FROM THE CHAIR  Wilson Chu

I hope that you find our M&A Snapshot helpful to track all the terrific content in store for us in DC. Special thanks for George Taylor (Burr & Forman), our Committee Vice Chair and Whip, for producing the Snapshot and otherwise artfully herding cats.

Just in time for our DC meeting, we’re really excited to rollout the “Pilot” of the Committee’s Market Check Video Series. Co-produced with Hotshot, the market-leading digital learning provider (www.HotShotLegal.com), our new thought-leadership offering is geared for our digital learners (read: younger) who’ll appreciate on-demand insights into the latest market trends and practices (including negotiation and drafting tips) behind advanced M&A topics. As you’ll see from our Pilot on materiality scrapes (featuring Rita O’Neill, Sullivan & Cromwell and Craig Menden, Wilkie Farr & Gallagher... many thanks for being our fearless test pilots), the substantive content is created by our handpicked Committee members, and delivered in Hotshot’s signature highly-polished short-video style. Best of all, it’s available for FREE to Committee members as well as members of the Section of Business Law! The Pilot is now live and available at www.ambar.org/blshotshot

But wait, there’s more! Season 1 is in the works featuring Sandbagging, Fraud Exceptions, Full Disclosure, and other tantalizing topics. We plan to have more seasons than Game of Thrones so raise your hand if you’d like to take your first step toward your Walk of Fame star by starring in an upcoming video. Please contact Craig Menden, Chair, Market Trends Subcommittee. At the Committee, we’re all about creating opportunities for our members to help us project thought leadership and to help you build your name and network!

Last but not least, special thanks to our DC Meeting sponsors as our enablers of our need to be well wined and dined:

• Arnold & Porter for our Committee Cocktail Party on A&P’s beautiful terrace
• J.P. Morgan Escrow Services for our Committee Dinner at Del Frisco’s
• Duff & Phelps for guilt-free Desserts
• Berkeley Research Group (BRG) for Late Night for M&A Young Guns at the rooftop bar at the W Hotel, 9:30, Thursday, 9/12

See you in DC!

FROM THE EDITOR  Chauncey M. Lane

In this issue of Deal Points, we take a look at the rise of #MeToo representations and warranties in acquisition agreements and the growing trend of direct investing by single-family offices. We finish with a compelling perspective on the use of materiality qualifiers in bring down certificates in transactions involving representation and warranty insurance. Thank you to each of our contributors. I encourage each of you to consider contributing to future issues. Articles should be 1,500 words or less and should address a topic of general interest to M&A practitioners. All submissions should be sent to me at Chauncey.Lane@huschblackwell.com. See you in D.C.!
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The M&A Market Trends Subcommittee is hard at work producing the What’s Market video series. Stop by the M&A Market Trends Subcommittee meeting Saturday morning at 9:00am to learn more!

M&A Market Check Video Series

Short, engaging videos on advanced M&A provisions.

- Analysis of trends and data from the Private Target M&A Deal Points Study
- Expert insights from M&A Committee members
- Drafting and negotiating tips
- Practice points

First Video Now Available!

Materiality Scrapes

FEATUREURING:

Craig Menden
Partner, Willkie Farr & Gallagher LLP
Chair of the ABA Business Law Section’s M&A Market Trends Subcommittee

Rita-Anne O’Neill
Partner and Co-Head of Global Private Equity Practice, Sullivan & Cromwell LLP
Co-Chair of the ABA Business Law Section’s Women in M&A Task Force and Co-Chair of the Acquisitions of Public Companies Subcommittee

Future Courses Include:
- Sandbagging
- Fraud Exceptions
- Full Disclosure
- Updating Disclosure Schedules
- And more

TO ACCESS THE CONTENT go to www.ambar.org/blshotshot. To learn more about Hotshot, go to www.hotshotlegal.com.
GOT NEWS & TRENDS?

Chauncey M. Lane — 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.
#MeToo Reps Becoming M&A Market Standard
By Grace Maral Burnett, Legal Analyst, Corporate Transactions at Bloomberg Law

It’s no longer a secret: c-suite sexual harassment can bring down a business. In fact, M&A lawyers have already devised contractual safeguards against this risk and, in relatively short order, the so-called “#MeToo” deal provisions show broad consensus.

A #MeToo sexual harassment representation and warranty (“rep” in deal jargon) started to appear in publicly filed M&A contracts last year, and we are now seeing it in every market segment including mega deals.

My prediction is that, like the #MeToo movement itself, the rep is here to stay and is on its way to becoming a market standard.

What is a “#MeToo Rep”?
Also referred to as a “Weinstein clause,” the #MeToo rep is a statement by a deal party about its involvement in allegations of sexual harassment. In M&A deals, the #MeToo rep is most commonly a representation and warranty by the target company to the buyer in the section entitled “labor and employment matters” (or in a similar section) that since a specific date no allegations of sexual harassment or misconduct have been made against the company’s officers or executives. Sometimes the statement also includes specific disclosures of sexual harassment and misconduct settlements.

Based on Bloomberg Law’s transactional precedent database, which contains all publicly filed M&A contracts, this new representation and warranty started appearing in 2018. This timing coincides with the #MeToo movement picking up momentum and shaking the country from corporate board rooms to Supreme Court confirmation hearings. Within the year following reports of serial sexual predation by Harvey Weinstein in October 2017, at least 425 prominent individuals across industries were publicly accused of sexual misconduct. It comes as no surprise that the U.S. M&A market rapidly began to react to the new risk presented by pending or potential sexual harassment allegations against senior corporate executives.

Prevalence of #MeToo Reps

The principal focus of the rep, the statement as to sexual harassment allegations, found greater consensus. Each of the contracts included some variation of this basic phrase:

Since x date there have been no sexual harassment allegations against the company’s executives.

The 45 contracts include a variety of standard M&A transaction agreements such as merger agreements, stock purchase agreements, business combination agreements, asset purchase agreements, and securities purchase agreements.

