VOLUME XXVI
Issue 3
Fall 2021

Deal Points

THE NEWSLETTER
OF THE MERGERS
AND ACQUISITIONS COMMITTEE

FROM THE CHAIR

Wilson Chu

Break out your favorite adult beverages because this is going to be an uncharacteristically long (for me) Chair's Message. I look forward and urge you to tune-in for the Committee's usual stellar lineup of programs at the upcoming Virtual Section Annual Meeting, September 22-24…which will be the last for my run as Committee Chair.

From lost opportunities to see friends in windowless conference rooms to Zoom fatigue to watching my last Chair's upgrade at the Montage go poof, there's plenty to complain about being known in the Committee's boilerplate as "The COVID Chair."

But woe-is-me is not me and that's certainly not our Committee Leadership Team (as if ABA stuff really matters when faced with a plague of Biblical proportions). Historic COVID measures notwithstanding, we materially and positively (no MAE here!) moved the needle, as the world's largest association of M&A lawyers, on my strategic priorities of:

1. Projecting our thought leadership; and
2. Creating opportunities for our members to build their names and networks.

"How" was easy. After begging terrific people to serve, all I had to do was encourage and empower them (think: windup Godzilla). Highlights:

Market Check Videos, with "showrunning" by Craig Menden (Market Trends Chair) and Netflix-quality production by Hotshot, our groundbreaking production features market-leading insights on the "why,""how," and "what's happening" on advanced M&A topics… in bite-sized videos devoured by budding masters-of-the-universe (and with game-changing CLE credits coming soon!). With 20 videos in the can (racking up thousands of views), the topics covered to-date (with more to come):

- 3rd Party Claims "If True" Indemnity (ft. Joanna Lin and Jessica Pearlman)
- Fraud Carveouts (ft. Glenn West and Tali Sealman)
- Materiality Scrapes (ft. Rita O'Neill and Craig Menden)
- Indemnifiable Losses (ft. Leigh Walton and Scott Whittaker)
- Sandbagging (ft. Nate Cartmell and Lisa Hedrick)
- Updating Disclosure Schedules (ft. Ann-Beth Stebbins and John Clifford)

Our videos (free to Committee members) are quickly becoming the BigLaw associate's go-to resource that can mean the difference between flailing around at 2:00a looking for an answer or showing up as the smartest lawyer on the Zoom.

More thought leadership shared by more Committee members targeting future Committee members. Strategic alignment? Check and Check.

Monthly M&A Hot Topics CLE Webinars that feature the highest quality speakers giving their unique insights into the trending M&A topics of the day. More thought leadership from more members, all coming to a screen near you – as yet another free benefit of being a Committee member. Check and Check.

MAC Bytes, our summary of take-aways from subcommittee meetings, promptly sent to attendees (when we used to meet in person!), that empowers our members to extend the benefits of being in the room by recirculating MAC Bytes in whole or in part to colleagues and clients. Targeted brand building by individual members – powered by MAC Bytes: Check and Check.

Snapshot, our quick-take preview of topics and speakers in upcoming subcommittee meetings so you don't miss that nugget that'll make your client look good by picking you. Check and Check.

In a pandemic, it's Herculean just to keep the wheels on daily life, let alone make progress on work-for-free ABA projects. None of this could happen without the best Leadership Team around. Special shout-outs start with our Committee Vice Chairs:

- George Taylor, our "Committee Whip," who has a bright future as a circus ringmaster (or lion tamer), for his deft (think: no good deed goes unpunished) coordination of our meetings and the Snapshot that's become catnip for deal geeks;
- Jessica Pearlman, for her relentless-pursuit-of-perfection leadership and sponsorship of our flagship Deal Points Studies and Women in M&A programs; and
- Mike O'Bryan, for so many unsung aspects of our Committee's inner-workings ...but most important, his agreement to serve as our next Chair.

Yes, that's right, Mike O'Bryan will be our next Chair!

Mike's the product of the most diligent and thoughtful talent search (not Hunger Games) in the Committee's history, conducted by a first-ever Selection Subcommittee that I asked to evaluate not only the usual suspects but also any member who the subcommittee members deemed qualified. So special thanks to our Selection Subcommittee for running a perfect process that even Leo Strine, in his most skeptical prime, would wholeheartedly approve: John Clifford, Rick Climan (Chair), Leigh Walton, and Scott Whittaker.

While Mike's busy cajoling together his leadership team, I'll take this opportunity to formally encrust (*a la* Glenn West) mine into the Committee's boilerplate, with my unqualified appreciation:

ACADEMIC
Glenn West

INTERNATIONAL M&A
Jeff Labine
Jorge Yanez *Vice Chair*

M&A JURISPRUDENCE
Nathaniel Cartmell, III *Chair*
JUDICIAL INTERPRETATIONS WORKING GROUP **Frederic Smith** *Chair*
ANNUAL SURVEY TASK FORCE
Lisa Hedrick *Chair*

MODEL ASSET PURCHASE AGREEMENT
John Clifford *Co-Chair*
Edward Deibert *Co-Chair*

PUBLIC COMPANY ACQUISITIONS
Rita-Anne O'Neill *Co-Chair*
Patricia Vella *Co-Chair*

PRIVATE COMPANY MODEL MERGER AGREEMENT
Melissa DiVincenzo *Co-Chair*
Amy Simmerman *Co-Chair*
Tatjana Paterno *Vice-Chair*

SHORT FORM AGREEMENTS JOINT TASK FORCE
Jason Balog *Co-Chair*
Eric Graben *Co-Chair*

WOMEN IN M&A
Rita-Anne O'Neill *Co-Chair*
Joanna Lin *Co-Chair*
Charlotte May *Vice Chair*

DELAWARE JUDICIARY LIAISON
Lisa Stark
Patricia Vella

LEGAL PROJECT MANAGEMENT
Byron Kalogerou *Co-Chair*
Dennis White *Co-Chair*

MARKET TRENDS
Craig Menden *Chair*
Kevin Kyte *Vice Chair*

MEMBERSHIP
Tracy Bradley Washburn *Chair*
Gina Conheady *Vice-Chair*

PRIVATE EQUITY M&A
David Albin *Chair*
Samantha Horn *Vice-Chair*

PROGRAMS AND PUBLICATIONS
Ashley Hess *Chair*
DEAL POINTS **Chauncey Lane**
MAC-BYTES **Caitlin Rose**

TECHNOLOGY IN M&A
Daniel Rosenberg *Chair*
Tom Romer *Vice-Chair*

So to our Leadership Team, thank you for helping me make lemonade and to our members, taken as a whole, thank you for allowing me to serve as your Chair. It's been my honor and pleasure. And as my daughter's USC Trojans say: Fight On!

FROM THE EDITOR

Chauncey M. Lane

Welcome to another issue of ***Deal Points***! This issue is packed full of great substantive and technical content thanks to our members who remain on the cutting edge of M&A practice around the world.

We begin this issue with a look at how private equity buyouts have driven a very busy year for M&A followed by a look at an anti-activist poison pill that could cause a significant shift in corporate governance jurisprudence. We then re-visit New Zealand foreign investment rules – a topic we visited in the Winter 2021 Issue of ***Deal Points*** – for an update on reforms that have now gone into effect. Next, we take a look at the entire fairness test for a reminder that what is legally possible is not always legally permissible. We then learn more about the role escrows and insurance play in allocating risk in M&A transactions from JPMorgan, one of our sponsors for this meeting, followed by a discussion of considerations in negotiating working capital in M&A transactions.

Next, we learn about legal issues in M&A transactions in Mexico against the backdrop of Mexico's new National Anticorruption System followed by a discussion from Litera, another one of our meeting sponsors, on how deal lawyers can use innovation tools to run more efficient M&A transactions. We then take a look at how one of the biggest deal trends of the year – SPACs – have played out in Spain followed by a discussion on the future of Section 5 of the Federal Trade Commission Act and what it means for the M&A market. We next receive some practical tips on how to close an M&A transaction European style and how the process has been modified during the ongoing pandemic. We finish this issue of ***Deal Points*** with a discussion of a recent Delaware Chancery Court decision on contractual limitations on post-closing fraud claims.

Thank you to each of our contributors. I encourage each of you to consider contributing to future issues of ***Deal Points***. 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: DealPoints@ReedSmith.com

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WHAT'S NEW & TRENDING

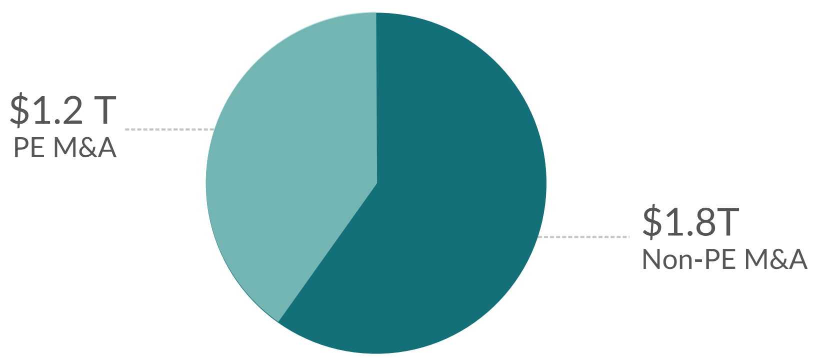
There's No M&A Boom Without Private Equity

GRACE MARAL BURNETT Legal Analyst – Transactions at Bloomberg Law

In the current market, when we talk about M&A, we know that what we're talking about is in large part private equity M&A. A staggering $1.2 trillion in mergers and acquisitions transactions announced and pending or completed so far in 2021 have involved a private equity party.

This year-to-date dollar amount, which includes total buyouts, majority and minority stake purchases, and venture capital investments, is already equal to 2020's total annual PE deal volume, and it represents 40% of global M&A volume in 2021 thus far. If this market share holds through the close of the year, PE's 2021 share in the global M&A market will have markedly surpassed 2020 (34%) and 2019 (29%).

Private Equity Deals 40% of All 2021 YTD Global M&A Volume



Source: Bloomberg as of Aug. 2, 2021. The data set includes all pending and completed global M&A transactions announced between Jan. 1, 2021 and Aug. 2, 2021. "PE M&A" means deals involving a private equity firm party.

By total deal count, the ratio is similar: the 14,666 pending and completed 2021 PE deals announced so far make up 39% of the global M&A deal count.

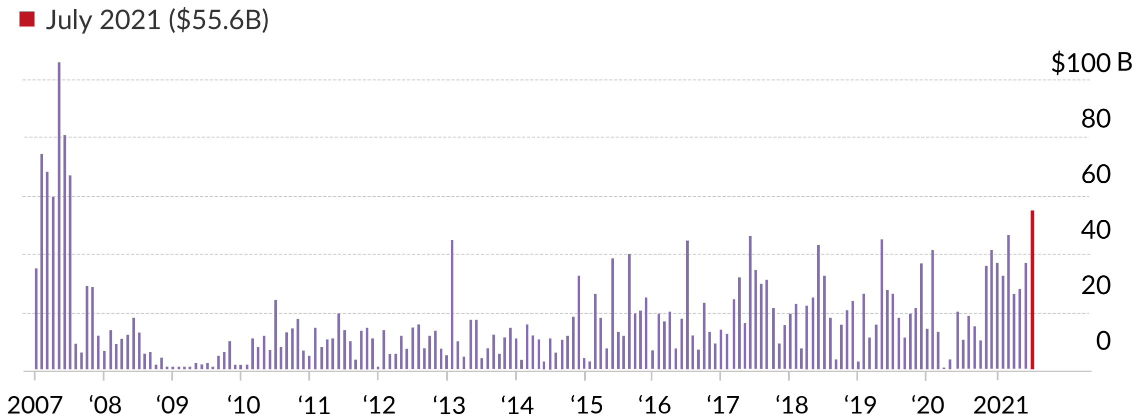
Considering only M&A deals involving the acquisition of a controlling stake in a company or asset, year-to-date PE volume represents 32% of global volume. In short, this M&A boom wouldn't be a boom without private equity deal activity. And M&A lawyers certainly know this.

Buyouts

In 2021, 883 global private equity buyouts—takeovers for a 100% stake that involve a private equity acquirer—have been announced and are either pending (247 deals) or have been completed (636 deals). These PE buyouts have an aggregate value of $239.2 billion. Though we still have five months remaining in the year, this year-to-date PE buyout volume has already surpassed 2020's total volume ($223.9 billion). And if the current pace continues for the remainder of the year, it is on track to surpass 2019 ($260.7 billion) and 2018 ($253.9 billion).

Looking at monthly totals, the volume of PE buyouts announced in July ($55.6 billion) is the highest monthly volume seen since the summer of 2007—marking "a return to abnormal," as so aptly put by Bloomberg Opinion columnist Tara LaChapelle. Nearly all (859 out of 883) of these buyouts were all-cash deals. About 40 percent were cross-border deals.

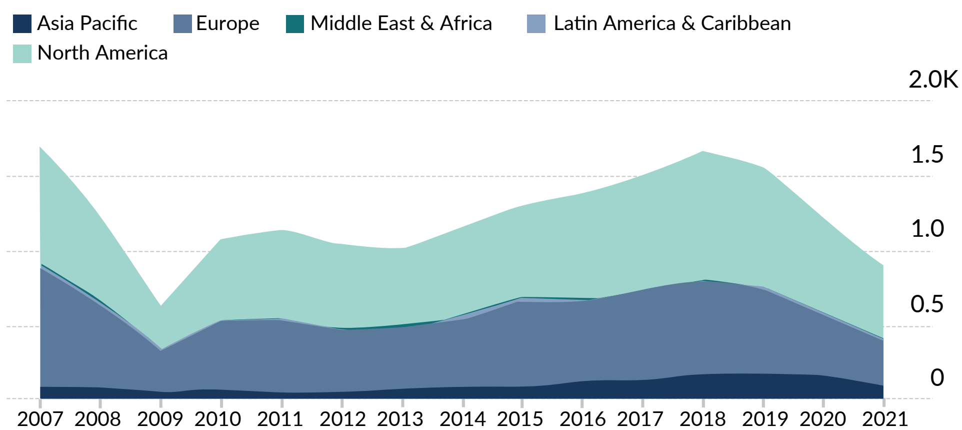
July Monthly Private Equity Buyout Volume Highest Since 2007



Source: Bloomberg as of Aug. 2, 2021. The data set includes all pending and completed global private equity buyout transactions announced between Jan. 1, 2007 and July 31, 2021.

The regional breakdown of buyout targets by deal count so far this year is consistent with prior years: North America has the lead with 482 PE buyouts, followed by Europe with 282 deals. So far in 2021, both of these regions have achieved roughly three-quarters of their total PE buyout deal counts for all of 2020.

Private Equity Buyout Counts by Target Region (2007-2021 YTD)



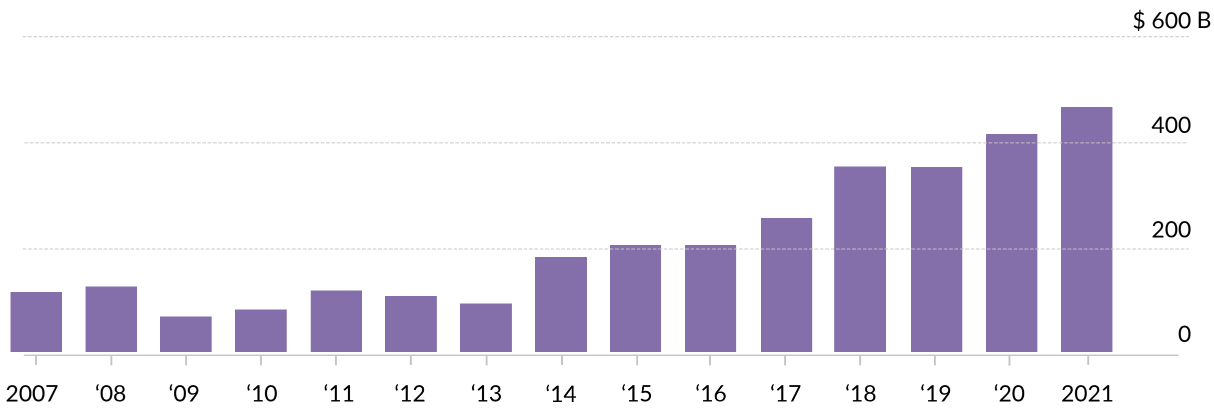
Source: Bloomberg as of Aug. 2, 2021. The data set includes all pending and completed global private equity buyout transactions announced between Jan. 1 2007 and Aug. 2, 2021.

