FROM THE CHAIR  Wilson Chu

Happy New Year!

First, I would like to again thank Scott Whittaker for his model leadership of the Committee over the past three years. He has taken the Committee to new heights, and I look forward to continuing that effort with your support.

Looking forward to our meeting in Laguna (and my first as Chair), let me kick off with a brief recap (below) of my strategic priorities (or, as we say in Texas: strategery). Suggestions/comments are always welcome. See you in Laguna!

Why do we do what we do?

• As the world’s largest forum of M&A lawyers, we own the strategic corner of “what you know” and “who you know.” We create opportunities for our members to increase their knowledge and build their reputation, influence and network.

How do we do it?

• We produce thoughtful and practical content
• We project thought leadership that is influential across the entire spectrum of the M&A community, from lawyers to judges to regulators to deal makers

What do we do?

• CLE programs (including, three Committee meetings each year)
• Deal Points Studies
• Model Definitive Acquisition Agreements with Commentary
• M&A Lawyer’s Library
• Handbooks for Practitioners on M&A Practice and Process

What more do we want (i.e., priorities)?

• More member engagement
• More “omni-channel” (live, webcast, video, written, etc.) thought-leadership opportunities (presentations/publications) for our members
• More members and participation from AmLaw 100 firms
• More women, minority, in-house and younger lawyers
• More interaction with M&A-related judiciary and regulators

INAUGURAL WOMEN IN M&A DEAL LAWYER OF THE YEAR AWARD

Oscar is coming to Laguna in the form of our Inaugural Deal Lawyer of the Year Award presented by our Women in M&A Subcommittee! The presentation will feature an interview by Bloomberg’s Sonali Basak of our M&A power-player honoree. You will be impressed, so tune in to Saturday’s full Committee Meeting!

THANKS TO OUR SPONSORS

I would like to thank each of our sponsors for the Laguna meeting: Kira Systems, Duff & Phelps, Thomson Reuters and U.S. Bank. On behalf of the Committee, thank you for your continued support of all that the Committee does.

UPCOMING MEETINGS

2019 Spring Meeting
March 28–30
Vancouver, BC
The Fairmont Waterfront

2019 Annual Meeting
September 12–14
Washington, D.C.
Marriott Marquis
FROM THE EDITORS  Ryan D. Thomas & Chauncey M. Lane

In this issue of Deal Points, our feature articles provide a wealth of practical insight for our committee members. From tips and strategies on adding value and driving efficiency in M&A transactions through legal project management to navigating our new committee webpage on the newly redesigned ABA website, our authors have sought to offer guidance and insights that will aid your practice and facilitate your ability to digest the wealth of resources our committee offers. Not to be outdone in offering practical guidance to our committee members, the co-chairs of the Joint Task Force on Governance Issues in M&A Transactions have included a special treat for each of you, which we hope you will enjoy. 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. We look forward to seeing everyone in Laguna!
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By Daniel Rosenberg

So where is everything?
The ABA has moved to a new web platform (or to be more accurate two new platforms) and all of our current material has been moved across. The main purpose of this article is to tell you where you can find your favorite committee, subcommittee and task force materials across the two new platforms.

The main ABA platform is open to the public and that is where our committee has its main homepage. There you will find:

• Information on the committee and how to join it.
• A list of our subcommittees and task forces and how to join them.
• Our world-famous Deal Points studies (which remain accessible to committee members only).
• Case summaries produced by our M&A Jurisprudence Subcommittee (which remain accessible to committee members only).
• The M&A Lawyers’ Library produced by our M&A Jurisprudence Subcommittee (which remain accessible to committee members only).
• The archive of back copies of our Deal Points newsletters.
• The materials from CLE programs sponsored by the committee (for our non-CLE meeting materials, see below).
• Details of our upcoming meetings through 2020, whether or not they are yet open for registration. Note that the links to the meetings which are not yet open for registration are not yet active.
• Details of our committee’s many publications.
• A link to our committee’s separate homepage on the Connect site.

Connect is a separate site, and it has been designed to be more interactive, allowing for increased discussion and engagement between members. It remains to be seen how this will evolve (bearing in mind we have nearly 6,000 members and we have always been careful not to bombard them information), and for the moment we are going to take things slowly. Connect can only be accessed if you are logged on to the ABA website.

Our committee’s pages on Connect have these five navigation buttons at the top:

• Home
• Discussion
• Library
• Events
• Members

There is the potential for a further menu tab for Discussion, but because we have nearly 6,000 members and the system does not allow the leadership to moderate discussion, we are not yet using this facility (we may open it up to individual subcommittees and task forces that want to encourage this kind of interaction between their members).
What's New & Trending

Home
Our committee’s Connect homepage contains:

- Information on the committee.
- Details of our upcoming meetings in the next year.
- A list of our members. Although it is not displayed in a particularly user-friendly way and also appears under the Members tab, unfortunately we do not have the option to remove this from our Connect homepage.
- Links to the Connect pages for our subcommittees and task forces.
- In due course we intend to add further content here in the form of a link to an externally maintained library of video content, professionally produced and featuring committee members, for example drilling down on key negotiation points in M&A documents. Watch this space!

Discussion
Because we have nearly 6,000 members and the system does not allow the leadership to moderate discussion, we are not using this facility other than for messages from the leadership. However we may in the future open it up to individual subcommittees and task forces that want to encourage this kind of interaction between their members.

Library
The committee’s non-CLE materials Library is organised in a folder structure and each subcommittee or task force that has produced materials has a folder. So for example, if you want to find the latest version of our Technology in M&A Directory, you will find it in the Technology in M&A Subcommittee folder.

If you want to find presentations from our committee’s non-CLE meetings (for example committee, subcommittee and task force meetings), go to the folder headed “Non-CLE Presentation Materials”, expand it and click on the subfolder for the relevant meeting. Within that you will find links to all of the non-CLE materials presented at that meeting. Where materials were presented at a particular subcommittee or task force, you should also be able to access the materials in the main folder for that subcommittee or task force. Unfortunately due to system limitations it is not possible to see from the folder list which folders contain materials and which do not, but there is an icon in the top right corner of the folder list page that will allow you to view a list of everything in all of the folders.

Events
This tab contains details of all of our upcoming meetings through 2020, whether or not they are yet open for registration.

Members
This tab allows you to access or search through the list of our committee members.

Our particular thanks go to the Section’s IT team who have put a huge amount of work into getting this all ready, not just for us but also for all of the Section’s many other committees. As you can see, there’s a lot that’s new here. Please bear with us as we try to get it all into a better shape.

In the meantime, I will give a live demo of the new platforms on Saturday, January 26, 2019, at the main M&A Committee meeting during the Committee’s Standalone Meeting in Laguna Beach, CA.

1 At the time of writing, the ABA IT staff have yet to set this up properly, but they have promised that this will be done shortly.
2 At the time of writing, the ABA IT staff have yet to set these up.
3 At the time of writing, the ABA IT staff have yet to set this up properly, but they have promised that this will be done shortly.
LIMERICKS

Stephen T. Buehl
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Consider the word “notwithstanding."
The power it has is commanding.
Its ravenous sweep
Swallows sections complete,
Leaving it as the only word standing.

A limerick is a humorous verse, generally five lines longs. Lines 1, 2 and 5 are longer (7 – 10 syllables) than lines 3 and 4, and rhyme with each other. Lines 3 and 4 have 5 – 7 syllables and rhyme with each another: aabba. The theme, in order to be published, must be related to M&A, the practice of corporate law or our committee. If there is an interest, send your submissions to Deal Points before the Laguna meeting. We may limit the number we publish to three an issue, so first come, first serve.

GOT NEWS & TRENDS?

Ryan D. Thomas — Co-editor
Bass, Berry & Sims PLC, rthomas@bassberry.com
Chauncey M. Lane — Co-editor
Husch Blackwell LLP, chauncey.lane@huschblackwell.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-firmwide@huschblackwell.com).
Value and Efficiency in M&A Practice

By David Rue

Companies strategically buying and selling assets are increasingly demanding more from the teams that serve them, particularly their law firms. Clients want fast, efficient deals at predictable cost. Firms are reacting with new initiatives aimed at predictability and efficiency, and are making significant investments in the tools and talent needed to advance the areas of pricing, project management, and process improvement.

Bass, Berry & Sims launched a Strategic Pricing and Legal Project Management (LPM) program in 2016 as part of a comprehensive Client Experience Initiative. We’ve been busy evaluating technology – with respect to pricing, budgeting and matter management – and recruiting talented analysts and managers. We’ve developed a number of tools and processes to facilitate our work. The following describes our journey to date, and a few of the technology decisions we’ve made.

