I look forward to seeing many of you in Orlando, Florida at the next meeting of the M&A Committee, which will be held at the Rosen Shingle Creek Hotel on April 13th and 14th, as part of the ABA Business Section Spring Meeting.

Our subcommittees and task forces will meet throughout the day on Friday and Saturday, concluding with our full Committee meeting Saturday afternoon. A complete schedule is set forth at the end of this issue of Deal Points. Some of the highlights of our subcommittee and task force meetings are also 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 sponsor for this weekend: Practical Law/Thompson Reuters. On behalf of the Committee, THANK YOU!

COMMITTEE LEADERSHIP CHANGES

Claudia Simon has stepped down from her position as Chair of the Market Trends Subcommittee, and Rita O’Neil has stepped up from her Vice-Chair position to take over as Chair. Kevin Kyte will continue in his position as Subcommittee Vice-chair, as the Market Trends Subcommittee continues its great work publishing an ever-widening array of Deal Points studies. Please join me in thanking Claudia for her leadership of the Market Trends Subcommittee. We look forward to Claudia’s continuing involvement in the work of the M&A Committee.

INAUGURAL MEETING OF SHORT FORM MODEL ACQUISITION AGREEMENTS JOINT TASK FORCE

The inaugural meeting of the Joint Task Force on Short Form Model Acquisition Agreements will occur in Orlando. This is a joint effort with the Middle Market and Small Business Committee, the goal of which is to publish a model short form stock purchase agreement and model short form asset purchase agreement, with ancillary documents and commentary. These model agreements, which will be more easily adaptable for use in smaller M&A transactions than the “long form” Model Stock Purchase Agreement and Model Asset Purchase Agreement previously published by the M&A Committee, are intended to address problems that practitioners have voiced with respect to using the “long form” agreements in smaller transactions. Those problems include client perception that the “long form” documents create “over-lawyering” and contain provisions that less deal-savvy clients consider incomprehensible and unnecessary, but that practitioners fear to shorten at the risk of unknowingly deleting important client protections.

This project was undertaken several years ago by the Middle Market and Small Business Committee, which has developed working drafts of both a model short form stock purchase agreement and model short form asset purchase agreement. It is now the time for members of the M&A Committee to get involved in developing those working drafts into model documents with commentary, for publication by the ABA. This project will undoubtedly present many interesting and challenging decisions and drafting opportunities, and we are hoping a number of M&A Committee members will attend this inaugural meeting and become actively involved in the work of this joint task force. Jason Balog will be the Task Force Co-Chair for the M&A Committee, to serve with Eric Graben, Task Force Co-Chair for the Middle Market & Small Business Committee. If you are interested, please join Jason and Eric on Friday, April 13, from 1:00 to 2:30 p.m. in Orlando.

FORMATION OF M&A ACADEMICS SUBCOMMITTEE

As was announced at our full committee meeting in Laguna Beach, the M&A Committee is forming an Academics Subcommittee. The purpose of the Academics Subcommittee is to create a forum within the M&A Committee, to bring M&A Committee members together with academics who spend time teaching, researching, and writing on M&A-related topics, so that the two groups can discuss M&A-related topics of mutual interest and areas of research that may impact M&A practice. The goal of the Academics Subcommittee is to facilitate greater discourse and idea exchange between academics, practitioners, and others who
participate in the Subcommittee, including the judiciary, on issues that swirl around M&A. The Academic Subcommittee will launch in Austin. John Hughes and Eric Talley, of Columbia Law School, will be the inaugural Co-Chairs of the Academics Subcommittee.

**FALL MEETING IN AUSTIN**

After Orlando, our next meeting will be September 14th and 15th in Austin, in conjunction with the ABA Business Law Section Fall Meeting. We are looking for ideas for educational programs for that meeting. For more information about the types of programs we are seeking, see George Taylor’s Programs Subcommittee write-up in this issue of Deal Points. Of course, we will also have our substantive subcommittee and task-force meetings, as well as some great dinners and socializing in Austin. Please save the date and plan to attend if you can.

If you have any questions concerning our meeting in Orlando, please don’t hesitate to ask. I look forward to seeing many of you in Orlando!

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**FROM THE EDITORS  Ryan D. Thomas & Chauncey M. Lane**

Spring has sprung...at least in most parts of the country! As the Winter season comes to a close, we hope the first quarter was full of M&A activity. From impressive membership growth to excellent committee produced publications, there is a lot to celebrate at the Spring Meeting!

In this issue of Deal Points, we have an article on common M&A antitrust compliance issues that occur before signing and pre-closing along with an article highlighting the work of Legal Project Management Task Force and the release of its second edition of Using Legal Project Management in Merger and Acquisitions Transactions.

As always, please let us know if you would like to submit an article for a future issue or would like to highlight your subcommittee or task force in What’s New & Trending. Otherwise, we look forward to meeting you in the warmth and beautiful rays of Orlando.
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COMMITTEE SPOTLIGHT

Jason E. Balog – Co-chair of the Joint Task Force on Model Short Form M&A Documents
Miles & Stockbridge, JBalog@MilesStockbridge.com

Eric K. Gaben – Co-chair of the Joint Task Force on Model Short Form M&A Documents
Wyche, EGraben@Wyche.com

As mentioned during the stand-alone meeting of the M&A Committee in January, the M&A Committee has joined the Middle Market and Small Business Committee to form a Joint Task Force on Model Short Form M&A Documents. The goal of the Joint Task Force is to publish a set of “short form” acquisition agreements (with ancillary documents and commentary) which would be more easily adapted for use in smaller M&A transactions than the “long form” Model Stock Purchase Agreement and Model Asset Purchase Agreement published by the M&A Committee. M&A Committee members have two opportunities during the ABA Business Law Section Spring Meeting in Orlando to learn about this exciting project and to get involved.

• CLE Program: On Thursday, April 12th members of the Joint Task Force will be presenting the CLE program: “Introducing the Model Stock Purchase Agreement.” This CLE program will introduce attendees to the working draft of the Model Short Form Stock Purchase Agreement. The program will be from 10:30 – 12:00 in Sebastian I-2, Level 1.

• Joint Task Force Meeting: On Friday, April 13th the inaugural meeting of the Joint Task Force will be held from 1:00 – 2:30 in Wekiwa 4, Level 2. This meeting will provide M&A committee members an opportunity to learn about and get involved with this exciting project.

LEGAL PROJECT MANAGEMENT

Byron S. Kalogerou – Co-chair of the Task Force on Legal Project Management
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Dennis J. White – Co-chair of the Task Force on Legal Project Management
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We’re excited to announce the release of the second edition of Using Legal Project Management in Merger and Acquisition Transactions – A Guidebook for Managing Deals Efficiently and Effectively. The new edition feature five new practical tools that can be implemented in various stages of a transaction. The new tools include:

• Multi-Jurisdictional Transaction Checklist
• Carveout Transaction Checklist
• Post-Acquisition Integration Checklist
• Deal Management and Complexity Tool
• M&A Budgeting Tool.

All of the tools may be accessed on a dedicated ABA website and are updated periodically. We believe you will find them beneficial in your practice. And last but certainly not least, please join me in extending a big thank you to the Task Force members who worked tirelessly on the production and development of the M&A Toolkit.
GOT NEWS & TRENDS?