Asia-Pacific has seen 97 PE buyouts year to date, putting it at 60% of its 2020 total deal count.

Investments

While buyouts have been drawing much attention because of their resurgence, investments by private equity—including minority stake purchases, additional stake purchases, and venture capital financing rounds—have also already broken records this year, with over $466 billion announced. Private equity investment volumes have been on a persistent upward path in recent years, and this year's volume already surpasses all prior years on record, according to Bloomberg data.

2021 Private Equity Investment Volume at Record High



Source: Bloomberg as of Aug. 2, 2021. The data set includes all pending and completed global private equity minority stake investments, including additional stake purchases and venture capital financing rounds announced between Jan. 1, 2007 and July 31, 2021.

This $466 billion in private equity investments is mostly composed of venture capital financing rounds ($361.9 billion). Most are also cross-border investments ($304 billion).

The vast majority of these investments, with an aggregate value of $308.7 billion, have an individual deal value equal to or less than $500 million.

Target Industries

Consumer, non-cyclical targets and technology targets have drawn the most private equity investment for majority and minority stakes combined this year. In the consumer, non-cyclical sector commercial services ($73.6 billion), healthcare products ($54.9 billion), biotechnology ($45.7 billion), food ($26.9 billion), and pharmaceuticals ($25.5 billion) targets have seen more than double the volume of private equity deals seen in the same period last year. In tech, software targets have taken the lion's share with $210.9 billion in deals, which, in turn, has mostly consisted of deals involving applications software targets ($108.7 billion). Both software overall and applications software volumes have more than doubled compared to the same period last year.

Private equity is also focusing on green energy: alternative energy targets have received $30.4 billion in PE investments in 2021, marking a 568% increase over the same period last year.

Author's Note: As of Sept. 9, 2021, $1.4 trillion in mergers and acquisitions transactions announced and pending or completed so far in 2021 have involved a private equity party, representing 40% of global M&A volume, year to date. By deal count, PE deals constitute 40% of all global M&A.

This article was originally published on Bloomberg Law as ANALYSIS: There's No M&A Boom Without Private Equity on Aug. 2, 2021.

Corporate Vote Suppression: The Anti-Activist Pill in *The Williams Companies Stockholder Litigation*

JEFFREY N. GORDON Richard Paul Richman Professor of Law at Columbia Law School

The Delaware Supreme Court has before it a case that could dramatically reshape corporate governance in the United States. The case, *The Williams Companies Stockholder Litigation*, addresses the legitimacy of an "anti-activist pill" whose particularly aggressive features would severely limit both an activist's economic incentives and its capacity to organize other shareholders.

The implications reach well beyond the hedge-fund wolf packs purportedly roaming the corporate landscape. The validation of such an anti-activist pill would throttle the incipient ESG activist movement that recently illustrated its potential in successful challenges at Exxon-Mobil. It would also require the Delaware courts to come up with a new legitimating theory for the discretionary authority reposed in corporate boards.

At the outset of the Covid-19 crisis, The Williams Companies adopted a "shareholder rights plan" designed to forestall an activist challenge to management's running of the company during a period of economic uncertainty. The pill contained two far-reaching elements. The first was a 5 percent ownership trigger. A party reaching that threshold would face an immediate dilution of its equity interest through a "flip-in" provision (which allows other shareholders to acquire more stock at a discount) and, in the event of a follow-up merger, would face further dilution through a "flip-over" provision (which allows shareholders of the target to buy the acquirer's stock at a discount). The second element was a sweeping definition of "acting in concert" for the purposes of determining "beneficial ownership." The definition included acting "in parallel" or simply acting "towards a common goal" as pertains not just to "changing" but also "influencing control of the Company." The "acting in concert" concept was further broadened to include "daisy chain" connections: parties who were acting in concert with one party who was, in tum, acting in concert with another party, an aggressive provision lifted from the criminal conspiracy playbook associated with organized crime. Institutional investors seem brought into this cabal merely through buying company shares in anticipation of a challenge to management, including by way of a proxy contest.

The beneficial ownership definition was further embellished by inclusion of synthetic ownership of the company stock that was the ''underlying" security in a total return equity swap, which is cash-settled.

A comprehensive opinion by Chancellor McCormick enjoined the pill, principally through an application of the Unocal/Unitrin framework. The Chancellor found that the vague, omnibus threat that appeared to motivate the board to adopt the pill did not justify the pill's extreme provisions. The pill expired on its own terms a year after its adoption, in March 2021. Yet the defendants are pursuing an appeal in the Delaware Supreme Court.

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Got News & Trends?

CHAUNCEY M. LANE Editor
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Are you following any new deal trends or have other news relevant to our committee? If so, I want to share your content. Simply contact me via email at dealpoints@reedsmith.com.

New Zealand: Significant Changes to Foreign Investment Consent Rules

DAVID QUIGG Partner at Quigg Partners
MATT WOOLLEY Senior Solicitor at Quigg Partners

Reforms to New Zealand foreign investment consent rules recently entered into force. The reforms include changes to the types of persons and transactions that require consent, changes to the criteria for obtaining consent, and the introduction of a new National Security and Public Order notification regime. Anyone considering an acquisition involving a New Zealand business should be alert to New Zealand's foreign investment rules and the recent changes.

Key changes are summarized in this update.

Changes to what requires consent

New Zealand's overseas investment regime requires overseas persons to obtain consent from the Overseas Investment Office prior to investing in significant business assets or sensitive land. Sensitive land includes residential land, non-urban land greater than five hectares, land on certain islands (other than New Zealand's two main islands), the marine and coastal area, and land greater than 0.4 hectares which adjoins sensitive land. Two changes of significance relate to the exclusion from the requirement for consent for leases of sensitive land, and a narrowing of the types of land that will be sensitive land by virtue of adjoining so-called sensitive land. These changes apply to applications for consent made on or after 5 July 2021 and are detailed below.

Certain leases of sensitive land are excluded from the requirement for consent on the basis that such an interest is temporary (leases of sensitive land otherwise require consent). Previously, a lease would be excluded from the consent requirement if the term of the lease, including rights of renewal or extension, was less than three years. That three-year period has been extended to ten years, except for leases of solely residential land, where the term remains at three years. However, investors looking to "roll-over" existing leases of sensitive land should be aware that the new ten-year period takes into account certain 'previous interests' in the same or substantially similar land (the previous three year period only related to the remaining term of a lease).

Consent can be required for transactions involving land that is located next to land with sensitive characteristics. Examples of such land include land adjoining foreshore, lakebeds, and certain types of conservation land. Following feedback that these rules are broader than necessary to protect sensitive land from the use of adjoining land, the types of land that require consent because it adjoins sensitive land have been narrowed.

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Coster v. UIP Companies, Inc.: Delaware Supreme Court Reminds That Entire Fairness Is Not a Ticket to Ride Where Critical Stockholder Rights Impaired

R. MONTGOMERY DONALDSON Partner and Chair of Business Litigation Practice Group at Montgomery Mccracken Walker & Rhoads, LLP

A recent *en banc* opinion by the Delaware Supreme Court furnishes an important reminder that, in some transactional paradigms, discharging the dual evidentiary burdens of entire fairness (*i.e.*, fair process and fair price) does not confer a "ticket to ride" upon a conflicted board animated principally by a desire to undermine the stockholder franchise. And again the adage, "inequitable action does not become permissible simply because it is legally possible" moves to the fore.

Trial Court Disposition

Coster v. UIP Companies, Inc., et al., Del. Supr., No. 49, 2020, Seitz, C.J. (June 28, 2021), involved an appeal from a post-trial decision of the Court of Chancery. In the action below, one of two equal stockholders (Plaintiff Marion Coster) in a multi-organizational real estate investment enterprise ("UIP") filed an action under 8 *Del. C.* § 226(a)(1) seeking the appointment of a custodian to break a deadlock over the election of directors. While parallel buy-out negotiations and special stockholder meetings to consider Coster's various proposals to reconstitute the five-member board (including filling two board seats left vacant for years) continued, the board (consisting of the other 50% stockholder's appointee (Defendant Steven Schwat) and two non-stockholder employees (Bonnell and Cox)) reduced the number of board seats to three by unanimous written consent.

The three-member board also retained an independent financial advisor to furnish a valuation of UIP. With the valuation in hand, Schwat offered to sell Bonnell one-third of IUP's authorized but unissued stock at one-third the valuation price. Bonnell accepted and the board authorized the transaction by unanimous written consent. The sale, of course, diluted Coster and broke the shareholder deadlock over board constituency, mooting the pending 226(a)(1) action.

In response, Coster filed a second action asserting direct and derivative fiduciary duty claims. In particular, the second action sought to cancel the Bonnell stock sale and impose a constructive trust, and alleged that the dilutive stock sale had interfered with her voting rights and impeded her statutory right to seek the appointment of a custodian. This action was consolidated with the first, and the two proceeded to trial.

At trial, the court found that the stock sale was significantly motivated by a desire to block Coster's efforts respecting the election of directors and to moot her initial custodian action. The court likewise found that Schwat and Burnell were "interested" in the transaction, and thus the sale was effected by a conflicted board. Under established Delaware precedent, and given the absence of prophylactic process enhancements, the Defendants bore the burden of proving the entire fairness of the sale.

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Escrow and Reps & Warranties Insurance: Comparing Risk Allocation Mechanisms

J.P. MORGAN ESCROW SERVICES

The Risk Allocation Landscape

Historically, escrows have served as a classic deal protection mechanism in mergers and acquisitions (M&A) transactions. Recently, however, representations and warranties (R&W) insurance has emerged as an escrow alternative, offering seller-friendly terms and competitive premiums. Is there room for two products on the market? Is one better than the other? Bottom line, it all depends. In this article, we will explore some areas to consider when evaluating the optimal deal protection mechanism for your transaction.

ESCROWS: A Primer

Holdback escrows are generally used by Buyers to segregate a portion of the purchase price for various reasons, with the most common reasons being to:

- Provide a means for the Buyer to claim back a portion of the purchase price for breaches of representations and warranties from the Seller.
- Secure post-close purchase price adjustments until finalization of such amounts.

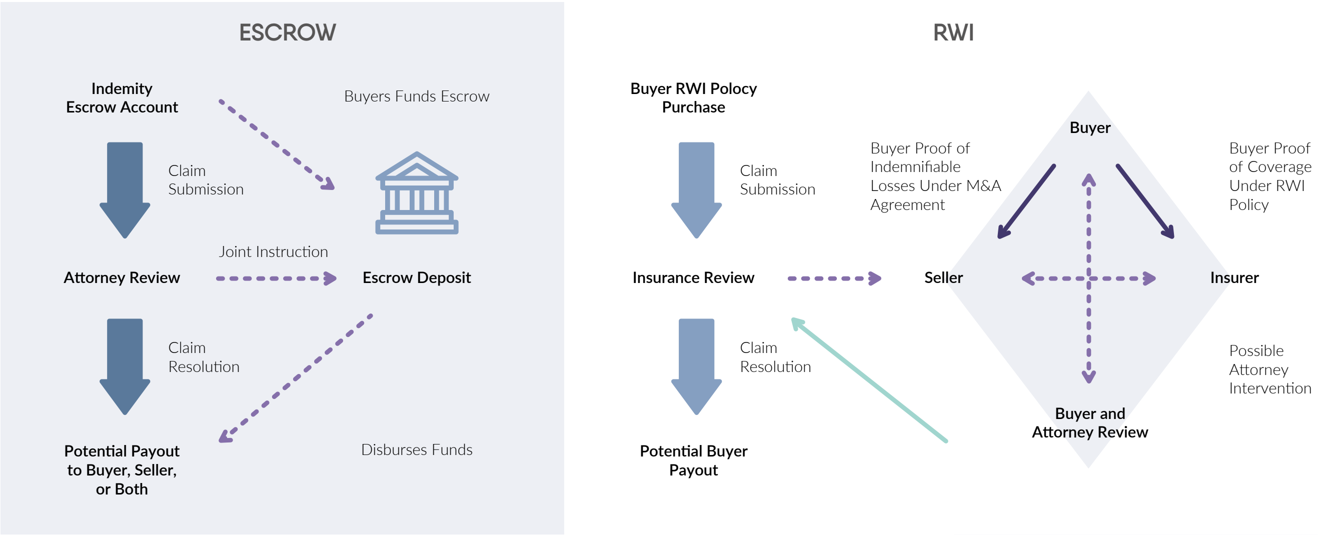
Escrows can also be used for other M&A purposes:

- Good Faith Deposit: can demonstrate serious interest and/or comply with regulations (e.g., if government approval is needed); can also be used to hold potential termination fees.
- Closing Agent / Paying Agent: can centralize funding sources and enable funds to be on hand prior to close; can also facilitate exchange of company stock from Seller for payment of cash from Buyer.

R&W Insurance

While there are Seller and Buyer R&W policies, the latter is more common. Under a buy-side R&W policy, the Buyer in an M&A transaction recovers directly from an insurer for losses arising from certain breaches of the Seller's representations and warranties in the purchase agreement. By shifting the risk of such losses from the Seller to an insurer, a policy can limit the Seller's liability for certain representation breaches. The Buyer retains the risk of receiving payment from the insurer for any claims submitted.

Claim Event Comparison*



*Escrow agent not involved in the claim resolution

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The Art of Negotiating Working Capital in M&A Transactions

KENNETH H. MARKS Partner at High Rock Partners
JOHN A. HOWARD Partner at High Rock Partners

The selling process for a privately held company has many nuances, including the analysis of the total value of a transaction. For the experienced seller and their team, terms and conditions of the deal can be just as critical as the purchase price. One of those key terms is called the working capital target.

In accounting terms, working capital is equal to current assets minus current liabilities. In middle market M&A transactions (those beyond the small, Main Street asset deals), the selling company is typically expected to deliver a normalized level of working capital (which is defined slightly differently from the accounting definition, as we discuss later) to support the operations of the business post-closing. Calculating the working capital and figuring the basis for the analysis is somewhat of an art and often changes depending upon the norms within a specific industry. Historical trends can be a sound baseline for establishing the target amount. The argument that a buyer can operate the seller's company with less working capital than the seller is hard to defend without evidence. In growth financings, tightening the working capital cycle can provide a cheap and quickly accessed source of funding. In both M&A and growth financing, optimizing the working capital cycle and assuring efficient use of this capital will increase the value of the business by decreasing or minimizing the capital required to fund the operating cycle.

Modifying the working capital cycle within a company can touch many aspects of the business. The approach and ability to make these changes depends, in some part, on the relative strategic and competitive strength of the company and the desirability of its products or services. This is where we connect the dots from the discussions above. Typical areas for tightening the working capital cycle include accelerating customer payment or requiring pre-payment, extending supplier credit terms to market norms, increasing inventory turns, and reducing the overall operating or process cycle times. When a seller in an M&A transaction tightens the working capital cycle a number of quarters prior to a sale, he or she demonstrates that the new norm is sustainable. From a buyer's perspective, this tightened working capital cycle can reduce the risk associated with estimations when negotiating the working capital target.

So, there are two major elements to the negotiations — agreeing on the working capital target amount, and agreeing on the formula for calculating the actual working capital for the target, at closing and in the true-up. The party that leads this discussion typically has the upper hand in the negotiation.

Below are a few key concepts to think about and consider in formulating a negotiating position -

1. First, analyze the actual historical monthly working capital; start with the trailing twelve months from the most recent month-end closing. Because most transactions are "Cash Free Debt Free", cash and funded debt (interest bearing debt) are excluded from the working capital calculation.

