

# DEAL POINTS

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## The Newsletter of the Committee on Mergers and Acquisitions

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### FROM THE CHAIR

By Leigh Walton

The Spring Meeting of the ABA's Business Law Section will take place in Boston, from April 14 until April 16, at the Marriott Copley Place and The Westin Copley Place hotels. I hope you will join us for an exciting series of events. As an overview – our Committee has a terrific CLE program on Thursday afternoon, a full slate of Subcommittee and Task Force meetings on Friday and Saturday, and our full Committee meeting and Committee Forum on Saturday afternoon.

More precisely, the full Committee meeting will be held Saturday afternoon, beginning at 12:30 p.m., in Salon E, on the 4<sup>th</sup> floor of the Marriott. Most of our meetings will be available by conference telephone. The dial-in information for the full Committee meeting and the Committee Forum is as follows:

US & Canada: (866) 646-6488  
International: (707) 287-9583  
Conference Code: 2162173359

Dial-in information for Subcommittee and Task Force meetings is included in the schedule of meetings and other activities of our Committee starting on page 27 of this issue of *Deal Points*.

#### CLE Offering

Our Committee is sponsoring a CLE program on Thursday, from 2:30 p.m. until

*(continued on next page)*

Leigh Walton – Chair  
Wilson Chu – Vice Chair  
Keith A. Flaum – Vice Chair  
Mark A. Morton – Vice Chair  
Michael K. Reilly – Editor

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4:30 p.m., entitled “*Breaking Away – Negotiating the Termination Provision in Public Company Merger Agreements.*” The panel is led by Diane Holt Frankle, who will be joined by Jim Griffin, Mark Morton, and Rick Alexander. This panel is the first of a series to introduce our soon-to-be released Model Merger Agreement for the Acquisition of a Public Company Target – work that I predict will very materially impact public company deal making.

### **Subcommittee and Task Force Meetings**

Our full schedule of Subcommittee and Task Force meetings can be found at the end of *Deal Points*. These meetings continue to add substantive content, providing excellent educational and networking opportunities that are more targeted than those provided at our full Committee meetings.

The Private Equity M&A Subcommittee has organized a panel discussion to review possible considerations that transaction participants – boards, bidders, bankers, and counsel – may want to keep in mind in the aftermath of several recent transactions and Delaware decisions. M&A sales processes involving financial and strategic buyers alike have been challenged, and other factors involving deal participants have raised potential conflicts of interest. The panel discussion will include the Honorable Myron T. Steele, Chief Justice of the Supreme Court of the State of Delaware, Mark Morton, and Ronald Barusch, an M&A expert who writes the *Dealpolitik* column for the *Wall Street Journal*.

The Acquisitions of Public Companies Subcommittee has invited Dan Burch, the CEO of MacKenzie Partners, to participate in its session to discuss the proxy season. Additionally, Joel Greenberg and Steve Bigler will lead a discussion on the implications for

boards of directors and bankers from the *Del Monte* case.

### **New Projects**

On Friday at 11:00 a.m., we will convene our second meeting of the Task Force on New Projects, chaired by Bruce Cheatham, to brainstorm initiatives for our Committee. If you want to participate in the future of our Committee, this is the one meeting you should attend. Your Committee leadership is committed to involving additional members in our initiatives, and we hope to develop a range of alternatives so that one of them will appeal to you. We had enthusiastic attendance at our Task Force meeting in Miami, and expect another lively conversation in Boston. Additionally, we are pleased to report that two of our new Task Forces will kick off in Boston.

On Friday morning at 9:30 a.m., we will convene an exploratory meeting of the Task Force on Financial Advisor Disclosures. The initial focus of this new Task Force will be to develop practice tools for M&A and corporate attorneys advising companies (and their financial advisors) on disclosures regarding capital markets transactions. As an initial project, the Task Force intends to develop an online clearinghouse and blog for relevant case law and commentary. The target membership includes M&A and corporate attorneys, bulge bracket banks, and boutique advisors. Yvette Austin Smith has led our preliminary evaluation of this subject and will chair this meeting. Additional leadership opportunities are available – so if you have an interest, please attend and contribute to shaping the mission of this emerging Task Force. Based on email traffic to date, this may evolve into one of our most interesting undertakings.