It’s Even Popping up in Mega Deals
A sign of its market adoption is that #MeToo provisions appear in deals of all sizes, from deals valued at $13 Million to $40.97 Billion. It’s not surprising that the highest prevalence of the #MeToo rep appears in the middle market, which also tends to be the segment with the highest overall deal count. In the first quarter of 2019, for U.S. targets, a total of 175 middle market deals were announced, while 32 large deals and 7 mega deals were announced in the same quarter.

Examples from Recent Mega Deals
The #MeToo clauses included in three mega deals highlight the main variations among the 45 publicly filed deal contracts containing these representations.

Three recent mega deals, defined as deals valued at $10 Billion or higher, included the provision. The pending Tableau-Salesforce mega deal valued at $15.3 Billion has a #MeToo rep in its Agreement and Plan of Merger dated June 9, 2019. In the representation and warranties subsection entitled “Labor Matters,” the target represents to the buyer as follows:

To [Tableau Software, Inc.’s] Knowledge, in the last five (5) years, (i) no allegations of sexual harassment have been made against any employee at the level of Vice President or above, and (ii) neither the [Tableau Software, Inc.] nor any of the [Tableau Software, Inc.] Subsidiaries have entered into any settlement agreements related to allegations of sexual harassment or misconduct by any employee at the level of Vice President or above. (emphasis added)

The WellCare-Centene mega deal valued at $13.53 Billion...
included identical, reciprocal #MeToo reps made between target and buyer in sections entitled “Labor Matters” in their Agreement and Plan of Merger dated March 26, 2019. They read as follows:

To the [Company/Parent!’s Knowledge, and except as has not resulted in and would not reasonably be expected to result in, individually or in the aggregate, a [Company/Parent] Material Adverse Effect, (i) since December 31, 2016, no allegations of sexual harassment have been made against any officer of any [Company/Parent] Entity or any employee of any [Company/Parent] Entity at the level of Vice President or above. (emphasis added)

The pending WorldPay-Fidelity mega deal valued at $40.97 Billion also contains identical, reciprocal #MeToo reps from target to buyer and buyer to target in sections entitled “Employees and Employee Benefit Plan” in its Agreement and Plan of Merger dated March 17, 2019. In that deal, the rep reads as follows:

To the knowledge of the [Company/Parent], in the last six (6) years, (i) no allegations of sexual harassment have been made against any [Company/Parent] Related Person who is a “named executive officer” in the [Company/Parent]’s most recent filing with the SEC that required disclosure pursuant to Rule 402(c) of Regulation S-K, and (ii) the [Company/Parent] and its Subsidiaries have not entered into any settlement agreements related to allegations of sexual harassment or misconduct by such Company Related Person. (emphasis added)

Stats on the #MeToo Rep Variations
Among the 45 #MeToo deals, certain key components of the reps show a range of variation:

- The length of the backward-looking period or “lookback” the rep covers (particularly relevant in the context of the #MeToo movement which has seen sexual misconduct allegations many years after the incident occurred);
- The inclusion of a knowledge qualifier; and
- The inclusion of a material adverse effect qualifier.

Time Limitations
Among the publicly filed deal contracts, 5 years was the most common lookback period for #MeToo reps. Three years was the second most common lookback duration. In third place, the rep was not limited by time.

Knowledge Qualifiers
An overwhelming 84% of the 45 publicly filed #MeToo reps included knowledge qualifiers. These limitations favor the party making the representation (usually the target) because they provide an opportunity to claim lack of knowledge as a defense to a claim that they breached the representation and warranty.

This made me take a closer look at the seven deals that did not contain knowledge qualifiers (see table below). As I would have guessed, almost all the acquirer legal advisors on these deals are top-ranked large firms.

In a market in which the pro-target knowledge qualifier in a #MeToo clause is so common, it would take a strong buyer to keep it out. In four of the seven no-knowledge-qualifier #MeToo reps, the target apparently made a specific disclosure of a past or currently pending sexual harassment allegation. Such disclosures were also made in other #MeToo reps that did include knowledge qualifiers. References to these disclosures are typically worded as follows: “Except as set forth on Company Disclosure Schedule X, to the Knowledge of the Company...”
MAE Qualifiers
Only three of the 45 publicly filed M&A deals contain material adverse effect qualifiers. They include the WellCare-Centene mega deal referenced and excerpted above, the GlaxoSmithKline-TESARO Inc. deal referenced in the No-Knowledge-Qualifier table above, and the Spark Networks-Zoosk deal. (See the landmark Delaware Chancery Court Akorn Decision and Bloomberg Law practical guidance on material adverse effect clauses.)

Making Waves and Probably Here to Stay
From May 1, 2018 to June 17, 2019, #MeToo reps have appeared in 7% of U.S. mega deals, 2.3% of publicly filed large deals, and 1% of publicly filed middle market deals. This level of visibility is significant and represents $113.9 Billion M&A dollars with #MeToo reps attached.

Smart buyers are increasingly likely to push for the inclusion of these target reps because they incentivize disclosure and permit risk management. I predict we will see these #MeToo rep percentages go up in all market segments.

Direct Investing by Single Family Offices
By Bryan P. Bylica and J.D. Costa

The recent growth of single-family offices (SFOs) continues its upward trend. A recent study by Ernst & Young estimates at least 10,000 family offices exist worldwide, with more than half established within the last 15 years. These family offices controlled in excess of $4 trillion as of the end of 2018 and a more recent study estimates that number to be as high as $5.9 trillion. As the number of SFOs worldwide continues to increase and the amount of wealth controlled by SFOs rises to unprecedented levels, the sophistication, investment strategies and needs of SFOs are changing as well.

SFOs historically have been, by their nature, private and opaque institutions. Because SFOs generally are structured to meet the needs of the family client, they vary significantly in their sophistication and infrastructure. While one SFO may have a robust internal team similar to a traditional private equity fund, another SFO may employ a wealth manager whose principal job is to prudently allocate the family’s assets. Families often treat their family offices as an extension of the underlying business that generated the family’s wealth, closely guarding investment strategies, investment opportunities and best practices.