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Legal Considerations in M&A Transactions in Mexico in light of the National Anticorruption System

LUIS GERARDO RAMÍREZ VILLELA Partner at Müggenburg, Gorches y Peñalosa, S.C.

In all mergers and acquisitions transactions, the anti-corruption issue is very important due to international practices. This is particularly true for Mexico where most of the transactions involve our neighboring country, the United States of America, which has a strict regulation called "Foreign Corrupt Practices Act" ("FCPA").

The FCPA was enacted with the purpose of making it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business.

In Mexico, prior to the creation of the National Anticorruption System (*Sistema Nacional Anticorrupción*) in 2015, it was common to use the FCPA as a reference for all M&A transactions and include specific provisions in the relevant agreement as deemed appropriate to protect from any potential liability.

Since the creation of the National Anticorruption System and applicable laws and regulations, it is now common to include provisions in M&A agreements referring to both statutes to provide maximum protection.

For such purposes, the General Law of Administrative Responsibilities (*Ley General de Responsabilidades Administrativas*) (the "LGRA") addresses actions that are serious administrative failures by private parties, as indicated below:

a. ***Bribery.*** When the private parties promises, offers or delivers any undue benefit to one or more public servants, directly or through third parties, in exchange for those public servants perform or refrain from performing an act related to their functions or those of another public servant, or else they abuse their real or supposed influence, for the purpose of obtaining or maintaining, for themselves or for a third party, a benefit or advantage, regardless of the acceptance or receipt of the benefit or result obtained;

b. ***Unlawful participation in administrative procedures.*** When (A) the private party who performs acts or omissions to participate in them are federal, local or municipal, notwithstanding that by law or resolution of competent authority they are prevented or disabled for doing so, or (B) the private party intervenes in their own name but in the interest of another or other persons who are unable or unwilling to participate in federal, local or municipal administrative procedures, with the purpose of or the latter to obtain, totally or partially, the benefits derived from such procedures;

c. ***Influence peddling.*** When the private party uses influence, economic or political power, real or fictitious, over any public servant, for the purpose of obtaining for itself or for a third party a benefit or advantage, or to cause harm to any person or public service, with independence of the acceptance of the server or of the public servants or of the obtained result;

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Close Any Deal, Any Time, Anywhere – Applying Innovation to 6 Stages of the Deal Process

LITERA

Over the last few decades, lawyers have embraced technology for all kinds of tasks across the different disciplines of law. Firms are increasingly using artificial intelligence to identify case law precedents, judicial analytics to better predict how judges might rule on issues, automation and advanced document technology to assemble and check first drafts, and technology-assisted review to help manage e-discovery. The commercial demands on the practice of law and changing expectations of clients have put innovation firmly on the agenda for lawyers.

Yet one area has consistently lagged, leaving considerable scope for innovation. When it comes to running transactions, legal teams still cling to slow, expensive, and administratively heavy manual processes.

Clients expect better. According to *Bloomberg Law*, many clients are no longer willing to pay full rates when lawyers spend an average of 48 percent of their time on administrative tasks—the very tasks that technology has revolutionized in other areas of the law.

Traditional methods of transaction management are no longer adequate

The administratively intensive nature of transactions makes them challenging and tedious for legal teams, opaque and frustrating for clients, and time-consuming for all parties. Legal technology offers a solution.

Litera Transact transforms the traditionally manual, labor-intensive, error-prone process of managing legal transactions into a secure, collaborative digital workspace that can be used in any deal, at any time, from anywhere. The result? Legal teams—whether working in the office or remotely—can manage their transactions more securely, efficiently, and collaboratively, while boosting profits and amazing their clients. And you don't have to take our word for it: 90 percent of respondents to a user survey reported that "Transact enables them to spend more time on billable activities."

The Litera Transact platform is based around standard transaction workflows, meaning that the stages of the deal—from kickoff to closing—are unchanged. But in place of manual intervention and tedium, Litera Transact automates key processes to create a more efficient, streamlined, and frankly enjoyable experience.

Here is how Litera Transact revolutionizes each stage of a deal lifecycle.

1. Identifying Participants

Before – The Traditional Way

The first stage of a deal requires identifying all of the participants—however central or tangential they may be—and ensuring that they receive the necessary communications and access to documents. Traditionally, legal teams manage the parties to a transaction through internal email distribution lists and paper-based working party lists.

CONTINUE READING ON PAGE 42

The Rise of SPACs in the Spanish Market

ALBERT GARROFÉ Partner at Cuatrecasas
IDOYA FERNÁNDEZ Of Counsel at Cuatrecasas
LOLA TEJERO Senior Associate at Cuatrecasas

Special purpose acquisition companies (commonly known as SPACs) have become a big trend in recent months in the global M&A market. In this article, we briefly describe SPACs and then focus on the impact this phenomenon can have on the Spanish market.

SPACs are vehicle companies set up by one or more sponsors to (i) raise capital through an offering in the stock markets and (ii) use those funds to "integrate" with one or several operating companies, within a maximum period of about two years (this combination transaction is known as DeSPAC or initial business combination - IBC). Target companies are not previously identified; therefore, SPACs are also referred to as blank check companies or search funds. The sponsors' previous experience and prestige in the market play a crucial role, as it determines the ability to raise funds through the SPAC.

As usual, this vehicle has advantages and disadvantages. The most important advantages are that:

I. it gives the target shareholders access to the stock markets (and the benefits generally associated with listing) along with the sponsors' knowledge and experience; it allows them to make bigger investments; and it gives them greater certainty in the valuation of the target company than in a traditional IPO;

II. IPO Investors (the investors that go to the SPAC IPO) have a low level of risk as all the funds are deposited in a trust; they have a repurchase right if they do not agree with the investment and do not approve the DeSPAC; and they have the know-how of the sponsors which, in addition, do not receive any management fees until the DeSPAC; and

III. for the sponsors, the most important advantage is the high percentage of participation they obtain after the IPO and, sometimes, after the DeSPAC.

The most significant disadvantages of SPACs are:

I. their especially short terms;

II. The crucial role that sponsors play can turn against the SPAC if the right one is not chosen;

III. the dilution effect that sponsors have together with potential conflict of interests they may face;

IV. with SPACs, the supervisor' usual lighter role results in less protection for IPO investors;

V. the obligations and additional costs of listing on the stock market; and

VI. the uncertainty surrounding the capital available due to the SPAC shareholders' repurchase right.

SPACs are not a new vehicle, but they have experienced remarkable growth since 2020, becoming a great trend in the M&A market at a global level. Although, for several reasons, the number of new SPACs has slowed down somewhat in recent months, large amounts of money have been raised that must be invested in the short term, which means a potential increase in activity in the M&A market not only in the United Stated but also in Europe and, therefore, also in Spain.

The rise of SPACs can impact the Spanish market in different ways:

CONTINUE READING ON PAGE **45**

A Brief Look into the Future of Section 5 of the FTC Act

ARAM SETHIAN COO, Director of Research at Vazirani Asset Management LLC

As the antitrust laws face a generational test of their potency in modern markets, the Federal Trade Commission ("FTC") seems poised to form a new front in antitrust enforcement through its standalone authority under Section 5 of the Federal Trade Commission Act ("FTC Act"). Section 5 of the FTC Act prohibits "unfair methods of competition in or affecting commerce" ("UMC").[1] While Section 5 has historically served as the statutory basis for the FTC to enforce the Sherman and Clayton Acts, there is a growing urge to promote a more vigorous competition agenda by untethering Section 5 and promoting a new UMC jurisprudence.

Section 5 has long been understood to have enforcement powers beyond the four corners of the Sherman and Clayton Acts.[2] However, while the second prong of the statute has been foundational in the development of the FTC's consumer protection authority, the unfair methods of competition doctrine "...wound up playing a rather insignificant role in antitrust enforcement or in the shaping of competition policy more broadly."[3] In 2015, Chairwoman Ramirez further limited its use by issuing the 2015 Statement, which essentially committed the Commission, under guidance of the consumer welfare standard, to avoid any challenge on unfair competition grounds if there was an enforcement basis under the other antitrust laws.[4] Joshua Wright praised the 2015 Statement as going a long way "...to tether the FTC's standalone authority to antitrust precedent, sound economics, and an evidence-based approach to antitrust."[5]

In a surprising twist, one of current Chairwoman Lina Khan's inaugural moves, tabled at the first open commission meeting since her nomination, was a 3-2 vote to rescind this 2015 Statement. In her supporting statement, she argued that the FTC's tying of Section 5 to this framework "offends the plain text, structure, and legislative history of Section 5...." Rather, she finds that Section 5 "...empowers the Commission to prohibit conduct that does not violate other antitrust laws...."[6] For this, the FTC has the advantageous power to adjudicate cases, issue rules, and conduct detailed marketplace studies.

CONTINUE READING ON PAGE 46

[1] 15 U.S.C. 45(a)(1)

[2] Joshua D. Wright & Angela M. Diveley, Unfair Methods of Competition After the 2015 Commission Statement 1 (2015) https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct15_wrigh t_10_19f.authcheckdam.pdf

[3] Joshua D. Wright, "All of That in One Page: The Application of the 2015 FTC Unfair Methods of Competition Policy Statement to Net Neutrality Disputes." Colo. Tech. L.J. citing William E. Kovacic & Marc Winerman, Competition Policy and the Application of Section 5 of the Federal Trade Commission Act, 76 ANTITRUST L.J. 929, note 30, at 931-35 (2010).

[4] 2015 Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act. https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf

[5] Wright. All of That in One Page.

[6] Statement of Chair Lina M. Khan, Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act. July 1, 2021.

Do Not Panic! It is Just a Closing

IGNACIO LACASA Managing Partner at Across Legal
SARAH J. SCHWARTZ Partner at Across Legal

Introduction

M&A and Venture Capital lawyers love the adrenaline associated with deal making. After all business issues have been finally agreed, all eyes look at the legal team to immediately "finish up the legal stuff" so that the clients can uncork the champagne. Unfortunately, there is no "finish up the legal stuff" button on our computer, so the pressure to close swiftly and without any crisis becomes quite intense. Although we all understand how to run a smooth closing subject to a state law, if a client hires you as a trusted advisor for a continental European investment, then you should highlight the differences in the closing process. Otherwise, if their expectations were not met, perhaps the client blames you instead of local counsel.

This paper reviews complexities related to M&A closing processes, focusing on the differences between US style closings and continental European style closings, so that attorneys can properly set clients' expectations for the final day of an international deal. This paper compares a typical US style closing against a Spanish style closing and highlights the primary characteristics and pitfalls. As a disclaimer, we advise on Spanish law, yet we have witnessed many of the practices below in other continental European deals. The critical questions that this paper attempts to answer are (i) how can I prepare my American client for a continental European closing and (ii) what are the common pitfalls that make EU closings more complex (and thus upset American clients). The authors' goal is to explain the primary pitfalls and give attorneys the tools necessary to prepare and advise clients so that the closing process is as smooth as possible.

The Public Notary's Role

Unlike the US system, continental European legal systems, such as Spain, do not have a premise that parties act in good faith. As a result, Public Notaries safeguard the legal system and ensure that the parties act in good faith. Spanish closings are formalistic and are typically performed in-person before a public authority, together with all other parties and their advisors. The parties must also draft additional documentation, such as public deeds. The public notary will then, in front of all participants, confirm all signatories' identities and authority to act, and then proceed to read all documents to be signed that day.

This process will immediately shock your American clients because (i) there are additional documents to negotiate (such as public deeds, powers of attorneys, or certifications), (ii) the Public Notary will confirm if the documents meet legal standards, and if he has any comments, the Public Notary can modify the documents, including underlying conditions to closing, (iii) the client is exposed to *and participates in* the full closing process, and (iv) the additional documents and the notary appointment increase transaction costs.

You need to prepare your American client for this event, the length of time, and any additional costs. In our experience, this advice helps to set expectations, making the client look competent and in control.

CONTINUE READING ON PAGE **48**

Delaware Court of Chancery Examines Contractual Limitations on Post-Closing Fraud Claims

NICHOLAS D. MOZAL Counsel at Potter Anderson & Corroon LLP
MATTHEW D. VENUTI Associate at Potter Anderson & Corroon LLP

Delaware courts frequently grapple with the contractual provisions in purchase agreements that impact a purchaser's right to claim fraud. Recently the Court of Chancery, in *Online HealthNow, Inc. v. CIP OCL Investments, LLC*, 2021 WL 3557857 (Del. Ch. Aug. 12, 2021), answered whether "in the context of an acquisition agreement, Delaware courts should enforce broad contractual limitations on the right of contracting parties to bring post-closing claims that are so potent they effectively eviscerate all claims, including those that allege the contract itself is an instrument of fraud." Relying heavily on what it described as the "seminal" decision of *ABRY Partners V, L.P. v. F & W Acquisition LLC, 891 A.2d 1032 (Del. Ch. 2006)*, to analyze survival and non-recourse provisions, Vice Chancellor Slights concluded that "a party cannot invoke provisions of a contract it knew to be an instrument of fraud as a means to avoid a claim grounded in that very same contractual fraud." The decision again illustrates that Delaware's public policy against fraud will often trump specific contractual provisions that would defeat fraud claims at the pleadings stage.

Transaction Background

A private equity fund's portfolio holding company (the "Seller") agreed to sell a continuing education company in a stock purchase agreement (the "SPA"). The key provisions of the SPA were:

- Seller representations that its financial statements were duly prepared and "correct and complete in all material respects" (Section 3.4), it had no undisclosed liabilities (Section 3.5), and its tax returns had been properly filed and were "complete and correct in all material respects" (Section 3.11(a)).
- An anti-reliance clause (Section 5.7) stating the Seller's representations in the SPA were accurate, and that Buyer (i) relied on those representations, (ii) had access to "all materials and information" it requested, and (iii) did not rely on any other representations from the Seller.
- A survival clause (Section 10.1), stating the representations and warranties terminated at closing, and that no party would be liable for breaches of the representations and warranties after closing.
- A savings clause (Section 11.3), providing that if a provision of the SPA violated public policy, the rest of the agreement would not be affected.
- A non-recourse provision (Section 11.16), limiting enforcement to only the parties to the SPA or their successors or assigns.

After closing, the Buyer discovered the acquired company did not properly charge state sales and use taxes. The result was a failure to properly collect taxes from online purchases. The Buyer claimed it had uncovered that the company was aware the software systems were not working properly years before the acquisition, had retained an outside accounting firm to investigate the issue just months before signing the SPA, and only days before signing the SPA learned of the magnitude of the error. In fact, one of the other bidders had received diligence on the issue and communicated that the tax liability was in the range of $8-9 million.

CONTINUE READING ON PAGE **49**

TASK FORCE AND SUBCOMMITTEE REPORTS

Academic Subcommittee

The Academic Subcommittee will be combining its normal meeting with a CLE program entitled "What's Academics Got to Do With It? What M&A Practitioners Can Learn from Law Professor Research." While there is a lot of truth to the general view that the Academy has very little to tell practicing lawyers, and too many law review articles authored by law professors are in fact intended for other law professors, not the practicing bar, this is not true of all research emanating from the Academy. The Academic Subcommittee seeks out and has presented at past meetings articles that being cited by the courts and are actually useful to the transactional bar. On September 24, 2021, at 10:00 am CT, the Academic Subcommittee will be presenting the work of two professors, John Coyle and Robert Miller, who have written must read articles about important provisions in M&A agreements, the MAE clause and the Governing Law and Forum Selection provisions. If you have not seriously re-read your standard documentation regarding these topics in the light of these academics' research, you need to do so. Come join us.

