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Deal Points

The Newsletter of the Mergers and Acquisitions Committee

FROM THE CHAIR **Mark Morton**

I hope many of you will be joining us in Chicago this week for the inaugural Annual Meeting of the Business Law Section. Over the past year, members of the ABA team have worked diligently to put together a great meeting, loaded with excellent CLE, great events and endless opportunities to meet and network. In addition, we are fortunate to have two sitting judges from Delaware - Chief Justice Leo Strine and Vice Chancellor Travis Laster - joining us for the Chicago meetings. You won't want to miss this meeting!

Sticking with tradition, our Subcommittees and Task Forces will meet on Thursday (one session), Friday (throughout the day) and Saturday (morning). Our full Committee will meet Saturday afternoon, followed by our Committee dinner at ***Mon Ami Gabi*** later that evening. A complete schedule is set forth at the end of *Deal Points*. If you are unable to attend in person, please consider joining us by phone. You can find the dial-in information for each Task Force, Subcommittee and the full Committee meeting in this issue.

A special note of thanks on behalf of the Committee to **JPM Escrow Services** (and Tracey Washburn Bradley) for sponsoring our dinner at ***Mon Ami Gabi***. The restaurant comes highly recommended by our Committee members from Chicago, so I am looking forward to another great dinner.

Full Committee Meeting

Our full Committee will meet on Saturday from 2:00 to 4:30 pm. During the meeting, the team from JPM Escrow Services will present their annual Holdback M&A Study. In addition, Rick Alexander will share some data on the way in which "medium form" mergers are changing M&A practice and Scott Whittaker will report on this summer's decision in the *J&J v. Guidant* decision.

Committee Sponsored CLE Programs

During the Chicago meeting, our Committee will have two programs. The first program is our first **Annual Review of Developments in M&A**. Eric Klinger-Wilensky, the chair for the program, has put together a great panel to review developments from the past year in three key areas (the role and responsibility of financial advisors, the evolving judicial standards of review for controlling stockholder transactions and recent trends in M&A litigation). The Annual Review program will be held on Thursday from 2:30 to 4:30 pm. We're also fortunate to have a second program, chaired by Craig Menden, entitled **Cases Do Matter: Judicial Forces Shaping M&A**, that will explore how business courts shape our practices. This program will be held on Saturday morning from 8:30 to 10:00 am.

Eric and Craig have worked hard over the past several months to put together great programs that are timely. Please plan to attend!

Task Force and Subcommittee Meetings

In Chicago, our Task Forces and Subcommittees once again will host a number of substantive programs and discussions. Highlights include the participation of Michele Anderson, Chief of the Office of Mergers and Acquisitions of the SEC, in the meeting of the Acquisitions of Public Companies Subcommittee and a presentation during the meeting of the Private Equity Subcommittee (*A Delaware Retrospective: M&A and Beyond*). If you have time, please attend these presentations.

Planning for Laguna Beach

Once again, we'll be journeying to Laguna Beach for our annual standalone meeting of our Committee. If you have been to the Montage for our prior standalone meetings, you know that it is an amazing location. Details to follow, but mark your calendar now. Our meetings will be held on Friday, January 31st and Saturday, February 1st.

If you have any questions concerning our upcoming meetings, please email or call me. I look forward to seeing all of you.

FROM THE CO-EDITORS

Eric S. Klinger-Wilensky & Ryan D. Thomas

We hope everyone had an enjoyable summer. What better way to welcome you back than with a brand new issue of *Deal Points*? Many thanks to all of our contributors, especially the authors of our Feature Articles, Chuck Nathan and Lisa Stark.

If you have any suggestions for improvements to *Deal Points*, or if you have authored an article that you would like to submit for inclusion in the next issue, please reach out to us.

We look forward to seeing you in Chicago.

Contents

A September Update on the Communications Challenges in the Valeant/Pershing Square Bid for Allergan

By Charles Nathan, Senior Advisor, RLM Finsbury

Author's Note: The following commentary on the communications challenges in the Valeant/Pershing Square bid for Allergan was written in May 2014. Since then the takeover contest has continued and each party's tactics and strategy have evolved. While the developing situation is quite different from its opening stages, it continues to present significant communications challenges to each of the participants. The updated situation is explored in the form of a post-script to the original commentary.

The bid by Valeant and Pershing Square to acquire Allergan has made a big splash in the M&A and corporate governance world. In brief, Pershing and Valeant have teamed up in a campaign to pressure Allergan to sell to Valeant in an unsolicited cash and stock deal. What distinguishes the Valeant/Pershing deal from a conventional public bear hug (such as Pfizer's recent effort to acquire AstraZeneca) is that, by pre-arrangement, Pershing Square acquired a 9.7% equity stake in Allergan immediately prior to the first public announcement of Valeant's bear hug. This unusual deal structure is a first and, if successful, may pioneer a new paradigm for unsolicited takeovers of public companies.

The initial public reaction to the deal largely ignored the financial merits of the bid and instead focused on the legality and legitimacy of Pershing's acquisition of a 9.7% stake in the target based on Pershing's knowledge of the impending bid at a time before the market was aware of Valeant's intentions. In the resulting debate two camps quickly emerged. One argued that if the Pershing buying program was legal, the law should be changed. This camp focused on the perceived unfairness of permitting a non-bidder third party to profit at the expense of existing shareholders through use of non-public information it acquired from the bidder. The other camp focused on existing law, which it asserted clearly permitted Pershing's activities, and bestowed kudos on Valeant and Pershing for being innovative and audacious.

As interesting as this debate may be, it is at best a side show and at worst a detriment to the success of Valeant's unsolicited bid for Allergan. Because Allergan adopted a poison pill in response to Valeant's unsolicited bid, Valeant can prevail only if and when it can convince the Allergan board that more value can be created for Allergan shareholders by selling the company than by continuing its independence. Valeant's leverage in this effort lies in its ability to persuade a majority of Allergan's shareholders to support Valeant's bid in a shadow or actual proxy contest to elect at least a majority of new Allergan directors. To make matters more complicated for Valeant, it must also offer a sufficiently pre-emptive price to induce the Allergan board not to solicit third party bids or, failing that, it must be prepared to outbid all comers in an auction-type setting where it may not be afforded the same non-public information about Allergan provided to other bidders.

Pershing's support of Valeant's bid brings two arguable advantages to Valeant. First is Pershing's almost 10% stake in Allergan—a stake which under the agreement between Valeant and Pershing will be voted in favor of Valeant's positions regarding the proposed acquisition. While a 10% toehold in a target always has this advantage, over the last 30 years unsolicited bidders have almost universally refrained from acquiring such a stake, calculating that its help in fashioning a majority shareholder coalition to support the unsolicited bid is not as important as the negative reaction it almost certainly will engender in the target's board room. Obviously, Valeant has chosen not to adhere to conventional wisdom.

The second possible advantage Pershing brings to Valeant's unsolicited bid is Pershing's considerable reputation as a savvy investor which thoroughly researches its investment thesis before it acts. The bulk of Valeant's proposed deal consideration consists of Valeant stock, not cash. Presumably, both Pershing and Valeant calculated that Pershing's active support of the proposed combination would help convince institutional investors to accept Valeant's business case that a combination of the two firms would represent a superior investment vehicle for Allergan's shareholders than a stand-alone Allergan.

Indeed, this is exactly how the next stage of the takeover contest is shaping up. Valeant and Pershing are each circulating to Allergan shareholders extensive PowerPoint presentations setting forth their investment theses that a combined company will provide higher value to Allergan shareholders than Allergan on a stand-alone basis. Allergan has countered with its own PowerPoint presentation arguing the superiority of the company on a stand-alone basis. Valeant and Pershing have begun a road-show to make their case in person to the larger Allergan shareholders, and Allergan has mounted a counter road-show. To "call the question," so to speak, Pershing is also commencing a straw-poll type proxy contest by seeking a non-binding majority vote of Allergan shareholders to support the Valeant bid. In short, both sides are trying to win the hearts and minds of a majority of Allergan shareholders, a contest that depends on the relative effectiveness of the parties' ability to communicate the superiority of their competing business plans.