Assessment

With a robust M&A practice generally, and significant experience in healthcare transactions specifically, we have collected a very large amount of data over the years, including the thousands of documents related to transactions; and attendant metadata including transaction types, total fees, leverage, and the distribution of work among the variety of practice disciplines deployed in service to transactions. The data live primarily in the specific transaction documents in our document management system and in our accounting system, in the form of time entries and the financial information flowing from them. When we first got under way, we found the data lying fallow. With the help of sophisticated search and AI-type tools (and some pretty analog processes and long days), we have been able to liberate much of the data and have created tools to facilitate our analysis as we scope M&A work and advance our project management initiatives. We now have very specific information about transactions by type and size, how we staffed matters, and our financial performance on those matters. Exemplar matters are now easier to find and extrapolate for new opportunities.

Pricing, Project Management and Process Improvement

Under the direction of our firm’s Chief Strategy Officer, we created a multi-disciplinary team to research tools to facilitate our initiative, including matter planning and budgeting software, and practice tools and processes used in our practice groups, including our M&A practice.

Pricing, Budgeting & Monitoring

We evaluated a number of Pricing, Budgeting & Monitoring (PBM) applications and chose to implement Umbria by Prosperoware (https://www.prosperoware.com/umbria). To date, we have been impressed with its functionality. The implementation process of any software should not be underestimated, however, particularly applications that extract information from complex accounting systems. We (and they) have devoted significant resources to maximizing the potential of Umbria at our firm. Our approach to rolling out the software to our attorneys has been a highly- individualized “white glove” approach through our Managing Directors (practice group managers and business developers), in the context of pursuing new work, and periodic individual, group and sub-group practice analysis.

Our typical process includes researching and analyzing exemplar matters, refining a prospective scope of work, identifying a team from the required practice disciplines, and modeling hours and leverage to establish a matter plan. We have created a database of hundreds of transactions from which we can extract relevant data. We also like Clocktimizer (https://www.clocktimizer.com), a software solution that uses natural language processing algorithms to read time entries to extract actionable historical data for matter planning. We then create the necessary project management support and continually report on our performance to plans.

We now have a significant number of matters “under management.”

Project Management

Managing to a budget requires coordination and efficiency. While most M&A practices have organically developed tools and processes to deliver excellent work, there are new forces at work driving innovation and change in the increasingly competitive landscape of LPM. We’ve had success with a number of innovative tools in our M&A practice. Two are notable.

AI – eBrevia

We conducted a trial of leading AI diligence tools and eventually chose eBrevia. https://ebrevia.com/ After our analysis and trial, we paused in our deliberations, looking for a compelling matter to launch our AI initiative and hoping that a representative matter would help drive our decision as to which product to select.

Our trial process was interesting. We selected two AI solutions and a team of two partners and several corporate and real estate associates to use them. We conducted the trial using a post mortem analysis of a buy-side transaction with thousands of retail locations and the diligence materials we created using our traditional approach. We compared our previous diligence findings to the AI results and were very impressed with the performance and results using AI. While we were still learning how to optimize the software functionality, we still achieved significant savings in the time required to complete the least valuable tasks in reviewing such a large volume of documents.

The new matter we hoped for presented itself in the form of a large healthcare joint venture transaction with the distinct (and perhaps rare) advantage of having a highly-organized data room with clear and relatively uniform documents. eBrevia added significant value to the diligence process.

Process Improvement – SimplyAgree

We also chose a new software solution called SimplyAgree (https://www.simplyagree.com/) SimplyAgree is a signature and closing management tool for transactional attorneys. SimplyAgree streamlines the administrative tasks of a closing so attorneys can focus on getting deals done and exceeding client expectations, and is specifically helpful in the automation, creation and distribution of signature packets and the creation of excellent closing binders.

Conclusion

We have found real value in these initiatives. We are able to create, track and manage to budgets for almost every kind of transaction. One of the most rewarding, if not surprising, results of our work has been found in the interaction our attorneys enjoy with our clients. The discussions about scoping to arrive at predictable fees facilitate the early refinement of mutual
expectations and the communication of progress throughout transactions. With respect to technologies that facilitate the actual work on transactions, like eBrevia and SimplyAgree, we have created efficiencies that reduce the tedious tasks necessary in transactional practice, allowing our teams to focus on the most highly valued, and fun, elements of deals.

Our clients agree. Through matter-end surveys and feedback from our Client Advisory Panel, we’ve seen increased satisfaction related to predictability of fees and encouragement as we introduce new efficiency technologies. The M&A practice continues to evolve and with investments in talent and technology, practitioners can leverage this evolution to better client relationships and a more satisfying practice.
This Chapter deals with the issues a target board may confront after the signing of a definitive agreement but before a merger closes. The corporate governance issues arising from a transaction do not end with the signing of a definitive agreement. Despite efforts the buyer and target may make to consummate the deal, post-signing events can threaten to derail a transaction and require board attention. For a transaction involving the sale of a publicly traded company, several months may go by between the announcement that a deal has been signed and the closing. In the case of a merger, a stockholder vote is required to approve the transaction, and of course, before the stockholders can vote, the proxy materials must be prepared. Beyond the stockholder vote, there are other conditions that must be satisfied; for example, typically there are antitrust filings and waiting periods, and in many cases, regulatory approvals must be obtained and tax or other conditions in the merger agreement must be met.¹

During this interim period between signing and closing, a deal is subject to “derailment” (i.e., threats to closing) in three common scenarios. First, a competing (or colloquially, a “jumping”) bidder may emerge and the board must decide whether and how to respond to the competing bid. Second, target stockholders may believe the proposed deal is inadequate and either bring litigation to challenge the sale process leading up to the deal – claiming, for example that the deal protections in the merger agreement are improperly suppressing superior proposals – or organize a stockholder “vote no” campaign in opposition to the transaction. Third, “intervening events,” such as an adverse financial or operational change, may make the deal less attractive to the buyer or the target, and lead a party to seek to terminate or renegotiate the deal, arguing the failure of one or more conditions in the merger agreement.²

In short, a target board’s job is not done when the merger agreement is signed. Post-signing events can call upon the directors to exercise their judgment to satisfy both their fiduciary duties and the company’s contractual obligations under the merger agreement.

**Target Board Responses to Competing Bidders**

Until the stockholder vote on the proposed merger, the board has a continuing duty to inform itself of all information reasonably available that is material to the stockholders’ decision, respond to a competing acquisition proposal in a manner consistent with the best interest of the stockholders and evaluate whether to maintain a recommendation that the stockholders vote in favor of the previously approved transaction.³

As discussed in Chapter 11, *Negotiation of Deal Protection Provisions*, deal protection provisions in the merger agreement and related documents may restrict the target’s ability to pursue alternative transactions or otherwise walk away from the signed deal. The board does have continuing fiduciary duties, however, and may be required to exercise its discretion in responding to competing offers. During the interim between signing the merger agreement and the stockholder vote, the target board will need to navigate the tight and sometimes muddy waters between the contractual deal protection measures it has agreed to and its continuing fiduciary duties to the target’s stockholders. The target board often will face hard decisions in determining whether the merger agreement permits its desired course of action. If the target board causes the target to violate its obligations under the merger agreement, it will expose the target to claims of breach of contract and damages. If instead the directors do not carefully and loyally protect the target stockholders’ interests, they may expose themselves to claims that they have breached their fiduciary duties.

A competing bid can come in many forms, including a friendly and discreet oral expression of interest, a confidential letter from the competing bidder to the target setting forth highly conditioned terms and an invitation to negotiate, or a fully funded publicly-announced hostile tender offer. See Chapter

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¹ Of course, if the transaction is structured as a “two-step” - a tender offer followed by a short form merger without the need for a proxy statement - the transaction will be accomplished much more quickly. Although most state corporation statutes require 90% ownership by the offeror to execute a short-form merger, Delaware permits an offeror to complete a merger, with some conditions, based on acquiring a majority of the outstanding shares in the first step tender offer. 8 Del. C. § 251(h). In the absence of delay due to regulatory approvals or the need to satisfy other conditions to closing, the two-step transaction may close within twenty business days, leaving less time for derailers. See Chapter 10, *Sales Process for a Sale of Control* for a further discussion of the target board’s consideration of structure. For a discussion of the buyer board’s perspective, see Chapter 12, *Buyer Issues*.

² The risk of deal disruption is not limited to publicly traded company targets, but the period between signing and closing is typically compressed to a week or two in private company sales. Thus, there is less time for disruption post-signing. See Chapter 16, *Private Company Issues*. The issue does arise; however, in private company deals where there is a longer time between signing and closing. See Cirrus Holding Co. v. Cirrus Indus., 794 A.2d 1191, 1207 (Del. Ch. 2001) (“Cirrus”)(“[T]he fiduciary duty did not end when the Cirrus Board voted to approve the [agreement]. The directors were required to consider all available alternatives in an informed manner until such time as the [proposed agreement] was submitted to the stockholders for approval.”)