GLENN WEST Chair

Acquisitions of Public Companies Subcommittee

The Acquisition of Public Companies Subcommittee will meet on Wednesday, September 22 at 2:30 eastern. We have a great line-up of presenters. Renata Hesse, former Acting Assistant Attorney General of the Antitrust Division at the DOJ and current co-head of Sullivan & Cromwell LLP's Antitrust Group will provide an antitrust update, including on the implications for M&A Activity of President Biden's Competition Executive Order. We will also hear from Melissa DiVincenzo from Morris, Nichols, Arsht & Tunnell LLP on the latest developments regarding Section 203 of the Delaware General Corporation Law, Delaware's business combination statue, and key issues to keep in mind when structuring a deal where Section 203 applies. We will also hear from John Mark Zeberkiewicz, from Richards, Layton & Finger, P.A., and Michael Pittenger from Potter Anderson & Corroon LLP, who will discuss the Delaware law developments on controlling stockholders and what deal lawyers should be thinking when structuring deals with a controlling stockholder. We look forward to seeing many of you!

RITA-ANNE O'NEILL Co-Chair
PATRICIA VELLA Co-Chair

International M&A Subcommittee

The International M&A Subcommittee "met" on Friday, April 23, 2021 from 1:45 pm – 3:00 pm US Central Time. Following an update by Jeffrey LaBine, Miller Canfield (Ann Arbor), Subcommittee Chair, and Diego Gómez-Cornejo, McDermott (Dallas), Editor in Chief, on the status of the new International M&A Due Diligence Publication, Caroline Berube, Managing Partner, HJM Law & Co, Guangdong, China, provided an update on recent anti-monopoly, corruption, and data protection laws in China together with a substantial amount of practical guidance and suggestions for addressing the same for M&A practitioners. Next, Jen Muller, Managing Director, Houlihan Lokey (San Francisco & New York) presented an update on recent M&A activity with a focus on international and multinational transactions and the variances from prior periods. The meeting concluded with next installment of our continuing country focused practice pointers primer with Stephen Matthews, Partner, Baker Botts, Dubai, United Arab Emirates and Kirk Durrant, Managing Partner, DWF, Doha, Qatar offering insights into some of the unique aspects of doing a deal in Saudi Arabia and Qatar and practice pointers to address the same.

JEFFREY LABINE Chair
M. JORGE YÁÑEZ V. Vice-Chair

Legal Project Management Subcommittee

We are pleased to report the recent publication of the Third Edition of our guidebook on Using Legal Project Management in Merger & Acquisition and Joint Venture Transactions. The new edition features eight new timely M&A tools, including a Representation and Warranty Insurance Checklist and a Cataclysmic Event Due Diligence Questionnaire. The Third Edition also breaks new ground with four LPM tools for handling joint venture transactions.

Sincere thanks to the task force members around the globe who spearheaded and worked on the development of these new tool. Their contributions were invaluable in making the Third Edition a reality. The ABA will be offering a discount off the list price of the Guidebook in conjunction with the upcoming Annual Meeting - details to follow.

In lieu of our regular task force meeting in connection with the upcoming Virtual Annual Meeting of the Business Section, we will be holding a CLE Program that will feature a panel of Task Force members who will be discussing several of the new tools. Entitled "Helping Deal Lawyers Expand the Transactional Toolbox to Deliver Even More Value to Their Clients", the program will be held on Thursday, September 23 at 1:45 pm Central. We hope you will be able to join us for this informative session.

BYRON KALOGEROU Co-Chair
DENNIS WHITE Co-Chair

Market Trends Subcommittee

We hope you can join us for the Market Trends "virtual" meeting at this year's Business Law Section Annual Meeting. As always, we have a packed agenda with a wide range of topics.

Jessica Pearlman and Tatiana Paterno will report on the progress of the 2021 US Private Deal Points Study and provide some teasers on what we can expect based on the results gathered and reviewed so far.

Rita-Anne O'Neil will provide an update on the US Public Study.

Andre Perry and Gesta Abols will provide an update on their plans for the next Canadian Private Deal Points Study and will no doubt be asking for volunteers.

Ian Nelson of Hotshots and Craig Menden will discuss the current series of videos in production focusing on public deal points.

We are very excited to have George Casey of Shearman & Sterling lead a presentation on ESG Considerations in M&A based on a paper he coauthored in The M&A Lawyer last year.

Finally we will have discussion on the recent opinion from the Delaware Court of Chancery, *Yatra Online, Inc. v Ebix, Inc. et al* with respect to which breaches parties agree can be pursued post termination of a merger agreement.

The Subcommittee will meet on Thursday, September 23 from 3:15 p.m. to 4:45 p.m. Central Time. Location and dial-in / Zoom information are located later in this edition of Deal Points. 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. We can be reached at cmenden@willkie.com and kkyte@stikeman.com.

We look forward to seeing you.

CRAIG MENDEN Chair
KEVIN KYTE Vice-Chair

Short Form Agreements Joint Task Force (Middle Market & Small Business Committee and M&A Committee Joint Task Force)

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 April at the Business Law Section Virtual Spring Meeting, members of the Joint Task Force had a productive session reviewing the final changes to the current draft of the model short form stock purchase agreement. As of now, the model short form stock purchase agreement is essentially final and work has commenced on drafting the commentary. Next up for the Joint Task Force is the model short form asset purchase agreement.

VOLUNTEER OPPORTUNITY!!! If you are looking for a way to get more involved with the ABA here is your opportunity. The Joint Task Force is looking for volunteers who would like to help prepare the model short form asset purchase agreement. This is your chance to get in at the "ground level" of an ABA project and have a significant impact. Please plan on attending the Joint Task Force meeting to hear more about this opportunity.

The Joint Task Force will be meeting during the Business Law Virtual Annual Meeting on Friday, September 24th from 1:30 to 3:00 (Central Time). See the schedule on page 24 for details. We look forward to seeing you virtually.

ERIC GRABEN Co-Chair
JASON BALOG Co-Chair

Technology in M&A Subcommittee

The Technology in M&A Subcommittee met on Tuesday, April 20, 2021 at the Business Law Section's Virtual Spring Meeting. The Zoom recording of the meeting is in the Committee's Connect Library and the meeting primarily comprised:

- A presentation by Joshua Fireman of leading technology consultants Fireman & Co on the current role that technology has in M&A transactions.
- A summary by Will Norton of SimplyAgree of the new technologies in the latest version of the Subcommittee's Technology in M&A Directory, which was published ahead of the meeting and of which he is the lead editor.
- Tom Romer of Greenberg Traurig summarized a recent Delaware case relating to the failure of a contract due to the way in which it was signed.
- Matt Kittay of Fox Rothschild gave an overview of the Subcommittee's guidance on ethical issues related to technology used in M&A, which was in final form (subject to peer review) and of which he is the lead editor.
- Tom Romer of Greenberg Traurig gave an overview of the Subcommittee's Digital Documentation Protocol (f/k/a, the eSigning/Closing Protocol), which was also in final form (subject to peer review) and of which he is the lead editor.

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.

Please join us by Zoom at our forthcoming meeting at the Section's Virtual Annual Meeting, which will take place from 1:30 pm to 3:00 pm CDT on Friday, September 24, 2021.

The agenda for that meeting will include the following:

- A presentation by David Wang, the Chief Innovation Officer at Wilson Sonsini Goodrich & Rosati, on how to think about the relationship between Contract Lifecycle Management software and the M&A diligence process and the future developments in this rapidly evolving technology. For this presentation we will be joined by members of the ABA Corporate Counsel Committee, who are co-sponsoring the presentation given the increasing importance of these CLM platforms to their members' businesses.
- Matt Kittay of Fox Rothschild will present the final version of the Subcommittee's guidance on Ethical Implications of the Use of Legal Technologies by Innovative M&A Lawyers.
- Tom Romer of Greenberg Traurig will present the final version of the Subcommittee's Digital Documentation Protocol.
- Emily Colbert and Tasha Hailey Hutchins of Thomson Reuters will demonstrate the Practical Law Dynamic Tool Set, which was laun-ched recently and which uses AI and dynamic graphical navigation to open up comparisons and analytics of data across a number of different M&A areas.

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 through the "M&A Subcommittees" page on the main ABA platform at https://www.americanbar.org/groups/business_law/committees/ma/subcommittees).

Our subcommittee is also responsible for maintaining the M&A Committee's pages on the ABA website. For details of where you can find everything 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 join us at our forthcoming meeting and if you can't do that please email my Vice-Chair Tom Romer (romert@gtlaw.com), our M&A Directory Project Leader Will Norton (will@simplyagree.com) or me (daniel.rosenberg@crsblaw.com).

DANIEL ROSENBERG Chair
THOMAS ROMER Vice-Chair

Women in Mergers and Acquisitions Subcommittee

At the last virtual Women in M&A Subcommittee meeting on April 21, 2021 from 1:45 to 3:30pm ET, we featured a key note presentation from Rachael Bosch, founder of Fringe Professional Development. Ms. Bosch led a discussion on exceling at communicating effectively from anywhere and addressed the growing need to be able to communicate effectively in a virtual environment. This program focused on building communication habits necessary to be effective in the virtual world, with an emphasis on pitches and negotiations in the M&A context. Ms. Bosch presented key strategies to help participants assess and enhance their virtual set-up and the tools needed to prepare for and participate impactfully in virtual pitches and negotiations. Our meeting also included an update on our 2021 initiatives and takeaways from our panel from the Laguna virtual meeting.

The upcoming virtual Women in M&A Subcommittee meeting is scheduled for September 22, 2021 from 1:00 to 2:30pm PT. The meeting will feature a Q&A session with Afra Afsharipour, Senior Associate Dean for Academic Affairs and Professor of Law at UC Davis School of Law, regarding her forthcoming Article on Women and M&A in the UC Irvine Law Review. The Article examines the lead actors in M&A revealing that women's leadership opportunities continue to be vastly unequal. Using data from 700 transactions, the Article reveals, among other things, that over a 7-year period, women make up on average 10.5% of lead legal advisors for buyers in M&A. Through this Q&A session, we hope to learn more from Professor Afsharipour's research in connection with this Article, and to have an in depth discussion around inequity in M&A and get insights on how to improve this disparity from this research.

RITA-ANNE O'NEILL Co-Chair
JOANNA LIN Co-Chair
CHARLOTTE MAY Vice-Chair

COMMITTEE MEETING MATERIALS

Please note that times listed are Central Time.

Business Law Virtual Section Annual Meeting

September 22-24, 2021

MEETINGS AND PROGRAMS SCHEDULE

Wednesday, September 22, 2021

M&A Jurisprudence Subcommittee Meeting
10:00AM – 11:00AM

Acquisitions of Public Companies Subcommittee Meeting
1:30PM – 3:00PM

Women in Mergers and Acquisitions Subcommittee Meeting
3:00PM – 4:30PM

Thursday, September 23, 2021

International M&A Subcommittee Meeting
10:00AM – 12:00PM

Private Equity M&A Joint Subcommittee Meeting
10:00AM – 12:00PM

Program: Helping Deal Lawyers Expand The Transactional Toolbox to Deliver Even More Value to Their Clients
1:45PM – 3:15PM

Market Trends Subcommittee Meeting
3:15PM – 4:45PM

Friday, September 24, 2021

Program: What's Academics Got To Do With It? What M&A Practitioners Can Learn From Law Professor Research
10:00AM – 11:30AM

Short Form Model Acquisitions Agreement Joint Task Force Meeting
1:30PM – 3:00PM

Technology in M&A Subcommittee Meeting
1:30PM – 3:00PM

Mergers and Acquisitions Committee Meeting
3:00PM – 4:30PM

Mergers and Acquisitions Committee Reception
4:30PM – 5:30PM

Note that given the virtual format of this year's Annual Meeting, access to all programming will only be available to registered attendees participating through the hosted site. Programming cannot be accessed through conference lines. All times are listed in Central Time Zone.

Committee Structure and Leadership

ACADEMIC SUBCOMMITTEE
Glenn West Chair

ACQUISITIONS OF PUBLIC COMPANIES SUBCOMMITTEE
Rita-Anne O'Neill Co-Chair
Patricia Vella Co-Chair

DELAWARE JUDICIARY LIAISON
Lisa Stark
Patricia Vella

GROWTH EQUITY TASK FORCE
Mike Kendall Chair

INTERNATIONAL M&A SUBCOMMITTEE
Jeffrey Labine Chair
M. Jorge Yáñez V. Vice-Chair

LEGAL PROJECT MANAGEMENT SUBCOMMITTEE
Byron Kalogerou Co-Chair
Dennis White Co-Chair

M&A JURISPRUDENCE SUBCOMMITTEE
Nathaniel Cartmell Chair
Lisa Hedrick Chair - Annual Survey Task Force
Frederic Smith Chair - Judicial Interpretations Working Group

M&A TAX TASK FORCE
Xander Lee Chair

MARKET TRENDS SUBCOMMITTEE
Craig Menden Chair
Kevin Kyte Vice-Chair

MEMBERSHIP SUBCOMMITTEE
Tracy Washburn Bradley Chair
Gina Conheady Vice-Chair

MODEL ASSET PURCHASE AGREEMENT SUBCOMMITTEE
John Clifford Co-Chair
Edward Deibert Co-Chair

PRIVATE COMPANY MODEL MERGER AGREEMENT SUBCOMMITTEE
Melissa DiVincenzo Co-Chair
Amy Simmerman Co-Chair
Tatjana Paterno Vice-Chair

PRIVATE EQUITY M&A (JOINT SUBCOMMITTEE OF THE VENTURE CAPITAL AND PRIVATE EQUITY COMMITTEE)
David Albin Chair
Mireille Fontaine Vice-Chair
Samantha Horn Vice-Chair

PROGRAMS AND PUBLICATIONS SUBCOMMITTEE
Ashley Hess Chair
Chauncey Lane Deal Points
Caitlin Rose MAC-Bytes

SHORT FORM AGREEMENTS JOINT TASK FORCE (MIDDLE MARKET & SMALL BUSINESS COMMITTEE AND M&A COMMITTEE JOINT TASK FORCE)
Jason Balog Co-Chair
Eric Graben Co-Chair**
**Appointed by MM&SB Committee

TECHNOLOGY IN M&A SUBCOMMITTEE
Daniel Rosenberg Chair
Thomas Romer Vice-Chair

TWO-STEP AUCTION SUBCOMMITTEE
Eric Klinger Wilensky Co-Chair
Michael O'Bryan Co-Chair

WOMEN IN M&A SUBCOMMITTEE
Rita-Anne O'Neill Co-Chair
Joanna Lin Vice-Chair
Charlotte May Vice-Chair

Organizational Chart

Mergers & Acquisitions Committee

Wilson Chu - Chair

- **Mike O'Byan** *Vice Chair*
  - *M&A Tax*
  - *International*
  - *M&A Jurisprudence (includes M&A Litigation)*
  - *Public Company*
  - *Private Company Model Merger Agreement*
  - *Two Step Auction*
- **Jessica Pearlman** *Vice Chair*
  - *Academic*
  - *Growth Equity*
  - *Model Asset Purchase Agreement*
  - *Membership*
  - *Market Trends*
  - *Women in M&A*
- **George Taylor** *Vice Chair*
  - *Committee Coordinator*
  - *Legal Project Management*
  - *Programs and Publications*
  - *Private Equity M&A*
  - *Short Form Agreements*
  - *Technology*
- **Byron Egan** *Senior Vice Chair and Chair, Executive Council of Past Committee Chairs*

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LITERA


YOU NEED AN ARBITRATOR
WHO UNDERSTANDS
MERGERS AND ACQUISITIONS.
WE HAVE THE EXPERTISE.
Our Mergers and Acquisitions and Joint Venture Panels are composed of accomplished arbitrators and mediators – attorneys, former federal and state judges and business leaders specializing in a diverse range of subjects. Each brings a lifetime of experience in areas such as warranties, financial guarantees, purchase price adjustments, working capital and intellectual property. When resolving your dispute requires expertise and understanding, trust the American Arbitration Association®.
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LITERA TRANSACT

Get deals done.

Manage transactions securely, efficiently, and collaboratively while boosting profits and amazing your clients.

Why Litera Transact?

In any given deal, there are countless paper documents, revisions, and signatures to review, negotiate, and track. Legal teams get inundated with administrative tasks, and unfortunately, the time spent searching for attachments, managing signatures, and creating closing books gets written-off.