In this context, Pershing's rapid stock accumulation may come back to haunt it. After all, the aggressive buying program immediately prior to deal announcement occasioned a storm of negative press coverage based on the perceived unfairness of Pershing's use of non-public information to the detriment of the investing public. While many lawyers rushed to defend the legality of the tactic, its legality clearly did not win the battle in the court of public opinion.

Moreover, investors who were selling Allergan stock (directly or as counter-parties to derivative transactions) during the period of Pershing's purchases surely have a bad taste in their mouths since they were the ones "victimized" by the tactic. Looked at from an investor's point of view, knowledge of Valeant's pending bid provided Pershing an opportunity to appropriate approximately $1 billion of profit (and more if a bidding contest ensues) from the shareholders of Allergan who sold to Pershing prior to the announcement of the bid. In Wall Street vernacular, Pershing's support for Valeant can be seen as having been paid for with "other people's money."

Another communications challenge for the success of Valeant's bid is that Ackman's reputation as a savvy activist investor might not be given full credit by the institutional investor community for other reasons as well. Institutional investors are not likely to miss the fact that Ackman's role in this situation is very different from his customary activist game plan, which consists of identifying and pursuing structural and operational reforms at companies to create added shareholder value. In the Allergan situation, Ackman is not relying on his proven skill-set of diagnosing company inefficiencies, but rather is acting on an investment thesis based on the merits of a pro forma M&A combination, an analysis far more typical of traditional long investment advisers.

Further, Ackman's credibility with Allergan shareholders may be compromised by the recognition that Ackman is bound to Valeant only so long as Valeant is pursuing a takeover of Allergan. The moment a rival bidder arrives with a superior offer, Ackman is free to vote for or sell to the higher bidder. The history of unsolicited takeover bids since the creation of the poison pill instructs that there are usually two phases in the contest. In the first, the target tries to defend its independence by arguing that more shareholder value will be created by staying independent than by being purchased on the bidder's terms. If the target fails in this effort (which is by far the most common outcome), it will usually do anything in its power to find an alternative higher bidder. There is no reason to think that Allergan will behave otherwise, particularly because of the highly aggressive nature of Pershing's tactics.

This predictable end game may cast doubt on the strength of Pershing's belief in Valeant's business thesis about the value creation possibilities of the combination. In effect, Pershing has put itself in an enviable position of winning even more if Valeant's bid is topped by a third party. While Ackman clearly has bet well over $3 billion, his bet is not on Valeant's business thesis as much as it is a bet on Allergan not being able to remain independent.

While the end-game for the Valeant unsolicited bid is still probably months away, it does seem that Valeant and Pershing have at best a mixed record in the first round in the communications battle to win the support of the remaining 90% of Allergan's shareholders. Many observers will correctly say that, at the end of the day, those investors will be swayed only by the highest bid. But this view misses the point that, in a takeover battle, getting to the end game of the highest bid (or a successful just say no defense) is rarely simple and linear. As a deal progresses, the sentiments of investors can and often are swayed by their perceptions of the tactics engaged in by the contestants—perceptions fashioned by a combination of communications and visceral reaction to the parties' stratagems. Right now, Valeant and Pershing have a mixed scorecard in this arena.

SEPTEMBER POST-SCRIPT:

A number of key events that have occurred since May:

- Valeant has improved its bid several times and moved on from its initial bear-hug by launching a formal stock and cash exchange offer for Allergan, conditioned on redemption of Valeant's poison pill.
- Allergan continues to resist the Valeant bid on the grounds that it significantly under-values Allergan and shows no willingness to redeem its poison pill or negotiate with Valeant.
- Both Valeant and Allergan continue to vociferously make their respective business cases to Allergan's shareholders in the form of dueling assertions, presentations and face-to-face meetings.
- An issue that distinguishes the financial aspects of this takeover contest from most others is that Allergan is arguing not only that Valeant's bid is too low in nominal dollar terms, but also that Valeant's business model is not sustainable. Accordingly, Allergan asserts that Valeant's acquisition would present a significant long-term risk to Allergan shareholders who, as a result of the exchange offer, would own almost a majority of Valeant stock.
- In the meantime, Pershing Square has mounted an apparently successful campaign to call a special meeting of Allergan shareholders. Pershing Square proposes to remove a majority of Allergan's directors at the special meeting in the expectation that success on this front would force the remaining directors to elect new directors put forward by Pershing Square who in turn would bring Allergan to the bargaining table.

While the jury is still out on the outcome of this complicated and novel takeover battle, a number of communications issues lie at the heart of each side's efforts to prevail.

On the Valeant/Pershing Square side, the key communications issues are:

- Successfully defending Valeant's business model against Allergan's criticisms so that a sufficient number of Allergan's shareholders conclude that the value of the Valeant bid is equal to or higher than Allergan's intrinsic share value. This is to say that the battle of business models, sustainability and future earnings growth will continue until the bitter end of the takeover contest. Be prepared for more and yet more dueling claims and presentations by the two companies.
- Continuing to fight the negative perceptions created by Pershing Square's share accumulation program. Allergan has kept this issue alive by suing Pershing Square, alleging that its share accumulation was illegal under the Federal securities laws. Allergan also has received important, if temporary, PR support on this front in the form of a SEC investigation of Pershing Square's share accumulation program.
- Convincing holders of an additional approximately 40% of Allergan's stock to support Pershing Square's efforts to remove a majority of the Allergan board at the special meeting that presumably will be held sometime this fall.
- In accomplishing its proposed removal of directors, Pershing Square will have to prevail not only on the substantive issues presented by the parties' dueling business models but also on investors' traditional reluctance to actively support removal of named directors which seems far more aggressive to many than merely voting for new directors.

This is not to say that Allergan is without its significant communications challenges.

- First and foremost, Allergan must work unceasingly to defend its value proposition on a substantive basis. This requires not merely facts, ideas and arguments, but, more importantly, effective communication with shareholders and the market in general. Adding to this challenge is the inevitable turn-over in Allergan shareholders as legacy investors sell and newcomers, including arbitragers and hedge funds, buy Allergan stock.

- Allergan has been subjected to fierce criticism by Pershing Square and a number of commentators for its onerous bylaw requirements for a call of a special meeting. While these complaints don't seem to have resonated as widely in the press as those about Pershing Square's stock accumulation, they do present a danger that at the special meeting a significant number of Allergan shareholders will side with the insurgents in part out of anger over the restrictive bylaws' attempted "throttling" of shareholder democracy.
- Finally, rumors have begun to circulate about Allergan making an acquisition in order to deter or prevent Valeant's bid. These rumors, like rumors of Allergan finding a white knight, could create expectations on the part of the market that, if unfulfilled, could lead to a shift in investor allegiance to the only deal on the table—that is, the Valeant exchange offer.

In sum, as the takeover battle intensifies and becomes more complicated, the parties' communication challenges do as well. In the end, this takeover battle (like most others) is about investors' beliefs and expectations—factors that are wholly dependent upon effective communications by the parties. ■

Disparate Treatment of Bidders in M&A Transactions: Protecting Directors and Officers from Liability after *Chen v. Howard-Anderson*

By Lisa R. Stark, Counsel, National Corporate Research, Ltd

In a recent 2014 decision, *Chen v. Howard-Anderson*,[1] the Delaware Court of Chancery confirmed that plaintiffs seeking to establish that a board of directors breached its fiduciary duties under *Revlon* by favoring one bidder over another in connection with a sales transaction are not necessarily bound by the "utterly failed" standard set forth in the Delaware Supreme Court's 2009 decision in *Lyondell Chemical Company v. Ryan*.[2] Specifically, Vice Chancellor Laster held that plaintiffs who claimed that a board acted in bad faith by favoring one bidder over another may establish a loyalty breach by showing that the directors acted with a purpose other than that of advancing the best interests of the corporation and its stockholders. In distinguishing this case from *Lyondell*, the Court emphasized that Delaware law recognizes several theories of fiduciary liability premised on actions taken in bad faith and that plaintiffs bringing bad faith claims under a theory other than the one advanced in *Lyondell* are not limited by *Lyondell's* "utterly failed" standard. *Lyondell* held that a board's "unexplained inaction" in conducting a sales process could constitute bad faith action and a breach of a disinterested board's duty of loyalty only if the plaintiffs showed that the "directors utterly failed to attempt to obtain the best sale price."[3] In *Chen v. Howard-Anderson*, plaintiffs alleged that defendants acted in bad faith by advancing some interest other than the stockholders' interests, not that the defendants acted in bad faith by consciously disregarding their *Revlon* duties, the theory of liability advanced by the plaintiffs in *Lyondell*.