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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 at dealpoints@bassberry.com
An Introduction to the Second Edition of “Using Legal Project Management in Merger and Acquisitions Transactions” – How We Got Here and Where We’re Going!

By Byron S. Kalogerou and Dennis J. White

This Spring, the ABA will be publishing the second edition of Using Legal Project Management in Merger and Acquisitions Transactions – A Guidebook for Managing Deals Efficiently and Effectively.

It has been just six years from the first meeting of the Task Force on Legal Project Management (LPM) in M&A, a Task Force that grew to over 70 members drawn from law firms, corporate law departments, academia and consulting firms.

Much has happened in those six years.

In launching the Task Force in 2012, we, its co-chairs, had observed a growing demand among sophisticated purchasers of legal services for greater transparency, collaboration, predictability and, yes, even actual budgets for M&A deals. Although LPM was in its infancy, we strongly felt that lawyers had to be proactive in responding to the “voice of the customer,” and responsive to these growing market trends.

We were inspired in part by the work of Dr. Atul Gwande, author of the best-seller, The Checklist Manifesto, a book that transformed how operating rooms function. Gwande’s thesis was that simple checklists could dramatically reduce the incidence of errors in operating rooms – and he was proven right. Like Gwande, we experienced skepticism and pushback – big-time pushback. Many experienced lawyers felt that LPM was a waste of time, that it impinged on their professional judgment, and that it was just another consultant-driven fad. In the intervening years, many of those naysayers have become converts as ideas our viewpoints have shifted from being on the lunatic fringe to pioneers.

Witness what has happened in the past several years:

• LPM has become something of an industry of its own with countless books, seminars, webinars, certification programs, and cadres of consultants

• Client RFP’s ask interested firms to detail how they will utilize LPM in handling the matter in question and in the relationship in general

• Entire new job functions have been implemented at law firms such as project manager, matter manager, pricing manager and their ranks are growing rapidly

• Many leading law firms have made legal project management a major firm initiative to help them compete more effectively, to become more profitable, especially in the case where alternative fee arrangements are used

• Legal malpractice insurers have embraced LPM and checklists in particular as a way of reducing errors to better managing risk

Even with regard to the first edition of our Guidebook, the initial printing sold out in record time and it continues to be one of the best-selling publications of the Business Law Section. It has been purchased by over 50 law schools, many of which are introducing LPM into their curricula.

This veritable LPM tsunami prompted the Task Force to continue to ride the wave and work on a second edition with new LPM tools. As before, in addition to appearing in a hardcopy book, the tools may also be downloaded from the web and customized for a particular transaction. The new tools cover different phases of a transaction: pre-deal, deal, post-deal and, of growing importance, billing/budgeting. Here are thumbnail descriptions of the new tools:

• Multi-Jurisdictional Transaction Checklist: Checklist of issues to consider in an M&A transaction that is multi-jurisdictional in nature. For example, buyer and seller may maintain operations in multiple jurisdictions.

• Carveout Transaction Checklist: A carveout transaction involves the sale of a subsidiary, division or business unit where the seller continues in existence as an operating entity following the closing. Carveout transactions are complex and raise their own unique set of issues. This internal tool is intended to assist counsel and its client in planning and handling such a transaction.

• Post-Acquisition Transaction Checklist: While deal making is hard, integration is even harder. This tool provides a list of questions and action items for a buyer to consider in developing and implementing a post-closing integration plan.

• Deal Management and Complexity Tool: This tool identifies certain elements of complexity that can consume resources, drive up legal costs and extend the duration of an M&A transaction. Consideration of such elements is critical in gathering resources, preparing a budget and setting expectations for a M&A deal.

• M&A Budgeting Tool: Utilizing the M&A Codes, this Excel-based tool sets out deal phases and allows counsel to insert tasks, estimated hours to complete the tasks, and timekeepers by seniority. With the estimated hours and billing rate inserted, counsel can calculate a budget with a reasonable degree of precision.

We thank the Task Force members who took the lead in producing these new tools and making valuable contributions to LPM in the M&A tool kit.

We regard the Guidebook as a dynamic document. Since the tools are posted to a dedicated ABA website, we update and supplement them continuously, without the need to wait for the next hardcopy edition. As a result, please be sure to forward to us any suggestions for improving the existing tools and, more importantly, providing ideas for new tools.

1 Byron S. Kalogerou, is a partner in the Boston office of McDermott Will & Emery LLP. Dennis J. White is senior counsel in the Boston office of Verrill Dana LLP. They are co-chairs of the Task Force on Legal Project Management in M&A of the Mergers and Acquisitions Committee of the Business Section of the ABA.
M&A Antitrust Compliance – Issues before Signing and Pre-Closing

By Matthew J. Bester and Creighton J. Macy

You’ve worked out the thousands of details necessary to close an acquisition. You’re getting close to the signing date. And then... your antitrust colleague asks whether the deal team considered the relevant antitrust issues that may stem from the acquisition.

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

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

As soon as possible, you should discern the competitive relationship between the parties. This is a key point that directly influences the level of antitrust scrutiny in the contemplated deal under Section 7A of the Clayton Act. 15 U.S.C. § 18, which prohibits transactions in the U.S. that may “substantially” lessen competition. Other jurisdictions around the world have similar tests. In general, transactions among competitors will be viewed more critically by antitrust authorities than other transactions. To determine if your client competes with its merger partner, you should ask questions such as whether the parties have competing products or services and whether they compete for the same type of customers.

In addition, important antitrust issues can arise in the due diligence process, particularly with respect to sharing competitively sensitive information (“CSI”) with your merger partner.2 If you determine that the parties are competitors, even in broad terms, your client must take precautions to protect the flow of CSI. Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits a “contract, combination . . . or conspiracy” that unreasonably restrains trade. Information exchanges among competitors therefore can be risky under Section 1 because they may increase competitors’ (and to be clear, merging parties are considered competitors until they close the transaction) ability to collude or coordinate behavior that lessens competition between or among them. For instance, competitors exchanging price information could facilitate illegal coordination among them—and, there are notable examples of competition enforcers finding instances of such facilitation when reviewing merger parties’ documents during the pendency of a review.3

Enforcement bodies around the world—including the Antitrust Division of the U.S. Department of Justice (“DOJ”), U.S. Federal Trade Commission (“FTC”), and European Commission (“EC”)—will investigate the improper sharing of CSI between competitors. They have made clear that the due diligence process does not provide a shield.4 The most competitively sensitive information includes non-aggregated data relating to: (i) pricing, including information related to margins, discounts, and rebates; (ii) other confidential, customer-specific data for current or potential customers (i.e., relating to product plans or terms that will be offered); (iii) detailed research and development efforts or product forecasts; and (iv) other forward-looking, market-facing activities.5 While there are many categories of information that can be shared with fewer restrictions, such as balance sheets, aggregated and/or anonymized customer information, and operational systems, note that these are just examples of common categories of CSI and not an exhaustive list of information that should be monitored.