³ Paramount Commc’ns Inc. v. QVC Network Inc. (“QVC”), 637 A.2d 34, 48-49 (Del. 1994); see also Cirrus, at 1207; Phelps Dodge Corp. v. Cyprus Amax Minerals Co., No. 17398, 1999 WL 1054255, at *34 (Del. Ch. Sept. 27, 1999) (“[e]ven the decision not to negotiate [with a competing bidder] ... must be an informed one...”). Post-announcement statements by management or the board of directors expressing unswerving commitment to the signed deal might suggest to a court that exploration of alternatives to the deal was not adequate. See In re Appraisal of AOL, Inc., 2018 Del. Ch. LEXIS 63, at *22-23 (Del. Ch. Feb. 23, 2018) (declining to rely on the deal price as evidence of fair value, due largely to the target CEO’s post-signing public statement that “I’m committed to doing the deal with Verizon and I think that as we chose each other because that’s the path we’re on. I gave the team at Verizon my word that, you know, [we’re] in a place where this deal is going to happen and we’re excited about it.”).
4. Exploring Strategic Alternatives and Responding to Unsolicited Approaches – Starting the Process, for a further discussion of the target board’s preparation for a response to an unsolicited bid. A competing bid that is undeveloped or highly conditional may require very little deliberation or response by the target board, but a competing bid that appears reasonably likely to provide the target stockholders with greater value than the signed deal will require careful review of the target’s obligations under the merger agreement, and careful attention to the target board’s ongoing fiduciary duties. The target board cannot ignore the competing bid and must deal with the competing bidder on an informed basis. If the target board refuses to consider a competing bid for a reason other than maximizing the value given for the target’s shares — for example, to favor a bidder more likely to continue current management or likely to generate more fees for the target’s financial adviser — it is vulnerable to a claim of a breach of fiduciary duty.

The existing merger agreement may contain a provision that prohibits the target from providing confidential information to a jumping bidder unless the bidder agrees to a confidentiality and standstill agreement that is no less restrictive than the provisions the original buyer has agreed to. Moreover, the target board can condition a competing bidder’s access to nonpublic information on its agreeing to be bound by a standstill agreement even if the merger agreement does not require it. On the other hand, if a standstill is used in a discriminatory fashion—for example, to give a bidder favored by management an advantage over a hostile bidder, it will be subject to challenge. See Chapter 7, Negotiation of Confidentiality and Standstill Agreements.

Deal protection measures such as superior proposal provisions and matching rights shape and restrict how the target board can respond. This section addresses those restrictions and the target board’s duties and risks in connection with pursuing a competing bid.

Superior Proposal Provisions Shape the Target’s Response

Before engaging with a competing bidder, the target board must review the relevant terms of the merger agreement relating to superior proposals to ensure the actions the target takes in response to the competing bid do not breach the merger agreement. See Chapter 11, Negotiation of Deal Protection Provisions, for a discussion of the various provisions that may affect the target board’s ability to respond. Some superior proposal provisions require that the board first determine that the competing bid “is reasonably likely to lead to a superior proposal.”

More restrictive language requires that the board find that the proposal “is a superior proposal,” not simply that it is reasonably likely to lead to one. Many merger agreements require that before a board can engage with a bidder, it must determine, with the aid of its legal and financial advisors, that the competing bid meets the specific requirements in the merger agreement relating to a “superior proposal.” Accordingly, the target board should engage its legal and financial advisors in making a superior proposal determination.

Some merger agreements also contain a fiduciary overlay and require that before engaging with a competing bidder, the target board also determine, with the aid of its legal and financial advisors, that the failure to entertain a competing bidder’s proposal would be a breach of, or inconsistent with, the board’s fiduciary duty. The target directors will need to understand the precise determinations the merger agreement requires them to make, as well as comply with all notice requirements and informational and matching rights. If the contractual limitations on a target’s ability to consider a competing bid are too tight or applied by the target board too strictly, they may be contrary to the target board’s fiduciary duty to remain sufficiently informed of potentially superior proposals.

In weighing whether a competing bid constitutes a superior proposal, it will be useful for the target board to keep in mind the factors courts have considered when they have reviewed a target board’s decision not to pursue a competing bid. The factors the board will want to take into account include:

- the strength (including price and terms) and conditionality (including regulatory and other risk) of the competing bid;
- whether the competing bid could be improved;
- whether the terms of the original transaction could be improved in light of the competing bid;
- whether each of the respective offers is reasonably likely to come to closure, and under what circumstances;
- whether additional material information is reasonably available for consideration by the target directors;
- whether there were viable and realistic alternative courses of action; and
- whether the timing constraints could be managed so the target directors could consider these matters carefully and deliberately.

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4 See LAMPERS v. Crawford, 918 A.2d 1172, 1183-84 n.12 (Del. Ch. 2007) (“LAMPERS”) (court describes how target board rejected competing bidder’s acquisition proposal as highly conditional and illusory, containing questionable financing commitments, uncertain in its tax implications, and possibly without coverage of the $675 million termination fee contained in the signed merger agreement, and court decides it did not need to address competing bidder’s challenge that termination fee and superior proposal provision were preclusive).

5 Phelps Dodge Corp. v. Cyprus Amax Minerals Co., 1999 WL 1054255, at *1 (Del. Ch. Sep. 27, 1999), citing Paramount Commc’ns, Inc. v. Time Inc. (“Time-Warner”), 571 A.2d 1140, 1154 (Del. 1989) (holding that a “no-talk” provision prohibiting target from having nonpublic dialogue with competing bidder could support a claim for breach of the duty of care, but declining to enjoin the transaction because of the absence of irreparable harm).

6 In re Topps Company Shareholder Litigation, 926 A.2d 58, 76 (Del. Ch. 2007) (“Topps”) (determining that the standstill was not being used for its proper purpose, i.e., extracting concessions from Upper Deck in order to unlock higher value, but instead I was being misused to prefer a private equity bidder favored by the target’s management for a reason unrelated to gaining value for Topps stockholders). See also In re Novell, Inc. S’holder Litig., 2013 WL 3225560, at *9 (Del. Ch. Jan. 3, 2013) (denying motion to dismiss breach of fiduciary duties claims as, in the context of a sales process, target “treated a serious bidder in a materially different way and that approach might have deprived shareholders of the best offer reasonably attainable”).

7 See Topps, at 91.

8 See In re Family Dollar Stores, Inc., 2014 WL 7246436, at *52 (Del. Ch. Dec. 19, 2014) (“Family Dollar”) (finding that the board of directors reasonably concluded that it was unable to negotiate with a competing bidder where the merger agreement required that a “superior proposal” be “reasonably likely to be completed on the terms proposed” and the board had received legal advice that a competing bidder’s proposal had a 60 percent chance of failure due to antitrust limitations).

9 See Chapter 11, Negotiation of Deal Protection Provisions for a more detailed discussion of the negotiation of superior proposal provisions.

10 QVC, at *49; see also Family Dollar, at *16 (finding the target board had determined that the competing bidder’s higher offer was not a superior proposal because it was not reasonably likely to be completed on the terms proposed due to antitrust concerns).
JOINT TASK FORCE ON GOVERNANCE ISSUES ARISING IN BUSINESS COMBINATION

Our Task Force had a mission – to create a handbook for directors and their advisors that gave guidance on the role of directors in M&A deals. 20+ authors, 16 chapters and lots of drafts later, we can say “mission accomplished!” We have submitted our manuscript to the ABA Publications folks and will be marking up galleys before (and possibly during!) the Laguna meetings! Our goal is to launch our new publication, entitled The Role of Corporate Directors in M&A Transactions: A Governance Handbook for Directors, Management and Advisors, at the upcoming ABA Business Law Section’s March meeting in Vancouver. We will also have a program in Vancouver entitled “Ten Tips on Board Oversight of M&A Transactions - Governance Handbook Comes to The Rescue!” Get your checkbooks ready, and please plan to attend our fun program where we will share with you some of the practical tips that are handy reminders in the world of M&A!

Seriously, a project like this has many midwives! We want to thank all of our authors [please be looking for and get back promptly your bios and ABA release forms], and our wonderful quality reviewers, Joel Greenberg and Steve Bigler, and our many supporters, including our Committee Chairs over our 8 year journey [Leigh Walton, who started it all with John Stout back in 2011, Mark Morton and Scott Whittaker], and our colleagues at the Corporate Governance Committee who worked with us on this joint project between our two Committees. Well done by all!

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

TASK FORCE ON LEGAL PROJECT MANAGEMENT

We recently followed through on our discussion at the Annual Meeting in Austin, Texas and circulated to Task Force Members an online survey. The survey assesses their use of legal project management in their law practices and the extent to when they are using the LPM and pricing tools that we have developed. The survey should take no more than five minutes to complete. The input of Task Force Members is critical to the direction that the Task Force takes in the future and to an understanding of how we can enhance our efforts and outreach. Many thanks to those who participated.

The next one hour meeting of our Task Force will be held on Saturday, January 26, 2019 at 10:30 am Pacific time. For those who cannot attend in person, dial-in information can be found on page 19.

At the meeting we will be discussing:

- Recent sales figures for the Second Edition of our LPM in M&A Guidebook
- The results of the LPM Task Force survey referred to above as well as a possible survey of the entire M&A Committee.
- New tools and enhancements to existing tools. Examples include:
  - M&A Auction Process Tool being developed and to be discussed by Task Force member Rainer Loges; and
  - Deal Cycle Management Tool developed by Byron Kalogerou for which Aileen Leventon will demonstrate the use of Lean techniques.
- Possible topics for future programming.