Several prominent commentators hailed *Chen v. Howard-Anderson* as a groundbreaking decision which will make it easier for plaintiffs to establish bad faith claims in connection with change in control transactions under *Revlon*.[4] However, this is not the first time that the Delaware Court of Chancery has declined to apply *Lyondell's* director-friendly "utterly failed" standard to bad faith claims in this context. Slightly over one year ago, in *In re Novell* Shareholders Litig., the Delaware Court of Chancery held that the "utterly failed" standard only applies if the bad faith actions are premised on a board's failure to act.[5] Like *Chen v. Howard-Anderson*, *Novell* also involved claims that a board of directors acted in bad faith by favoring one bidder over another and the plaintiffs alleged a bad faith theory of liability that was different from the theory advanced in *Lyondell*.

In *Novell*, the plaintiffs' theory of bad faith liability was that the defendant directors' behavior was "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith."[6] In reviewing the parties' contentions on a motion to dismiss, the *Novell* Court found it reasonably conceivable that the defendant directors and their financial advisor treated one bidder ("Party C") in a sales process, in a way that was both adverse and materially different from the way they treated the bidder which ultimately prevailed ("Attachmate") and that plaintiffs had therefore stated a claim for breach of the good faith component of the fiduciary duty of loyalty. Specifically, the defendant directors allowed Attachmate, but not Party C, to team with any other interested bidder and, more importantly, failed to inform Party C of a material transaction which would have provided a substantial amount of cash to Party C at closing. In the Court's view, the availability of additional funds might have allowed (or incentivized) Party C to increase its offer. Because Party C's offer was roughly comparable to the price Attachmate was offering, the Court found that it was reasonably conceivable that Party C would have increased its bid to an amount higher than that of Attachmate. While there might be many plausible and good explanations for the disparate treatment, those facts were

1. 87 A.3d 648 (Del. Ch. 2014).
2. 970 A.2d 235 (Del. 2009).
3. *Id.* at 243.
4. *See*, e.g., http://blogs.law.harvard.edu/corpgov/2014/05/05/chen-v-howard-anderson.
5. *In re Novell, Inc. S'holder Litig.*, C.A. No. 6032-VCN, 2013 WL 322560, at *9-10 (Del. Ch. Jan. 3, 2013) (hereinafter "Novell") (declining to apply the "utterly failed" standard where the bad faith theory of liability was that "the fiduciary's actions were so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith").
6. *Id.*, at *10.

not before the Court. Accordingly, the Court denied plaintiffs' motion to dismiss, finding that it was reasonably conceivable that the plaintiffs may be able to demonstrate that the director defendants' conduct was so far beyond the bounds of reasonable judgment that it was essentially inexplicable on any ground other than bad faith.

As illustrated by these brief introductions to *Novell* and *Chen v. Howard-Anderson*, there are several ways in which plaintiffs may establish bad faith conduct. Since the Delaware Supreme Court's decision in *Disney*,[7] Delaware law has recognized at least three different theories of fiduciary liability premised on actions taken in bad faith. A failure to act in good faith may be shown, for instance, (1) where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, (2) where the fiduciary acts with the intent to violate applicable positive law, or (3) where the fiduciary intentionally fails to act in the face of a known duty to act.[8] As articulated by the Delaware Court of Chancery in *Novell* and *Chen*, it is only the third category of actions to which *Lyondell's* "utterly failed" standard applies. The significance of framing a claim for breach of fiduciary duty under a bad faith theory of liability is that an exculpatory charter provision will not protect directors from liability for breaches of such duty.

With *Novell* in mind, the decision in *Chen v. Howard-Anderson*, the facts of which are discussed below, seems less groundbreaking, but certainly serves as a cautionary tale to those advising directors and officers in sales of corporate control involving multiple bidders.

Chen v. Howard-Anderson: Background

This action arose from the 2011 acquisition of Occam Networks, Inc. ("Occam") by Calix Inc. under which each share of Occam common stock was converted into the right to receive 0.2925 shares of Calix common stock and $3.83 in cash. Prior to the merger, defendants Robert Howard-Anderson, Steven Krausz, Robert Abbott, Robert Bylin, Thomas Pardun, Brian Strom, and Albert Moyer constituted Occam's board of directors. Howard-Anderson also served as Occam's President and CEO. The directors other than Howard-Anderson were facially independent and disinterested outsiders. However, Krausz and Abbott were affiliated with investment funds that together held approximately 25% of Occam's common stock.

In early 2009, Krausz began discussing a potential strategic transaction between Occam and Calix with Carl Russo, Calix's CEO. During the summer of 2009, Occam worked with Jefferies to evaluate a range of strategic alternatives, and Jefferies identified a number of potential acquisition partners. Occam subsequently reached out to a number of the candidates, including Adtran Inc. As the exploratory period progressed, Occam prepared internal projections several times during the spring and summer of 2010, which projected substantially higher earnings for 2010, 2011 and 2012 than the estimates prepared by the two analysts that followed Occam or than could be derived from Occam's public filings. Jefferies and Adtran requested Occam's projections, but Occam management instead referred them to publicly available information or to modified and outdated projections. During this period, Calix made an offer that valued Occam at $155.6 million, or $7.02 per share.

On June 23, 2010, Calix submitted a revised term sheet increasing the aggregate merger consideration to $171.1 million, or $7.72 per share. That same day, another bidder, Keymile expressed interest in being acquired by Occam. The following day, Adtran sent a letter of intent proposing an all-cash offer at a 30-35% premium to Occam's trading price. Using the midpoint of the range, this equated to an offer of $8.60 per share, representing a premium of approximately 11% over Calix's bid. Adtran asked for an exclusive negotiating period that would extend through mid-July. Despite the fact that Adtran's bid was higher, Jefferies described the two offers as equivalent to the Occam board. Subsequently, the Occam board indicated its willingness to grant Calix exclusivity, but authorized Jefferies to conduct a 24- hour market check over the July 4th weekend. Jefferies received some interest to its market check; five of the seven potential acquirers (including Adtran) expressed interest in a transaction, but indicated that the time-frame was too short.

Occam subsequently granted Calix exclusivity. During this period, management and the board realized that Occam's third quarter results were tracking considerably ahead of expectations, but they did not use the results to negotiate for a better deal from Calix. In mid-August 2010, Calix asked for Occam's management projections for its financial advisor to use in a fairness analysis. Inexplicably, Occam management altered previously prepared internal projections to show sharply lower growth for 2011 and 2012. In September, the Occam board approved a deal with Calix with an aggregate value of $7.75 per share.

Court's Analysis

In this decision on defendants' motion for summary judgment, the Delaware Court of Chancery considered claims that the defendants breached their fiduciary duties by favoring Calix over other bidders, by performing a 24-hour market check and by disseminating materially misleading disclosures in the proxy statement. With respect to plaintiffs' claims arising from the approval of the merger, the Court applied enhanced scrutiny under *Revlon* because the merger consideration was approximately 49.6% cash and 50.4% stock. In so doing, the Court declined to apply the entire fairness standard of review because it found a majority of the members of the Occam board were disinterested and independent with respect to the merger despite ties between board members and large Occam stockholders. The Court did found Howard-Anderson interested in the merger because he personally received more than $840,500 in benefits from the merger, including $272,803 in cash severance and other benefits from a change of control agreement. The Court found that it could assume at this procedural stage that the benefits were material to Howard-Anderson.