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

1 Mr. Bester is the Director of Competition Law and Senior Director of Government Procurement Compliance at Accenture LLP, and Mr. Macy is a Partner in the Global Antitrust & Competition Law Practice of Baker McKenzie’s Washington, D.C. office. They previously worked together at the Department of Justice’s Antitrust Division. The views expressed herein are those of the authors alone and do not necessarily represent the views of their current or former employers or their clients. The authors thank Paul Johnson, Of Counsel in Baker McKenzie’s Brussels office, for his contributions to the article.

2 Of course, non-antitrust issues can arise during the due diligence process as well. For instance, the sharing of personally sensitive information can result in privacy concerns.


4 The FTC in a recent blog post highlighted this point, noting that that agency: “looks carefully at pre-merger information sharing to make sure that there has been no inappropriate dissemination of or misuse of [CSI] for anticompetitive purposes.” Holly Vedova et al., Avoiding antitrust pitfalls during pre-merger negotiations and due diligence, FED. TRADE COMM’N (Mar. 20, 2018), https://www.ftc.gov/news-events/blogs/competition-matters/2018/03/avoiding-antitrust-pitfalls-during-pre-merger?utm_source=govdelivery.

5 See, e.g.; id.; see also Michael Bloom, Information exchange: be reasonable, FED. TRADE COMM’N (Dec. 11, 2014), http://www.ftc.gov/news-events/blogs/competition-matters/2014/12/information-exchange-be-reasonable; Omnicare, Inc. v. UnitedHealth Group, 629 F.3d 697, 709-11 (7th Cir. 2011).
If an antitrust enforcement body believes there may have been an improper information exchange, it will likely open a separate investigation. This will not only expose the parties to additional antitrust risk, which could include fines, but it could also prolong any investigation related to the deal itself.

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

Given that a merger filing may be necessary, as explained below, it is never too early to remind members of the business team that their correspondence (including, e-mails, voicemails, instant messages, text messages, handwritten notes, standalone documents, and presentations) regarding the deal may be evaluated by antitrust regulators. It is imperative that the business team members be factual and accurate in their communications, as overstated or hyperbole could be misinterpreted. Recent cases and statements from antitrust enforcers show that the U.S. government has relied heavily on the merging parties' ordinary course documents when evaluating a transaction's potential harm or filing a complaint to block a transaction. For instance, then Acting Associate Attorney General and former Assistant Attorney General for Antitrust Bill Baer noted that the DOJ’s “assessments of competitive effects do not simply rely on quantitative evidence provided by expert testimony; we look at likely effects as shown by qualitative evidence, including party documents and industry and customer witness testimony.” This is a trend that we have also noticed in cases with the EC, in which the regulator will increasingly issue questions that focus solely on the merging parties' internal documents.

### Counsel, we're negotiating the merger agreement, what about antitrust related provisions in the agreement?

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

### Counsel, it’s now time to consider the merger control process, what do we need to think about?

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

Failure to comply with antitrust regulatory requirements can result in substantial fines. For instance, the EC has the authority to impose fines up to 10% of the aggregate worldwide turnover of the parties for failing to make a merger notification. If a party is found in violation of the HSR Act, 15 U.S.C. § 18a, in the U.S., it can be fined up to $40,000 per day. Other jurisdictions (including Brazil, China, Canada, India, Japan, and Germany, among others) also have penalties for violation of applicable merger notification laws.

Finally, as noted above, some jurisdictions require the production of documents and the submission of accurate information as part of the filing. For instance, the U.S. antitrust bodies and the EC require the production of certain deal-related documents prepared by or for any officer or director. Failure to adhere to this requirement can result in the company being penalized. The DOJ, for example, imposed a $550,000 fine against a party for failure to provide required documents, even though the DOJ ultimately found that the deal did not pose any substantive antitrust issues. In the EU, Facebook was fined EUR110 million by the EC for allegedly submitting misleading information in its acquisition of WhatsApp. These cases provide an important reminder that filing requirements must be taken very seriously.

### Counsel, we’ve now signed, are there pre-closing issues that we should be aware of?

Many of the questions we get from our clients relate to the scope of proper conduct after the deal has been signed, but before regulatory approval and closing. At a high level,
TASK FORCE ON LEGAL PROJECT MANAGEMENT

The January 2018 meeting of the Task Force in sunny Laguna Beach featured a presentation focused on how concepts of scheduling and Gantt Charts, well established in other business disciplines, are relevant to handling M&A deals more efficiently. Task Force members, Aileen Leventon and John Murdock, covered:

- How to develop a timeline and work plan that shows when tasks, milestones and other events should occur.
- How to best manage work which is contingent upon other events occurring or which may be done in parallel.
- Is it ever too soon to start work on an aspect of a deal, like preparing for closing, or conducting due diligence?
- Is it ever too late to start work that may result in failure to meet critical deadlines, when the client may not be willing to pay for it?

At the upcoming Business Law Section Meeting in Orlando, we will announce the publishing and availability the Second Edition of our Guidebook, Using Legal Project Management in Merger and Acquisition Transactions on Friday, April 13 from 9:00 am - 10:00 am ET in the program: “Legal Project Management in M&A, Version 2.0 - A Look at the 2nd Edition of the LPM in M&A Guidebook”. That session will be held in Panzacola G-2, Level 1. We will not be holding a regular task force meeting in Orlando and encourage Task Force members and other M&A Committee members to attend this program in lieu thereof.

We want to thank everyone who contributed to the new edition. If you have any suggestions for improving our existing tools, ideas for new tools or ideas for future programs, please be sure to send them our way.

We look forward to seeing many of you in Orlando.

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

JOINT TASK FORCE ON MODEL SHORT FORM M&A DOCUMENTS

Some commentators have suggested that worthy lower middle-market transactions break down due to perceived “over-lawyering” and long purchase documents with provisions that less deal-savvy clients perceive are incomprehensible, but that no one wants to shorten for fear of unknowingly deleting a “market standard” liability protection. A few years ago the Middle Market and Small Business Committee (MMSBC) created the Model Short Form M&A Documents Task Force to provide quality model documents to address this concern.

The MMSBC has made substantial progress to develop working drafts of both a model short form stock purchase agreement and model short form asset purchase agreement. The short forms are intended to be model documents for business acquisitions with a purchase price in the $500,000 to $10 million range. The short forms will contain the critical elements of well-drafted purchase agreements typically used in traditional lower middle-market transactions, but with a starting length of about 15 pages. It is the intention that the short forms will be more “user friendly” to owners of smaller businesses and require less attorney time and legal expense than what is typically required for a $10 million to $100 million deal. The short forms may also be used in “tuck-in” or “add-on” acquisitions typically used to help grow a private equity backed platform in anticipation of an exit.

The M&A Committee has recently joined the efforts of the MMSBC to create the new Joint Task Force on Model Short Form M&A Documents. The Joint Task Force now provides M&A Committee members with the opportunity to learn about and get involved with this exciting project. The inaugural meeting of the Joint Task Force will occur on Friday, April 13 from 1:00 – 2:30 in connection with the ABA Business Law Section Spring Meeting in Orlando. See the schedule on page 21 for room location and dial-in details. We look forward to seeing you in Orlando and encourage you to get involved with this project.