Over the last several years, however, SFOs have begun to network in a manner similar to their traditional private equity peers. A recent study reveals that 85 percent of SFO senior executives made concerted efforts to expand and enhance their business development outreach programs. The most commonly cited reasons for doing so are to gain access to (1) best practices and market trends and (2) business opportunities and proprietary deal flow. As SFOs reallocated dollars away from hedge funds and other high-fee third-party investment options, direct investing saw an uptick in activity from the same SFOs. About 45 percent of family offices said they plan to invest more in direct investments in the next 12 months, according to UBS’ “Global Family Office Report 2018.”

While there is a clear desire among SFOs to move from a portfolio of passive investments to one that includes more direct investments (which tend to be more actively managed), direct investing requires a thoughtful approach to the appropriate investment strategy, access to deal flow and an experienced team of employees and advisors.

The success of any investor depends heavily on that investor’s ability to source quality deals. For the SFO that is new to direct investing, a focus on high-quality targets is of utmost importance. The family’s direct network, an SFO’s executives’ and team members’ networks as well as experienced advisors are all great sources of investment opportunities. That said, finding the right target can be a time consuming and competitive process. It is easy for an investor to become fatigued and to loosen (or even abandon) its investment criteria to justify pursuing a particular target. Developing an investment thesis based on the family’s strengths and capabilities is a critical first step. However, the discipline needed to remain faithful to that thesis while implementing the investment strategy over the long term is just as important.

Once an SFO finds a potential deal that fits within its investment strategy, that SFO must be able to manage the deal to completion. Conducting due diligence, managing seller expectations, securing debt financings, implementing management incentive programs and wading through legal documents are just a few of the many complex areas that require navigation when leading a direct investment. One advantage that many family offices possess over other capital providers is a deep knowledge of the industry in which their families earned their wealth. If possible, SFOs new to direct investing should seek investments in industries in which the family has significant familiarity and operating knowledge. However, there are other strategies for performing appropriate due diligence on companies where an SFO does not have that knowledge in house.

The first strategy is to co-invest alongside a traditional private equity fund, where the fund’s investment team is responsible for due diligence but includes the SFO in the process. The fund will also be responsible for managing the other parts of the closing process, including negotiating the financing and acquisition agreements. One of the keys to co-investing with a private equity fund, however, is having the ability to move quickly to a closing.

A second strategy is to partner with an experienced independent sponsor that has secured an investment opportunity but requires
a source of capital. While that independent sponsor might lead the transaction, it may lack the necessary human capital to run each aspect of the transaction, so an SFO having some familiarity with debt financings, post-closing equity structures and market terms for acquisition agreements is useful in support of the independent sponsor. Independent sponsors can be valuable sources of deal flow and are often sophisticated operators or former private equity professionals. However, it is important to vet the independent sponsor and its track record before agreeing to provide the capital.

A third strategy option is to outsource the due diligence to a third-party service provider. While this increases costs, the familiarity of the relevant market by the service provider may provide insight not readily apparent to an SFO unfamiliar with that market. Often, these service providers not only provide due diligence support but can also provide transactional advisory services in connection with negotiations and transaction process. Again, proper vetting for experience and fit within the deal is important when evaluating third-party service providers.

Finally, an appealing strategy option for SFOs is to make a club investment with other family offices that have the expertise in direct investing and can properly perform due diligence on the target company. Often, this lead family will act as the deal lead and will coordinate the closing process. Each of these methods has its pros and cons for SFOs considering making direct investments, but they all allow SFOs to become more involved in the direct investing process without being solely responsible for the outcome.

In addition to the strategies noted above, a team of experienced advisors can be an invaluable resource to an SFO new to direct investing. In addition to providing the substantive advice for which they are hired, experienced advisors can often provide guidance as to process (even outside of the scope of their engagement) and will ensure an SFO is informed as to industry and market standards and norms. In addition to accountants and legal counsel, it is wise to hire advisors in other areas to aid with due diligence and post-closing integration and transition, especially in areas where an SFO does not have the requisite expertise. For example, most investors can benefit from engaging an insurance broker to evaluate the target’s insurance policies and to advise on post-closing coverage. Depending upon the deal, SFOs should consider engaging environmental consultants, regulatory advisors and other specialized advisors such as food safety consultants or medical coding and billing specialists.

A focus on direct investing is expected to continue as SFOs seek outsized returns, desire greater control over their investments and continue to allocate investment dollars away from the high-fee options offered by third-party investment managers. However, given the increased resources required, a thoughtful, measured approach to direct investing is a prudent way to implement a direct investment strategy.

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**Required Accuracy of Seller’s Representations as a Condition of Closing in Transactions Involving Representation and Warranty Insurance**

By Mark C. Witt, Shareholder at Godfrey & Kahn, S.C.

Buyers and sellers of businesses increasingly are structuring their transactions in order to transfer to insurance companies some of the responsibility to reimburse the buyer for its losses arising out of the seller’s breach of its representations and warranties in the purchase agreement. However, even in this increasingly favorable marketplace for insureds, representations and warranties insurance (RWI) policies are not a panacea for all risks that may exist for a buyer in an M&A transaction. A common exclusion from coverage are breaches of representations and warranties that first occur after the purchase agreement is executed and that are known to the buyer prior to the Closing, which exclusion is commonly defined in RWI policies as an "interim breach”. While parties are more frequently requesting and obtaining additional RWI coverage for interim breaches, losses arising out of an interim breach remain a standard exclusion from coverage. Given this common exclusion from coverage for an interim breach, this article comments on the importance of properly considering the materiality thresholds used in certain closing conditions in transactions involving RWI where the closing date will occur after the purchase agreement is executed.