We look forward to either seeing or hearing from you in Laguna. In the interim, if you have not yet completed the Task Force online survey, please do so.

Many thanks.

BYRON S. KALOGEROU, CO-CHAIR
DENNIS J. WHITE, CO-CHAIR
AILEEN LEVENTON, PROJECT MANAGER
THE 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 updated draft model agreement and commentary. With this work underway, the Task Force will not be meeting in the immediate future.

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

THE TASK FORCE ON WOMEN IN M&A

Our upcoming Task Force meeting is scheduled for Friday, January 25, 2019, from 2:30pm to 3:30pm at Montage Laguna Beach. At the meeting, we will interview Bloomberg News M&A reporter, Sonali Basak, regarding her observations of women in M&A based on her research and reporting. Topics will include: (i) her perception of how women present and promote themselves in comparison to male dealmakers; (ii) what women can do to increase their media exposure; and (iii) what men can do to promote women in their organizations. We will also discuss the status of our various Task Force initiatives.

We hope you will also attend our meeting to support our Women in M&A scholarship program. We are hosting several UCLA Law students and one Harvard Law student at the conference. Please come to meet and welcome our scholarship recipients. We are also pleased to be announcing the recipient of our inaugural Women in M&A Deal Lawyer of the Year Award at the conference. The recipient will be announced at the Friday dinner and interviewed by Sonali Basak at the main M&A Committee meeting on Saturday, January 26.

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

THE 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 Laguna Beach. 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 Laguna, we will have some of the authors of sections of our model agreement lead a discussion about drafting issues and related issues that arise in practice. In particular, we will discuss termination provisions and closing conditions. We expect to touch on case law in this area that should be of interest. Finally, we will discuss our ongoing efforts for volunteers to augment and build out our working draft.

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

THE TASK FORCE ON SHORT FORM MODEL ACQUISITION AGREEMENTS

The Joint Task Force on Model Short Form M&A Documents is a combined effort of the M&A Committee and the Middle Market and Small Business Committee with the goal of publishing 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. The Joint Task Force held a productive meeting during the ABA Business Law Section Annual Meeting in Austin, Texas, in September focusing on the current working draft of the model short form stock purchase agreement and developing a work plan for the various Joint Task Force projects. Middle Market and Small Business Committee members of the Joint Task Force had an opportunity to meet again during the ABA Business Law Section Fall Meeting in Washington D.C. in November spending their time discussing the current updated draft of the model short form stock purchase agreement. At the upcoming M&A Committee Meeting in Laguna Beach, California, M&A Committee members of the Joint Task Force will take a turn reviewing and discussing the current updated draft of the model short form stock purchase agreement.
The International M&A Subcommittee met in Austin, Texas, on Saturday, September 15, 2018, from 9:00 – 10:30 a.m. at the Fairmont Austin. The meeting began with introductions of the members present and a brief report by Jennifer Muller (Managing Director of Houlihan Lokey) on year to date 2018 and an overview of the Trump administration’s regulatory and tax activities. Ms. Muller went on to provide an overview of the International M&A market during the second quarter of 2018, and Reid Feldman (Kramer Levin) provided an overview of deal volume and terms correlation work with Deal Points. The meeting presentation, “Life Cycle of and Cultural Issues: Doing deals with family businesses in China, India and Ireland,” was moderated by Jessica Pearlman (K&L Gates) with panelists Lan Lou (JunHe LLP), Akil Hirani (Majmudar & Partners) and John Barrett (Arthur Cox). The meeting concluded with comments by Daniel Rosenberg on European security regulation.

MEMBERSHIP SUBCOMMITTEE

The M&A Committee membership continued to grow in 2018, with 80 new members, bringing our total membership to 5,258.

New Year’s Resolutions!

While we remain the largest committee in the Business Law Section, like the M&A industry generally, ensuring diversity among our ranks is an ongoing challenge for the M&A Committee. For example:

- Only 21% of the membership is female;
- Only 14% of our membership is under 40; and
- Only 5.5% of our membership self-reported as being of an ethnicity other than Caucasian.

We would really like to improve on these numbers as a resolution for 2019! With that in mind, the Membership Committee will be working closely with the WIMA Taskforce and other sub-committees throughout 2019 to identify ways that we can help to grow and support a more diverse membership base moving forward.

You can help!

In the meantime, you can help. Please consider “paying it forward” at the upcoming section meeting in Vancouver by inviting a younger, female or diverse colleague to attend and encourage them to participate in the Committee’s meetings, programs and events.

Please also extend a warm welcome to any new members you meet at our upcoming Committee meeting in Laguna. In particular, please welcome the Future Women in M&A who will be joining us from UCLA and Harvard as part of the WIMA Scholarship Initiative. You can read more about that initiative under the WIMA Taskforce update on page 12.

We look forward to seeing you in Laguna!
The M&A Jurisprudence Subcommittee will meet soon in Laguna Beach:

Friday, January 25, 2019
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, and
• Topics under review by the Judicial Interpretations Working Group.

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.

We need cases!

We ask all members of the M&A Committee to send us judicial decisions they think would be of interest to M&A practitioners. Submissions can be sent by e-mail either to Lisa Hedrick at lhedrick@hirschlerlaw.com or Nate Cartmell at nathaniel.cartmell@pillsburylaw.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=CL560000)
• The Judicial Interpretations Working Group — examines and reports to the Committee on judicial interpretations of specific provisions of acquisition agreements and ancillary documents, looking for recent 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.

We need more topics!

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.
ACQUISITIONS OF PUBLIC COMPANIES SUBCOMMITTEE

Happy New Year from Rita-Anne O’Neill and Patricia Vella, the new Co-Chairs of the Acquisitions of Public Companies Subcommittee! We had a great meeting in Austin and are looking forward to building on that momentum in Laguna! In Austin, Mike O’Bryan from Morison & Foerster led a discussion on recent Delaware appraisal cases with Brad Davey from Potter Anderson lending the litigator’s view and Yvette Austin Smith from The Brattle Group providing the financial expert’s view. The panel discussed the Norcraft and Solera appraisal decisions, when a process is worthy of price-deference under Dell/DFC, whether valuations for purposes of appraisal and fairness opinions are interchangeable, and the guidance from Norcraft on the go-shop structure. Also at the Austin meeting, Jen Fitchen led a discussion on the key differences between how strategic buyers and private equity buyers approach public company deals.

Our meeting in Laguna will take place on Friday, from 1:00 – 2:30pm, and will feature a panel of M&A practitioners discussing hot topics, trends and takeaways from their recent public company M&A transactions. Rita and Tricia will moderate the panel, which will include Jenny Hoohenberg (Cravath, New York City), Charlotte May (Covington, Washington D.C.) and Ann Beth Stebbins (Skadden, New York City).

If you have any topics that you would like to cover in future meetings, or would be interested in speaking at one of our upcoming meetings, please reach out to Rita at oneillr@sullcrom.com and Tricia at pvella@mnat.com.

We look forward to seeing you!

RITA-ANNE O’NEILL, CO-CHAIR
PATRICIA O. VELLA, CO-CHAIR

M&A MARKET TRENDS SUBCOMMITTEE

As the new Chair of the Market Trends Subcommittee, let me first extend an open armed invitation to all to join us in Laguna. In addition to a packed agenda that includes many of the best parts of the Market Trends Subcommittee meetings you have come to expect, I am excited to announce that we will be introducing two new products that fall under the oversight of the Market Trends Subcommittee. You will have to wait until the meeting to learn more, but the Subcommittee is moving forward with new products that offer practical educational tools to deal lawyers. We expect they will be extremely well received by M&A professionals.

Our meeting will provide an update on the status of the Canadian Private Target Deal Study and the unique approach taken on this latest study. We are starting the work on the current iterations of all of the U.S. based studies and, as always, if you would like to volunteer for any of the studies, we would love to have your involvement. Working on a Deal Points Study is a great way to get more involved in the M&A Committee and meet other members of the Committee.

We will also have a statistics-based presentation on materiality scrapes from Kira that used the Kira Machine Learning Contract Analysis Software to generate the statistics.

The Kira presentation will be followed by a market update from Houlihan Lokey. I think we are all concerned about the current state of the market and what the key indicators are saying about 2019. Jen Muller will focus the Houlihan Lokey presentation on the key facts that are often barometers of future M&A activity.

Our meeting will culminate in a discussion with Vice Chancellor Joseph Slights of the Delaware Chancery Court. In order to make this segment really useful, if there are any current case law topics that you would like to hear about from someone who makes Delaware law, please let us know at cmenden@cooley.com and kkyte@stikeman.com so that we can include those topics in our preparations for the meeting.

We look forward to seeing you in Laguna!