JASON BALOG, CO-CHAIR
ERIC GABEN, CO-CHAIR
JOINT TASK FORCE ON M&A LITIGATION

Join the Joint Task Force on M&A Litigation on Friday, April 14 at 1:00 pm – 2:00 pm ET as part of the Business Law Section Spring Meeting in Orlando. The topics of discussion will be the most recent progeny of Corwin, developments in earn-out disputes, and a brief review of the impact of control premiums and agency costs on M&A valuation disputes. The Task Force is a joint initiative of the M&A Committee and the Business and Corporate Litigation Committee. We look forward to your attendance and participation in the discussion. Please feel free to dial-in if you are unable to attend in-person. Dial-in numbers can be found in the schedule on page 21.

LEWIS H. LAZARUS, CO-CHAIR
YVETTE AUSTIN SMITH, CO-CHAIR

JOINT TASK FORCE ON GOVERNANCE ISSUES ARISING IN BUSINESS COMBINATION TRANSACTIONS

Our Task Force is close to publication of our handbook covering the many governance issues confronted by boards of directors engaged in an M&A transaction. Thanks to the hard work of our many authors, we are very near completion of our handbook. Our goal is to publish in 2018. The four co-chairs are serving as the editorial board, and we have completed editorial review for 12 chapters. Three additional chapters have had significant editorial work done and are close to co-chair editorial review. The content submitted by our authors has been excellent quality and we know you will all find this handbook to be a tremendous resource for directors and their advisors. We are still waiting on a draft of one chapter, but otherwise have all content in hand. We will not be meeting as a Task Force in Orlando, but we look forward to seeing many of you there!

DIANE HOLT FRANKLE, CO-CHAIR
LAWRENCE A. HAMERMESH, CO-CHAIR
MICHAEL J. HALLORAN, CO-CHAIR
PATRICIA O. VELLA, CO-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 Orlando. 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. In Orlando, 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 continues. In particular, Neal Reenan (Kirkland & Ellis, Boston, Chicago) will lead a discussion on drafting financing provisions in the private company context. We also expect to continue our traditional meeting format of reviewing any recent case law and practice developments relevant to private company acquisition issues that might affect the drafting of our agreement. Finally, we will discuss our ongoing efforts for volunteers to augment and build out our working draft.

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

TASK FORCE ON REVISED MODEL ASSET PURCHASE AGREEMENT

The Task Force has now moved to the editorial stage. A group of Task Force members has consolidated the work of the small groups and is now reviewing the draft updated model agreement and commentary. With this work underway, the Task Force will not be meeting in the immediate future.

ED DEIBERT, CO-CHAIR
JOHN CLIFFORD, CO-CHAIR
TASK FORCE ON WOMEN IN MERGERS & ACQUISITIONS

In our last Women in M&A Task Force meeting in Laguna Beach, we broke out into three working group sessions in order to make progress on some of our key initiatives: (1) our presentation for law firms on how to increase the level of participation and retention of women in M&A, (2) improvement of communication and dissemination of information through our ABA website, and (3) improvement of our Women in M&A survey. Thanks to all of you who provided valuable input into these initiatives.

We look forward to seeing you all at our next meeting on Friday, April 13 from 2:30 pm – 3:30 pm ET. We will be providing an update on our law school initiatives as well as summarizing the survey and website ideas that came out of our last meeting. The main portion of the meeting will be devoted to the advancement of our law firm presentation. Our goal is to have the presentation finalized for our Laguna Beach meeting in January 2019. Please welcome our two scholars who will be attending the conference, Hannah Dawson from Harvard Law School and Grace Do from NYU Law.

For those of you that cannot join our meeting in person, we will be using the dial-in number listed in the schedule on page 21 for this meeting.

JENNIFER MULLER, CHAIR
RITA-ANNE O’NEILL, VICE-CHAIR

INTERNATIONAL M&A SUBCOMMITTEE

The International M&A Subcommittee met from 10:30 am – 12:00 pm on Saturday, January 27 in connection with the M&A Stand Alone meeting in Laguna Beach.

1. Introductions

Franziska Ruf, the Chair of the Subcommittee, introduced herself and welcomed the participants. She advised those in attendance that she would no longer be able to join us due to other responsibilities. The Subcommittee members warmly applauded her contribution and dedication to the M&A Committee over the years. Franziska you will be missed. Thanks for everything.

2. International M&A activity during the last quarter of 2017

Jennifer Muller, (Houlihan & Lokey, San Francisco, New York) provided attendees with a broad survey on international M&A activity in Europe, Asia and North America.

3. One year on – the influence of the Trump administration in regulatory and tax aspects of M&A.

Brian McCarthy (Skadden, Los Angeles, California) and Larry Stein (Latham & Watkins, Los Angeles, California) provided us with a view of what the Trump administration has done that may affect international M&A. Larry Stein spoke to the recently passed tax reform. The main take away was that there will be more money for strategics to invest with. Debt financing will be at a slight disadvantage cost-wise with caps on interest deductibility. There still remain many questions and that much is still to be worked out in respect of the effects that the reform will have in general. At this stage no one has a very precise idea as to what will be the overall effects. Brian McCarthy went through some of the most significant regulatory issues that M&A is facing. One of the points is that national security and CFIUS are going to remain very active under this administration. There is potential for fundamental change in the US approach. Brian also remarked on the activity of the Justice Department in ant-trust, citing as an example the vertical integration AT&T case. This type of decision will impact structuring and deal certainty. Looking out at what is occurring in Europe where the Commission is reviewing with care investments from China in strategic industries it will come as no surprise that the America first administration will not welcome certain types of investments and will use the tools at its disposal to carry out campaign promises.

4. Take-aways on drafting and post-closing litigation issues.

Lewis Lazarus, (Morris James, Wilmington, Delaware) spoke briefly about some of the issues that may be avoided in post-closing litigation with more careful drafting. He brought to the attention of the subcommittee issues regarding [conflicts of interest and fairness opinions]

5. Subcommittee Website

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

- 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, April 14 from 10:30 am – 12:00 pm, in connection with the Spring meeting of the ABA Business Law Section, Mergers and Acquisitions Committee, in Orlando.

RICHARD SILBERSTEIN, CHAIR
JEFF LABINE, VICE-CHAIR
M&A JURISPRUDENCE SUBCOMMITTEE

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

Friday, April 13
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 M&A related court decisions as we can get to in our allotted time
- topics under review by the Judicial Interpretations Working Group.

A summary of the recent Aruba appraisal opinion, in which the court found the fair value to equal the unaffected trading price prior to the announcement of the merger agreement (about 30% less than the deal price), is attached. We’ll discuss that and more at the meeting.

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

Panel Presentation: As an added bonus, the authors of several of our issues memos, in a panel moderated by Frederic Smith, will present “Recent Developments in M&A Law – Insight from the M&A Lawyers’ Library” on Friday, April 13 from 2:30 pm – 4:00 pm to highlight the practical consequences of and potential responses to the issues. Come to refresh on the issues and see what you may have missed.

We need cases! and more issues topics!

We ask all members of the M&A Committee to send us judicial decisions they think would be of interest to M&A practitioners. We also would like your ideas on topics for future issues memos. Cases and ideas for topics can be sent to Nate, Frederic or me (e-mails below). We rely on members to help identify important cases from all jurisdictions.

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 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 on-line 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.