In M&A transactions involving a purchase agreement that is executed prior to the closing date, two questions that need to be addressed by the purchase agreement include: (1) When must the seller’s representations and warranties be true in order for buyer to have a claim for breach (for example, when the purchase agreement is signed and/or when the transaction is closed); and (2) how true must the seller’s representations and warranties be in order for the buyer to be obligated to close? In order to address the second question, a seller typically is obligated to certify, as a condition to buyer’s obligation to close, that the seller’s representations and warranties made in the purchase agreement remain true at closing, subject to negotiated materiality qualifications. This certification is commonly referred to as a “bring down certificate,” and is intended to give the buyer some comfort (again, subject to negotiated materiality qualifications) that the target business has not materially degraded during the period between the signing of the purchase agreement and closing.1

Adding significant materiality qualifiers to the closing condition requiring the seller’s representations and warranties to be true

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1 Counsel for the buyer sometimes may rely on the bring-down certificate (as qualified by the negotiated level of materiality) to address the first question stated, above (i.e., when must the representations and warranties be true in order for the buyer to have a claim for breach). However, the bring-down certificate may be drafted to answer only the second question (i.e., the accuracy required as a condition to closing). When the bring-down certificate is used to address the first question, any negotiated materiality qualifiers used for purposes of defining the accuracy of the representations and warranties required as a closing condition (such as material adverse effect) would add a second (and potentially significant) filter of materiality (beyond negotiated baskets, claim thresholds, etc.) to any ability of the buyer to recover for a breach of representation or warranty that first arose after the purchase agreement was signed. This result may be contrary to the expectations of the buyer’s client regarding allocation of the pre-closing date (not only pre-signing date) risks of the business.
TASK FORCE ON LEGAL PROJECT MANAGEMENT

The next in person meeting of the Task Force on Legal Project Management in M&A will be held in conjunction with the Annual Business Section Meeting on Saturday, September 14 at 1 p.m. (EDT). We will be convening on the 2nd Floor of the Marriott Marquis Washington in the Cherry Blossom Room (appropriate name for a conference in DC).

Our meeting will feature a program on Matter Management Boards, sometimes referred to as Kanban Boards, by Karen Dunn Skinner and David Skinner, the principals of Gimbal Lean Practice Management Advisors. The matter management board solution is a work and workflow visualization tool that can be readily adopted to the M&A context.

In addition, Task Force Project Manager, Aileen Leventon, will brief us on the "Legal Project Management Initiative" being undertaken by the Corporate Legal Operations Consortium or CLOC. Aileen is one of the team leaders of that initiative.

We will also discuss how certain of our existing tools are being adapted to be used in public company acquisitions. We will also learn of the efforts of members of our Task Force and members of the International M&A and Joint Ventures Committee in adapting four of our tools for use in cross-border joint ventures.

Finally, we will invite some brainstorming on other subjects of interest to Task Force Members, including how the tools can be more effectively digitized and how the tools can be integrated into a law school class on mergers and acquisitions.

We look forward to seeing you in DC.

BYRON S. KALOGEROU, CO-CHAIR
DENNIS J. WHITE, CO-CHAIR

JOINT 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. In March, the Joint Task Force spent a productive session reviewing and discussing the current draft of the model short form stock purchase agreement at the ABA Business Law Section Spring Meeting in Vancouver, British Columbia. Work continues on the short form stock purchase agreement with the intention of finalizing the agreement shortly and then focusing on the commentary. The Joint Task Force will also be ramping up its efforts related to the short form asset purchase agreement shortly. As always, we continue to need more volunteers.

Please join the Joint Task Force at the upcoming ABA Business Law Section Annual Meeting in Washington D.C. The Joint Task Force will be meeting in person and by teleconference on Friday, September 13th from 2:30 PM – 3:30 PM (Eastern Time). See the schedule on page 14 for room location and dial-in details. We look forward to seeing you in Washington D.C. and encourage you to get involved with this project.

JASON BALOG, CO-CHAIR
ERIC GRABEN, CO-CHAIR

TASK FORCE ON WOMEN IN M&A

The upcoming Women in M&A Subcommittee meeting is scheduled for Friday, September 13, 2019, from 2:30pm to 3:30pm at the Marriott Marquis. The meeting will feature a panel of female directors and lawyers that will discuss how M&A lawyers can use their access to boards to help increase the number of female directors, not only for the greater good, but also for their own practice development. The panel will discuss tools for raising the issue of board diversity with their clients, developing a network of board eligible women to refer to client (and potential client) boards, and how to leverage this network for deal generation.

The Subcommittee also will provide an update on several of its ongoing initiatives, including our Women in M&A law school panels and our "Strategies to Retain and Promote Women in M&A" law firm presentation. Please welcome our female law school scholarship recipients who will be attending the conference from Harvard and NYU Law Schools.

For those of you that can not join our meeting in person, we will be using the dial-in number listed on page 14 for this meeting.

Please also join us for drinks from 5:30pm to 6:30pm at the Women in Law Reception co-sponsored by Sullivan & Cromwell and Houlihan Lokey, located at the Shaw & LeDroit Park meeting rooms on Meeting Level 3.

For those of you that can not join our meeting in person, we will be using the dial-in number listed on page 14 for this meeting.

JENNIFER MULLER, CO-CHAIR
RITA-ANNE O’NEILL, CO-CHAIR
JOANNA LIN, VICE-CHAIR
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 online M&A Lawyers’ Library, which Committee members can access from the Committee’s home page on the ABA website.

• 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 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.

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**M&A MARKET TRENDS SUBCOMMITTEE**

I hope you can join us for the next Market Trends meeting. We have a packed agenda.

In what I expect will be the largest segment in the meeting, we will show an early release version of the pilot video in the new “What’s Market” Video Series. The script for the pilot video is done, the shoot has been completed and the video is now in the editing room. You’ll all get to see what this new ABA product will look like and hear about the plans for starting the work on the additional videos that will be part of “Season 1”.

Work on the other videos that will constitute Season 1 will begin immediately after the meetings in D.C. At the meeting we will discuss the plans going forward. If you are interested in participating in any of these videos, please let me know.

Work is progressing on the Deal Points Studies that will be released later this year. 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.