> "I've never experienced this with the transactions that I do: the same day we closed a transaction with Litera Transact, we were able to send out original closing sets."
>
> **Marc Latman**
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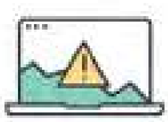

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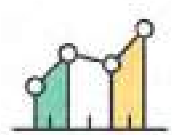

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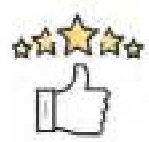

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Perhaps the spur for the appeal is the award of $9.5 million in attorney's fees. But The Williams Companies pill is a management wish list of tools to suppress the possibility of an activist challenge. In particular, it is designed to hunt down and kill off wolf packs, those aggregations of activist investors that purportedly respond to one another's call to create the appearance if not the fact of a high level of shareholder dissatisfaction.

In one sense, the extreme nature of the Williams poison pill would make it easy to predict ready affirmance of the Chancellor's opinion. But this is a moment when the shareholder-centric model of corporate governance is under scrutiny if not attack. The Business Roundtable has issued a statement that is widely interpreted to deprioritize the interests of shareholders in favor of stakeholders. Managerial and political elites have pushed for "new paradigms," "common sense principles," and "inclusive capitalism." Asset managers have issued statements supportive of a broad conception of the corporate "purpose."

The case against activism flies under two flags. The first, the traditional approach, is that activist pressures lead firms to think about the short term rather than the long term. Managers who are busily fighting off activists (or acting preemptively to avoid such a confrontation) are short-changing investments (R&D, for example) that will produce greater value in the long run in order to demonstrate superior short-term results that will keep the activists at bay. This is bad from the perspective of both long-term shareholders and society because of the sacrifice of long-term economic growth.[1]

The second, more recent attack on activism is that its focus on shareholder value heightens income and wealth inequality. Managers who are concentrating on delivering the highest returns for shareholders will hold down employee wages, which suppresses wage growth. Moreover, executives are partly, sometimes principally, paid through stock-based compensation, which means that increasing shareholder returns may in itself exacerbate income inequality. Additionally, since the distribution of public share ownership is skewed to the top 10 percent, even the top 1 percent, success at increasing stock values will exacerbate wealth inequality.[2]

These concerns have taken on national political valence. Before the 2020 election, an influential senator proposed a semi-federalization of corporate law.[3] President Biden has publicly called out the disparity between productivity growth and wage growth as the disconnect "between the success of our economy and the [workers] who produce that success."[4] It is thus not inconceivable that the Delaware Supreme Court would see advantage in preempting potential federal encroachment on state corporate law through a doctrinal move that might relieve some pressure. Delaware has a history of judicial turnaround[5] and legislative measures[6] that seem calibrated to address such hydraulics.[7]

Moreover, the Delaware courts have a history of slapping down actors who they see as misusing the Delaware "system." This is surely at least partial explanation for decisions, like *Corwin v. KKR Financial Holdings*[8] and *In re Trulia, Inc. Stockholder Litigation*,[9] that target plaintiffs lawyers and the several appraisal decisions that have drained the juice out of appraisal arbitrage pursued by hedge funds.[10] Given these factors, it would be a surprise but not a shock for the Delaware Supreme Court to reverse the Chancery Court decision in *The Williams Cos*. in whole or in part in the course of broadening the occasions for use of the poison pill and expanding the range of permitted features.

Nevertheless, this would amount to a major wrench to the Delaware corporate governance system. It would require a re-basing of the rationale for the poison pill, which operates through discrimination against particular common shareholders and whose core legitimacy was premised on the ultimate power of the shareholder franchise. Moreover, an empowered anti-activist pill would operate not just against the hedge fund activists, the villains de jour, but also against ESG activists, just now gaining influence, as reflected in the recent ExxonMobil contest. Indeed, judicial validation of the anti-activist pill could kill off ESG activism just as it gets a head of steam.[11]

The Delaware Supreme Court should resist these pressures as short-termist and instead look to principles that stabilize and vindicate Delaware's approach to corporate governance over the long term. This should lead the Court to reject the anti-activist pill as simply outside the core legitimating principles of Delaware law that reside in protection of the shareholder franchise. Unlike the original pill, which was designed to restore the board to its traditional structural role in vetting proposed mergers, the anti-activist pill is designed to protect the board against shareholder pressure expressed through director elections. The Court, which has on many occasions insisted on the importance of the shareholder franchise, including quite recently,[12] should put an end to this aberrant turn in corporate governance.

The Origins of the Pill

The "shareholder rights plan" that came to be known as the "poison pill" or simply "the pill" was forged in the fires of the takeover wars that erupted in the 1970s and early 1980s. In the struggle for control over large companies, bidders wielded the tender offer, which became a legitimate and common tactic after enactment of the 1968 Williams Act and the follow-on SEC regulations. Target management's defensive measures were limited and sometimes consisted of measures such as asset dispositions or acquisitions designed to make the target less attractive to the hostile bidder, but which also disrupted the target's prior business plan and may well have reduced target shareholder value.

The pill ingeniously combined two elements. First was the Delaware corporate finance statutes that established the board's power to issue "rights" to purchase shares[13] and then to prescribe the terms of "blank check" preferred stock.[14] Second was the just-inaugurated (in *Unocal v. Mesa Petroleum*[15] power of the board to adopt defensive measures that would discriminate against a shareholder who made an unwanted bid. But the pill persisted because it solved a certain structural problem while not undermining core principles of Delaware corporate governance.

The statutory set-up relating to mergers contemplated a two-step process: first, agreement by the board to a merger proposal and its terms; second, a subsequent shareholder vote on the merger agreement. It turned out that the board's prerogative depended upon a friction: the collective action costs of shareholder override given the dispersed ownership of a large public corporation. The key element of the hostile takeover was the control entrepreneur's ability to overcome this friction through a tender offer to obtain at least a majority of shares to be able to remove directors or to prevail at the next annual meeting. By imposing a severe economic penalty for crossing a particular sub-control threshold, the pill blocked the tender offer as a form of structural work-around. Another critical feature, however, was the retention by the board of the power to redeem the pill before a party crossed the ownership threshold. This element induced the would-be acquirer to negotiate with the board. Thus, the post-pill board had approval rights over merger terms prior to shareholder action, restoring the structural status quo.

The initial justification for the re-establishment of this status quo was the "threat" that particular bids presented to the shareholders, whose inability to coordinate required intervention of the board. The initial threat, pivotal in both *Unocal* and *Moran v. Household Int'l, Inc.*[16], was the "structural coercion" inherent in a front-loaded two-tier bid, in which the bid structure could induce tendering even by shareholders whose reservation price was above the bid price. On the assumption that your own vote was not pivotal, the rational response to such a bid was to tender, even if you believed the offer was too low, since if it turned out that the offer succeeded, you would at least receive a mix that included the higher front-end consideration rather than entirely the lower back-end.

With the assist of capital market developments, bidders turned to "any and all" cash offers which were designed to avoid the objection of *Unocal*. The pivotal case *is Paramount v. Time*,[17] decided in 1989, in which the Delaware Supreme Court decided that such a bid could nevertheless be subject to a preclusive defensive tactic. This paved the way for a target's invocation of a "just say no" defense in the refusal to redeem a pill when confronted with an all cash, all shares bid.[18] The case is commonly regarded[19] as having embraced a theory that "substantive coercion" - a bid whose apparent appeal can misdirect shareholder judgment - is the "threat" that justifies such measures. The notion of "substantive coercion" is introduced only in a footnote, however.[20] Rather, the opinion is framed in terms of protecting board prerogative:

> Plaintiffs' position represents a fundamental misconception of our standard of review under *Unocal* principally because it would involve the court in substituting its judgment as to what is a "better" deal for that of a corporation's board of directors.[21]

In short, the case stands for Delaware's "board-centric" approach when it comes to mergers and acquisitions. The board can authorize target defense tactics against a share purchase offer made to shareholders in which formally the company is a bystander because actions that would result in a merger ought to be vetted by the board in the first instance. The subsequent cases that establish the need for a "fiduciary out" in a merger agreement rest on the distinctive role of the target board in initiating and superintending a merger.[22] The subsequent cases that bar pill provisions that would limit the authority of a post-proxy contest directors focus on the "fundamental importance" of the board's responsibilities in "negotiating a possible sale of the corporation." [23]

In creating "board centrism" in the case of mergers, the Delaware courts did not establish a self-perpetuating board or "Platonic masters."[24] Just the opposite: Business disputes are to be channeled through the corporate governance machinery in which director elections are the means by which shareholders can exert control over the direction of the firm. Indeed, the shareholder franchise has been accepted as a cornerstone principle of the legitimacy of director authority. In the famous phrasing of Chancellor Allen in *Blasius*:

> The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests. It is critical to the theory that legitimates the exercise of power by some (directors and officers) over vast aggregations of property that they do not own.[25]

In this respect, shareholder activism reflects the triumph of Delaware's board-centric governance. Like a hostile bidder, an activist takes its proposal initially to the board. But if rejected, the activist's next move is different: not a tender offer but a proxy contest; not generally even a contest for a majority of board seats, but a short-slate contest for a serious voice in the boardroom and perhaps an alternative strategic plan. Because an activist starts with only a small percentage of the company's stock and no intention to obtain a control block, the activist ultimately must persuade the large institutional owners that are the majority owners of most large public corporations. Such persuasion requires communication with other shareholders and can well lead to communication among shareholders who are trying to assess the arguments and rebuttals of the activists and the insurgents. The core of shareholder governance is debate and deliberation.[26]

Reflection on *Moran v. Household* Int'l reminds us of how far the activist pill has deviated from the original justification for its extraordinary discrimination against a stockholder.[27] The plaintiff objected that the 20 percent trigger in the Household pill "fundamentally restricts stockholders' right to conduct a proxy contest."[28] The court's response was that, while the threshold would "deter" some proxy efforts, it would not necessarily "frustrate" them. In other words, the impediments to waging a proxy battle were a regrettable (but not fatal) side effect of the pill's protection against the threat of a coercive bid.

The Anti-Activist Pill

By contrast, in an anti-activist pill, the regrettable side effect is precisely the point. That is, the activist has no plan to push through a merger with a hostile bid, coercive in one way or another. The activist has no plans to obtain a change in control that could be a prelude to a merger. Rather, the activist is pursuing a change in the corporation's business plan and perhaps board representation and is using the possibility of a proxy contest- *a contested election of directors* - to promote this objective. The very point of the activist pill is to disrupt the possibility of a proxy contest, for without that credible threat, the activist has no power. Without a credible threat of a proxy contest, the shareholder activist is a kibitzing gadfly.

The anti-activist pill in *The Williams Company Shareholder Litigation* is simply a representative example of all such pills. A low ownership trigger of course reduces the prospects for success in a proxy contest. A low trigger means the activist can immediately command fewer votes; more shareholders must be persuaded. A low trigger also caps the activist's "skin in the game," which could undercut the activist's credibility with the shareholders it must persuade as well as limiting the activist's economic upside, which is tied to share appreciation.[29] But as the recent Exxon-Mobil proxy contest illustrated, a low threshold does not necessarily make a successful proxy contest "unattainable." For the largest corporations, with market capitalizations in the $10s or $100s of billions, serious skin-in-the game begins below 5 percent.[30]

The evil genius in the anti-activist pill is the effort to disrupt shareholder communication through an over broad definition of "beneficial owner." Recall that the definition of "beneficial ownership" in the Section 13(d) regulations focuses on "having or sharing" "voting power" and "investment power" and that acquisition of beneficial ownership through a "group" requires parties to "agree to act together."[31] The added concepts of parallelism, acting towards a common goal, chain-linked to parties you may not know, expands the idea of "sharing" power and "agreement" without discernible boundaries. This afternoon perhaps 30,000 people will have acted in parallel to buy tickets to a Yankees game with the common purpose of influencing the outcome through simultaneous cheering (or perhaps booing), and many will buy tickets and go precisely because they know others are acting in the same way. So under the activist pill definitions, they may be "acting in concert." Playing with the definition in this way is sport, but where a financial fiduciary faces the risk that its position in a particular company's stock is at risk of substantial dilution because of a shallow interaction, that will chill communication.

Notice the reinforcing interaction between the low pill triggers and the capacious definition of beneficial ownership. A low pill trigger is an immediate impediment because it reduces the prospective activist's potential upside. The all-inclusive definition of beneficial ownership is an impediment because it makes organization and success in a proxy contest more difficult. Yet the two reinforce one another, perversely: The lower the pill trigger, the greater the need to bring along other shareholders for success in a proxy contest. Yet as such organizational activity becomes more widespread, the greater the risk that other shareholders will be snared as "beneficial owners." With a low pill trigger, the activist will necessarily depend upon various forms of parallel and common behavior for success; yet it is those actions that present serious risks of economic harm to shareholders who could be found to be "beneficial owners" under the activist pill's definition. The features of an anti-activist pill are not separately impediments to a proxy contest; the low pill threshold and the high risks of communication or even common behavior and purpose are designed to work together to provide protection and insulation.

To recap: The original "poison pill" was designed to restore the structural status quo in the board's plenary power to vet and approve mergers in which the company would be acquired. It has been repurposed as an anti-activist pill for an altogether different (and illegitimate) purpose: to disrupt the capacity of a shareholder activist to mobilize the election machinery to resolve a disagreement over business strategy.[32]

This difference becomes apparent in considering one the essential features of a pill: the board's reserved redemption right. Until the parties cross the beneficial ownership threshold, the board has the capacity to redeem the pill. Notice how differently this functions in the context of a potential hostile bid and in a proxy contest. In the case of the bid, the board's redemption right serves as the mechanism to channel merger proposals for board vetting; if the board approves, friendly negotiations ensue and the board redeems the pill. The pill (or a "shadow pill") can be used by the board to facilitate negotiations among several competing friendly bidders; the pill guarantees that none of the bidders can steal a march through a tender offer. The pill and its redemption enable the board to vet all possible mergers and orchestrate the competition.

How would this work in the case of the anti-activist pill? Well obviously it wouldn't. "We want to challenge your control of the corporation because you have made strategic and operational mistakes. Please give us permission to acquire more stock to give us greater economic upside and permission to enlist other shareholders in this venture." Really? It is the misfit of the redemption right that emphasizes how the anti-activist pill is an illegitimate effort to supplant the shareholders' core corporate governance rights. The pill does not work without a redemption right; it becomes a dead-hand pill squared. As Chancellor Chandler observed, the pill on its face is preclusive; it is the viability of a proxy contest that could lead to its redemption that is its saving grace.[33] Yet it is the very point of an anti-activist pill to interfere with prospects for a successful proxy contest by a party that is not seeking a merger.

In the case of proxy contest where the objective is to replace incumbents with directors who might look more favorably upon a proposed merger, the bidder's need to acquire a significant block of stock, or for there to significant deliberation among shareholders, are both low. If the bidder couples its proxy contest with a conditional cash tender offer, virtually the only issue for the other shareholders is the bid's adequacy. The shareholders do not need persuasion on potential private benefits extraction by a new controller, or the desirability of a new business plan, or board room dynamics. By contrast, in a proxy contest waged by an activist, these are very real issues; they will arise at all stages in the run-up to an actual proxy battle as an activist considers its strategy, and an anti-activist pill is aimed against the necessary deliberation among shareholders. The actions that make a proxy contest feasible trigger the pill's economic penalty.

Thus it's clear: The goal of the anti-activist pill is to preclude challenges to the board's power. This is vote suppression, corporate style. Under current conceptions of Delaware law, it cannot stand. There is no "compelling justification" that would sustain such an action. Chancellor McCormick was surely right that The Williams Company pill fails under Unocal as a disproportionate response. But as Chancellor Allen said in *Stahl v. Apple Bancorp*[34], Blasius is the right standard for a pill, like the anti-activist pill in this case, that "represents action taken for the primary purpose of interfering with the exercise of the shareholders' right to elect directors." The importance of the shareholder franchise was recently underscored by Chief Justice Seitz in *Coster v. U/P Companies, Inc.*[35] in an opinion that fully embraced Blasius and its progeny. "To invoke *Blasius* the challenged board action 'only need[s] to be taken for the primary purpose of interfering with or impeding the effectiveness of the stockholder vote in a contested election for directors.'"[36] This is indeed the objective of the anti-activist pill in The Williams Companies Stockholder Litigation, and the Delaware Supreme Court should be forthright in its defense of shareholder democracy.