To join the M&A Jurisprudence Subcommittee, please email any of us, or simply come to the next Subcommittee meeting.
Delaware Chancery Court in Aruba Appraisal Finds Fair

Value to be the Pre-Announcement Market Price: 30% Below Deal Value

Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., Del. Ch. Feb. 15, 2018

In 2015, Hewlett Packard acquired Aruba for a negotiated price of $24.67 per share (for a total of about $2.8 billion). Several stockholders sought appraisal. On February 15, the Delaware Court of Chancery found that, for purposes of appraisal, the fair value of the Aruba shares equaled the thirty-day average unaffected market price of the shares prior to announcement of the transaction, which was $17.13, about 30% less than the negotiated price.

The court’s reasoning was driven largely by what it believed to be directions from the Delaware Supreme Court’s decisions arising from the earlier DFC and Dell acquisitions, including assumptions regarding efficient trading markets. While the court noted that its decision was “not interpreting DFC and DFC to hold that the market price is now the standard for fair value,” the court weighed heavily the unaffected, pre-merger stock price after concluding that Aruba’s stock traded in an efficient market. Notably, the final appraised value was less than the amount proposed by Aruba in the proceedings.

Court Analysis. The court reviewed several potential valuation methods, including the unaffected market price for Aruba shares, the deal price (and the deal price less synergies), and discounted cash flow analyses provided by the parties’ respective experts.

Unaffected Market Price. The court noted that, according to DFC and Dell, the unaffected trading price of a company’s shares “provides evidence of the fair value” of the shares for appraisal purposes “if [the] company’s shares trade in a market having attributes consistent with the assumptions underlying a traditional version of the semi-strong form of the efficient capital markets hypothesis.” The court further noted that the Delaware Supreme Court had described a market as “more likely efficient, or semi-strong efficient,” if “it has many stockholders; no controlling stockholder; highly active trading; and if information about the company is widely available and easily disseminated to the market.” The court noted that the Supreme Court in DFC had stated that market prices were “typically viewed superior” compared to other valuation techniques because they “should distill the collective judgment of the many based on all the publicly available information about a given company and the value of its shares.”

Here, the court found evidence of an efficient market for Aruba shares, including, among other things, the following:

- Aruba did not have a controlling stockholder
- Aruba made public filings in compliance with federal securities laws
- Thirty-three securities analysts covered Aruba
- Aruba’s weekly trading volume was 9.5 million shares or 8.7% of total shares outstanding
- Aruba’s bid-ask spread of 0.055%
- Aruba’s large public float as a percentage of its outstanding shares (96%)
- Evidence that Aruba’s stock price reacted quickly to the release of news about Aruba

The court noted, though, that neither party had proffered an expert opinion on the efficiency of the market for Aruba’s shares, as the court noted was “common” in certain types of federal securities law cases, nor was all the market evidence included in the trial record.

The court also rejected the stockholders’ contention that HP had taken advantage of a presumably temporary “trough” in the market for Aruba’s shares. The court noted that the court’s reliance in an earlier appraisal action for Dell on a “valuation gap” between the trading price for Dell and Dell’s “operative reality” had been rejected by the Delaware Supreme Court “in light of the attributes of the market for Dell shares and the implications of the semi-strong form of the efficient capital markets hypothesis,” and that in this case the evidence of market mispricing was “considerably weaker.”

Deal Price and Synergies. The court noted that, pursuant to Dell, the deal price in appropriate circumstances would merit “heavy, if not overriding, probative value,” but that reductions still would be needed to adjust for any value arising from the deal itself, including both synergies and reductions in agency costs (which the court described generally as the “flipside of the benefits of control”). The court noted that Aruba’s negotiators might have had some interests that made them “less effective … than they might have been,” but that, for purposes of appraisal, the issue was whether the stockholders “got fair value and were not exploited,” and that, while stronger negotiations might have been able to get a higher price from HP, they would not have changed Aruba’s standalone value.

The court looked to an estimate of potential synergies provided by an outside consultant to HP in connection with the acquisition, and to a general study cited by Aruba’s expert of the extent to which sellers shared in the value of synergies. Based on the midpoint of the range of the portions of synergies shared with sellers, as suggested by the study, the court concluded that the negotiated deal value less the value of such synergies was $18.20 – substantially less than the deal value of $24.67. The court noted, though, the likelihood of the court’s “human error” in making such calculations and the corresponding preference for using “market indications” rather than a “judgment-laden exercise of backing out synergies,” as well as the need to adjust for any remaining “element of value derived from the merger” in the form of agency costs.

Discounted Cash Flow Analyses. The court reviewed discounted cash flow analyses provided by experts for the stockholders and for Aruba, which arrived at values of $32.57 per share (in the case of the stockholders’ expert) and $19.85 per share.

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1 DFC Glob. Corp. v. Mairfield Value P’s, L.P. (Del. Supreme Aug. 1, 2017) (“DFC”); Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd (Del. Supreme Dec. 14, 2017) (“Dell”). In Dell, the Delaware Supreme Court reversed the Chancery Court’s finding of a fair value approximately 28% above the negotiated transaction price. The Supreme Court’s DFC decision also reversed an earlier Chancery Court decision.
share (in the case of Aruba’s expert). Despite the stockholders’ expert’s analysis’ “seemingly strong methodologies,” the court found that the difference between its conclusion and various market indicators created “significant doubt” about its reliability. The court also expressed “concern” with Aruba’s expert’s analysis. More generally, the court noted Dell’s admonition regarding “the hazards that always come when a law-trained judge is forced to make a point estimate of fair value based on widely divergent partisan expert testimony.”

**Takeaways**

- The court’s finding raises questions for stockholders considering whether to seek appraisal, at least in a seemingly arm’s-length transaction with a strategic buyer where the company’s shares could be seen prior to announcement of the transaction as trading efficiently. The court considered, but rejected, valuation methods traditionally used by courts that were more likely to provide at least the deal price. The Aruba pre-announcement trading price was lower (about 14% lower) than the amount suggested by the company’s own expert’s DCF analysis, which itself was lower (about 19% lower) than the negotiated deal price.

- The court enhances the scope of the arguments and methods that may be viewed as proper approaches to valuing companies for appraisal purposes, where the “governing standard” remains a company’s going concern value. The court noted that, while market value provided the best evidence of fair value for Aruba in the present circumstances, it did not identify any overriding rules and separately evaluated both discounted cash flow and other analyses. Thus, the scope of the potential approaches to valuation is as wide as it has ever been in the appraisal context.

- The court also noted that academics have questioned the efficient market hypothesis (citing, among other things, insights from behavioral economics), and that future appraisal litigants might “retain experts on market efficiency” and that future appraisal decisions might “consider subtler aspects of the efficient capital markets hypothesis.” While not stated expressly by the court, such an approach could lead to different results for a company even in the same position as Aruba.

**M&A MARKET TRENDS SUBCOMMITTEE**

We will kick off our meeting in Orlando with a presentation on the 2017 Canadian Public Target Study by Study Chair, Cameron Rusaw (Davies, Toronto, Ontario).

Then we welcome Tasha Hutchins (Practical Law, New York, New York) for a presentation on their always-popular annual study – this year’s study covers reverse break fees and specific performance remedies.