Court Finds Disparate Treatment of Bidders Unreasonable under *Revlon*

With respect to plaintiffs' *Revlon* claims, the Court noted that a board of directors may favor one bidder over other bidders if it believes shareholder interests would be thereby advanced. Here, however, the record supported a reasonable inference that the Occam board favored Calix at the expense of generating greater value through a competitive bidding process or by remaining a stand-alone company. Thus, the Court found that the Occam board acted unreasonably under *Revlon* in favoring Calix over other bidders. The Court also found that the 24-hour July 4th market check fell outside the range of reasonableness given that five of seven bidders responded but stated that the time-frame was too short for a meaningful response. Adtran's CFO described it as a "24 hour gun to our head."

7. *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27 (Del. 2006).
8. *Stone v. Ritter*, 911 A.2d 362, 369 (Del. 2006).

Exculpatory Charter Provision Protects Occam Directors for *Revlon* Claims

The Court next addressed whether the board's breaches of fiduciary duty in conducting the sales process were non-exculpated breaches. Because this was a case where enhanced scrutiny applied and because the directors took actions that fell outside the range of reasonableness, the plaintiffs contended that the Court could draw an inference of bad faith. In contrast, the director defendants argued that, under the Delaware Supreme Court's decision in *Lyondell*, summary judgment must be granted in their favor unless the plaintiffs showed that the defendant directors utterly failed to attempt to obtain the best sale price. The Court rejected defendants' argument that *Lyondell* controlled this case on the basis that the plaintiffs did not contend that the Occam directors acted in bad faith by consciously disregarding known duties (as was alleged in *Lyondell*), but rather that the defendant directors acted in bad faith by intentionally advancing non-shareholder interests. The Court stated: "the utterly failed to attempt standard does not govern the question of whether the evidence supports a permissible inference that the directors acted with a purpose other than that of advancing the best interests of the corporation." Nonetheless, the Court found that the factual record did not support a reasonable inference that any of the outside directors were motivated by a non-shareholder-related influence: there was simply no reasonable, bad faith motive advanced by plaintiffs to suggest why the outside directors might have preferred Calix to other bidders.

Claims against Occam Officers Survive Summary Judgment

However, the Court found that plaintiffs established a bad faith motive with respect to Howard-Anderson. The Court considered Howard-Anderson interested in the merger by virtue of the change in control benefits he received as CEO. Howard-Anderson consistently delayed responding to Adtran's overtures while responding quickly and supportively to Calix, an acquirer that was willing to confirm that it would honor management's change in control agreements and monetize all equity awards. This was enough in the Court's view to deny defendants' motion for summary judgment as to plaintiffs' claims that Howard-Anderson breached his fiduciary duties by favoring Calix over other bidders to the detriment of Occam's stockholders.

The Court also declined to grant summary judgment in favor of Occam's CFO who played a role in the generation and manipulation of Occam's internal projections and was not protected by an exculpatory charter provision. The Court did not articulate whether it believed that the plaintiffs had shown a loyalty breach or merely a breach of the duty of care at this stage in the proceedings. Since Occam's CFO was not protected by an exculpatory charter provision, the Court did not need to make that determination at this stage.

Plaintiffs' Disclosure Claims Survive Summary Judgment

Finally, the Court declined to grant summary judgment in defendants' favor with respect to plaintiffs' claims that the board breached its disclosure obligations by, inter alia, failing to disclose management's projections in the proxy statement. In contrast to its finding with respect to the board's conduct during the sales process, the Court found that Occam's exculpatory charter provision did not protect the defendant directors because the record supported an inference that the defendants knew about the disclosure problems before approving the proxy statement, but approved it anyway. In addition, the defendants engaged in questionable conduct during discovery sufficient to support an inference that they sought to conceal evidence about potential disclosure issues until after the merger closed.

Lessons from *Chen v. Howard-Anderson*

Regardless of whether *Lyondell's* "utterly failed" standard applies to claims that directors breached their fiduciary duties under *Revlon* by favoring one bidder over other bidders in a change-in-control transaction to the detriment of stockholder interests, *Chen v. Howard-Anderson* shows that plaintiffs still face an uphill battle in pleading non-exculpated claims against outside directors for a number of reasons. First, discriminatory treatment is not invalid per se: a board of directors may treat one bidder differently than others if the disparate treatment advances stockholder interests and the directors' actions are reasonable in relation to the advantage they seek to achieve. Disparate treatment of a bidder who arrives late on the scene might be justified if the target board has a very reasonable fear that it will lose the proverbial bird in the hand by engaging with another bidder, especially if funding is already secured and diligence completed.

Second, even if a board favors one bidder over another to the detriment of the corporation's stockholders, plaintiffs must show that a board comprised of disinterested and independent directors acted in bad faith. Otherwise, an exculpatory charter provision will protect the directors from liability for breaches of the duty of care. In *Chen v. Howard-Anderson*, the Court found that the directors acted unreasonably under *Revlon*, by favoring Calix over other bidders, but could not attribute that favoritism to any self-interested or bad faith motive (other than with respect to Howard-Anderson at the summary judgment stage). While the Court rejected the application of *Lyondell's* "utterly failed" standard to the facts of this case, the decision did not have an adverse effect on director liability.

Chen v. Howard-Anderson does serve as a cautionary reminder that officers who play a role in the sales process face a greater risk of liability than directors because they are not afforded the benefits of exculpatory charter provisions and frequently possess the very type of routine severance packages at issue in this case. The Court was willing to find that Occam's CEO acted in bad faith for purposes of denying his motion for summary judgment based on discriminatory treatment plus the existence of the severance agreement. On the current motion, the Court was able to assume that the severance agreement was material to Mr. Howard-Anderson, with the result that he faces the prospect of a lengthy and expensive trial absent settlement of the case. ■

JOINT TASK FORCE ON GOVERNANCE ISSUES IN BUSINESS COMBINATIONS

Our Task Force is preparing a handbook covering the governance issues that arise in business combination transactions. Our goal is to provide practical advice for all deal participants (counsel, bankers, management and boards) about the most common governance issues that arise in deal-making.

We have drafts of many chapters and detailed outlines of many more. Our task force members are busy crafting the chapters on matters like the use of an NDA or standstill, the negotiation of deal lockups, the way boards should think about "deal derailers" like jumping bids, activists or MAC clause issues, the engagement of bankers, or the issues to consider in a sale process.

There is always room for more help both in drafting and in the editorial process. Please let us know if you would like to get involved!

Our Task Force meetings are now devoted to discussing current governance issues and the practical concerns that are arising for us as practitioners in understanding and implementing key decisions.

We had a great meeting in Los Angeles in April! Lewis Lazarus led a discussion about the practical issues that arise in starting a special committee including determining independence of the members of the special committee and compensation for the special committee. We had quite a spirited discussion about the disclosure requirements regarding compensation of special committees. **Note to those who attended - after the meeting, we were able to confirm that compensation of special committee members is NOT a Form 8-K item, but does have to be disclosed in the proxy statement section on compensation of directors.**

Rolin Bissell also spoke at the Los Angeles Task Force meeting about stockholder activist issues including vote "no" campaigns against a merger. Finally, Diane Frankle led a discussion about advice to boards on electronic communications, which will be a component of Chapter 4.

In Chicago we will be meeting from 1:30-2:30pm on Friday, September 12. We are still planning the agenda, but we know that Steve Bigler will be leading a discussion on Section 203 issues that arise in deal making, and Tricia Vella and Nick Dietrich will discuss various governance issues that arise in connection with rights plans. Please join us whether to learn or to offer your own experiences - it all goes into the mix!