This article originally appeared in the Columbia Law School Blue Sky Blog, Aug. 19, 2021. Eric Robinson of Wachtell Lipton Rosen countered and Prof. Gordon responded.

END NOTES

[1] See John C. Coffee and Darius Palia, The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance, l Annals Corp. Governance 1 (2016).

[2] See generally Leo Strine, Who Bleeds When the Wolves Bite? A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System, 126 Yale L.J. 1870 (2017).

[3] This is Senator Elizabeth Warren's Accountable Capitalism Act, S.3348, 115th Cong (2017-18) initially introduced Aug. 15, 2018, reintroduced as S.3215, 116h Cong. (2019-2020) (Jan. 16, 2020).

[4] President Joseph Biden, Remarks by President Biden on the Economy (May 27, 2021) (speech at Cuyahoga Community College).

[5] For example, the series of cases attempting to govern freeze-out mergers and going-private transactions and then refashioning the appraisal remedy and appropriate fiduciary standards, beginning with Singer v. Magnavox, 380 A.2d 969 (Del. 1977) and culminating with Weinberger v. UOP, 457A.2d 701 (Del. 1983) (refashioning appraisal remedy to avoid prior opportunistic use of"Delaware block" and heightening fiduciary standards at a time when federalization of corporate law was under discussion).

[6] See, e.g., Del. Gen. Corp. L. § 112 (2009), adopting shareholder proxy access legislation at a time of concerted proposals for a federal proxy access mandate.

[7] See Mark J. Roe, Delaware and Washington as Corporate Lawmakers, 34 Del. J. Corp. L. 1 (2009).

[8] 125 A.3d 304 (2015) (disinterested majority shareholder approval in an arm's length merger provides a basis for dismissing a suit seeking post-closing damages before discovery and other litigation elements that create settlement value). See James D. Cox & Randall S. Thomas, Delawares Retreat: Exploring Developing Fissures and Tectonic Shifts in Delaware Corporate Law, 42 Del. J. Corp. L. 323 (2018).

[9] 129 A.3d. 885 (Del Ch. 2016) (rejecting proposed class action

settlement providing only unimportant additional disclosure prior to shareholder vote but including a global release of possible fiduciary claims). See generally Matthew D. Cain, Jill Fisch, Steven Davidoff Solomon & Randall S. Thomas, The Shifting Tides of Merger Litigation, 71 Vand. L. Rev. 603 (2018).

[10] See Wei Jiang, Tao Li & Randall Thomas, The Long Rise and Quick Fall of Appraisal Arbitrage, 100 B.U. L. Rev. 2133 (2020).

[11] See Matthew Levine, Exxon Lost a Climate Proxy Fight, Bloomberg, May 27, 2021 (describing interaction between ESG activist and asset managers).

[12] Coster v. UIP Companies, Inc., 2021 WL 2644094 (Del. Supr. June 8, 2021).

[13] Del. Gen. Corp. L. § 157 (a), (b) (issuance of rights to acquire stock);

[14] Del. Gen. Corp. L. § 15 l(a), (g) (board authority to specify terms of a new class of stock).

[15] Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. Supr. 1985).

[16] 500 A.2d 1346 (Del. Supr. 1985).

[17] Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140 (Del. Supr. 1990).

[18] See Jeffrey N. Gordon, Corporations, Markets and Courts, 91 Colum. L. Rev. 1931 (1991) (discussing implications of Time.)

[19] See Air Products and Chem., Inc v. Airgas, Inc., 16 A.3d 48, 108-110 (Del. Ch. 2011) (Chandler, Ch.). This is an opinion that I assign in a mergers and acquisitions course for its compact discussion of the Delaware law of target defensive measures.

[20] Footnote 17, discussing the concept as introduced in Ronald J. Gilson & Reinier Kraakman, Delawares Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?, 44 The Business Lawyer, 247,267 (1989).

[21] 571 A.2dat 1153.

[22] ACE Ltd. v. Capital Re Corp., 747 A.2d 95 (Del Ch. 1999); Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34, 48 (1993) (deal protection provisions in merger agreement " may not validly define or limit the directors' fiduciary duties under Delaware law or prevent the [target] directors from carrying out their fiduciary duties under Delaware law").

[23] Quickturn Design Systems, Inc. v. Shapiro, 721 A.2d 1281, 1292-93 (Del. Supr. 1998); Carmody v. Toll Brothers, Inc., 998 WL 418896 (Del. Ch. July 24, 1998).

[24] See Blasius Industries, Inc. v Atlas Corp., 564 A.2d 651,663 (Del. Ch. 1988) (Allen, Ch.)

[25] Id. at 659. See also 662 & 662 n.2; Accord, MM Cos. v. Liquid Audio, 813 A.2d 1118 (Del Supr. 2003); Costerv. UIP Companies, Inc., 2021 WL 2644094 (Del. Supr. June 28, 2021).

[26] See Edward Rock and Marcel Kahan, Anti-Activist Poison Pills, 99 B.U. L. Rev 915 (2019).

[27] Until Unocal and then Moran no Delaware case had permitted the discrimination against a shareholder that is the heart of a pill. The citation to Cheff

v. Mathes, 199 A.2d 548 (Del. Supr 1964) and other cases entailing "greenmail" are inapt. The "discrimination" in such cases runs in favor of the greenmailer, who in any event has consented to the transaction; the potentially discriminated-against parties are the remaining shareholders. They are both the shareholder majority (so can discipline the errant officers and directors) and are purportedly benefited, not injured, by the disparate treatment, which rids the corporation of a raider whose plan would purportedly reduce shareholder value.

[28] Moran, 500 A.2d at 1355.

[29] See generally Ronald J. Gilson and Jeffrey N. Gordon, The Agency Costs of Agency Capitalism: Activist Investors and the Reevaluation of Governance Rights, 113 Colum. L. Rev. 863 (2013) (discussing how an activist gains credibility). See also Kahan & Rock, supra note-, at 923-925 (importance of pill thresholds to activists if not necessarily hostile bidders).

[30] Compare Icahn Amps Up Pressure on Apple, but His Stake Limits His Leverage (NY Times, Oct. 24, 2013) with Carl Icahn Sold Apple Too Soon & It Cost Him $3.7B (Forbes, Nov. 10, 2017) (earning $2 billion profit while pushing for subsequently executed stock buybacks; maximum ownership percentage approximately 0.9%).

[31] See 15 CFR §§ 240.13d-3, 13d-5 (b)(l).

[32] The NOL pill validated in Versata Enterprises, Inc. v. Selectica, 5 A.3d 586 (Del Supr. 2010) is a one-off. Because of the peculiarities of the federal tax regime governing net operating loss carryforwards, the very act of acquiring 5 percent or more of a company's stock could cause harm. Such an acquisition in combination with stock purchases by other shareholders could subject the company to an unwanted (by anyone) "ownership change." A pill designed to forestall a "creeping tender offer," see Yucaipa American Alliance Fund II v. Riggio, 1 A.3d 310 (Del. 2010), is once again designed to protect the structural primacy of the board in negotiating mergers or a change in control that is foreseeably a prelude to a merger.

[33] Air Products, 16 A.3d at 122 n. 480.

[34] 1990 WL 114222 (Del. Ch. Aug 9, 1990) at *7.

[35] 2021 WL 2644094 (Del. Supr. June 28, 2021).

[36] Id at *8, citing MM Cos. Inc. v. Liquid Audio, Inc., supra, 813 A.2d at 1132.

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Changes to how applications for consent are assessed

To obtain consent, the overseas person – or the individuals with control, defined broadly to include shareholders with more than 25% ownership, directors, or in some cases senior management – must satisfy the 'investor test'.

Prior to the reforms, the scope of the investor test was broad, including a good character test that required consideration of any offences or contraventions of the law, and any other matters that reflect adversely on a person's fitness to hold the particular overseas investment. For consent applications made on or after 5 July 2021, the good character test has been replaced with a more targeted list of factors that decision makers must take into account. These factors relate to the investor's character and capability:

- The character factors include convictions resulting in imprisonment, corporate fines in New Zealand and overseas, and being ineligible to come to New Zealand.
- The capability factors include prohibitions on being a director, promotor, or manager of a company, penalties for tax avoidance or evasion, and unpaid tax of NZ$5 million or more.

The new investor test is satisfied if none of the 12 factors are established, or, if a factor is met, the decision maker is satisfied that this does not make an investor 'unsuitable' to own or control a sensitive New Zealand asset.

In addition to meeting the investor test, an overseas investor wanting to acquire an interest in sensitive land must show the investment will, or is likely to, benefit New Zealand. Previously, the benefit to New Zealand was assessed by reference to 21 benefit factors broadly grouped into economic, environmental and other factors (but with specific rules applying to residential land, forestry activities and farm land). The 21 benefit factors have been streamlined to seven broad factors, with the particular benefits to be assessed against the existing investment at the time the transaction is entered into, rather than a "with and without" counterfactual (as is the case currently). This change is due to come into force on a date to be determined, but no later than 24 May 2022.

For investments in significant business assets, a prospective investor is now also required to disclose certain tax-related information, including the proposed equity and debt funding for the investment, the nature of any cross-border related party transactions and the tax residence of the investor entity, its holding company and ultimate holding company. The Overseas Investment Office has stated that the disclosed information would not be used in deciding whether consent should be granted, but rather will be provided to Inland Revenue to monitor compliance with New Zealand law and to help Inland Revenue's broader tax policy and audit functions. The tax disclosures are required where an application for consent is made on or after 5 July 2021.

New National Security and Public Order notification regime

In response to Covid-19, an Emergency Notification Regime was introduced last year requiring a notification to be made if, for example, an overseas investor wished to acquire more than 25% ownership or control of a New Zealand business where the acquisition did not otherwise require consent from the Overseas Investment Office. The Emergency Notification Regime has been replaced with a National Security and Public Order notification regime applying to transactions entered into on or after 7 June 2021. The new regime only applies to an investment in "strategically important business assets" that does not otherwise require consent.

In broad terms, strategically important businesses are businesses operating in areas that are considered to be strategically important to New Zealand, including businesses involved in military or dual use technology, ports or airports, electricity, water, telecommunications, banking and financial markets infrastructure. The new notification regime should be carefully considered, as a pre-closing notification may be mandatory in which case a direction order allowing the transaction to proceed must be obtained. If a transaction is considered to pose significant risk to national security or public order, there are powers for investments to be blocked, conditions to be posed or the ordering of the disposition of assets.

Further foreign investment reforms are not expected

Following the enactment of the bill giving effect to certain of the reforms outlined above, the Government Minister responsible for the reforms (Hon David Parker) stated it was "a significant milestone and the final step in the Government's wide scale reforms to [New Zealand's] overseas investment rules." Further reforms have not been signaled and are not anticipated at this time.

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The trial court determined that, though sub-optimal, the process employed by the board was fair given, especially, the board's reliance on a third-party valuation. The court likewise determined that the sale price was fair, in that the valuation was credible and provided the most reliable indication of enterprise value. Having determined that the stock transaction was entirely fair, the court declined to appoint a custodian and dismissed the action. In particular, the court determined that because Delaware's most onerous standard of scrutiny had been met, the Court could not then proceed to scrutinize the transaction under a lesser level of scrutiny to determine, as urged by Coster, whether the board had a "compelling justification" to take the action it did given its obvious impact on stockholder rights – or as argued by Coster, "in the context of stalled buyout negotiations, even though the board had the legal authority to issue IUP stock, the board could not act inequitably by approving the [stock sale] in order to dilute her ownership interest, defeat her voting and statutory rights, and entrench themselves." And this is where things get interesting.

Delaware Supreme Court's Reversal and the Schnell/Blasius Test

On appeal, the Supreme Court found no fault with the trial court's entire fairness determinations. The Supreme Court did, however, find reversible error in the lower court's decision to limit its inquiry to entire fairness.

The Supreme Court held: "In our view, the court bypassed a different and necessary judicial review where, as here, an interested board issues stock to interfere with corporate democracy and that stock issuance entrenches the existing board." The Supreme Court analyzed a line of cases (foremost among them, *Schnell v. Chris-Craft Industries*, 658 A.2d 176 (Del. Ch. 1985), *aff'd*, 500 A.2d 1346 (Del. 1985) and *Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988)) advancing the principle that a board of directors cannot escape judicial review under the cloak of mere legality; on the contrary, director actions are "twice-tested" for (1) legal authorization and, critically, (2) for equity. Accordingly, "careful judicial scrutiny" is necessary where the stockholder franchise is frustrated or denied. And where boards of directors deliberately employ legal strategies to undermine a shareholder vote, there "can be no dispute that such conduct violates Delaware law."

The Supreme Court also clarified that while the bedrock principle articulated in *Schnell* (that the subversion of corporate democracy by manipulation of corporate machinery will not be countenanced under Delaware law) does not apply where the board acts in good faith, the Court of Chancery's later decision in *Blasius*[1] teaches that if the board nonetheless acts for the "primary purpose" of impeding stockholder franchise rights, the board must prove a "*compelling justification*" for its actions.

[1] The standard of review articulated in *Blasius* later was approved by the by the Delaware Supreme Court on *MM Cos., Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118 (Del. 2003).

Key Takeaways

Actions taken by a conflicted board that technically are lawful but intended to undermine stockholder voting rights or other valuable statutory rights cannot be "sanitized" simply by meeting the dual fair process – fair price requirements of entire fairness; rather, such actions are subject to a further "compelling justification" inquiry (*i.e.*, "*Schnell/Blasius* review");

Where the directors' "primary purpose" was to thwart stockholder franchise rights, the "compelling justification" inquiry is to be undertaken before application of mid-tier judicial scrutiny, such as the reasonableness and proportionality test of *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985);

While *Coster v. UIP Companies, Inc.* and the precedent it analyzes focus on directorial missteps, stockholders, too, are equally capable of using the powers lawfully at their disposal for purposes inimical to the best interests of the enterprise. Nothing in *Coster v. UIP Companies* signals that the compelling justification test cannot be met under the right (though probably extraordinary) circumstances. But where a conflicted board takes action for the purpose of entrenchment or otherwise undermining stockholder rights (foremost, voting rights), it should be preceded by some intensely introspective directorial soul-searching.

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Vital Parameters to Consider

Claim Coverage

For both escrows and R&W policies, claim coverage is particularly important for a Buyer seeking to mitigate risk in its acquisition. In general, an escrow can provide a clear solution to resolve risks between the parties and may be customized to facilitate a comprehensive coverage model. Conversely, many R&W policies cover only specific, targeted areas.

Currently, in a typical R&W policy, known issues may be excluded, whether or not reported to the insurer or included in a due diligence memo. In addition, in many instances R&W policies will not cover breaches of covenants, forward looking statements, or purchase price adjustments. Depending on the specific policy, common indemnity claim types such as tax, litigation / product liability, collectability of accounts receivable, pension underfunding issues and environmental liabilities may require separate policies or increased premiums.

Claim Payouts

Traditionally, claim payouts are not influenced by the escrow agent as it serves as a neutral third party, acting generally on joint instructions to release funds. Existing R&W insurance studies provide limited visibility on claim payouts and timing. This calls into question whether or not R&W providers will face increased pressure to pay on claims and potentially to increase premium fees to ensure claim payouts.

Cost

R&W premiums vary based on the level of coverage but are generally a certain percentage of required coverage. On the other hand, escrow fees are nominal, and larger escrow deposits generally do not result in higher fees. Additionally, in the current low interest rate environment, the opportunity costs of having funds on deposit in escrow are relatively low. Escrow will likely continue to be a less expensive risk mitigation tool regardless of whether claims increase over time.

Due Diligence

When circumstances change, escrow does not require a separate due diligence work stream like R&W insurance does, and it will typically be quicker and simpler to execute a new escrow agreement vs. an R&W policy. As a result, escrow can provide much needed flexibility when quick turnaround is needed or to resolve last minute negotiation issues that come up between the Buyer and Seller.