We will spend the remainder of our meeting focusing on what is market in Earnouts and Contingent Value Rights – starting with a substantive presentation on considerations and pitfalls when drafting contingent consideration provisions in acquisitions agreements, discussing the results of this Subcommittee’s survey of earnout provisions in the 2017 Private Target Study and the 2017 Carveout Study, and concluding with a presentation by Jennifer Muller (Houlihan Lokey, San Francisco, New York) and Youmna Salameh (Houlihan Lokey, New York, New York) on the use of Earnouts and CVRs in recent healthcare transactions.

The meeting will also continue to focus on how technology can assist our market trend tracking efforts.

We look forward to seeing everyone in Orlando.
MEMBERSHIP SUBCOMMITTEE

A force to be reckoned with: For those of us who have been involved with the committee for years and years, we tend to take for granted the fact that we are the LARGEST committee within the Business Law Section, comprising 5,188 members as of September 2017 when the membership year begins. 5,188! That an impressive 51% growth over the past 5 years when we came in at 3,426 members in September 2013.

A little bit about our committee: The Mergers and Acquisitions Committee hosts three in person meetings a year and conducts several webinars to stay connected to our members. About 200 colleagues gather each January in Laguna Beach, California for the M&A Stand-Alone Meeting. Almost 400 M&A Committee members attend the ABA Business Law Section Annual Meeting each September in addition to the Section Spring Meeting every April. We will highlight various metrics about our committee numbers in each issue of Deal Points, starting with the following:

Who are our members?

M&A committee members represent a variety of organization types both large and small, and 2,067 different companies are represented among the membership.

- 46% of lawyer members are from large firms with over 100 attorneys.
- 14% of lawyers are with mid-size firms with 20 to 99 attorneys.
- 21% of lawyer members are with firms under 19 attorneys.

The breakdown of members by firm size is:

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<td>40.21%</td>
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Upcoming Membership Initiatives:

Ambassador Program

We want all first time attendees to feel welcome at our meetings and what better way to do so than by pairing them up with seasoned M&A committee veterans. These ambassadors will help first time attendees navigate the meeting landscape by helping them sort out their schedule, figure out receptions and dinners to attend, etc. We are actively searching for ambassadors for the annual meeting so please reach out if you are interested. NOTE: The Business Law Section is rolling out a similar program this year called the Host program, in case you hear about it in passing.

We will also be informing new attendees about ABA related events catering to them, such as:

First-Timers Welcome Breakfast

Thursday, April 12, 7:30 am-9:00 am

All first-time meeting attendees are invited to this special welcome breakfast. Meet with Business Law Section Chair, Christopher Rockers, and committee leaders to gain insight on navigating the meeting.

Icebreaker Reception

Thursday, April 12, 5:00 pm-6:00 pm

Whether you are a young or experienced lawyer, a new or long-time Section member, or a first-time or return meeting attendee, we invite you to attend this reception to break the ice with new colleagues before the Welcome Reception.

New Member + Leadership + 2+ Year Attendees Reception

We are trying to organize a first time attendee, leadership, and recruiting reception after the leadership meeting in Austin whereby first time attendees and folks who have been attending meetings for years can learn more about ways to get involved in the various subcommittees or initiatives within our M&A Committee. Stay tuned for more details!

We look forward to seeing you in sunny Orlando!

TRACY BRADLEY, CHAIR
GINA CONHEADY, VICE-CHAIR
TECHNOLOGY IN M&A SUBCOMMITTEE

The Technology in M&A Subcommittee met on Saturday, January 27 at the Stand-Alone Meeting of the M&A Committee in Laguna Beach. That meeting primarily comprised an overview of our Subcommittee’s project (a directory of technologies currently being used by M&A practitioners, which Will Norton (SimplyAgree, Nashville, Tennessee) is helping the Subcommittee to develop), with presentations on five main categories within the directory from members of our subcommittee. These were led by Kevin Kyte (Stikeman Elliott LLP, Montreal, Quebec) (Diligence), Rich Robbins (Morningstar, Chicago, Illinois) (Drafting), Will Norton (SimplyAgree, Nashville, Tennessee) (Negotiation), Matt Kittay (Fox Rothschild LLP, New York, New York) (Closing) and Steve Obenski (Kira Systems, Washington, D.C.) (Organization).

We have circulated an updated copy of the latest version of the directory to Subcommittee members ahead of our forthcoming meeting in Orlando. The directory is also available on our Subcommittee webpage (https://apps.americanbar.org/dch/committee.cfm?com=CLS00026), but because it is a work in progress it is only available to Subcommittee members (you can join through the ‘Join a Committee’ button on the Section’s main ‘Committees’ page).

Tom and I would again like to thank Will for all his hard work in getting the directory to its current state and also to thank those members of our Subcommittee who have given us initial comments on it. If you are aware of additional technologies not listed in the directory, please let us know. Please also let us know if you have practical experience of any of these technologies and, if so, whether you would be prepared to share your experiences with Subcommittee members in connection with our planned development of a series of case studies on these technologies or by demonstrating them at a future meeting.

Going forward we are considering four further projects, for which we are seeking leaders and volunteers:

- Establishing whether there are any particular risks when using “free” technology in M&A, e.g. Google Drive instead of one of the commercial data rooms. For example, are you giving the host any rights over your data (such as IP rights, or the right to conduct data analytics on it) and are there security, virus-risk and data sovereignty issues?

- Crowdsourcing data from our members (e.g. by polling) on the M&A technologies they are using and what they think of them.

- A project for the wider M&A Committee, considering how all of our subcommittees and task forces might communicate better with our members.

- Producing a series of case studies on technologies being used in M&A.

Please join us at our forthcoming meeting, which will take place from 3:30 pm - 5:00 pm on Friday, April 13 at the Spring Meeting of the Business Law Section in Orlando. At that meeting, we will report on the status of our main project, discuss our possible future projects and host a series of short “show and tell” presentations from four of our members on the key features of four types of technologies namely:

- Document negotiation tools – Haley Altman (Doxly, Indianapolis, Indiana) will highlight version control systems and document/task tracking tools.

- Document integrity checking tools – Tasha Hailey Hutchins (Thomson Reuters Practical Law, New York, New York) will demonstrate this feature using the Drafting Assistant product (e.g. checking for definitions that are not used and defined terms with no definitions).

- Automated diligence – Anne McNulty (Kira Systems, Toronto, Ontario) will give a basic overview of the use of AI in automated diligence for those who haven’t seen it before.

- Closing management – Will Norton (SimplyAgree, Nashville, Tennessee) will demonstrate how technologies can facilitate closings, including the use of e-signatures.

If you have or use a type of technology that you’d like to demonstrate at a future meeting (or to produce a case study on – see above), please let us know. For example, we’d like someone to demo the use of cap table management tools to the Subcommittee, so if you’re up for that please come forward.

Being a member of our Subcommittee is the only way to ensure that you receive updates on our Technology in M&A directory and other relevant materials from our Subcommittee. If you are not already a member we warmly invite and encourage you to join, through the “Join a Committee” button on the Section’s main “Committees” page.