We hope to see you all in Chicago!

ANNUAL MEETING INFORMATION

Friday, September 12, 2014 • 1:30PM - 2:30PM

Hyatt Regency, Regency Ballroom C, Gold Level, West Tower
(866) 646-6488 (US and Canada) (707) 287-9583 (International)
Conference Code: 5884742049

Co-Chairs: Diane Frankel, Michael Halloran, Larry Hamermesh, Patricia Vella

TASK FORCE ON LEGAL PROJECT MANAGEMENT

The Task Force on Legal Project Management in M&A Transactions held a well-attended session in conjunction with the ABA's Spring Business Section meeting in Los Angeles. We had an interactive discussion regarding a variety of existing projects of the Task Force and also explored the launch of several new projects.

Since the LA meeting, Co-Chairs Byron Kalogerou and Dennis White co-authored an article for the ABA's e-publication *Business Law Today* entitled "How Practitioners Can Apply Legal Project Management to M&A: New Tools for New Times." The article describes the impetus behind the formation of the Task Force and provides an overview of the projects in which its various working groups are involved.

We have a full agenda of interesting items scheduled for the upcoming September Annual Meeting Chicago. Among other things, we will be discussing the following projects:

- **Acquisition Task List.** This tool is the equivalent of a "pre-flight" checklist for an M&A Deal. Working group leader Murray Perelman will discuss the latest update to the Task List.
- **Deal Issues Negotiating Tool.** This tool is intended to highlight and facilitate the negotiation of significant deal issues that are often not included in a letter of intent. Cliff Pearl and Tom Romer will discuss the initial draft of this tool.
- **After-Action Assessment Checklist.** As in most LPM-related matters, lawyers have been late in adopting post-matter debriefings in order to capture lessons learned. Task Force project manager Aileen Leventon will share draft materials on this often neglected aspect of practice.
- **Alternative M&A Billing Arrangements.** When asked by a client to explore alternative billing arrangements, many M&A lawyers are sometimes like the proverbial deer caught in the headlights. Co-chairman Byron Kalogerou will discuss possible approaches to addressing such requests.
- **Budgeting 101.** Even if a client does not insist upon an alternative fee arrangement, it may want to establish a budget for deal-related legal work. Many firms and lawyers consider themselves unequipped to hand such requests. Time permitting, we will discuss what kind of tools and resources the Task Force might develop to assist deal lawyers in such circumstances.

As always, if you utilize any of the Task Force tools in actual transactions, please be sure to share any suggestions with us as to how they might be improved.

We look forward to seeing many of you in Chicago.

ANNUAL MEETING INFORMATION

Friday, September 12, 2014 • 11:00AM - 12:00PM

Hyatt Regency, Regency Ballroom C, Gold Level, West Tower
(866) 646-6488 (US and Canada) (707) 287-9583 (International)
Conference Code: 5884742049

Co-Chairs: Byron Kalogerou & Dennis J. White
Project Manager: Aileen Leventon

JOINT TASK FORCE ON **TWO-STEP AUCTIONS**

We continue to work to finalize the seller-friendly Model Tender Offer Agreement.

Our next meeting is scheduled as part of the larger Business Law Section meetings in Chicago. We'll go through the new model Support Agreement and an alternative financing section for the model Tender Offer Agreement, as well as a write-up of the securities law comments that we've discussed generally at prior meetings.

There are still a few places where we need some initial drafting, and at the meeting we'll be setting up responsibilities for final revisions to other sections, so if you'd like to get involved or provide more comments let Rick or Mike know or come to the meeting.

ANNUAL MEETING INFORMATION

Friday, September 12, 2014 • 4:00PM - 5:00PM

Hyatt Regency, Regency Ballroom C, Gold Level, West Tower
(866) 646-6488 (US and Canada) (707) 287-9583 (International)
Conference Code: 5884742049

Co-Chairs: Frederick H. Alexander & Michael G. O'Bryan

TASK FORCE ON **REVISED MODEL ASSET PURCHASE AGREEMENT**

At the Business Law Section Spring Meeting in Los Angeles, the Task Force on the Revised Model Asset Purchase Agreement (MAPA2) received reports from the small groups that are drafting specific sections of the updated model agreement and related commentary, and we discussed the draft Sale and Transfer section in detail. The Task Force also had a lively roundtable discussion on the issues that typically arise when negotiating the indemnity provisions of an asset purchase agreement. The points discussed will help inform the commentary that is being developed about indemnity negotiations. The working groups continue to make excellent progress.

The Task Force is still seeking the participation of ERISA/employment law specialists to review/update the related provisions of MAPA2. Please let us know if you or one of your colleagues is interested in assisting with the project.

At the Annual Meeting in Chicago, we look forward to other groups presenting their proposed updates to the MAPA2 provisions on which they are focused and we will also discuss a work plan and schedule to get us to completion of the project.

ANNUAL MEETING INFORMATION

Friday, September 12, 2014 • 12:30PM - 1:30PM

Hyatt Regency, Regency Ballroom C, Gold Level, West Tower
(866) 646-6488 (US and Canada) (707) 287-9583 (International)
Conference Code: 5884742049

Co-Chairs: John Clifford & Ed Deibert

TASK FORCE ON **M&A LITIGATION**

During the Spring Meeting in Los Angeles, our Task Force meeting included a discussion of the potential implications for M&A transactions of the decision in *In re Information Management Services, Inc. Derivative Litigation* (Del. Ch. Sept. 5, 2013), in which the Delaware Court of Chancery held that communications between executives and their individual counsel made using company email accounts were not privileged because there was no reasonable expectation of privacy. Our Task Force also co-organized a CLE program during the Spring Meeting, titled "Prosecution, Defense and Settlement of M&A Stockholder Litigation - A Solution in Search of a Problem." The program was well received, and the ABA arranged for an encore presentation in August as part of its "In The Know" webinar series.

At our meeting in Chicago, we plan to provide an update on our multi-forum litigation project and discuss potential new projects and potential programming opportunities. We also plan to engage in an interactive discussion regarding the fiduciary duties of corporate officers in the M&A context. Most of the existing case law and commentary regarding fiduciary duties in the M&A context focuses on the duties of corporate directors. But in the wake of *Chen v. Howard-Anderson* and other recent decisions construing the scope of Section 102(b)(7) exculpatory provisions, stockholder plaintiffs may increasingly target corporate officers in their suits challenging M&A transactions. We will discuss how the obligations of, and potential liability exposure for, corporate officers may differ from those of corporate directors. In addition, we plan to discuss other recent M&A litigation trends and developments affecting both transactional and litigation practices, including a discussion of the future of fee-shifting bylaws after the Delaware Supreme Court's decision in *ATP Tour, Inc. v. Deutscher Tennis Bund*, an update regarding forum selection bylaws, and a discussion of recent decisions addressing the fiduciary duty of care in the Revlon context.

We hope you will be able to attend.

ANNUAL MEETING INFORMATION

Thursday, September 11, 2014 • 4:30PM - 5:30PM

Hyatt Regency, Regency Ballroom C, Gold Level, West Tower
(866) 646-6488 (US and Canada) (707) 287-9583 (International)
Conference Code: 5884742049

Co-Chairs: Hon. Myron T. Steele & Michael A. Pittenger

ACQUISITIONS OF PUBLIC COMPANIES SUBCOMMITTEE

Our Subcommittee meeting was well attended during our Spring Meeting in April in Los Angeles. Given the increase in cross-border public company M&A activity, we thought we would put a little "international" flair into the meeting. Jen Fitchen led a timely discussion on public-company cross-border acquisitions structured as "inversion" transactions. Nicholas Dietrich also reviewed for the Subcommittee certain proposed legislative changes in Quebec addressing permissable defensive measures in response to unsolicited takeovers in Canada. Mark Morton also discussed the Delaware Supreme Court's decision in the *MFW* matter, as well as some practical considerations in controlling-stockholder transactions that arise in light of that decision.