Choosing a Mechanism for Your Deal

Despite their recent emergence, most R&W policies only cover certain types of breaches for representations and warranties, though added coverage may be available, potentially for an additional cost. Claims may be paid but sometimes at the expense of increased legal fees and the extent of recovery. The ability to close within timeframes desired by Buyers can also be impacted. On the other hand, many transactions, even those with R&W policies, involve some form of escrow to help cover and protect the gaps left by R&W policies. Escrow can offer flexibility, low cost and broad security, such as extending coverage through the "interim period" (time between signing and closing) via a good faith deposit.

Bottom line: Each transaction and its requirements are unique, and understanding the needs of your transaction – including what it will cost, how long it will take, the extent of its coverage provided, the user experience and quality of digital offerings and certainty of enforceability – will drive towards a coverage model that makes the most sense for you.

J.P. Morgan Escrow Services

J.P. Morgan has breadth and depth of knowledge in areas ranging from M&A, litigation, debt capital markets, project finance account bank, real estate and bankruptcy. Our escrow solutions are supported by the financial strength of J.P. Morgan. With over $3.6 trillion in assets, J.P. Morgan is a leading global escrow agent.

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2. If you are on the sell-side of the transaction, look for opportunities to normalize the historical numbers on the balance sheet giving consideration to what the buyer is likely to experience post-closing and accounting for income statement normalizations. For example, consider excluding certain one-time extended accounts receivable balances if those terms will not exist for the buyer.

3. If there are extended (or stretched) accounts payable, the amounts of these accounts may look like funded debt to the buyer and become the responsibility of the seller at closing ...resulting in reduced cash to the seller. A seller can defend against this claim if the vendor agrees to provide those terms extended terms permanently.

4. Keep in mind that customer deposits for future work are usually carved-out as an exception to the Cash Free Debt Free concept ...the seller is expected to leave cash in the business to cover those amounts. A possible solution to minimize the impact to the Seller of this cash exception, is to look for opportunities to reduce the deposit amounts where there may be work in process that has occurred but not been recognized... and then making the recognition.

5. For software or subscription based businesses, start the analysis by excluding deferred revenue. A compromise in the negotiation is to accrue the estimated cost of services in the future needed to support the operational commitment created by having those deferred amounts.

6. There are three time-based variables that can impact the working capital calculation in some deals: (a) the period used for analyzing and determining the working capital target, (b) the number of days in aging accounts receivable in which the buyer will not recognize the value of invoices, and (c) the number of days in accounts payable that the buyer will consider those invoices as effectively funded debt. For each of these, analyze the numbers in comparison to both historical norms and industry norms to determine opportunities to create an argument for exceptions that will reduce the required level of working capital.

The list above is not meant to be comprehensive, but rather a list of thought provokers to prompt a deeper dive into the working capital terms of a deal. As you might expect, many of these can be flipped and used for the buyer's advantage to increase the level of required working capital in an M&A transaction for their benefit.

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d. ***Use of false information.*** When the private party presents false or altered documentation or information, or simulates compliance with requirements or rules established in administrative procedures, with the purpose of obtaining an authorization, a benefit, an advantage or harming any person;

e. ***Obstruction of research faculties.*** When the private party having information related to an investigation of administrative offenses, provides false information, deliberately and unjustifiably delays the delivery of the same, or does not respond to the requirements or resolutions of investigating, substantiating or resolving authorities, provided that they have previously imposed enforcement measures have been imposed in accordance with the applicable provisions;

f. ***Collusion.*** When the private party (A) executes with one or more individuals, in matters of public procurement, actions that imply or have the purpose or effect of obtaining an undue advantage or benefit in public procurement of federal, local or municipal character, or (B) agree or conclude contracts, agreements, arrangements or combinations between competitors, whose purpose or effect is to obtain an undue benefit or cause damage to the public treasury or the assets of public entities;

g. ***Misuse of public resources.*** When the private party (i) performs acts by which it obtains, makes undue use or deviates from the purpose for which public resources are provided, whether material, human or financial, when for any circumstance it manages, receives, administers or has access to these resources, or (ii) omits to render accounts that prove the destiny that was granted to such resources; and

h. ***Undue hiring of former public servants.*** When the private party hires whoever has been a public servant during the previous year, who has privileged information that he has acquired directly because of his employment, position or commission in the public service, and directly allows the contracting party to benefit in the market or place in an advantageous situation against its competitors.

For such reason, it is advisable that during the legal due diligence process a certification is requested, under oath, from the officers and/or employees of the company involved in the transaction, specifically stating that they do not have any relationship with public servants and they have not been sanctioned in any way in accordance with the provisions of the LGRA.

Based on the above, in structuring purchase agreements, whether of shares or assets, it would be convenient to include in the representations and warranties of the sellers and the company section, a clause to be read as follows:

"None of the sellers, nor any director or officer thereof, nor any agent, employee or other associated person or acting on behalf of the sellers, directly or indirectly, in connection to [the Company] [the Business or Assets Commercial], nor the Company (i) used corporate funds for illicit contributions, gifts, entertainment or other illegal expenses related to political activities, illegal payments to officials or employees of the national or foreign government or political parties or national or foreign campaigns of corporate funds, or illicit payments of bribes or reimbursements, influence payment, bribery, or other illegal payment, and (ii) have been sanctioned or condemned for acts related to serious administrative offenses in accordance with the provisions of the General Law of Administrative Responsibilities."

It is important to mention that as the possible sanctions provided by the LGRA are not quantifiable, it is important to consider that in addition to the compensation for damages and losses caused for such purposes, the parties shall agree on a mechanism for reimbursement of a proportional part of the purchase price considering that some of the possible implications would consist in the temporary disqualification, suspension of activities or the dissolution of the acquired company.

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But, as the transaction proceeds, these lists often evolve and expand. New parties must be added; other parties are replaced or removed entirely. With each change, the individuals handling the deal must go through the tedium of updating and manually confirming their list and adjusting the levels of document access according to each participant's roles and responsibilities.

This is time- consuming work that incurs risk in both directions: if a participant does not have sufficient access to the deals and documents they need to see, correcting their access can cause delays—while too much access can violate confidentiality or document security.

After – With Litera Transact

A new deal in Litera Transact begins with the creation of a Working Group List that includes all of the organizations and individuals working on the transaction. For example, the list can include law firms, their clients, local counsel, and any third parties who are currently involved. Each participant is invited to access the transaction and any documents they are authorized to view according to their unique roles and permissions in the transaction.

As the deal evolves and participants come and go, updating the list is a matter of a few simple clicks; as soon as participants are in the system, users can add them to future transactions without having to retype—or double-check—any of their information. With Litera Transact, the legal team can control what is visible to each participant while also using the platform as an effective and secure tool for collaboration.

2. Coordinating Due Diligence

Before – The Traditional Way

Managing the due diligence and other pre-contractual investigations in a commercial transaction is a fundamental step to ensuring success. Parties to complex transactions must ensure that their pre- transaction research and analysis regarding an organization or its assets are managed as securely, efficiently, and cost-effectively as possible. While the nature of the diligence exercise will vary with each transaction, it typically involves considerable volumes of confidential and often sensitive information, in various formats, which need to be carefully reviewed and revised by multiple parties within a defined timeframe.

The usual approaches to diligence involve circulating documents using email, virtual data rooms, or file storage sites. All of these approaches raise challenges. First, legal teams must manage data access while protecting data security and confidentiality. When sensitive or proprietary documents are shared via email or less-secure file storage sites, they are at risk of going astray, being shared to unauthorized parties, or—particularly for large documents—being blocked by a firewall or rejected by a server. Additionally, the price that law firm clients must typically pay for virtual data room access often depends on the amount of storage used, an expense that can rapidly become prohibitive.

After – With Litera Transact

Litera Transact's built-in virtual data room—available at no additional cost—gives parties access to a secure space where all due diligence data, such as documents and files, can be uploaded, shared, stored, and reviewed. By default, the data room is populated from the transaction type selected for the deal and all contacts on the Working Group List can have access for collaboration. This provides security by restricting folder and document access to only authorized parties.

Within the data room, parties can organize and review documents within their due diligence list in a controlled, collaborative, yet secure environment. The virtual data room avoids the use of email or less-controlled file storage options, providing a secure, live environment where legal teams can effortlessly track diligence review. And because all parties can engage with the platform and access review status at any time from anywhere, checklist updates and status calls are much shorter—as we'll turn to next.

3. Managing Closing Checklists

Before – The Traditional Way

Legal teams rely heavily on checklists to monitor and complete transactions, using them to identify all of the information that is needed at the outset, assign and track tasks, support the drafting and negotiation of relevant documents, and facilitate the execution of the final versions of documents. Checklists allow supervising attorneys to monitor the progress of the deal and ensure that all relevant issues have been covered.

But creating and managing these checklists manually in Word or Excel is a labor-intensive, high-risk undertaking. Legal teams spend countless hours creating and formatting checklists only to spend hours more laboriously updating them, row by row, and circulating them to all relevant parties through email. Teams must participate in regular—and often lengthy—status calls to review the current status of the transaction. Despite all that effort, checklists can again be obsolete within minutes of an update, such that parties never feel entirely clear about where the deal is or what needs to happen next.

After – With Litera Transact

With Litera Transact, legal teams can use checklists as a live, central point of truth regarding closing documents, conditions precedent, and any other deliverables required throughout the transaction. All participants in a deal can immediately access the checklist through Litera Transact to obtain an up-to-the-moment view of the transaction's status and can filter the checklist to look for incomplete or pending items or easily search for specific information. As a result, status calls are drastically reduced—or even eliminated. This transparency helps all parties understand and identify those actions that they are responsible for, which minimizes administrative effort and helps deals close faster and more efficiently.

Legal teams can also create their own checklist templates—with customized formats, column names, and status labels—for specific practice groups or transaction types, obviating the need to create a new checklist for every transaction. Reducing the administrative load associated with managing checklists allows lawyers to focus on the more meaningful parts of the transaction—driving positive outcomes for their clients.

4. Sharing Documents

Before – The Traditional Way

Transactions typically involve a large volume of documents, each of which proceeds through numerous versions as the deal progresses. Managing these documents requires high levels of accuracy and organization. Unfortunately, typical transaction processes impede that accuracy and organization, particularly where key information and documents are managed in Word and exchanged via email.

Status updates involve listing all documents, confirming that each party has the current version, and running comparisons between different versions to identify and track changes. With different versions of documents scattered through different email chains, it's easy to lose track of the latest version or misplace important amendments. This stage of the process creates tremendous inefficiencies and substantial risks.

After – With Litera Transact

With Litera Transact, legal teams can use checklists as a live, central point of truth regarding closing documents, Litera Transact automatically tracks every document and its different versions, which makes the document negotiation phase clearer, easier, and faster. As noted previously, legal teams can assign folder- and document-level access permissions, preventing unauthorized access to confidential or proprietary information. Authorized participants can view different versions of documents at their convenience and use Litera Transact's in-app comparison functionality to instantly view and track changes. This eliminates the need for manual updates, check-in calls, or document recirculation.

Litera Transact also dramatically reduces risk by moving the transaction away from email and manually managed Word documents to a live and secure environment that is accessible at any time and from anywhere.

5. Signing Documents

Before – The Traditional Way

Managing the signing process for a complex, multi-party transaction is laborious, stressful, and low-value work—at least with the traditional, paper-based approach to transactions. Legal teams must first create signature pages, either from scratch or by manually copying and pasting signer information into each document. Then they must painstakingly compile separate signature packets for each signer, customized to what that signer is authorized to see and required to sign. Finally, those packets must be distributed through email or post, signed, and returned—all while tracking the status of individual documents and signatures. This tedious process creates an outdated reliance on industrial-sized printers, copiers, and scanners to assemble and distribute signature packets.

Nor is that inconvenience limited to the legal teams disseminating signature packets: clients and other signatories must navigate a similarly unwieldy process. If documents are sent via post, signatories must either return the hard copies or scan them to return electronically. For documents that are sent electronically, signatories have even more steps to complete, printing, signing, scanning and recurring each one of their signature pages. This process is particularly difficult when signatories are traveling or working remotely, without access to copiers and scanners.

After – With Litera Transact

Litera Transact simplifies the entire signature process from start to finish. First, it automates the creation of signature blocks and signature pages. Legal teams need only enter the signers' information once and identify who needs to sign which documents and the system generates all signature pages and packets automatically. Signature packets can then be distributed directly through the platform for digital or wet-ink signing.

Signers benefit too, as they can digitally sign their documents online using Litera Transact's e-signature integrations. This process ensures a seamless signing experience for clients, who can sign anywhere, any time, and on any device. The result is a cost-efficient experience for everyone involved in the signing process.

6. Creating Executed Copies & Closing Books

Before – The Traditional Way

To close the deal, legal teams must track the progress of signatures, typically in Word or Excel, to ensure that every signature page is signed and returned. From those pages, teams must manually assemble executed deal documents, printing all of the returned signature pages along with their corresponding documents, manually placing each signature page with the appropriate document, and scanning everything into the document management system to create the final executed versions of the closing documents. This process bears the substantial risk of signature pages being lost, not signed, or appended to the wrong document, any of which can invalidate the document and potentially the transaction.

The billing may stop after the deal closes, but the legal work isn't over until everyone has received a complete and accurate record of the deal. Closing books (also known as closing bibles or closing binders) can take further days, weeks, or even months to assemble through a labor-intensive process of sifting through all of the transaction documents to copy, rename, file, and organize them into complete sets. Physical paper documents need to be scanned, compiled, relabeled, and added into new folders. In addition, a closing binder index must be drafted and populated with the fully signed executed versions—another time-consuming and error- prone process. And different parties may require multiple or unique versions, greatly increasing the amount of time spent preparing and confirming the accuracy of each closing book.

After – With Litera Transact

With Litera Transact, monitoring signatures is easy, as the platform automatically collects and tracks all signatures needed for each document required to close the deal. It then streamlines the document execution phase by automatically matching signed signature pages to the correct checklist documents, even for wet-ink signatures. Legal teams can use the in-app PDF editing functionality to easily collate final executed versions, rearrange signature pages, add exhibits, and append attachments as needed.

The platform can then generate bespoke closing books for each participant in a matter of just minutes. This reduces write-offs and improves the client experience by providing closure and certainty almost immediately after the conclusion of the transaction.

In Summary

Litera Transact applies innovation to every stage of the deal lifecycle to produce significant improvements in profitability, productivity, and efficiency. Each stage of the process is enhanced and streamlined to reduce the risks of human error, security breach, or unauthorized document access. At the same time, law firms, their clients, and all other stakeholders are more empowered and engaged throughout the deal lifecycle with a tremendous increase in transparency that eliminates the need for frequent, lengthy, and frustrating status calls. As a result, the legal team maintains the familiar transaction workflow while maximizing its profit margin and vastly improving the client experience.

Best of all, by sparing legal teams from hours, days, and weeks of tedious, low-return work, Litera Transact enables lawyers to spend their time adding value for their clients, improving outcomes for everyone involved.

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I. Foreign SPACs that acquire Spanish targets:

There will be cases of SPACs listed on a foreign market (generally in the United Sates) that will want to acquire a Spanish target. From the Spanish law perspective, there will be five options to implement the DeSPAC:

A. Direct acquisition of shares: The SPAC acquires shares in a Spanish company: This is probably the most direct and fastest option, but it is not always the most beneficial from a tax point of view.

B. Cross-border merger: A cross-border merger in which a foreign SPAC absorbs a Spanish company: The challenge will be coordinating the laws, since it will be necessary to coordinate closely with lawyers from both jurisdictions and to coordinate the criteria of both commercial registries. Under Spanish law, from a corporate point of view, and taking into account the SPACs' tight calendars, it will be important to verify the need to call a shareholders meeting and the need for an independent expert report and its content.