CRAIG MENDEN, CHAIR
KEVIN KYTE, VICE-CHAIR
The Private Equity M&A Subcommittee last met on Friday, September 14, at 10:30 a.m. local time in Austin, Texas, as part of the Business Law Section’s Annual Meeting. We had two presentations at our meeting. First, as part of our “Recent Developments” series, I chaired a panel with The Honorable Justice Collins J. Seitz of the Delaware Supreme Court; Leigh Walton, a partner at Bass Berry & Sims in Nashville, Tennessee, and a former chair of the Mergers and Acquisitions Committee; and Pamela Millard, a partner at the Wilmington, Delaware, law firm of Potter Anderson Corroon LLP. The program was entitled “Negotiating the Governing Law Clause post Eagle Force.” The panel discussed the Delaware Supreme Court’s decision in Eagle Force Holdings, LLC v. Campbell (Del. 2018) and how it might and should effect Private Equity M&A lawyers in negotiating governing law clauses in acquisition agreements. Then, as part of our “The Experts Speak” series, we had a panel moderated by Matt Sachse, Managing Director of Page Mill Partners in Palo Alto, California, that also included Margaux Knee, Assistant General Counsel at Protocol Labs; Daniel Goldman, a partner of Gunderson Dettmer in New York, New York; and Todd Bissett, a partner in the Kitchener-Waterloo, Ontario, office of Miller Thomson, that discussed “The Movement of Private Equity into Technology.”

The Private Equity M&A Joint Subcommittee will meet next on Friday, January 25, 2019, at 10:30 a.m. local time in Laguna Beach, California, as part of the Merger and Acquisitions Committees standalone meeting. We have three material items on the agenda. First, based on the feedback that our discussion on Eagle Force Holdings in Austin has generated, we are going to revisit the topic in Laguna Beach. I will be joined by The Honorable Leo Strine, Chief Justice of the Delaware Supreme Court, and Lisa Stark of K&L Gates in Wilmington, Delaware. The panel will remind everyone what we discussed in Austin, mention how Vice Chancellor Laster’s decision in Acorn effects the discussion, review some of the feedback that I received after our Austin discussion and hear the Chief Justice’s thoughts on the matter. Second, my Vice Chair, Samantha Horn of Stikeman Elliott in Toronto, Ontario, is going to introduce and discuss what I hope is the Private Equity M&A Subcommittee’s first project – a document showing how to modify a purchase agreement to provide for a tax free equity rollover. Finally, I note that it was exactly two years ago that our Subcommittee had a program on representation and warranty insurance. In our third segment I will be joined by Bill Monat of WTW, who participated in the original panel discussion two years ago, and Philip Henry of AON, for an update on R&W insurance entitled “Representation and Warranty Insurance—an Update on Current Terms, Trends and Claims.”

My Vice Chairs (Mireille Fontaine of BLF in Montreal, Quebec, and the aforementioned Samantha Horn) and I continue to seek YOUR feedback as to the meetings and the Joint Subcommittee, either by talking to one of us in Laguna Beach 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 Laguna Beach meetings, please feel free to come by and introduce yourself.

I look forward to seeing many of you in Laguna Beach on Friday, January 25, at 10:30 a.m. local time (1:30 Eastern). If you are unable to be there, please feel free to dial in and listen using the instructions set forth elsewhere in Deal Points.
The Technology in M&A Subcommittee met on Friday, September 14, 2018 at the Annual Meeting of the Business Law Section in Austin, Texas. The meeting primarily comprised a report on the status of our directory project, a discussion of our other projects and the following presentations:

- Matt Kittay of Fox Rothschild led a discussion on ethical issues that arise when using different types of technology in M&A, with participation from Haley Altman of Doxly, Steve Obenski of Kira and James Walker of Richards Kibbe & Orbe.
- Brooke Goodlett and Jackie Tokuda of Wilson Sonsini Goodrich & Rosati gave a live demonstration of cap table software.
- Kevin Kyte of Stikeman Elliott overviewed his case study on document assembly technology (which appeared on page 12 of the Fall 2018 issue of *Deal Points*).

We have circulated to subcommittee members an updated copy of the directory of technologies currently being used by M&A practitioners, which Will Norton of SimplyAgree is helping the subcommittee to develop. The updated directory includes a number of additional technologies, as well as a new column to capture security standards and important integrations that the technologies support. The updated directory is also available in our subcommittee’s folder in the main committee’s Library on the Connect platform ([https://connect.americanbar.org/businesslawconnect/community/home/librarydocuments?communitykey=8008dda8-c826-4df2-a0ca-03b584170b26&tab=librarydocuments](https://connect.americanbar.org/businesslawconnect/community/home/librarydocuments?communitykey=8008dda8-c826-4df2-a0ca-03b584170b26&tab=librarydocuments)), but because it is a work in progress it is only available to subcommittee members (you can join through the “Join this subcommittee” button on the main ABA platform at [https://www.americanbar.org/groups/business_law/committees/ma/subcommittees](https://www.americanbar.org/groups/business_law/committees/ma/subcommittees)).

Tom and I once again would like to thank Will for all his hard work in progressing the directory further 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 with any of these technologies and, if so, whether you would be interested in sharing 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**

- The ethical issues that arise when using different types of technology in M&A. This project is being led by Matt Kittay of Fox Rothschild, who will lead a discussion on it at our meeting in Laguna Beach.
- 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 to 5:00 pm on Friday, September 14, 2018, at the Committee’s Standalone Meeting in Laguna Beach, California. At that meeting, we will hear the following presentations:

- Wei Chen, VP and Associate General Counsel of Salesforce.com, will give an overview of the “Atticus Project”, an exciting project she is leading to create an open-source dataset to foster AI innovation in M&A contract diligence. The project team includes some of the world’s leading technology companies and a range of leading technology lawyers, with our Subcommittee being represented on it.
- Emily Colbert of Thomson Reuters will give a preview of a legal workflow solution with tailored content for M&A practitioners. The solution aims to connect the practice of law with the business of law by pulling together the assets that Thomson Reuters has into one integrated platform in which attorneys can plan, manage and execute their deals.
- Will Norton of SimplyAgree will give an overview of the latest version of the directory of technologies currently being used by M&A practitioners.
- Matt Kittay of Fox Rothschild will lead a discussion on ethical issues that arise when using different types of technology in M&A.

If you 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.

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.

Our subcommittee is also responsible for maintaining the committee’s pages on the ABA website, where the platform we have been using for many years has recently been replaced by two new platforms. For details of the changes and where you can find everything now, please see the separate article on page 4 of this issue of *Deal Points*. Daniel Rosenberg will also give a live demonstration of what’s where on the new platforms on Saturday, January 26, 2019, at the main M&A Committee meeting during the Committee’s Standalone Meeting in Laguna Beach, California.

If you have ideas for how we might take the subcommittee forward, please share them with us. Please come to our forthcoming meeting in Austin, and if you can’t do that, please email our Vice-chair Tom Romer at romert@gtlaw.com, our M&A Directory Project Leader Will Norton at will@simplyagree.com, our Ethics in M&A Technology Project Leader Matt Kittay at mkkittay@foxrothschild.com or me at daniel.rosenberg@crsblaw.com.

**TECHNOLOGY IN M&A SUBCOMMITTEE**
In this issue of Deal People, I am introducing M&A Committee members to Grace Do, a recent recipient of a Women in M&A scholarship to attend an M&A Committee meeting. Her story speaks volumes about the positive impact that WiMA's efforts are having on female law students who are making decisions about whether to pursue a career in M&A.

Grace was born in South Korea. She grew up in Sri Lanka (age 5 through 12), when at the time her parents were missionaries in Sri Lanka, where they built a school and undertook various development projects in the community. After attending middle school and high school in Los Angeles, Grace went to USC for undergrad, and she is now at NYU law school.

Grace first heard about the WiMA scholarship program through the weekly emails she receives from NYU Law Women (a student group on campus – its mission is to promote the success of females in the legal field). She submitted an application online, was interviewed by Jen Muller and Rita-Anne O’Neill, and was awarded a scholarship.

Grace did not know any lawyers in her community when she grew up and, as she says, “I started law school not even knowing the difference between litigation and corporate/transactional.” She is grateful for the WiMA scholarship because “it was my very first exposure to corporate law and M&A law. Though I didn’t understand more than half of the content that was discussed during the ABA Business sector meetings, sitting in the conferences, I found it interesting and it sparked my curiosity.”

“I especially appreciated the opportunity to meet various M&A lawyers (I still keep in touch with a handful of lawyers I met) and hear about which aspects of the M&A work excited them. They were all very generous and kind in taking the time to share about their work with me.”

Since receiving the WiMA scholarship, Grace has continued her interest in M&A. She worked at the corporate department at Ashurst Hong Kong during her first-year summer and sought more exposure to M&A. She will be working at Gibson Dunn’s New York City office this summer and hopes to work with the M&A group.

Grace, the entire Committee hopes that you continue to have great experiences working on deals and meeting other deal lawyers. We wish you the very best for your M&A career!