Our Subcommittee meeting in Chicago is currently scheduled to be held on Friday afternoon September 12, 2014, from 2:30pm to 4:00pm. Michele Anderson, Chief of the Office of Mergers and Acquisitions of the SEC, has graciously agreed to discuss with us various issues being focused on by the OMA Staff in the context of public company acquisitions. We will also hear from the leaders of our various Task Forces – Financial Advisor, Corporate Governance in M&A Transactions, and the Two-Step Task Force – as to the status of their projects.

Our Subcommittee dinner during our Chicago meeting will be held on Friday, September 12, 2014 at Mastro's Steakhouse - Chicago. Cocktails begin at 7:00pm, with dinner starting at 7:30pm. I hope to see many of you there.

ANNUAL MEETING INFORMATION

Friday, September 12, 2014 • 2:30PM - 4:00PM

Hyatt Regency, Regency Ballroom C, Gold Level, West Tower
(866) 646-6488 (US and Canada) (707) 287-9583 (International)
Conference Code: 5884742049

Chair: Jim Griffin
Vice Chairs: Jen Fitchen & Jim Melville

INTERNATIONAL M&A SUBCOMMITTEE

The International M&A Subcommittee met from 11:00 a.m. to 12:30 p.m. on Saturday, April 12, 2014, in connection with the 2014 Business Law Section Spring Meeting in Los Angeles, CA.

I. Introductions
The co-chairs of the Subcommittee, Keith Flaum, Freek Jonkhart and Franziska Ruf, introduced themselves and welcomed the participants to the meeting. The Subcommittee members then proceeded to introduce themselves. It was again noted that the participants present included a diverse group of corporate, academic and private practitioners from many countries around the world.

II. Status of Current Projects
A. Public Company Takeovers Project
Daniel Rosenberg of Speechly Bircham, London, gave a short summary of the current status of the Subcommittee's Public Company Takeovers Project that he and Franziska Ruf of Davies Ward Phillips & Vineberg, Montréal, are leading. He reported that 15 out of the 16 promised submissions had been received and were currently at various stages of first edit review. The target was to finalize the first edit reviews by the September meeting, at which time a second edit review will be conducted prior to publication of the work.

III. US Style vs. Continental Style M&A Contracts
Richard Climan (Weil, Gotshal & Manges, Silicon Valley) and Hermann Knott (Luther, Cologne) reviewed the trends and developments between the US style of contract drafting and the practice in Continental Europe regarding same, highlighting the material differences that still remain between the two regimes in the context of private company acquisitions. The discussion included, among other topics, a description of a typical European-style locked box transaction and the differing approaches in the two jurisdictions to the scope and use of disclosures in the context of the due diligence review, the disclosures contained in the virtual data room materials and the disclosure schedules to the acquisition agreement and the impact of such practices on anti-sandbagging and the apportionment of liability between sellers and buyers.

IV. Disclosure Rules in Public M&A
Michael O'Bryan (Morrison & Foerster, San Francisco), Ton Schutte (De Brauw Blackstone Westbroek, Amsterdam) and Takashi Toichi (Anderson, Mori & Tomotsune, Tokyo), gave a presentation on the disclosure requirements, both voluntary and mandatory, in public M&A transactions in their respective jurisdictions. The analysis included a review of the relevant stock exchange and securities rules and the application thereof to various stages of a transaction, including at the time of the entering into of a non-binding letter of intent and at the time board of director approval is obtained in respect of the transaction. The discussions also covered disclosure obligations in the context of rumours in the market as well as the impact on trading windows adopted in the context of corporate policies.

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

- Presentation notes of Richard Climan and Hermann Knott on the Key Differences Between US- and European-Style Acquisitions of Privately-Held Companies.
- Presentation notes of Michael O'Bryan, Ton Schutte and Takashi Toichi on the Disclosure of Merger Negotiations Around the World.
- Details of the Subcommittee's publications, future meetings, other work-in-progress and other past program materials.

ANNUAL MEETING INFORMATION

Saturday, September 13, 2014 • 12:30PM - 2:00PM

Hyatt Regency, Regency Ballroom C&D, Gold Level, West Tower
(866) 646-6488 (US and Canada) (707) 287-9583 (International)
Conference Code: 6550809121

Co-Chairs: Keith Flaum, Freek Jonkhart & Franziska Ruf

MEMBERSHIP SUBCOMMITTEE

Membership numbers increased across the board over the past 6 months, which is a testament to the hard work of all of your subcommittees, events, and the ABA Membership team as a whole.

We saw an increase in our numbers across the working groups, with the most notable jumps occurring with associate (non lawyer) members (+11%). The number of Canadian members increased a bit to 225 from 210 (a 7% increase).

A word on our Subcommittees: The M&A Trends Subcommittee is still our largest group with 1,636 members, up approximately 5% from 1,556 members, and the private equity subcommittee right on its heels rising slightly this quarter to 1,424 members from 1,372 in March.

The biggest news this year comes from the Diversity and Women in M&A subcommittees who saw their numbers climb 200%! It is a staggering number with the caveat that they are new committees who went from 1 member to 3 members, and 0 to 2 members respectively. Let's see if they can keep the trend going over the next 6 months!

Another notable increase can be found within the Law Project Management category that saw a steady 28% increase from 76 to 97 members, and the Governance Issues in Business Combinations category rising from 212 members to 238 members, a 12% increase. Here are some of the other subcommittees' numbers:

- Acquisitions of Public Companies 854 (up from 835)
- M&A Jurisprudence 767 (up from 735)
- International M&A 969 (up from 931)
- Dictionary of M&A Terms641 (up from 626)

We thank you for your involvement and look forward to seeing you all in Chicago.

ANNUAL MEETING INFORMATION

Thursday, September 11, 2014 • 3:00PM - 4:30PM

Hyatt Regency, Wrigley, Bronze Level, West Tower
(866) 646-6488 (US and Canada) (707) 287-9583 (International)
Conference Code: 5170670679

Co-Chairs: Tracy Washburn Bradley, Mireille Fontaine & Tatjana Paternor

M&A JURISPRUDENCE SUBCOMMITTEE

M&A Jurisprudence Subcommittee is currently comprised of the following two working groups and three project groups:

- 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 Mergers and Acquisitions, which is published annually in The Business Lawyer. After publication, the Annual Surveys are posted in an on-line library, called the M&A Lawyers' Library, which members of the Mergers and Acquisitions Committee can access from the Committee's home page on the ABA website (http://apps.americanbar.org/dch/committee.cfm?com=CL560000). The eleventh Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions was included in the February 2014 issue of The Business Lawyer.
- The Judicial Interpretations Working Group examines and reports to the Committee on judicial interpretations of specific provisions of acquisition agreements and ancillary documents, looking not only for recent M&A cases of special interest, but also examining the entire body of case law on the specified type of provision. The work product of the Judicial Interpretations Working Group consists of memoranda summarizing our findings regarding these acquisition agreement provisions and M&A issues. The memoranda are posted in the M&A Lawyers' Library. Currently, the Library contains fourteen memoranda, and we expect to post several more to the Library in the near future. The most recent addition is the memo by Satira Nair on Enforceability of Letters of Intent, dated June 19, 2014.
- The Library Index Project Group is creating a topic index for the M&A Lawyers' Library, which will allow on-line visitors to the library to search the material in the Library by topic.
- The Jurisdictional Project Group is creating a chart, with supporting analysis, comparing the jurisprudence in the federal and state courts of Delaware, New York, California and Texas, concerning some of the more commonly litigated topics in M&A jurisprudence. We believe this will be a very instructive and useful tool for M&A practitioners who are involved in multi-jurisdictional transactions.
- The Damages Project Group is preparing a comprehensive analysis of the types of damages that are recoverable in common M&A litigation contexts, and the methods that courts have used, or allowed the parties to use, to calculate damage awards.