Our meeting will also include a presentation on the impact of privacy regulations, focusing on the GDPR and the California Consumer Privacy Act that will become effective in January of 2020. The presentation will include a discussion of the laws as well as the impact they’ve had on M&A practice and what the experts are seeing as “market” and “trends”.

If time permits, the meeting will also include a discussion of two recent cases, FTC v. Qualcomm and SRS v. RSI Holdco, and their impact on M&A practice.

To maximize the benefit of these meetings, please let us know if you have any suggestions for topics or comments on how to improve our meetings. I can be reached at cmenden@willkie.com and Kevin at kkyte@stikeman.com.

We look forward to seeing you in D.C.

**PRIVATE EQUITY M&A JOINT SUBCOMMITTEE**

The Private Equity M&A Subcommittee last met on Friday, March 29 at 10:30 a.m. local time, in Vancouver, British Colombia, as part of the Business Law Section’s Spring Meeting. We had two presentations at our meeting. First, I was joined on a panel by Glen West of Weil Gotshal in Dallas, Texas and Jeffrey Katz of BDO in New York, New York for a discussion entitled “Drafting Proper Working Capital Dispute Resolution Provisions—What Can Be Learned from Penton Business Media Holdings.” The panel discussed the Penton Business Media Holdings decision, how the M&A Committee’s model agreements dealt with the issue and what happens when an accounting firm is asked to make legal decisions on how to run the process of resolving working capital disputes. On the second panel, Subcommittee Vice Chair Samantha Horn of Stikeman Elliott in Toronto, Ontario was joined by Elliot Greenstone of Davies Ward in Montreal, Quebec, and three Vancouver based panelists—Tracy McVicar of CAI, Maria Parella of Penderfund and Rob Wildeman of Jericho, to discuss the Vancouver and Canadian PE scene and cross border Private Equity into the U.S. The panel discussed industry focus, trends, the competitive landscape for deals and differences and similarities across the Canada/US border.

The Private Equity M&A Joint Subcommittee will meet again on Friday, September 13 at 10:30 a.m. local time in Washington, D.C., as part of the Business Law Section’s Annual Meeting. We have two panel discussions prepared. One panel, which will include Sophie Lamonde of Stikeman Elliott in Montreal, Quebec, Neal Reenan of Kirkland and Ellis in Boston, Massachusetts, and I will discuss Financing Issues in Private Equity M&A Transactions. Topics will include how a seller protects itself if a “newco” buyer that is party to the purchase agreement fails to close. The second panel, which will consist of Jeny Maier of Axinn in Washington, D.C. and John Clifford of McMillan, Toronto, Ontario will discuss Antitrust Issues for Private Equity...
M&A Lawyers. Topics will include issues regarding the pooling of bids by private equity firms and strategies for handling HSR Act requirements. If time permits we may also discuss some recent developments.

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 Washington 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 Washington meetings, please feel free to come by and introduce yourself.

I look forward to seeing many of you in Washington on Friday, September 13th at 10:30 a.m. local time. If you are unable to be there, please feel free to dial in and listen using the instructions on page 14.

TECHNOLOGY IN M&A SUBCOMMITTEE

The Technology in M&A Subcommittee met on Friday, March 29, 2019 at the Business Law Section’s Spring Meeting in Vancouver, Canada. The meeting primarily comprised a report on the status of our directory project, a discussion of our other projects and the following presentations:

- David Wang, who is Corporate Strategic Innovation Counsel at Wilson Sonsini Goodrich & Rosati, gave an in-depth insight on rights and data in digitized transactions as part of the subcommittee’s project to provide guidance on ethical issues arising out of the use of technology in M&A. The presentation focused on three key issues—what the data is, how it is used and where it is stored, all of which are key to meeting the ethical obligations to understand the impact of transactional technology.

- Will Norton of SimplyAgree gave a live demonstration of some of the tools from the Organization section of the Technology in M&A Directory he has put together for the Subcommittee (including Asana, Basecamp, Jira and Trello). These tools can be used by M&A deal teams to manage projects and transactions. The demo covered the primary features of these tools and how the tools differ in their project management approach.

- Tom Romer of Greenberg Traurig gave an overview of the new project he is leading for the subcommittee to provide guidance on electronic closings. The protocol for the use of eSignings and eClosings in M&A is being led by Tom Romer of Greenberg Traurig and Anshu Pasricha of Koley Jessen.

- Will Norton of SimplyAgree gave a live demonstration of a technology currently being used by M&A practitioners, which Will Norton of SimplyAgree is helping the subcommittee to develop, is also available in our subcommittee’s folder in the main committee’s Library on the Connect platform, 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).

Tom and I would like to repeat our thanks to 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 we continue with five other projects:

- Our newest project to create guidance on electronic closings, which is being led by Tom Romer of Greenberg Traurig and Anshu Pasricha of Koley Jessen.

- 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.

- 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 as at our forthcoming meeting, which will take place from 1:30 pm to 3:00 pm on Saturday, September 14, 2019 at the Business Law Section’s Annual Meeting in Washington, DC. The agenda for that meeting will include the following:

- An update on our highly popular Technology in M&A Directory, including an outline of planned next steps.

- An update on our Technology in M&A Ethical Issues project, including a presentation on some issues that the project is covering.

- An update on our latest project, namely to create a protocol for the use of eSignings and eClosings in M&A transactions, including highlights of some of the issues faced.

- A live demonstration of a technology currently being used in M&A transactions.

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 "M&A Subcommittees" page on the main ABA platform.

Our subcommittee is also responsible for maintaining the M&A 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 article on page 4 of the Winter 2019 issue of Deal Points.

If you have ideas for how we might take the subcommittee forward, please share them with us. Please come to our forthcoming meeting in Washington, and if you can’t do that please email my Vice-Chair Tom Romer (romert@gtlaw.com), Tom’s Co-Project Leader on our eSignings and eClosings in M&A Transactions Project Anshu Pasricha (anshu.pasricha@koleyjessen.com), our M&A Directory Project Leader Will Norton (will@simplyagree.com), our Ethics in M&A Technology Project Leader Matt Kittay (mkittay@foxrothschild.com) or me (daniel.rosenberg@crsblaw.com).