If you are interested in learning more about the Committee’s Women in M&A Task Force or the WiMA scholarship, please contact either Co-Chair of the Task Force, Jen Muller at JMuller@hl.com and Rita-Anne O’Neill at oneillr@sullcrom.com.
Please note that times listed are PACIFIC TIME. 
Dial-in numbers are different for the two meeting rooms that are in use. Please be conscientious of start and end times.

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<td>(707) 287-9583</td>
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<td>Gallery I &amp; II</td>
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Friday, January 25, 2019

9:00 am – 10:30 am
**M&A Jurisprudence Subcommittee**
Chair: Nathaniel M. Cartmell, III

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

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

1:00 pm - 2:30 pm
**Acquisitions of Public Companies Subcommittee**
Co-Chairs: Rita-Anne O’Neill and Patricia O. Vella

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

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

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

3:30 pm - 4:30 pm
**Academic Subcommittee**
Co-Chairs: Eric Talley and Glenn D. West

5:00 pm – 5:45 pm
**Meeting of Committee Chair and Vice Chairs, Subcommittee and Task Force Chairs**
Chair: Wilson Chu
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<td>9:00 am – 10:30 am</td>
<td>Market Trends Subcommittee</td>
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<td>Legal Project Management Task Force</td>
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<td>M&amp;A Litigation Task Force</td>
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<td>Co-Chairs: Yvette Austin-Smith &amp; Lewis H. Lazarus</td>
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<td>Two Step Auction Task Force</td>
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<td>Co-Chairs: Michael G. O’Bryan &amp; Eric Klinger-Wilensky</td>
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<td>2:00 pm – 3:00 pm</td>
<td>Private Company Model Merger Agreement Task Force</td>
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<td>Co-Chairs: Melissa A. DiVincenzo &amp; Amy L. Simmerman</td>
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<td>3:00 pm – 5:00 pm</td>
<td>Mergers and Acquisitions Full Committee Meeting</td>
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FULL COMMITTEE MEETING AGENDA (January 26, 3:00-5:00pm)

3:00pm
Welcome and Around-the-Horn Introductions (15 mins)
Wilson Chu, Chair, McDermott Will & Emery, Dallas, TX

3:15pm
Sea Squirting M&A Boilerplate (15 mins)
Glenn West, Weil Gotshal & Manges, Dallas, TX

3:30pm
User's Guide to M&A Committee's Sections on New ABA Website (10 mins)
Daniel Rosenberg, Chair, Technology Subcommittee
Charles Russell Speechlys, London, England

3:40pm
Atticus Project: Open-Source Dataset to Foster AI innovation in M&A Contract Diligence (10 mins)
Wei Chen, VP and Associate General Counsel, Salesforce.com, San Francisco, CA

3:50pm
Market Check: Negotiating MAE Post-Akorn (Anything Really New?) (20 mins)
George Taylor, Vice Chair, Burr & Forman, Birmingham, AL
Mike O'Bryan, Vice Chair, Morrison & Foerster, San Francisco, CA
Jessica Pearlman, Vice Chair, K&L Gates, Seattle, WA

4:10pm
New Project: Market Check Video Series (10 mins)
Craig Menden, Chair, Market Trends Subcommittee, Cooley LLP, Palo Alto, CA

4:20pm
Women in M&A Deal Lawyer of the Year Award Presentation (40 mins)
Jennifer Muller, Chair, Women in M&A Subcommittee, Houlihan Lokey, New York, NY
Rita-Anne O’Neill, Vice Chair, Women in M&A Subcommittee, Sullivan & Cromwell, Los Angeles, CA

5:00pm
Adjourn
## COMMITTEE STRUCTURE AND LEADERSHIP

### MAC Subcommittee/Task Force Leadership

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<td>• Co-Chair, Glenn West</td>
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**Governance Issues in M&A** (Joint Task Force with Corporate Governance Committee)

- Co-Chair, Diane Holt Frankle
- Co-Chair, Patricia Vella
- Co-Chair, Lawrence Hamermesh
- Co-Chair, Michael Halloran

** Financial Advisor Task Force **

- Chair, T. Brad Davey

** International M&A **

- Chair, Richard Silberstein
- Vice-Chair, Jeff Labine

** Legal Project Management **

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Disclosure of the Competing Bid to the Buyer and Matching Rights

The merger agreement will also set forth the circumstances under which the target must disclose the existence of a competing bid to the buyer. Specifically, contractual provisions may require:

- the target to give the buyer notice of the identity of the competing bidder before the target may commence discussions with the competing bidder;
- advance notice of what information the target is supplying to the competing bidder; and
- disclosure to the buyer of communications between the target and competing bidder.

These disclosure obligations may be in connection with matching rights the target has granted to the buyer, giving the buyer the right to make a new offer before the target can accept a competing bid as a superior proposal. While matching rights can raise issues of fair treatment, in general courts have not viewed matching rights as an insurmountable barrier to entry of a competing bidder. The target board will need to comply carefully with the contractual notice and matching rights provisions to avoid a breach of the agreement giving rise to damages or a right of the buyer to terminate the transaction before the target board has concluded that the competing bid represents a superior proposal.

Disclosure to Target Stockholders

The existence of a competing bid may also create disclosure obligations running to the target stockholders. The target directors’ fiduciary duty requires that the target disclose material developments so that the stockholders voting on a transaction are voting on an informed basis. A mere expression of interest by a competing bidder (or an “exploding offer,” which, by its terms, is withdrawn if publicly disclosed) may not be material and need not be disclosed. Once an actionable proposal with specific terms is conveyed, however, the board may be compelled to disclose the competing offer as it may be material to the stockholders’ vote or tender decision on the original deal. The target’s disclosures in its proxy statement or solicitation statement about the background of the merger may give rise to an obligation to make disclosure about competing offers, so that the proxy statement provides a full and fair disclosure of the negotiation history and the background of the target board’s decision making. This may require disclosure of not only the existence of a competing bid, but also what consideration the board gave to the competing bid and why it was rejected.

Engaging With a Competing Bidder

A decision by the target board to negotiate with the competing bidder triggers a number of serious consequences for the target, chief among them being the likely payment of a termination fee to the buyer if the target board changes its recommendation that the stockholders vote in favor of the original deal (which it must do if it accepts the second deal). Until the stockholders vote, the target board must inform the stockholders if it believes that the original deal being voted on is no longer in the stockholders’ interest. Accordingly, if the target board believes that it has been presented with a superior proposal, it will need to change its recommendation as to the advisability of the original merger proposed for a stockholder vote, so that the stockholders will be aware of the target board’s change in recommendation when they vote on the transaction, unless the change of recommendation for a superior proposal permits the board to terminate the agreement before the stockholder vote. If the board of directors concludes, however, that the competing bid is not a superior proposal, it may choose to maintain or deploy defensive devices (such as a poison pill) to counter that bid, subject to the target board’s fiduciary duties.

11 Topps, at 86, citing Ace Ltd. v. Capital Re Corp., 747 A.2d 95 (Del.Ch.1999) (topping bid made by alternative buyer acceptable despite substantial termination fee and matching right); Family Dollar, at 8, “11 n. 80 (same).

12 See Chapter 2, Fiduciary Duties of Directors Generally in a Business Combination.

13 Arnold v. Soc’y for Sav. Bancorp., Inc., 650 A.2d 1270, 1280 (Del. 1994) (making a partial disclosure triggers “an obligation to provide the stockholders with an accurate, full, and fair characterization” of the facts concerning that partial disclosure.).

14 See e.g., Topps, at 62, 64, 72-73, 77-79 (discussing alleged omissions and material statements bearing on credibility of bid by competing bidder); LAMPERS, at 1185-86, 1189 (discussing duty of disclosure and finding additional disclosure concerning the antitrust risks presented by competing bidder unnecessary).

15 See e.g., MoneyGram International, Inc. Form 8-K filed March 20, 2017 (announcing receipt of an unsolicited competing bid from Euronet Worldwide Inc. for $15.20 per share); MoneyGram International, Inc. Form 8-K filed March 27, 2017 (announcing that MoneyGram had entered into a confidentiality agreement with Euronet Worldwide Inc. to further consider Euronet’s unsolicited proposal); MoneyGram International, Inc. Form 8-K filed April 17, 2017 (describing receipt of increased bid of $18.00 per share from Alipay and determination that competing bid made by Euronet Worldwide Inc. was not a superior proposal); MoneyGram International, Inc. Schedule 14A filed April 19, 2017 at 10-12 (describing the steps the MoneyGram board took to evaluate the competing bid).

16 Del. Code §251(b). Merger agreements generally provide the buyer a termination right if the target board changes its recommendation. In addition, many merger agreements give the target the right to terminate for a superior proposal, subject to satisfaction of the target’s contractual obligations such as notice and matching rights. In each of these cases a termination fee is the buyer’s remedy on termination. See Chapter 11, Negotiation of Deal Protection Provisions for more information on termination provisions and the board’s consideration of termination fees. Obviously, the target board will want to delay any determination to change its recommendation until it is sure the second deal is indeed superior, is buttoned up with an acceptable definitive agreement, and any matching rights of the original buyer have been satisfied.