At our meeting in Chicago, we plan to discuss as many recent court decisions as we can get to in our allotted time, including the recent decision of the U.S. District Court for the Southern District of New York in *Johnson & Johnson v. Guidant Corporation*, which is summarized below. We will also discuss a draft of the memo on successor liability in asset acquisitions that is being prepared by Jon Hirschoff, John Lawrence and Dan Peters, and the final version of the memo by Frederic Smith and Mike Pittenger on stockholder representatives and obligations imposed on non-signing shareholders and other parties in M & A transactions. We will also discuss the progress of the Project Groups and future additions to the Library.

We welcome all interested M&A Committee members to join our Subcommittee. The M&A 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. Not only can our working groups and project groups use additional help on current projects, but we also have a virtually unlimited pool of topics to work on in the future.

We are also asking all members of the M&A Committee to send us significant judicial decisions for possible inclusion in the survey. Submissions can be sent by e-mail either to Scott Whittaker at swhittaker@stonepigman.com or to Mike O'Bryan at mobryan@mofo.com. Please state in your email why you believe the case merits inclusion in the survey. **We need you to help identify cases!**

The first criterion for inclusion is that the decision must 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. The second criterion is that the decision must (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.

Decision to be Discussed at the Chicago Committee Meeting

Court Denies Summary Judgment on Breach of No-Shop — *Johnson & Johnson v. Guidant Corporation*, (S.D.N.Y., No. 06-cv-7685, July 7, 2014)

The court in this opinion denies a target company's motion for summary judgment in a dispute over breach of a no-shop. The resulting litigation got some attention in 2007 when a motion to dismiss was denied, with the court then providing the famous (amongst M&A attorneys, at least) admonition that "'[w]illful'" is a notoriously ambiguous word." See, 2007 *Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions*, The Business Lawyer, Volume 63, p. 547, February 2008.

Background

In August 2004, Guidant signed a NDA with J&J that provided, among other things, that J&J could share information with its "Representatives," defined as "officers, directors, employees, agents, advisors or representatives."

In December 2004, Guidant signed a merger agreement to be acquired by J&J for $25.4 billion. The merger agreement included several fairly common protective and related provisions, including:

- a no-shop, providing that Guidant "shall not ... solicit, initiate or knowingly encourage, or take any other action designed to, or which could reasonably be expected to, facilitate, any Takeover Proposal", with "Takeover Proposal" defined as "any inquiry, proposal, or offer ... relating to ... any direct or indirect acquisition or purchase ... of assets ... or businesses that constitute 15% or more of the revenues, net income or assets" of Guidant;
- an exception to the no-shop, allowing Guidant to furnish confidential information to potential buyers who, among other things, signed a NDA "not less restrictive ... than the confidentiality provisions of" the J&J NDA;
- an obligation of Guidant to "keep J&J informed in 'all material respects of the status and details ... of any Takeover Proposal'" and to "'promptly advise' J&J of the 'identity of the person making any such Takeover Proposal;'"
- a right for Guidant to terminate to accept a Superior Proposal; and
- a provision that termination did not eliminate liability for "wilful and material" breaches.

The merger agreement was later amended to lower the purchase price to $21.5 billion, after Guidant faced a number of product recalls that J&J claimed had had a material adverse effect on Guidant.

In December 2005, Boston Scientific ("BSC") announced a competing bid for Guidant. As part of its bid, it said that it would divest certain assets of Guidant to help assure antitrust approval. Guidant and BSC signed a NDA, which provided that the "Representatives" with whom BSC could share information included "financing sources" and "potential purchasers of assets to be divested." Less than two weeks later, Guidant signed an addendum to the BSC NDA that prohibited Guidant from disclosing "the existence or name of any third party who is a potential purchaser of [the] assets to be divested."

BSC informed Guidant that Abbott would buy the assets to be divested. Abbott signed an accession to the addendum to the BSC NDA, providing that Abbott was to "advise" BSC. Guidant then provided due diligence information to Abbott. On January 8, 2006, Abbott and BSC signed a sale agreement. Later in January BSC and J&J engaged in bidding war, which BSC won, and Guidant terminated the J&J merger agreement to take the BSC offer. Guidant paid J&J a $705 million termination fee.

J&J sued Guidant for breach of contract, on the basis that Guidant had disclosed confidential information to Abbott in violation of the no-shop. J&J also sued Abbott and BSC for tortious interference, but that claim was dismissed in 2007 in response to a motion to dismiss by Guidant and other then-defendants. See, 2007 *Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions*, The Business Lawyer, Volume 63, pp. 550-551, February 2008.

The Court:

The court applied Indiana law, pursuant to the merger agreement's choice of law provision. The key question was whether Guidant had committed a "willful and material" breach of the merger agreement, since otherwise J&J was limited to the termination fee it had received.

Election of Remedies. The court rejected Guidant's argument with respect to election of remedies. The court acknowledged that (at least under New York law, which was reflected in the precedent cited by Guidant) "a non-breaching party that continues to perform loses its right to otherwise terminate ... at some later point," but noted that the merger agreement contemplated remedies of both accepting a termination fee and seeking damages due to willful and material breach. The court also noted that parties generally can "draft language that purports to avoid the consequences of election" and that the language of the merger agreement did that.

Willful Breach. The court reiterated that the term "willful" by itself is ambiguous, noting that J&J contended that it meant "voluntary and intentional" while Guidant contended that it meant "acting knowingly or with 'reckless disregard of the law.'" Accordingly, the court looked to interpretive principles and extrinsic evidence to determine the intent of the parties, including how the term was used in other parts of the merger agreement (more specifically, in the termination provisions and the elimination of right to terminate), since "the general rule of contract construction presum[es] that words have the same meaning throughout the contract." Based on the term's usage in the restrictions on termination rights, and the parties' negotiations over such provisions, the court determined that "willful" in the merger agreement was intended to require "acting with knowledge that a breach would ensue, as opposed to mere intentionality."

Good Faith Reliance on Counsel. J&J did not dispute whether good faith reliance on the advice of counsel could prevent a finding of willfulness. However, J&J disputed, and the court found a question of fact as to, whether Guidant had reasonably relied on its counsel. In particular, the court noted that there was no clear justification for expanding the definition of Representatives to include financing sources, and that Guidant did not get a written explanation from its counsel as to the basis for that conclusion. The court also noted that Guidant's counsel had insisted that Abbott be described as an advisor to BSC before allowing it to have any diligence. The court found that, in light of the Guidant general counsel's "experience, legal training, and awareness of Guidant's obligations to J&J," the court could not conclude for purposes of the SJ motion that reliance on the outside counsel's advice was reasonable.

Materiality. The court noted that, in contrast to "willful," "material" is "well-defined ... in the law of contracts," with a material breach being one that "goes 'to the very heart of the agreement." Ultimately, though, the determination of whether a breach is material is a "'complicated question of fact ... [which] must be resolved by reference to the intent of the parties...." The court found that Guidant's actions were more than just a "technical breach" of the merger agreement, noting that, among other things, even if Guidant did not solicit the BSC bid, it facilitated the BSC bid in ways not permitted by the merger agreement. The court also rejected Guidant's argument that Abbott had made a Takeover Proposal that qualified for the exception to the no-shop, noting that, even if the assets to be purchased by Abbott did exceed the 15% threshold, the merger agreement also required Guidant to notify J&J of any Takeover Proposal, which Guidant had not done.

The court denied the motion for summary judgment because a trial was needed to determine whether Guidant's breach was willful and material.

To join the M&A Jurisprudence Subcommittee, please email either Scott Whittaker at swhittaker@stonepigman.com, Jon Hirschoff at jhirschoff@fdh.com, or Mike O'Bryan at mobryan@mofo.com, or simply come to the Subcommittee meeting in Chicago.

