrated in Southern Louisiana. Celebrations are concentrated for about two weeks before and through Shrove Tuesday, the day before Ash Wednesday (the start of lent in the Catholic tradition). Usually there is one major parade each day (weather permitting); many days have several large parades. The largest and most elaborate parades take place the last five days of the Mardi Gras season. In the final week, many events occur throughout New Orleans and surrounding communities, including parades and balls (some of them masquerade balls).”

The parades in New Orleans are organized by social clubs known as krewes (pronounced in the same way as “crew”). With the strong support of M&A Committee Chair Scott Whittaker and his Section colleagues in New Orleans, the Business Law Section krewe did a great job organizing a special off-season Mardi Gras parade for the Section and Committee when we met in New Orleans in April. Here are some favorite pictures from the fun night out. Note the prominent use of the colors purple, green and gold, which since 1872 have traditionally been associated with Mardi Gras in New Orleans and which symbolize justice, power and faith respectively.

About Deal People

Deal People is a feature in Deal Points that highlights members of the M&A Committee and things that interest them, other than doing deals. Ideas for future features in Deal People are welcomed.

John F Clifford   |   McMillan LLP   |   Toronto, Canada   |   john.clifford@mcmillan.ca
COMMITTEE MEETING MATERIALS
Dial in information for Committee & Subcommittee Meetings
SHERATON GRAND CHICAGO AND GLEACHER CENTER | CHICAGO, ILLINOIS
SEPTEMBER 15-16, 2017

Please note that times listed are CENTRAL 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>Sheraton</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Chicago Ballroom VII, Ballroom Level</td>
<td>(866) 646-6488</td>
<td>(707) 287-9583</td>
<td>1786332268</td>
</tr>
<tr>
<td>Sheraton</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wrigleyville, Lobby Level</td>
<td>(866) 646-6488</td>
<td>(707) 287-9583</td>
<td>5656721804</td>
</tr>
</tbody>
</table>

Friday, September 15, 2017

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>9:00 – 10:30 am</td>
<td>M&amp;A Jurisprudence Subcommittee</td>
<td>Sheraton Chicago Ballroom VII, Ballroom Level</td>
</tr>
<tr>
<td></td>
<td>Chair: Michael G. O’Bryan</td>
<td></td>
</tr>
<tr>
<td>10:30 am – 12:00 pm</td>
<td>Private Equity M&amp;A Subcommittee</td>
<td>Sheraton Chicago Ballroom VII, Ballroom Level</td>
</tr>
<tr>
<td></td>
<td>Chair: David I. Albin</td>
<td></td>
</tr>
<tr>
<td>1:00 pm – 2:00 pm</td>
<td>Legal Project Management Task Force</td>
<td>Sheraton Wrigleyville, Lobby Level</td>
</tr>
<tr>
<td></td>
<td>Co-chairs: Byron S. Kalogerou and Dennis J. White</td>
<td></td>
</tr>
<tr>
<td>1:00 pm – 2:30 pm</td>
<td>Acquisition of Public Companies Subcommittee</td>
<td>Sheraton Chicago Ballroom VII, Ballroom Level</td>
</tr>
<tr>
<td></td>
<td>Chair: Jennifer F. Fitchen</td>
<td></td>
</tr>
<tr>
<td>2:30 pm – 3:30 pm</td>
<td>Women in M&amp;A Task Force</td>
<td>Sheraton Chicago Ballroom VII, Ballroom Level</td>
</tr>
<tr>
<td></td>
<td>Chair: Jennifer Muller</td>
<td></td>
</tr>
<tr>
<td>3:30 pm – 4:30 pm</td>
<td>Technology in M&amp;A Subcommittee</td>
<td>Sheraton Chicago Ballroom VII, Ballroom Level</td>
</tr>
<tr>
<td></td>
<td>Chair: Daniel P. Rosenberg</td>
<td></td>
</tr>
<tr>
<td>4:30 pm – 5:00 pm</td>
<td>Subcommittee and Task Force Chairs Meeting</td>
<td>Sheraton Chicago Ballroom VII, Ballroom Level</td>
</tr>
<tr>
<td>5:00 pm - 6:00 pm</td>
<td>Women in Law Reception</td>
<td>Sheraton Missouri, Meeting Room Level</td>
</tr>
</tbody>
</table>
### Saturday, April 8, 2017