If you have ideas for how we might take the Subcommittee forward, please share them with us. Please come to our forthcoming meeting in Orlando and if you can’t do that please email either my Vice-chair Tom Romer (romert@gtlaw.com), our Project Leader Will Norton (will@simplyagree.com) or me (daniel.rosenberg@crsblaw.com).
The Private Equity M&A Joint Subcommittee met at the Mergers & Acquisitions Committee standalone meeting in Laguna Beach on January 26.

We commenced with our “The Experts Speaks” segment with The Honorable Leo Strine, Chief Justice of the Delaware Supreme Court, sharing his insights on Delaware law as it related to a number of topics of interest to Private Equity M&A practitioners. I was joined by Lisa Stark (K&L Gates, Wilmington, Delaware) in asking the Chief Justice to comment on various topics, including the recent and much discussed Dell decision dealing with appraisal rights. Next, as our “Nuts and Bolts” segment, we had a panel discussion of “The New Deal Points Private Company Study – what it means to Private Equity M&A Attorneys.” I was joined on the panel by Wilson Chu (McDermott Will & Emery, Dallas, Texas) one of the creators of the Deal Points surveys, Jessica Pearlman (K&L Gates, Seattle, Washington) and Dennis White (Verrill Dana, Boston, Massachusetts).

The Private Equity M&A Joint Subcommittee will meet next on Friday, April 13 at 10:30 am as part of the Business Law Section’s Spring Meeting in Orlando. For those of you who, like me, live in the northeastern part of the United States, the Spring Meeting cannot come soon enough. At our meeting we will have two major segments. As part of our “Recent Developments” series, we will have a panel discussion on “Trump Tax Reform and Private Equity M&A.” I will be joined on a panel by an investment banker, Rachel Regenstein (Houlihan Lokey, New York, New York); a U.S. tax lawyer Cristin Keane (Carlton Fields, Tampa, Florida); and a Canadian tax lawyer, John Lorito (Stikeman Elliot, Toronto, Ontario) to discuss how the recent changes to our tax code are and might effect Private Equity M&A and our practices. Then, as part of our “The Experts Speaks” series, Glenn West (Weil, Gotshal & Manges LLP, Dallas, Texas) will discuss “Private Equity Deal Issues that keep Recurring – Why are we not learning the lessons from Caselaw.” Finally, time permitting, I will discuss some recent case law developments.

I, along with my Vice-chairs Mireille Fontaine (BLF, Montreal, Quebec) and Samantha Horn (Stikeman Elliot, Toronto, Ontario) continually seek YOUR feedback as to the meetings and the Joint Subcommittee, either by talking to one of us in Orlando or reaching out to one of us afterwards. We are always looking for ideas for future programs, presentations and projects, as well as volunteers for all of them. And, as I’ve said before, if you don’t know me and you are at the Orlando meetings, please feel free to come by and introduce yourself.

I look forward to seeing many of you in Orlando on Friday the 13th at 10:30 am. If you are unable to be there, please feel free to dial in and listen using the instructions set forth in the schedule on page 21.

We are looking forward to an engaging Public Companies Subcommittee meeting on Friday, April 13 from 1:00 pm – 2:30 pm. We will first hear from Farhad Jalinous (White & Case, Washington, D.C.) who will discuss the federal government’s recent order to block the proposed acquisition of Qualcomm by Broadcom and the impacts such action may have on future transactions. We will also discuss what deal lawyers should be thinking about in drafting acquisition agreements in light of this development.

Next, Jennifer Muller (Houlihan Lokey, San Francisco, New York) will be providing a first quarter update on the M&A market, including how tax reform and market volatility may be impacting M&A activity. Finally, we will discuss miscellaneous M&A topics that have arisen in public company M&A transactions since we last met. In connection with this last item, if there are particular items of interest you’d like to raise with the group, please let Jim Melville and me know so that we can add it to the mix!

We look forward to seeing many of you in Orlando!
Continuing the tradition of profiling new members of the M&A Committee, in this issue of Deal People I’m introducing Joanna Lin. Joanna is an associate at the Dallas office of McDermott Will & Emery LLP, where she focuses her practice on corporate, securities and transactional matters. She attend her first M&A Committee meeting in January 2018, at the infamous Montage at Laguna Beach, and she came away from the meeting thinking that the M&A Committee does things right!

Joanna started her career splitting her time between emerging company and VC financing work and M&A. In her earlier days, she also worked with public companies, including advising on IPOs and secondary offerings for both issuers and underwriters. She enjoys cross-border transactions in all of its forms more so than any other, given that her entire life has placed her at the crossroads of being not quite one culture. Joanna says that working on cross-border transactions truly allows her to use this skill set. She recently moderated a panel on the trends and outlook for Chinese outbound investments in Hong Kong.

Joanna spent her most formative years in Taipei, Taiwan, and attended an international school until she finished high school. She later moved back to Southern California for college, and to Boston for law school (go Eagles!). As a child, she spent time with her family growing up in San Francisco, Taipei, and Lagos (Nigeria, where her parents lived for nearly a decade). Given her background, the most difficult question for Joanna to answer is often the simple icebreaker: “where are you from?”

She considers herself as a cultural hybrid, as she never spent much time in one place long enough to consider it home. She does, however, consider this as an advantage: she now has friends from her past living all over the world. She’s even run into an old friend on the peak of Huayna Picchu in Peru!

Joanna has lived in Dallas for three years. But one of her strong points is being able to adapt to new environments, having lived in no less than eight cities and three countries. She continues living the life of a global citizen/Third Culture Kid by constantly finding new countries to explore. The most recent ones include Iceland, Peru, Indonesia and Ireland.

She loves sports (basketball and volleyball in particular), and found that her decade of living in Boston really attached her alliances of professional sports with New England (Patriots, Celtics and the Red Sox in particular).

When not working the life of a busy M&A attorney, Joanna is a strong supporter of various causes, including women’s rights, education and immigration. She devotes her free time to advocate for these causes in various forms. She served as a board member of Many Hopes, a sustainable nonprofit that builds homes and schools for orphaned children in Kenya, and continues to support the charity by raising funds. She also volunteers as a pro bono attorney for Human Rights Initiative in North Texas, which dovetails with her work as a pro bono attorney for four years at KIND (Kids in Need of Defense). She is also an amateur foodie and loves connecting with people over food, a great quality for a member of the M&A Committee, and Joanna makes it her mission to find the best food possible at any new city she visits.

Welcome to the M&A Committee, Joanna!
YVETTE AUSTIN SMITH

Many of you know Yvette Austin Smith because of her many leadership roles within the M&A Committee and her accomplished professional life at The Brattle Group, where Yvette provides testifying and consulting expert services in litigation matters related to mergers and acquisitions, dissenting shareholder actions, leveraged buyouts, recapitalization, debt recharacterization, avoidance actions and other complex matters.

But the New York City girl likes to get out and walk in the woods.