ANNUAL MEETING INFORMATION

Friday, September 12, 2014 • 8:00AM - 9:30AM

Hyatt Regency, Regency Ballroom C, Gold Level, West Tower
(866) 646-6488 (US and Canada) (707) 287-9583 (International)
Conference Code: 5884742049

Subcommittee Chair: Scott T. Whittaker
Chair - Annual Survey Working Group: Michael G. O'Bryan
Chair - Judicial Interpretations Working Group: Jon T. Hirschoff
Project Group Chairs:
Library Index Project - Rikki L. Bagatell
Jurisdictional Project - Brian S. North
Damages Project - Lisa J. Hedrick

M&A MARKET TRENDS SUBCOMMITTEE

Our last meeting in Los Angeles started with a review of the status of our recent pending publications. Following the publications updates, we held an informal poll on the Delaware statute of limitations issue to see whether, and how quickly, practitioners had begun to change practice by using "contracts under seal" as a technique for creating enforceable claims periods in private target acquisition agreements. Jennifer Muller of Houlihan Lokey then reviewed the state of the M&A market and Emily Colbert shared highlights from the PLC Deal Protections Study. The meeting ended with Tricia Vella and Craig Menden discussing the implications of the *Great Hill* case.

Our next meeting will be held at the Annual Meeting of the Business Law Section in Chicago. The agenda includes:

- A review of pending publications;
- An update on the state of the M&A market;
- A discussion of the practice implications of Delaware 8106(c), including an informal survey; and
- A "Tales from the Trenches" presentation

ANNUAL MEETING INFORMATION

Saturday, September 13, 2014 • 10:00AM - 11:30AM

Hyatt Regency, Regency Ballroom C&D, Gold Level, West Tower
(866) 646-6488 (US and Canada) (707) 287-9583 (International)
Conference Code: 6550809121

Chair: Hal Leibowitz
Vice-Chair: Craig Menden

PRIVATE EQUITY M&A SUBCOMMITTEE

The Private Equity M&A Subcommittee met in Los Angeles, CA on Friday, April 11, 2014 in conjunction with the other sessions of the ABA M&A Committee and its subcommittees that took place there as part of the ABA's Spring Business Law Section Meeting. The Subcommittee reviewed certain market and legal trends and developments regarding the Private Equity industry, Private Equity dealmaking, and the broader M&A markets that had occurred since the Subcommittee last gathered several months earlier.

In that regard, the Subcommittee received presentations and materials on the following topics from the referenced parties:

- **Highlights from Bain & Co.'s 2014 Global Private Equity Report.** William Halloran, Partner, Bain & Company, Inc. reviewed highlights from Bain's 2014 Global Private Equity Report. That Report analyzes various data points around dealmaking trends from the prior year, and provides commentary on the current state-of-play in the industry while highlighting contours of emerging trends to watch for in the future.
- ***In Re Rural Metro.*** A panel, consisting of Myron T. Steele, Potter Anderson & Corroon (and former Chief Justice of Delaware's Supreme Court), Brad Davey, Potter Anderson & Corroon, Steve Kotran, Sullivan & Cromwell, Jennifer Muller, Houlihan Lokey, and the Subcommittee Chair discussed and debated aspects of the Delaware Chancery Court's ruling in In Re Rural Metro Corporation Stockholders Litigation along with the effect the decision could have on boards, bankers, bidders, and counsel.

The Subcommittee meeting was well-attended, and the Subcommittee Chair thanks all participants and Subcommittee members for contributing to the session.

ANNUAL MEETING INFORMATION

Friday, September 12, 2014 • 9:30AM - 11:30AM

Hyatt Regency, Regency Ballroom C, Gold Level, West Tower
(866) 646-6488 (US and Canada) (707) 287-9583 (International)
Conference Code: 5884742049

Chair: John K. Hughes

COMMITTEE MEETING MATERIALS

Agenda and dial-in information for 2014 annual meeting

Please note that times listed are central time. Programs (including those the committee is co-sponsoring) are shaded in blue. **US and Canada dial in number: (866) 646-6488 • International dial in number: (707) 287-9583**

Thursday, September 11, 2014

MEETING	TIME	LOCATION	PASSCODE
Existing with an ESOP: A Compelling Exit Strategy for a Privately-Held Business	2:30 PM – 4:30 PM	Hyatt Regency, Buckingham, Bronze Level, West Tower	N/A
The 2014 Annual Review of Developments in Mergers and Acquisitions	2:30 PM – 4:30 PM	Hyatt Regency, Columbus KL, Gold Level, East Tower	N/A
Membership Committee	3:00 PM – 4:30 PM	Hyatt Regency, Wrigley, Bronze Level, West Tower	5170670679
M&A Litigation Joint Task Force	4:30 PM – 5:30 PM	Hyatt Regency, Regency Ballroom C, Gold Level, West Tower	5884742049

Friday, September 12, 2014

MEETING	TIME	LOCATION	PASSCODE
M&A Jurisprudence	8:00 AM – 9:30 AM	Hyatt Regency, Regency Ballroom C, Gold Level, West Tower	5884742049
Ethics–The Responsibilities and Liabilities of the Lawyer in International Transactions	9:00 AM – 10:00 PM	Hyatt Regency, Water Tower, Bronze Level, West Tower	N/A
Private Equity M&A	9:30 AM – 11:30 AM	Hyatt Regency, Regency Ballroom C, Gold Level, West Tower	5884742049
How Inside and Outside Corporate Counsel Can Work Together to Maximize the Value of Corporate Legal Services	10:30 AM – 12:30 PM	Hyatt Regency, Columbus IJ, Gold Level, East Tower	N/A
Legal Project Management Task Force	11:00 AM – 12:00 PM	Hyatt Regency, Regency Ballroom C, Gold Level, West Tower	5884742049
Women in Mergers and Acquisitions Task Force	11:00 AM – 12:00 PM	Hyatt Regency, San Francisco, Gold Level, West Tower	7898943366
Revised Model Asset Purchase Agreement Task Force	12:30 PM – 1:30 PM	Hyatt Regency, Regency Ballroom C, Gold Level, West Tower	5884742049
Governance Issues in Business Combinations Joint Task Force	1:30 PM – 2:30 PM	Hyatt Regency, Regency Ballroom C, Gold Level, West Tower	5884742049
Acquisitions of Public Companies	2:30 PM – 4:00 PM	Hyatt Regency, Regency Ballroom C, Gold Level, West Tower	5884742049
Diverse Attorneys, Women and Millennials: Successful Paths to Leadership	2:30 PM – 4:30 PM	Hyatt Regency, Gold Coast, Bronze Level, West Tower	N/A
Two-Step Auction Task Force	4:00 PM – 5:00 PM	Hyatt Regency, Regency Ballroom C, Gold Level, West Tower	5884742049
Subcommittee and Task Force Chairs Meeting	5:00 PM – 5:45 PM	Hyatt Regency, Regency Ballroom C, Gold Level, West Tower	5884742049

Saturday, September 13, 2014

MEETING	TIME	LOCATION	PASSCODE
Cases Do Matter: Judicial Forces Shaping M&A Deal Terms	8:30 AM – 10:00 AM	Hyatt Regency, Columbus IJ, Gold Level, East Tower	N/A
Market Trends	10:00 AM – 11:30 AM	Hyatt Regency, Regency Ballroom C&D, Gold Level, West Tower	6550809121
Whether Collaborative Law Can Be Used to Effectively and Efficiently Resolve Post-Merger and Acquisition Disputes?	10:30 AM – 12:00 PM	Hyatt Regency, Gold Coast, Bronze Level, West Tower	N/A
Financial Advisor Disclosures Task Force	CANCELLED		
International M&A	12:30 PM – 2:00 PM	Hyatt Regency, Regency Ballroom C&D, Gold Level, West Tower	6550809121
Mergers & Acquisitions Full Committee Meeting	2:00 PM – 4:30 PM	Hyatt Regency, Regency Ballroom C&D, Gold Level, West Tower	6550809121
Mergers & Acquisitions Committee Dinner	7:00 PM Reception, 8:00 PM – 10:00 PM Dinner	Mon Ami Gabi, 2300 N. Lincoln Park West	N/A

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