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>9:00 am – 10:30 am</td>
<td><strong>Market Trends Subcommittee</strong>  &lt;br&gt;Chair: Hal J. Leibowitz</td>
<td>Sheraton Chicago Ballroom VII, Ballroom Level</td>
</tr>
<tr>
<td>10:30 am – 12:00 pm</td>
<td><strong>International M&amp;A Subcommittee</strong>  &lt;br&gt;Chair: Franziska Ruf</td>
<td>Sheraton Chicago Ballroom VII, Ballroom Level</td>
</tr>
<tr>
<td>12:00 pm – 1:00 pm</td>
<td><strong>M&amp;A Litigation Joint Task Force</strong>  &lt;br&gt;Co-chairs: Lewis H. Lazarus and Yvette Austin Smith</td>
<td>Sheraton Chicago Ballroom VII, Ballroom Level</td>
</tr>
<tr>
<td>1:00 pm – 2:00 pm</td>
<td><strong>Private Company Model Merger Agreement Task Force</strong>  &lt;br&gt;Co-chairs: Melissa D. DiVencezo and Amy Simmerman</td>
<td>Sheraton Chicago Ballroom VII, Ballroom Level</td>
</tr>
<tr>
<td>2:00 pm – 3:00 pm</td>
<td><strong>Financial Advisor Disclosures Task Force</strong>  &lt;br&gt;Chairs: Brad Davey</td>
<td>Sheraton Chicago Ballroom VII, Ballroom Level</td>
</tr>
<tr>
<td>3:00 pm – 5:00 pm</td>
<td><strong>Mergers and Acquisitions Full Committee Meeting</strong>  &lt;br&gt;Chair: Scott T. Whittaker</td>
<td>Sheraton Chicago Ballroom VII, Ballroom Level</td>
</tr>
<tr>
<td>7:00 pm – 10:00 pm</td>
<td><strong>Mergers and Acquisitions Committee Dinner</strong>  &lt;br&gt;Sponsored by: Doxly and U.S. Bank  &lt;br&gt;7:00 pm Reception</td>
<td>Coco Pazzo  &lt;br&gt;300 W. Hubbard</td>
</tr>
</tbody>
</table>

**Deal Points**  <br>●  <br>Volume XXII, Issue 3, Fall 2017

### CLE Programs

<table>
<thead>
<tr>
<th>Date</th>
<th>Time</th>
<th>Event</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>Friday, September 15</td>
<td>8:30 am – 10:00 am</td>
<td><strong>What M&amp;A Lawyers Need To Know about Representation and Warranty Insurance</strong></td>
<td>Sheraton Chicago Ballroom III, Ballroom Level</td>
</tr>
<tr>
<td>Friday, September 15</td>
<td>10:30 am – 12:00 pm</td>
<td><strong>Blockchain: How the Technology Behind Distributed Ledgers Will Impact Corporate Law And M&amp;A Practice</strong></td>
<td>Sheraton Chicago Ballroom III, Ballroom Level</td>
</tr>
<tr>
<td>Friday, September 15</td>
<td>2:30 pm – 4:00 pm</td>
<td><strong>Spotting Traps and Tripwires in the M&amp;A Sales Process - Governance Handbook Comes to the Rescue</strong></td>
<td>Sheraton Chicago Ballroom III, Ballroom Level</td>
</tr>
</tbody>
</table>

*Ticket Required*
Superior and precise M&A escrow and paying agent services

Our local escrow specialists have a deep understanding of the complexity and timing requirements of your M&A transactions. Your dedicated relationship manager will work with you and our internal exchange and paying agent team to customize a solution that ensures timely and flawless execution of your transaction.

Lars Anderson
National Sales Manager
313.234.4719
lars.anderson@usbank.com
Find an escrow agent that
- supports local and global transactions
- has expertise in M&A, Bond and Loan Capital Raising and Litigations
- provides integrated paying agent services
- distributes funds quickly and securely

Reminder
Call J.P. Morgan Escrow Services

To learn more, call your J.P. Morgan Escrow Services representative, or visit jpmorgan.com/escrow
In addition, the Notice provides guidance regarding the active role to be played by special committees of independent directors in the context of material conflict of interest transactions. Despite acknowledging that a special committee of independent directors is only mandated by MI 61-101 in the case of insider bids, Staff are of the view that a special committee is advisable for all material conflict of interest transactions. To this end, the Notice sets out Staff’s recommendations with respect to the formation, role and mandate of special committees. For example, Staff believe that special committees should be formed prior to the negotiation of a particular transaction, composed of independent directors; and have a mandate that includes the ability to (1) conduct or supervise negotiations, (2) consider alternative transactions, (3) provide or withhold recommendations and (4) retain independent legal and financial advice.

With respect to fairness opinions, Staff believe that a special committee cannot substitute the results of a fairness opinion for its own judgment as to whether a transaction is in the best interests of shareholders. Rather, it is generally the responsibility of the board of directors and the special committee to determine whether a fairness opinion is necessary, and similarly to determine the terms and financial arrangements for the engagement of an advisor to provide a fairness opinion.

However, in the context of material conflict of interest transactions and where a fairness opinion has been obtained, the Notice indicates that such disclosure should include:
1. the compensation arrangement;
2. how the compensation arrangement was taken into account;
3. any other relationship between the financial advisor and the issuer;
4. a clear summary of the methodology, information and analysis underlying the opinion; and
5. how the opinion was utilized by the board or special committee.