DANIEL P. ROSENBERG, CHAIR
THOMAS B. ROMER, VICE-CHAIR
STEVE WILSON

Steve Wilson is a UK qualified M&A lawyer. He has been an active member of the Business Law Section and the M&A Committee for more than a decade.

Steve started his career as a “solicitor” in the UK and joined his current firm, Osborne Clarke in late 2000 before relocating “for a couple of years” to Silicon Valley in 2007. He spent the following nine years heading-up Osborne Clarke’s Silicon Valley representative office—advising West Coast tech clients on their overseas (mainly Europe and Asia) deals and strategic growth projects (no US legal advice!). In 2016, he moved again to become (as Sting would put it), an Englishman in New York and launched Osborne Clarke’s East Coast rep office in New York City: building a similar model to support East Coast clients.

Steve became an American citizen in 2015—partly to join the rest of his family, all of whom are Americans (or joint citizens). He has been told by his wife that the ONLY charming thing about him is his accent, so he’s tried to hold onto it notwithstanding the world in which he operates!

Supporting clients with global legal issues means that his eyes are open to cultural differences, but also many of the similarities that exist to make cross border businesses successful. This interest has extended to his love for travel, and he has been very vocal about his three month sabbatical he earned in the summer of 2018 when he and his family enjoyed a trip of a lifetime covering four continents. Experiencing the countryside of Vietnam, compared with the glitz of cities in Asia and Europe and contrasted with an African safari, allowed him and his family to have so many amazing experiences—and see how friendly and welcoming people are around the world. And when that was all done, they had a truly North American experience driving from Palo Alto to their new East Coast home in Connecticut.

When his feet are on the ground, Steve enjoys running (having completed multiple half marathons, and the London marathon back in 2002). He’s raised funds for a number of charities (thanks to those who have sponsored him from within this group) and he supports his community through the amazing work of St George’s Society of NYC. He’s a supporter of many international organizations (he’d spell that word with an “s!”), alumni societies and a strong advocate for supporting next generation professionals.

With two teenagers, life is never quiet and he claims to be able to earn more as an Uber driver for his kids than he earns as a lawyer. Current projects are teaching his daughter to drive and narrowing down university choices—which is looking like a European college, so more travel is in his future.

Steve is known to many on the Committee, but please say hello to him at the Annual Meeting in DC if you have not met him before—he really is a nice chap!

About Deal People

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

If you have pictures from Committee meetings that you would like to suggest for inclusion in a future issue of Deal Points, please send them to me.

John F Clifford | McMillan LLP | Toronto, Canada | john.clifford@mcmillan.ca
COMMITTEE MEETING MATERIALS
Dial in information for Committee & Subcommittee Meetings
MARRIOTT MARQUIS | WASHINGTON, DC | SEPTEMBER 12-14, 2019

Please note that times listed are EASTERN TIME.
Dial-in numbers are meeting-room specific. Please be conscientious of start and end times.

<table>
<thead>
<tr>
<th>Meeting Room</th>
<th>Toll-Free US Number</th>
<th>International Number</th>
<th>Conference Code</th>
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<tbody>
<tr>
<td>Salon 6, M2</td>
<td>(866) 646-6488</td>
<td>(707) 287-9583</td>
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<tr>
<td>Mount Vernon Square, M3</td>
<td>(866) 646-6488</td>
<td>(707) 287-9583</td>
<td>3870540632</td>
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<tr>
<td>Cherry Blossom, 2nd floor</td>
<td>(866) 646-6488</td>
<td>(707) 287-9583</td>
<td>1446196893</td>
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Friday, September 13, 2019

8:30 am – 10:00 am
Program: So You’re Buying an Entity That Does Business with the US Government... Here’s What You Need to Know  
Salon 2, M2

9:00 am – 10:30 am
M&A Jurisprudence Subcommittee Meeting  
Chair: Nathaniel M. Cartmell, III  
Salon 6, M2

10:30 am – 12:00 pm
Private Equity M&A Joint Subcommittee Meeting  
Chair: David Albin  
Salon 6, M2

11:00 am – 12:30 pm
Salon 4, M2

1:00 pm - 2:30 pm
Acquisitions of Public Companies Subcommittee Meeting  
Co-Chairs: Rita-Anne O’Neill & Patricia Vella  
Salon 6, M2

2:30 pm – 4:30 pm
Program: Regulatory Issues Every M&A Lawyer Should Consider When A Client Is Making An Inbound Investment In The US  
Salon 2, M2

2:30 pm – 3:30 pm
Women in M&A Subcommittee Meeting  
Chair: Jennifer Muller  
Salon 6, M2

2:30 pm - 3:30 pm
Short Form Model Acquisitions Agreement Joint Task Force Meeting  
Chair: Jason Balog  
Mount Vernon Square, M3

5:00 pm – 5:45 pm
Meeting of Committee Leaders  
Chair: Wilson Chu  
Salon 6, M2
### Saturday, September 14, 2019

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
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<tbody>
<tr>
<td>9:00 am – 10:30 am</td>
<td>Market Trends Subcommittee Meeting</td>
<td>Salon 6, M2</td>
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<td>Chair: Craig Menden</td>
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<tr>
<td>10:30 am – 12:00 pm</td>
<td>International M&amp;A Subcommittee Meeting</td>
<td>Salon 6, M2</td>
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<td></td>
<td>Chair: Richard Silberstein</td>
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<tr>
<td>12:30 pm – 1:30 pm</td>
<td>Academic Subcommittee Meeting</td>
<td>Salon 6, M2</td>
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<td>Chair: Glenn West</td>
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<tr>
<td>1:00 pm – 2:00 pm</td>
<td>Task Force on Legal Project Management Meeting</td>
<td>Cherry Blossom, 2nd floor</td>
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<td>Co-Chairs: Byron Kalogerou &amp; Dennis White</td>
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<tr>
<td>1:30 pm – 3:00 pm</td>
<td>Technology in M&amp;A Subcommittee Meeting</td>
<td>Salon 6, M2</td>
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<td>Chair: Daniel Rosenberg</td>
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<tr>
<td>3:00 pm – 5:00 pm</td>
<td>Mergers and Acquisitions Committee Meeting</td>
<td>Salon 6, M2</td>
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<td></td>
<td>Chair: Wilson Chu</td>
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### Attitude Adjustment for the M&A Lawyer