C. International transfer and domestic merger: Transfer of the Spanish company's international domicile to the country of the SPAC's nationality and its subsequent merger with the SPAC: This is possible under Spanish law if the country to whose territory the Spanish company is transferred allows it to keep its legal personality. In terms of deadlines, the calling of the shareholders meeting and the period of opposition from creditors will be important. The subsequent merger with the foreign SPAC would be governed by the legislation of the SPAC's nationality, as it will be a domestic merger of that country.

D. Setting up a holding company to absorb the foreign SPAC: This way, the Spanish target is prevented from becoming a company listed in a foreign country due to the regulatory formalities and costs that this entails. In the US market, there is the additional advantage of being able to benefit from being a foreign private issuer if the requirements are met.

E. Contribute to capital increase: Contribute the Spanish company's shares in a capital increase of the SPAC.

The DeSPAC's consideration may consist, as in other jurisdictions, of cash, shares or a combination of both. The decision will be conditioned by the structure of the operation, which will be determined, among others, by tax and regulatory issues, and the target's size and shareholding structure, on a case-by-case basis. In addition, part of the consideration is often structured as an earn-out typically tied to the listing price or a subsequent performance metric of the combined company after the DeSPAC. Earn-outs give the target's shareholders flexibility when there is a discrepancy between the price offered by the SPAC and the one intended by the target's shareholders.

II. Setting up a Spanish SPAC

Although the former scenario will be the most common in practice, it may also happen that a Spanish SPAC is set up. At the time of writing this article, no SPAC has yet gone public in Spain, but there is a general consensus that two things are important for this vehicle to be a better fit: (i) to make certain amendments to the Spanish regulations since, to date, there is no specific regulation for SPACs. There is only a draft law that proposes the amendment of the Spanish Capital Companies Act to introduce a chapter regulating key aspects of these vehicles, such as the trust and the mechanism for reimbursing shareholders at the time of the DeSPAC.

Also, it will be necessary to see what position the Spanish supervisor adopts on this; to date, it has confirmed that it welcomes this type of vehicle as an alternative to traditional IPOs, and that it is already working on them to guarantee they are a good fit for the Spanish market. Again, the decision on whether to carry out a traditional IPO as we know it so far or to opt for this new form of listing must be made on a case-by-case basis, as it will depend on a multitude of factors, such as the type and size of the company, the sector, the management team, the deadlines, the necessary capital, the applicable regulations and many other questions that must be considered to analyze the most efficient and appropriate way to go to public.

III. Impact on the private equity and venture capital sector

Finally, it will probably have an impact on the private equity and venture capital sector in the Spanish market. This is a mature sector in Spain that has broken investment records in recent years. Therefore, the SPAC phenomenon can be both fierce competition and opportunity. The SPACs will compete with these funds when investing in certain sectors and company profiles, but there will also be cases of funds that use SPACs in their own strategies, both in their fundraising strategy (acting as sponsors) and in their exit strategy (as one more option to traditional exits).

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In a 2020 paper, Chairwoman Khan and Commissioner Chopra have expressed this very preference for using the Commission's Section 5 rulemaking authority more vigorously.[7] Now in the majority, these commissioners have an opportunity to institutionalize this view, whereby unfair competition policy is more efficiently and transparently established by rulemaking rather than an ambiguous and inefficient case-by-case adjudication. Rulemaking would enable the commission to issue clearer rules, relieve antitrust enforcement of litigation costs, and enable the Commission to establish such rules through a transparent and participatory process. They argue that the FTC would more efficiently enforce the antitrust rules by engaging in such ex-ante rulemaking rather than trying to achieve the same by ex post, case-by-base adjudication.

In defense of the status quo, former acting chair Maureen Ohlhausen has emerged as a notable dissenting voice. This broad approach to rulemaking, she argues, would likely encounter resistance in the courts given the position's tenuous statutory basis. There is a rich

[7] Rohit Chopra & Lina Khan, "The Case for 'Unfair Methods of Competition' Rulemaking". University of Chicago Law review.

history in the hybrid rulemaking approach directed by Congress for the FTC's consumer protection mandate through the Magnuson Moss Warranty-Federal Trade Commission Improvements Act of 1975, which stands in contrast with the view of an unbridled UMC rulemaking authority in tandem. This argument against such authority is further buttressed by the fact that the FTC's past approaches have not interpreted the statute this way either. Ohlhausen also suggests that modern statutory interpretation would take a different approach from the only precedent treating this issue, *National Petroleum Refiners*,[8] as Congress does not hide the proverbial "elephant in the mousehole" by granting such broad authority through the absence of limiting language and vague authorizing provisions.

Ultimately, Ohlhausen's prescription is to forego this rulemaking-centric approach as it distracts from the FTC's core mission as a case-by-case adjudicator in administrative courts.[9] It's telling that Congress curtailed FTC's rulemaking authority in the consumer protection space through Magnuson-Moss largely because of FTC activism in the 1970s. While Chopra and Khan read the omission of UMC treatment in that Act as a preservation of FTC authority, Ohlhausen finds the context of the Act to be best read as *declining to endorse* this authority.[10]

Whether or not this new approach eventually withstands judicial or legislative scrutiny, the Commission seems committed to pursue this course of action. In doing so, the Commission would likely wield this new tool in areas where it has adequately studied the issues at hand, built a substantive factual record, and calls for a remedy that the Commission has the authority to grant. There are a few areas that seem well suited for this endeavor, and they may well be the opening salvos in UMC rulemaking in the coming months.

For one, using UMC rulemaking to address pay-for-delay settlements in the pharmaceutical sector is ripe for action. As noted by Chopra and Khan, the FTC has already published significant studies on the practice and pursued several successful cases. However, changing industry practices and the time-consuming nature of litigation have kept pay-for-delay settlements alive despite their established anticompetitive effects. In a similar vein, there is also a pressing need to address non-compete clauses and no poaching agreements. While the FTC also has a long enforcement history with this practice, Pres. Biden's Executive Order on Promoting Competition has called on the FTC to ban or limit non-compete agreements altogether.[11] This type of focus could also drive enforcement against unfair practices in labor markets more generally. There have already been reports that the FTC has been expanding the scope of its second requests to include questions surrounding labor market dynamics. Even in the merger context, where acting Chairwoman Slaughter launched a working group focused on pharmaceutical mergers, the issues in question target pharmaceutical conduct and the types of evidence needed to challenge new or expanded theories of harm.[12]

Despite persuasive arguments to the contrary, the FTC, as presently composed, is in position to pursue this rulemaking-centric approach to antitrust enforcement. While the consumer welfare standard has found its way into antitrust law over the past few decades, UMC under Section 5 would be relatively unbeholden to these principles. For instance, on a more ambitious front, Jonathan Baker and Steven Salop have gone so far as to address issues like income inequality by targeting monopoly pricing and price discrimination against the less advantaged.[13] Commissioner Slaughter has likewise expressed an interest in focusing on disproportionate harm to marginalized communities. As this may suggest, while there is substantial breadth of potential for the FTC to test this rulemaking authority, its permanent place in the FTC's enforcement toolkit will certainly have to withstand some formidable challenges ahead.

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[7] Rohit Chopra & Lina Khan, "The Case for 'Unfair Methods of Competition' Rulemaking". University of Chicago Law review.
[8] 482 F.2d 672 (D.C. Cir. 1973)
[9] Maureen K. Ohlhausen, Pushing the Limits? A Primer on FTC Competition Rulemaking, U.S. Chamber of Commerce. August 12, 2021.
[10] Supra. At 11.
[11] FACT SHEET: Executive Order on Promoting Competition in the American Economy. https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/
[12] https://www.ftc.gov/news-events/press-releases/2021/03/ftc-announces-multilateral-working-group-build-new-approach
[13] Jonathan B. Baker & Steven C. Salop, Antitrust, Competition Policy, and Inequality, 104 GEO. L.J. ONLINE 1, at 23 (2015).

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Virtual versus In-Person Closings

As mentioned above, if your American client invests in Spain, the European counterparts will expect an in-person closing before a Public Notary. Until the closing date, the American and European closing processes are similar in that typically the external counsel representing the parties will work together, and together with the Public Notary, to finalize and agree on execution versions of all documents. Counsel may also complete a dry run the night before the closing date so to ensure that everything will run smoothly. But, the closing day is different.

On the closing date, the lawyers from both sides will typically go to the Public Notary's office earlier to prepare everything and finalize last-minute changes. Once the clients appear, everyone needs to put on their game face, in particular when additional changes need to be made (for example, a last-minute negotiation of a clause or a change in signatory), as those changes will need to be handled smoothly because your client will be watching you. Then, the notary will read the documents to the clients and request that they confirm that they understand what they are signing. Please bear in mind that if your client invests into a non-English speaking country, to prove the signatory's competence, either the parties and Public Notary agree to notarize the documents in English or otherwise your client must locate a signatory that understands the local language. If your client does not have such expertise, then a specific power of attorney can be granted to local counsel. Typically, in such situations, the deal documents will be drafted in bilingual, double columns, with the local language governing in case of conflicts.

Notwithstanding, Covid-19 and the pandemic has pushed our profession to modernize. In this regard, if your client cannot be physically present at the Public Notary, you could try to insist on a virtual closing by availing your client to a qualified, electronic signature process in accordance with Regulation 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market. Although more cumbersome than just the advanced electronic signature, qualified, electronic signatures are granted full legal authority and considered equivalent to a wet signature. After travel restrictions were imposed, Public Notaries increasingly have accepted qualified electronic signatures for those signatories who are unable to travel to an in-person closing, and in certain European jurisdictions, notaries can now grant public deeds using the qualified electronic signatures. Unfortunately, Spain still requires physical attendance to grant a public deed (which is required for M&A activities), although perhaps this could evolve to permit videoconference and electronic signature in the future. In the meantime, if your client cannot travel to the notary appointment, then it should grant a power of attorney to someone located locally to close the deal.

Powers of Attorney

Unlike the American style where an Officer's Closing Certificate proves authority, continental European style requires notarized powers of attorney or certified corporate resolutions expressly authorizing the signatory to sign the deal documentation. Unless the power of attorney or certificate is notarized by a local public notary, the client must notarize and apostille the document. In addition, unless the Public Notary can speak English, your client might also have to prepare an official translation of the document into the local language. These formalities increase costs and complexity and can be time consuming. As such, you should understand the estimated timetable and communicate it to your client so that a procedural issue does not derail the closing.

Paying the Purchase Price and Changing Bank Signatories

If closing occurs simultaneously with payment, then you better bring a bank check or otherwise be prepared to sit in the Public Notary's office waiting for the bank to formally confirm via a certificate that the funds have been received. This seems a bit antiquated, but the Public Notary includes in the public deed a copy of the bank check or bank certificate to confirm that the closing has occurred. Obviously, a bank check significantly simplifies this process.

Although not typically considered "legal," your client could be concerned about changing bank signatories immediately post-closing so to take control of the newly acquired entity. In the United States, in our experience, this change can be done quickly and most likely on the closing date, provided that the client has completed the necessary paperwork. In Spain, on the other hand, this change can be bureaucratic, and without an existing banking relationship with a Spanish bank, this process can take one or two weeks, during which your client will not control the bank accounts. As advisors, you should understand these complications and work together with your client, its bank, and local counsel to quickly produce all documents the bank will require (including notarized documents from the Public Notary). Resolving this issue can be bureaucratic and complex for a non-native, so your ability to anticipate the issue and assist your client will most definitely add value.

Restrictions on Foreign Investment into Spain

During 2020, the Spanish legislature implemented the European regulation 2019/42 related to foreign investment into Europe. Similar to CFIUS, this law requires certain foreign buyers to obtain authorization before investing. If your client will own more than 10%, exercise control, is related to a foreign government, or otherwise invests into an industry related to law and order, security, or the public health system, then you should contact local regulatory counsel to determine if your client must obtain approval. Impacted industries include, among others, defense, transportation, artificial intelligence, cloud, cybersecurity, data, media, and telecommunications.

Conclusion

Closings are exciting because of their unique challenges. When advising a client on a continental European deal, you should expect differences, discuss the same with local counsel, and then set your client's expectations. These details will smooth the closing process, which, of course, will just serve to confirm how great of a lawyer you really are. Best of luck!

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The Court's Rulings Concerning Fraud

The Buyer filed a complaint alleging fraud against the Seller, its private equity sponsor, and individual officers and directors of the Seller and private equity sponsor. The defendants moved to dismiss. The Court started its analysis by explaining that "it is relatively easy to plead a particularized claim of fraud" when suing on a written representation given the ease of identifying "who made what representations where and when." *Online HealthNow* at *9 (quoting *Agspring Holdco, LLC v. NGP X US Hldgs., L.P.*, 2020 WL 4355555, at *13 (Del. Ch. July 30, 2020)). The Buyer's allegations against the individual defendants easily met the standard given the detailed explanations of their acts and how those acts demonstrated knowledge of the falsity of the Seller's financial misrepresentations. The knowledge of those individuals, which included officers of the Seller's private equity sponsor, was imputed to both the Seller and the sponsor and so also sufficiently pled claims against them.

The defendants asserted the SPA barred the claims as a matter of law in two ways. First, according to defendants, the survival clause prevented any claim arising from the representations and warranties made in the SPA, which were extinguished upon closing by the survival clause. Second, defendants argued that the SPA's anti-reliance and nonrecourse provisions worked together to limit the Buyer's remedy to claims *only* against the Seller. That would mean their fraud claims against the private equity sponsor, who did not fall within the definition of the non-recourse provision, must be dismissed.

The Court proceeded with a lengthy examination of then-Vice Chancellor Strine's decision in *ABRY*, explaining that decision's "thorough and thoughtful treatment of post-closing fraud claims is now engrained in Delaware's common law." The principles distilled from *ABRY* cut in favor of the Buyer on all points.

As to the survival clause, the defendants sought to distinguish *ABRY* on the ground that the clause did not limit the Buyer's claim to a remedy. Instead, it only limited when the Buyer could pursue that remedy, and so long as there is a "reasonable opportunity" to discover the misrepresentations the clause did not violate public policy. The Court rejected this argument based on Delaware's anti-fraud public policy expressed in *ABRY*: the Seller could not "invoke a clause in a contract allegedly procured by fraud to eviscerate a claim that the contract itself is an instrument of fraud." As part of its analysis, the Court expressed skepticism about a Delaware Superior Court decision the defendants had taken their proffered "reasonable opportunity" analysis from. The skepticism arose from the Court's concern of analyzing on the pleadings a fact-intensive question of the reasonableness of investigation, when the entire basis of the claim was the other party's intentional deception.

The nonrecourse provision also did not save the private equity sponsor from the representations made by its holding company. The defendants focused on statements in *ABRY* concerning the parties' contractual freedom to allocate the intentional lies of managers. The argument fell flat because that idea applied only where the private equity seller had no knowledge of the misrepresentations. The Vice Chancellor thought the law clear on this point, citing numerous decisions and concluding "courts have generally understood Delaware law to disregard non-recourse clauses where the parties purportedly insulated by those clauses were complicit in contractual fraud." In this case, the Buyer had alleged individuals associated with the private equity sponsor knew of and helped carry out the alleged fraud. That meant the sponsor could not invoke the non-recourse provision to defeat the contractual fraud claim.

Finally, the Court noted the impact of its ruling on the sequencing of the SPA's working capital adjustment (which involved submitting disputes to an independent accounting firm if the parties could not resolve them in good faith). Because fraud claims were outside the purview of the accounting firm, the proper sequencing for the parties to submit their dispute to the accounting firm would be to wait for the Court to "finally adjudicate[] the scope of the contractual fraud (if any)."

Conclusion

The decision vividly articulates and distills ideas that have been part of Delaware law for over a decade to reach clear conclusions about what claims parties cannot bargain away. The Court's summary puts it best: "while contractual limitations on liability are effective when used in measured doses, the Court cannot sit idly by at the pleading stage while a party alleged to have lied in a contract uses that same contract to detonate the counter-party's contractual fraud claim." Parties must consider whether the provisions they are bargaining for will hold up when tested, keeping in mind the now oft-repeated view of Delaware's public policy that *"fraus omnia corrumpit*—fraud vitiates everything it touches."

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