Following recent court decisions in Canada, there has been significant debate as to whether (1) reliance on a fairness opinion from an advisor that is being paid a fee contingent on a successful outcome is appropriate, (2) the specific amount of an advisors’ success and other fees should be disclosed (which disclosure is common in the United States) and (3) fairness opinions should disclose the financial analysis underlying them. Although, the Notice makes it clear that Staff expects a fairness opinion to disclose the financial analysis underlying the opinion, it did not set out any clear rules regarding the other two issues of controversy.

Over time, we would expect that more fulsome disclosure of fee arrangements will become the norm in Canada. On the other hand, there has been much resistance to retaining an additional advisor to provide a fairness opinion on a fixed-fee basis, particularly for middle market or smaller transactions. Nevertheless, we expect that, in contested M&A transactions, the retention of a second advisor to provide a fairness opinion on a fixed-fee basis will become more prevalent in order to provide additional protection for the transaction and insulate a board of directors. In other words, a second fixed-fee opinion in contested M&A transactions may be insurance well worth buying.

The conduct of Canadian boards in material conflict of interest transactions with respect to independent special committees and fairness opinions will no doubt evolve over the next few years due to the increasing oversight and heightened regulatory scrutiny that has been a feature of the Canadian regulatory landscape for well over a decade.
of confidential business information. The seller may contend that it should share in all incremental benefits and growth to the buyer originating from its business as that is the purpose of the earn-out and any other approach would simply be substance over form. The buyer may contend that it is already paying a premium for the business, which includes the anticipated synergies, and that seller’s approach would result in seller effectively double dipping its capture of synergistic benefits. Prior to closing, the parties may well consult their M&A advisors and work out this issue in the form of some kind of compromise, which should be accurately set forth in the purchase agreement. After the fact, litigation is all but guaranteed in a binary situation as described in the case study above.

Finally, if the parties agree that the transfer of intellectual property or confidential information should be considered for purposes of calculating the earn-out, it may well be advisable to provide for a clear and detailed valuation methodology in the purchase agreement. Without the benefits of clarity to that effect, the parties may agree that the transferred confidential information has economic value, but disagree vehemently on what that value is.

Continued from Page 13

Drafting Tips

As highlighted by the above Delaware caselaw, drag-along provisions are valuable tools for private-equity and venture capital investors to use to protect the fund-affiliated directors of their portfolio companies from litigation regarding alleged breaches of fiduciary duties. Drag-along provisions also enhance such investors’ control over their exit from an investment by protecting the sale transaction from objection by minority stockholders. The following list contains drafting tips and recommendations with respect to exercise procedures drawn from the recent Delaware case law described above.

- the procedures laid out in the terms should be clear and easy to follow;
- the terms should require the minority stockholders to sign all documents required by the transaction agreement, including the transaction agreement or a joinder thereto;
- the minority stockholders should have all requested documentation executed and delivered prior to consummation of the transaction;
- the terms should require the minority stockholders to vote their shares in favor of or consent to the transaction and such action should occur prior to the consummation of the transactions;
- the terms should grant the majority stockholders a proxy and a power of attorney enabling the majority stockholders to vote the minority stockholders’ shares and to sign any documentation on behalf of such stockholders;
- the terms should explicitly include an express waiver of statutory appraisal rights;
- the terms should explicitly provide that the minority stockholders will agree to all indemnification obligations and other post-closing obligations being agreed to by the majority stockholders;

- the terms should explicitly provide that the minority stockholders will agree to the appointment of a stockholder representative chosen at the discretion of the majority stockholders, as well as the establishment of an escrow or similar-type of fund to pay the expenses of such stockholder representative;
- the exercise of the drag-along should only be triggered by stockholder action and should not be triggered by board action (i.e., the affirmative vote of certain stockholders, rather than the affirmative vote of certain stockholders and the board of directors);
- the majority stockholders should meticulously follow the exact terms and requirements of the drag-along provision when exercising the drag;
- any equity or option plan should also contain drag-along provisions (to the extent participants are not required to execute the stockholders’ agreement or other agreements containing the drag-along provisions applicable to other stockholders);
- the notice to the minority stockholders notifying them that the drag-along provisions are being exercised should include an express waiver of statutory appraisal rights;
- the drag-along provision should be exercised prior to the consummation of the transaction (particularly if it is requiring the vote or consent of the minority stockholders) and the majority stockholders should not consummate the transaction until all votes have been cast or all documentation signed.

Conclusion

Although practitioners must always be aware of the inherent conflict of interest faced by institutional investor/fund-affiliated board members, exercise of a properly tailored drag-along provision to effect a transaction can help to obviate these risks. The inclusion of drag-along provisions which properly deal with director fiduciary duty obligations, restrictive covenants and indemnification schemes is an essential component in drafting documentation upon acquisition by fund investors of private companies. A sound understanding of the drafting and exercise of these provisions, and how they can affect an exit, is becoming even more important in light of the increased scrutiny being placed on a board’s involvement in preferred stockholder exit (particularly, in regard to the recent caselaw that the preferred stockholder’s contractual rights do not trump the fiduciary duties owed to the corporation and its stockholders).