**Thursday September 12, 2019 | 9:30 pm – 12:00 am**  
M&A Young Guns Open Bar  
POV Rooftop Terrace, W Hotel  
515 15th St, NW

**Friday September 13, 2019 | 5:30 pm – 6:30 pm**  
Women in M&A Reception  
Shaw & LeDroit Park  
Meeting Level Three, Marriott Marquis

**Friday September 13, 2019 | 6:30 pm – 9:00 pm**  
Section Reception and Dinner  
**Ticket Required**  
National Museum of African American History and Culture

**Saturday September 14, 2019 | 6:30 pm – 7:45 pm**  
M&A Committee Pre-Dinner Reception  
**Ticket Required**  
Arnold & Porter  
601 Massachusetts Avenue, NW

**Saturday September 14, 2019 | 8:00 pm – 11:30 pm**  
M&A Committee Dinner  
**Ticket Required**  
Del Frisco’s Double Eagle Steakhouse  
950 "I" Street NW Suite
FULL COMMITTEE MEETING AGENDA (September 14, 3:00-5:00pm)

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

3:15pm
**Coverage Gaps in Rep & Warranty Insurance** (30 mins)
Rick Climan, Hogan Lovells, Silicon Valley, CA
Rita O’Neill, Sullivan & Cromwell, Los Angeles, CA
Gaurav Sud, AON, San Francisco, CA

3:45pm
**Update on Post-Closing Claims: JP Morgan Escrow Study** (10 mins)
Kevin Pruner, JP Morgan Escrow Services, NY, NY

3:55pm
**M&A Developments (Part I): Hot Cases** (15 mins)
Lisa J. Hedrick, Hirschler Fleischer, Richmond, VA
Nathaniel Cartmell, Pillsbury, San Francisco, CA

4:10pm
**M&A Developments (Part II): Crystal Balling the Impact on M&A of the Business Roundtable’s Stakeholder Open Letter** (15 mins)
Mike O’Bryan, Morrison & Foerster, San Francisco, CA

4:25pm
**Overview of Market Check Video Series & Pilot Course on Materiality Scrapes** (15 mins)
Craig Menden, Willkie Farr & Gallagher, Palo Alto, CA
Ian Nelson, Co-Founder, Hotshot, NY, NY

5:00pm
Adjourn
## COMMITTEE STRUCTURE AND LEADERSHIP

### MAC Subcommittee/Task Force Leadership

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<thead>
<tr>
<th>Subcommittee/Task Force</th>
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<tr>
<td><strong>Academic</strong></td>
<td><strong>Delaware Judiciary Liaison</strong></td>
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<tr>
<td>• Chair, Glenn West</td>
<td>• Lisa Stark</td>
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<td>• Patricia Vella</td>
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<tr>
<td><strong>International M&amp;A</strong></td>
<td><strong>Legal Project Management</strong></td>
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<tr>
<td>• Chair, Richard Silberstein</td>
<td>• Co-Chair, Byron Kalogerou</td>
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<tr>
<td>• Vice-Chair, Jeff Labine</td>
<td>• Co-Chair, Dennis White</td>
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<tr>
<td><strong>M&amp;A Jurisprudence</strong></td>
<td><strong>Market Trends</strong></td>
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<tr>
<td>• Chair, Nathaniel Cartmell, III</td>
<td>• Chair, Craig Menden</td>
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<tr>
<td>• Chair, Judicial Interpretations Working Group, Frederic Smith</td>
<td>• Vice Chair, Kevin Kyte</td>
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<td>• Chair, Annual Survey Task Force, Lisa Hedrick</td>
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<tr>
<td><strong>Model Asset Purchase Agreement</strong></td>
<td><strong>Membership</strong></td>
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<tr>
<td>• Co-Chair, John Clifford</td>
<td>• Chair, Tracy Washburn Bradley</td>
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<tr>
<td>• Co-Chair, Edward Deibert</td>
<td>• Vice-Chair, Gina Conheady</td>
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<tr>
<td><strong>Public Company Acquisitions</strong></td>
<td><strong>Private Equity M&amp;A</strong></td>
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<tr>
<td>• Co-Chair, Rita-Anne O’Neill</td>
<td>(joint subcommittee of the Venture Capital and Private Equity Committee)</td>
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<tr>
<td>• Co-Chair, Patricia Vella</td>
<td>• Chair, David Albin</td>
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<td>• Vice-Chair, Mireille Fontaine</td>
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<td>• Vice-Chair, Samantha Horn</td>
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<tr>
<td><strong>Private Company Model Merger Agreement</strong></td>
<td><strong>Programs and Publications</strong></td>
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<tr>
<td>• Co-Chair, Melissa DiVincenzo</td>
<td>• Chair, Ashley Hess</td>
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<td>(also, BLS Content Director)</td>
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<tr>
<td>• Co-Chair, Amy Simmerman</td>
<td>• Deal Points Editor, Chauncey Lane</td>
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<tr>
<td>• Vice-Chair, Tatjana Paterno</td>
<td>• MAC-Bytes Editor, Caitlin Rose</td>
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<td>Subcommittee/Task Force</td>
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<td><strong>Short Form Agreements Joint Task Force</strong></td>
<td><strong>Technology in M&amp;A</strong></td>
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<tr>
<td>(Middle Market &amp; Small Business Committee and M&amp;A Committee Joint Task Force)</td>
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<tr>
<td>• Co-Chair, Jason Balog</td>
<td>• Chair, Daniel Rosenberg</td>
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<tr>
<td>• Co-Chair, Eric Graben**</td>
<td>• Vice-Chair, Tom Romer</td>
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<td><strong>Appointed by MM&amp;SB Committee</strong></td>
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<td><strong>Two-Step Auction</strong></td>
<td><strong>Women in M&amp;A</strong></td>
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<tr>
<td>• Co-Chair, Michael O’Bryan</td>
<td>• Co-Chair, Jennifer Muller</td>
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<td>• Co-Chair, Eric Klinger-Wilensky</td>
<td>• Co-Chair, Rita-Anne O’Neill</td>
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<td>• Vice-Chair, Joanna Lin</td>
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**Diagram:**