17 Frontier Oil v. Holly Corp., 2005 WL 1039027, at *28 (Del. Ch. Apr. 29, 2005) (board had a duty to review transaction and to confirm that a favorable recommendation would continue to be consistent with its fiduciary duties in connection with considering a change in recommendation.) (Frontier”).

18 See Chapter 11, Negotiation of Deal Protection Provisions for more information on change in recommendation and termination provisions. If the merger agreement does not give the target the right to terminate for a superior bid, the agreement is said to “force the vote” on the initial transaction, and assuming the buyer chooses not to terminate the merger agreement and take a termination fee, but rather insists on the vote, the target board is obligated to fully inform its stockholders prior to the vote.

19 See in re Orchid Cellmark Inc. S’holder Litig. 2011 WL 1938253, at *6-8 (Del. Ch. 2011) (“[A] sophisticated and serious bidder would understand that the Board would likely eventually be required by Delaware law to pull the pill in response to a Superior Offer”); Family Dollar, Inc., at *25, “35 n.80 (noting the board’s decision to exempt the original merger agreement from the poison pill it had adopted, and the continued application of the pill to a competing bid). See also Chapter 4, Exploring Strategic Alternatives and Responding to Unsolicited Approaches - Starting the Process, for a discussion of the issues a board will consider in the adoption of a poison pill or stockholder rights plan.
**Stockholder Opposition**

A target board can expect significant pressure from institutional stockholders and proxy advisory services if it fails to respond meaningfully to a potentially superior proposal by a competing bidder. A target’s stockholders may seek to oppose a deal at the ballot box, even if no competing bidder has emerged. This could be because the stockholders favor no transaction at the time, favor an alternative transaction that they believe may emerge with more time, or believe a credible “vote no” campaign may force the buyer to increase its bid.

A target board may face a situation where it believes a transaction is in the best interest of the target and its stockholders, but it is concerned that a majority of the stockholders will vote no and thus defeat the transaction. The target board has some flexibility to schedule and adjourn the stockholders’ meeting in an effort to obtain approval of the holders of a majority of the outstanding shares. That discretion is not unlimited, however, and if it is misused it can be vulnerable to attack as an improper defensive response and an improper interference with the stockholder right to vote. See also Chapter 11, Negotiation of Deal Protection Provisions—Obtaining Stockholder Approval for further discussion of contractual limitations on the target’s ability to change a meeting date.

Similarly, the use of corporate resources to “buy” votes also can raise issues of disenfranchisement and will be carefully scrutinized by the courts. Although vote buying is not always illegal, management... may not use corporate assets to buy votes in a hotly contested proxy contest about an extraordinary transaction that would significantly transform the corporation, unless it can be demonstrated... that management’s vote-buying activity does not have a deleterious effect on the corporate franchise.

Stockholder opposition to a deal may also take the form of litigation, often asserting that the target directors have breached their fiduciary duties. In assessing whether such litigation poses a threat to a deal, the target and buyer will consider the identities and relative stakes of the plaintiffs in the litigation. When no competing bidder has emerged, lawsuits by class action plaintiffs with insignificant economic stakes pose at most a negligible threat to deal closing on the terms specified in the merger agreement.

In contrast, a legal challenge by a target stockholder or group of stockholders that holds a significant economic stake in the target (or a competing rival bidder) may present a challenge to deal certainty. Although injunctions against proceeding with the deal are rare, they can lead to delay in the closing or the stockholder vote, or help force the buyer to increase its bid.

**Intervening Material Financial or Operational Developments**

There are also instances where either the buyer or the target decides it wants to terminate a signed deal. The buyer can suffer reversals in its own business, lose financing or become less bullish about the prospects of the combination due to reversals in the target’s business. Alternatively, the target board may come to believe that it is better off not selling, either because of an unexpected increase in the value of the target or a decline in the buyer’s prospects (in the case of a stock for stock deal). See Chapter 10, Sales Process for a Sale of Control for a discussion of the target board’s consideration of different forms of consideration.

Deal breaking comes at a cost. Where the target board believes the deal is no longer in the best interest of the stockholders, it will need to carefully examine the deal protection provisions in the merger agreement to determine if the target board is permitted to change its recommendation under the circumstances. See Chapter 11, Negotiation of Deal Protection Provisions—Obtaining Stockholder Approval for a discussion of the change of recommendation provisions. Further, the target board will need to consider if it also has the right to terminate the agreement, and the consequences of a change of recommendation. A change in recommendation generally triggers a right for the buyer to terminate the agreement and receive a termination fee from the target. If the target does not have an express right to change its recommendation, the target board can face the risk of a lawsuit asserting breach of the merger agreement, exposing the target to damages for the lost benefit of the bargain. If the target does not have a right to terminate the agreement, the buyer can force the target to hold the stockholders’ meeting, rather than simply terminating the agreement and taking a fee.

20 Mercken v. Inter-Tel (Delaware), Inc., 929 A.2d 786, 788 (Del. Ch. 2007) (applying Unocal and requiring board to postpone stockholder vote); In re MONY Grp., Inc., Stockholder Litig., 853 A.2d 661, 676–77 (Del. Ch. 2004), as revised (Apr. 14, 2004) (applying business judgment rule and allowing board to postpone stockholder vote and reset record date). In 2013, Dell Inc. adjourned a meeting to vote on a buyout proposal led by its founder Michael Dell three times to gather additional support for the transaction. In re Appraisal of Dell Inc., 143 A.3d 20, 27–28 (Del. Ch. 2016) (describing the adjournments).


22 See note 19.

23 Under Delaware law, ‘an agreement involving the transfer of stock voting rights without the transfer of ownership is not necessarily illegal and each arrangement must be examined in light of it’s object or purpose.’ In fact, under most circumstances, “[h]shareholders are free to do whatever they want with their votes, including selling them to the highest bidder.” Flaa v. Montana, 2014 WL 2212019, at *8 (Del. Ch. May 29, 2014) (analyzing but declining to decide whether a stock purchase agreement constituted impermissible vote buying in connection with a consent solicitation and invalidating consent solicitation for failure to provide disclosure of the stock purchase agreement). Although vote buying that does not involve use of corporate resources (so called “third-party vote buying”), such as when a director or a controlling stockholder uses his or her own resources to whips votes, does not present the same concerns as when the corporation’s resources are used to influence votes, third-party vote buying will nonetheless be subject to judicial review to ensure that it is not disenfranchising or the product of fraud. Kurz v. Holbrook, 989 A.2d 140, 177 (Del. Ch.) (judgment entered, 2010 WL 7961655 (Del. Ch. 2010)) (finding no illegal vote buying in connection with a consent solicitation to elect board members), aff’d in part, rev’d in part sub nom. Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377 (Del. 2010).

24 Hewlett v. Hewlett-Packard Co., 2002 WL 549137, at *4 (Del. Ch. Apr. 8, 2002). In the Hewlett-Packard case, Walter B. Hewlett, a stockholder of Hewlett-Packard Company (“HP”), sought to set aside a stockholder vote approving a merger of HP with Compaq Computer Corporation on the basis that HP’s management had engaged in vote buying to prevail in the hotly contested vote. The central factual issue was whether HP management had coerced Deutsche Bank into voting 17 million shares in favor of the merger by using the ongoing business relationship between HP and Deutsche Bank as a weapon. After trial, the court concluded that Hewlett failed to prove that HP management improperly enticed or coerced Deutsche Bank and allowed the vote to stand.

25 See note 19.
the buyer may require payment of a reverse breakup fee to the target or subject the buyer to a risk of a lawsuit by target alleging breach of the merger agreement and seeking damages or specific performance.

Material Adverse Change Disputes
A party seeking to terminate the merger agreement will often claim that there has been a failure to satisfy a condition to completing the merger. In this regard, merger parties frequently rely on a claim that there has been a material adverse change (a “MAC,” also often called a “material adverse effect,” or “MAE”) in the target’s business and as a result the buyer is allowed to terminate the merger agreement. A related claim would be that a breach of a representation supplies independent grounds to terminate, or results in damages that would be sufficient to constitute a MAC.

Establishing a material adverse change, given the way most MAC clauses are written, is typically a challenge. Most MAC clauses exclude macroeconomic and industry changes that might affect the value of the business. A buyer faces a heavy burden when it attempts to invoke a MAC clause in order to avoid its obligation to close.24 The MAC clause should be seen primarily as providing “a ‘back stop protecting the acquirer from the occurrence of unknown events that substantially threaten the overall earnings potential of the target in a directionally-significant manner.’”227 Care should be taken before asserting that a material adverse change has occurred and in responding to such an assertion.28 See Chapter 12, Buyers Issues, for a further discussion of the difficulties in asserting a failure of condition as a result of a material adverse change.