Two years ago Yvette received what she describes as “an offer I could not resist” – to become a board member of the Appalachian Mountain Club (www.outdoors.org). Being involved with the AMC gets Yvette out to enjoy and share the joys of the outdoors. Growing up in California, Texas and Maryland (yes, her family moved a bit…), the outdoors were an intrinsic part of Yvette’s childhood – whether at the beach or in the woods. Santa Monica, Venice, Lake Conroe, Cut-and-Shoot (yes, there is such a place in Texas), Galveston, Ocean City and Maryland’s Eastern Shore are all places where Yvette learned to swim, fish, camp, ride horses and just play in the dirt. These days, you are more likely to find Yvette in the Berkshires of western Massachusetts or around Long Lake in Maine. For her, lakes have replaced the ocean and hiking and gardening have largely replaced camping. Nonetheless, says Yvette, she still draws the same peace and renewal from being outside.

The AMC promotes conservation of natural resources through active engagement in the outdoors of the Mid-Atlantic and Northeast regions of the United States. AMC has been in the New York metropolitan area for nearly 100 years but has recently undertaken a series of initiatives to promote its mission in urban areas and with an emphasis on engaging kids. These initiatives were what propelled Yvette from membership in the organization to leadership. Yvette knows that learning to build a fire, pitch a tent, cook outdoors, navigate trail blazes, paddle a kayak or identify animal scat (ew!!) (one of Yvette’s son’s favorites when he was younger!) can instill both confidence and stewardship. Kids, in particular, gain confidence in their ability to be self-sufficient and a sense of stewardship of the world’s resources. Yvette says that to play even a small role in this is deeply rewarding for her.

So, for all of you fellow hikers, campers, anglers, bird-watchers, kayakers, etc. (and we know there are some on this Committee), Yvette wants to organize a side trip – in the outdoors – at one of our next conference stops. Austin, Texas, here we come!
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. If you have pictures from Committee meetings that you would like to suggest for inclusion in a future issue of Deal Points, please send them to me.

John F Clifford  |  McMillan LLP  |  Toronto, Canada  |  john.clifford@mcmillan.ca

A new feature in this issue of Deal Points is celebrating the dealing that goes on with Deal People at our M&A Committee meetings. Here are a few pictures from the Committee’s most recent meeting, the Stand-alone meeting in Laguna Beach that took place on January 26-27.
COMMITTEE MEETING MATERIALS
Dial in information for Committee & Subcommittee Meetings
ROSEN SHINGLE CREEK | ORLANDO, FLORIDA, USA | APRIL 12-14, 2018

Please note that times listed are EASTERN TIME and 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>
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<th>Meeting Room</th>
<th>Toll-Free US Number</th>
<th>International Number</th>
<th>Conference Code</th>
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</thead>
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<td>Sebastian L 2-4, Level 1</td>
<td>(866) 646-6488</td>
<td>(707) 287-9583</td>
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<td>(707) 287-9583</td>
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Friday, April 13, 2018

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

9:00 am – 12:00 pm
RMAPA Editorial Working Group

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

1:00 pm – 2:30 pm
Acquisitions of Public Companies Subcommittee
Chair: Jen Fitchen

1:00 pm – 2:30 pm
Joint Task Force on Short Form Model Acquisition Agreements
Co-chairs: Jason E. Balog and Eric K. Graben

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

3:30 pm – 5:00 pm
Technology in M&A Subcommittee
Chair: Daniel P. Rosenberg

5:00 pm – 5:30 pm
Leadership Committee (Subcommittee and Task Force Chairs)
**Saturday, April 14, 2018**

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
<th>Location</th>
</tr>
</thead>
</table>
| 9:00 am – 10:30 am| **Market Trends Subcommittee**  
Chair: Claudia K. Simon                                                                     | Sebastian L 2-4, Level 1 |
| 10:30 am – 12:00 pm| **International M&A Subcommittee**  
Chair: Richard Silberstein                                                               | Sebastian L 2-4, Level 1 |
| 1:00 pm – 2:00 pm | **Joint Task Force on M&A Litigation**  
Co-chairs: Lewis H. Lazarus and Yvette Austin Smith                                         | Sebastian L 2-4, Level 1 |
| 1:00 pm – 2:00 pm | **Task Force on Private Company Model Merger Agreement**  
Co-chairs: Melissa DiVincenzo and Amy Simmons                                             | Wekiwa 2, Level 2 |
| 3:00 pm – 5:00 pm | **Mergers and Acquisitions Full Committee Meeting**  
Chair: Scott T. Whittaker                                                               | Sebastian L 2-4, Level 1 |
| 7:00 pm – 10:00 pm| **Mergers and Acquisitions Committee Dinner**  
**Ticket Required.**                                                                    | Norman’s at the Ritz-Carlton  
4012 Central Florida Parkway |

**Programs**

- **Friday April 13, 2018 | 9:00 am – 10:00 am**  
Panzacola G-2, Level 1

- **Friday April 13, 2018 | 2:30 pm – 4:00 pm**  
**Recent Developments in M&A Law -- Insight from the M&A Lawyers Library**  
Panzacola G-2, Level 1

- **Saturday April 14, 2018 | 8:00 am – 10:00 am**  
**Program: Entity Selection for the M&A Lawyer**  
Panzacola H-1, Level 1

- **Saturday April 14, 2018 | 2:00 pm – 3:00 pm**  
**Ethics Hotspots in Acquisition Transactions**  
Sebastian L 2-4, Level 1
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the rule is that the two merging parties are still separate companies and must act accordingly. That means that they cannot go to customers jointly and sell products of the future, combined company. They also cannot exchange CSI without proper safeguards in place, integrate research and development efforts, or make any public statements (in press releases or to investors) that would imply that the two companies are one.

The merging parties have every incentive to start selling the benefits of the deal to clients and investors as soon as it is signed. But antitrust regulators will focus on improper conduct in combining the two merging parties, known as “gun jumping,” before they have received a chance to review the acquisition. For example, in 2016, the French Competition Authority fined telecommunications company SFR and its parent Altice EUR80 million for allegedly implementing two transactions before receiving regulatory clearance. Last year, the DOJ settled gun jumping allegations stemming from Duke Energy’s acquisition of Osprey Energy Center. There, Duke allegedly took control over Osprey’s output as well as received the right to Osprey’s day-to-day profits and losses. There is, however, some pre-closing conduct that is permissible. For instance, it is permissible for your clients to tout to customers or investors the benefits of merging the two companies, and to begin to plan for day one of the merged company, including discussions on how to combine corporate functions. But it is not permissible to actually combine them. Another way to address pre-closing issues, in addition to the continued assistance by outside counsel and other third-parties, is to have an isolated integration clean team that has no market-facing responsibilities in either company. These clean teams have the ability to plan for integration but are not exposed to CSI from either of the merging parties. This best practice allows the parties to structure the interim period between signing and closing in a way that prevents CSI from ever traveling from one party to the other.

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

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

Once you receive approval from all necessary regulatory agencies, no further antitrust obstacles prohibit you from closing, so close! Often, regulatory approval is the last hurdle before an acquisition can close, so it is not difficult to convince clients to do everything they need to do in order to complete this step. While limited, there is some antitrust risk while the companies are still separate even after antitrust regulators have cleared the deal. Once they have merged operations, however, the two companies are now one and cannot be liable under the antitrust laws aimed at illegal agreements between competitors.


14 For instance, as the FTC recently noted: “[c]ompanies must also be conscious of the risks of sharing information with a competitor before and during merger negotiations—a concern that remains until the merger closes.” Vedova, supra note 4.