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Mergers & Acquisitions Committee

Wilson Chu - Chair

Mike O’Bryan – Vice Chair
International

M&A Jurisprudence

Private Company Model Merger Agreement
Public Company

Two-Step Auction

Jessica Pearlman – Vice Chair
Academic

Model Asset Purchase Agreement
Membership

Market Trends

George Taylor – Vice Chair

Committee Coordinator
Legal Project Management

Programs and Publications
Private Equity M&A

Women in M&A

Short Form Agreements
Technology

Byron Egan – Senior Vice Chair and Chair, Executive Council of Past Committee Chairs

Marty Lipton – Special Advisor to the Committee
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and correct at closing can cause the buyer to incur substantially more risk than the buyer expected and its purchase price assumed.

In a typical purchase agreement involving RWI, the seller’s liability for a breach of the representations and warranties is capped at a portion of the retention under the RWI policy. For example, a typical allocation of risk between the buyer and the seller for the seller’s breach of non-fundamental representations and warranties would involve the buyer being responsible for losses up to .5% of the purchase price, and the seller then being responsible for losses up to the next .5% of the purchase price, at which point the retention under the RWI policy would be satisfied and the insurer would be responsible for the remaining losses up to the policy limit.

However, in the event of an interim breach, the seller’s share of the losses would remain at .5% of the purchase price, but there would be no insurance coverage to cover the excess because losses arising out of an interim breach are excluded from coverage. Unless the buyer is able to insert into the purchase agreement a line-item indemnity for all matters excluded from coverage, which few sellers would accept, the buyer’s primary protection in the event of an interim breach involving significant losses would be to refuse to close. But if the seller has succeeded in adding significant materiality qualifiers into the bring-down closing condition (such as a “material adverse effect” qualifier) in order to increase the likelihood of closing, the buyer may be forced to close in the face of significant losses (as long as they do not constitute a “material adverse effect,” for example) with no recovery from the insurer and limited recovery from the seller. 2

So given the seller’s justifiable desire for “deal certainty” after the purchase agreement is signed, as well as the buyer’s justifiable desire to maintain limited exposure for losses arising out of a breach of a representation and warranty by the seller, how should sellers and buyers address the issue of an interim breach in the context of the buyer’s condition to closing? One obvious way to address this issue would be to purchase coverage for interim breach under the RWI policy. Assuming that coverage for interim breach is not available or otherwise not purchased, then there appears to be no “silver bullet” that would address this issue satisfactorily for all buyers and sellers in all transactions.

While factors including the relative leverage of the parties, the anticipated time between signing and closing, and required publicity of the transaction pre-closing must be considered, at least one perspective that may be helpful to address this issue is to consider how the risks would be allocated for the interim breach between the buyer and the seller in a transaction without RWI. If one assumes for purposes of illustration that a “market” indemnification basket would be a deductible basket equal to 1% of the purchase price in a non-RWI transaction, the buyer would be taking the risk of incurring losses up to 1% of the purchase price in the case of an interim breach. Accordingly, one may argue that the buyer should still be required to close as long as an interim breach does not involve potential losses to the buyer in excess of 1% of the purchase price. If the purchase agreement requires the seller to pay losses for an interim breach up to .5% of the purchase price (after the buyer pays its share up to .5% of the purchase price), then buyer’s exposure for an interim breach involving losses equaling 1.5% of the purchase price would be limited to 1% of the purchase price. As a result, from this perspective, the buyer should have to close as long as the interim breach does not involve potential losses in excess of 1.5% of the purchase price.

This approach certainly would not be ideal for the buyer or the seller. The seller may want the ability to force a buyer to close even if an interim breach involves potential losses exceeding 1.5% of the purchase price, a very low threshold when compared with typical materiality qualifiers on closing conditions. If so, in the event of losses that can be easily quantified, the closing condition could provide the seller with the option to elect to force the buyer to close as long as the seller is willing to indemnify the buyer against any losses exceeding 1.5% of the purchase price (potentially subject to a market cap).

On the other hand, the buyer may not like the idea of closing the transaction knowing that it will immediately incur an unreimbursed loss equal to 1% of the purchase price. In addition, in order to recover under the RWI policy for other breaches of representations and warranties, the buyer would have to incur losses of .5% of the purchase price (or more likely 1% of the purchase price if the retention does not step-down to .5% of the purchase price after the seller pays losses for the uncovered interim breach equal to its .5% cap) arising out of breaches of representations and warranties covered by the RWI policy before the insurance company would pay for losses arising out of those breaches.

However, while not perfect and certainly not the only potential approach, this approach could prevent any unexpectedly large risks from being incurred by either party while still providing some assurance to the seller of closing. Regardless of how buyer’s counsel chooses to address an interim breach in its closing conditions in a transaction involving RWI with no coverage for interim breach, it is important to make sure the buyer is aware of the interplay between the closing conditions and an interim breach, and willing to accept the risks to closing and/or incurred losses that the chosen approach presents.

2 The lack of coverage for interim breach under most RWI policies, combined with the chosen materiality threshold for the closing condition relating to the accuracy of the seller’s representations and warranties at closing, can create strange incentives for the seller and the buyer regarding any obligation of the seller under the purchase agreement to update the buyer after the signing date regarding new developments in the business that could constitute a breach of representation or warranty. For example, given the absence of RWI coverage for these new developments, the buyer may not want to know about them unless and until they would give rise to the right not to close.