Failure to Meet Other Conditions Precedent
A party seeking to walk from the merger agreement may also seek to “slow roll” the meeting of a condition precedent (such as financing commitments or regulatory approvals) so that the deal does not close within the time limitations within the merger agreement and therefore terminates. However, financing and regulatory approval conditions frequently include “reasonable best efforts” requirements or “good faith” requirements. When that is the case, a target board must monitor what efforts the parties are making to obtain financing and regulatory approvals.29

Efforts clauses can be tiered from most demanding to least demanding as follows:

- a “hell or high water” provision requiring the target (or the buyer) to spend all necessary resources to satisfy a condition, and maybe even pay damages if it fails to do so (this sometimes appears in a condition of antitrust approval and may require a party to dispose of assets as required by the Justice Department or FTC);
- a simple “best efforts” provision requiring a party to make less costly concessions to meet the condition than those required of a party committed to a “hell or high water” provision, but likely still requiring the expenditure of substantial time and resources to cause a condition to be fulfilled;
- a “reasonable best efforts clause” requiring the expenditure of reasonable time and resources, whatever that is; and
- a “commercially reasonable efforts” clause requiring somewhat less effort.

Often an “in the most expeditious manner possible” clause might be added, under which the party has agreed to speed the process to get regulatory approval or meet a condition precedent. Courts have indicated, however, that they can discern no difference between “reasonable best efforts” and “commercially reasonable efforts,” but agreements contain both, suggesting either that drafters think there is a difference, or that the drafters are not exercising sufficient clarity or care in drafting these clauses.30

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26 Hexion Specialty Chems., Inc. v. Huntsman Corp., 965 A.2d 715, 738 (Del. Ch. 2008).
27 Hexion, at 738 (quoting In re IBP, Inc. Shareholders Litigation, 789 A.2d 14, 68-69, 71 (Del. Ch. 2001) (finding IBP had not suffered a MAC, even though IBP had suffered a dramatic fall in earnings, showing a drop-off of 64% from its first quarter.).
28 In Frontier, 2005 WL 1039027, at *2-3. Frontier was concerned Holly might assert that Frontier had suffered a material adverse change and breach of warranty claims due to potential liability for toxic torts (which the famous Erin Brockovich movie portrayed). Frontier denied a MAC had occurred, and claimed that Holly, by suggesting that a MAC may have occurred and staging a desire to renegotiate the merger agreement or change its recommendation and exercise its fiduciary out, had repudiated it. Frontier claimed the right to terminate and sued Holly for $160 million in damages, which included payment of the termination fee, plus Frontier’s costs and other damages. The court found that Holly’s suggestions were not repudiation. Moreover, by incorrectly suing for repudiation and abandoning its own efforts to complete the merger, the court held that Frontier itself had repudiated and was in breach of the merger agreement. The court held that Frontier had no right to the termination fee either. In contrast, in Akorn, Inc. v. Fresenius Kabi AG., C.A. No. 2018-0300-JTL, 2018 WL 4719947, slip op. at 119-121 (Del. Ch. October 1, 2018) affirmed ___ A.3d ___ (Del. December 7, 2018) (“Akorn”), the court held that the buyer had met its burden in proving that a material adverse effect had occurred. Akorn addresses the conduct of buyers that might influence a judicial finding of a MAC. The court observed that “[i]n prior cases, this court has correctly criticized buyers who agreed to acquisitions, only to have second thoughts after cyclical trends or industry-wide efforts negatively impacted their own businesses, and who then filed litigation in an effort to escape their agreements without consulting with the sellers.” Akorn, slip. op. at 5. In Akorn, the court found that the buyer consulted the target about both deteriorating financial performance and whistleblower allegations of regulatory noncompliance, appropriately used its rights under the merger agreement to investigate the latter issues, and complied except for an immaterial breach, with its own contractual obligations. After analyzing the materiality of the adverse effects the court determined that the buyer was entitled to terminate the merger agreement. Writing for the Delaware Supreme Court en banc, Chief Justice Strine, affirming the Court of Chancery’s judgment, found that the factual record adequately supported the Court of Chancery’s determination that Akorn had suffered a material adverse effect that excused any obligation on the buyer’s part to close and the buyer properly terminated the merger because Akorn’s breach of its regulatory representations and warranties gave rise to a material adverse effect and the buyer had not itself engaged in a prior, material breach of covenant that would have prevented the buyer from exercising its immediate termination right under the merger agreement. See Chapter 12, Buyers Issues - Judicial Interpretations of MAC Clauses for a further discussion of MAC clauses and the courts’ view of buyers conduct in assessing whether a buyer may successfully assert a MAC.
29
A party subject to a reasonable best efforts provision must do more than refrain from taking actions to thwart or obstruct performance of the agreement. A party is also obliged "to take all reasonable steps to solve problems and consummate the transaction."\(^{31}\)

The target board or buyer seeking deal certainty will want to limit the ability of the other party to walk away from a transaction. A reasonable best efforts clause does not require a party to agree to costly or burdensome concessions required by a regulator or financing sources, if the party has not expressly agreed to do so in the merger agreement. Similarly, a reasonable best efforts clause does not require a party to act against its good faith business interests or take a futile act that supposedly would ensure a condition will be met.\(^{32}\) "Commercially reasonable efforts" and "reasonable best efforts" clauses also do not require a party to amend the agreement to consummate it.\(^{33}\)

When it becomes clear that a regulatory approval or condition precedent will not be met before the termination date, the parties may seek to negotiate an extension, and the buyer may seek to extract concessions from the target. When deciding whether to agree to a concession, the target board or buyer board will need to inform itself of relevant regulatory and financial information that may have come to light since the signing of the merger agreement and make a determination that the extension or other concession is in the best interest of the target stockholders.\(^{34}\)

Boards will also want to be attentive to who is required to make efforts to meet the condition. Under ordinary rules of contract interpretation, non-parties to a merger agreement are not bound by "best efforts" covenants made by the actual parties to the agreement.\(^{35}\)

**Conclusion**

In at least three distinct ways, a signed merger agreement can be derailed before it can be consummated: a competing (jumping) bid may come along; stockholders may resist the deal through voting opposition or through litigation; and parties may invoke post-signing events to justify termination of the agreement. In each of these three situations, the target board of directors needs to be cognizant of its pertinent obligations — namely, the obligations of the company under the merger agreement, which may limit the board’s discretion in responding, and the directors’ fiduciary obligations. These sets of obligations may be in tension, and the advice of experienced deal counsel in resolving such tension is as important in the post-signing phase as it was in the negotiation of the original deal.

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\(^{32}\)See Alliance Data Sys. Corp. v. Blackstone Capital Partners V L.P., 963 A.2d 746, 764 (Del. Ch. 2009), aff’d, 976 A.2d 170 (Del. 2009) (finding no breach of a reasonable best efforts clause where there was “nothing that [the defendant] could have done” to cause a different outcome); Anwil Hlds. Corp. v. Iron Acq. Co., 2013 WL 2249655, at *11-12 & n.48 (Del. Ch. Sept. 22, 2011) (“[t]he law does not require a futile act.”); In re Chateaugay Corp., 196 B.R. 848, 856 (S.D.N.Y. 1996), aff’d, 108 F.3d 1369 (2d Cir. 1997) (the duty “to use reasonable efforts to consummate a transaction [does] not stretch so far as to require [a party] to make futile gestures.”).

\(^{33}\)Cooper Tire & Rubber Co. v. Apollo (Mauritius) Holdings Pvt. Ltd., 2013 WL 5977140 (Del. Ch. Nov. 9, 2013) (no breach of “reasonable best efforts” clause where a party refused to accept a different contract than the bargained-for agreement; cf. Harbinger F&G, LLC v. OM Group (UK) Ltd., 2015 WL 1334039 (S.D.N.Y. Mar. 18, 2015) (construing “reasonable best efforts” clause where the parties had expressly agreed to use their best efforts to agree to alternative contractual terms); Williams, at *6 (counsel was unable to give a tax opinion that was a closing condition; plaintiffs argued that defendant should have been willing to consider non-substantive changes in the agreement that might have enabled counsel to give the opinion, but the Delaware Supreme Court did not reach the issue).

\(^{34}\)McGowan v. Fero, 859 A.2d 1012, 1019, 1033-35 (Del. Ch. 2004), aff’d 873 A.2d 1099 (Del. 2005) (suggesting that the business judgment rule, not Revlon, applied to target board’s decision to make concessions to gain extension and finding that, where no alternative transaction had emerged board was not required to run a new market check or obtain an updated fairness opinion).

\(^{35}\)See Alliance Data Systems Corp. v. Blackstone Capital Partners V L.P., 963 A.2d 746 (Del. Ch. 2009), aff’d, 976 A.2d 170 (Del. 2009). In Alliance Data Systems, the court dismissed a claim by a target that the buyer had breached a reasonable best efforts obligation to obtain the approval of the office of Controller of the Currency (“OCC”). The OCC indicated that it wanted the buyer’s parent to commit to financial support of the target. The buyer’s parent, a large private equity fund, was not a party to the merger agreement and as a result had no obligation to take any affirmative action to achieve OCC approval.