On Saturday morning at 9:30 a.m., we will convene the inaugural meeting of the Task Force on Two-Step Auctions, chaired by

Michael O'Bryan, and Rick Alexander. The Task Force will create a model form of tender offer agreement along the lines of what a public company seller might distribute at the beginning of an auction. Like the Model Merger Agreement, the Model Tender Offer Agreement will be a practical guide for attorneys, with explanatory comments and alternative language showing potential buyer responses. The Model Tender Offer Agreement will utilize some of the work reflected in the Model Merger Agreement. All volunteers are welcome!

Finally, an existing Task Force is undertaking a new project. I encourage you to consider signing up for the Task Force on Distressed M&A's "Bankruptcy Code Section 363 Transaction Study." The Study will focus on completed transactions authorized under Section 363 of the Bankruptcy Code for the years 2007 through YTD 2011. The final report resulting from the Study will detail key issues in Section 363 transactions, provide an indication of what is "market," and also explore trends over the past four years.

### **Cocktails, Youth, and Diversity**

Members are encouraged to attend the joint reception that will be hosted by our Committee and the Boston Chapter of ACG, and sponsored by Houlihan Lokey. The reception will be held Friday evening at the America North Ballroom, in The Westin Copley Place, from 4:30 p.m. until 6:30 p.m. We are also inviting young lawyers and minority members of the bars in the area to support our important efforts to increase the number of younger and diverse members of our Committee. Please stop by to support these efforts and help strengthen our growing relationship with the ACG.

### **Committee Meeting and Committee Forum**

As always, we have a packed agenda for the full Committee meeting. I am pleased to announce that John C. Coates, John F. Cogan, Jr. Professor of Law and Economics, Harvard Law School will join our full Committee meeting to provide "*An Analysis of Private Equity Deals in the 21st Century: Why Some Deals have Faltered.*" We are delighted to showcase Professor Coates' expertise at our Boston meeting.

Chief Justice Steele will share his views with the Committee on the continued utility of staggered boards as a tool for board supremacy and "shareholder rights."

We also will be joined at the full M&A Committee session by Ron Barusch, who recently retired from Skadden Arps where he was an M&A partner and practiced for 25 years. Among other pursuits, Ron is currently writing the *Dealpolitik* column for the *Wall Street Journal* where he provides commentary and observations around current M&A-related developments and other market events. Ron will talk generally about the *Dealpolitik* column and how the *WSJ* is using that feature as part of its deal markets coverage. Ron also will discuss who he ends up talking with as he provides his coverage, some interesting calls he has received, what he has learned about whether it is good to talk to reporters on background about one's deals, what the original ideas were when the column started and how that has evolved, and what it is like to be edited by journalists.

Our M&A Jurisprudence Subcommittee will present two cases at the full Committee meeting: *Patriot Rail Corp. v. Sierra Railroad Company* (E.D. Cal. Feb. 1, 2011) (implied covenants in an LOI) and *Monty v. Leis* (Cal. Ct. App. March 30, 2011) (California case declining to follow *Omnicare*). Additionally, the Subcommittee will discuss a nugget or two

from the Judicial Interpretations Working Group memos. The focus will be on the memo on Judicial Interpretations of Dispute Resolution Clauses in Purchase Price Adjustment Provisions, and perhaps others.

At our Committee meeting in January, we introduced the concept of supplementing our traditional deal analysis from structural lines to include a focus on transactions within a specific industry. We will continue that industry focus in Boston. Jim Doub of Miles & Stockbridge will lead a discussion on the acquisitions of manufacturing businesses, highlighting key due diligence concerns, special contract provisions, and post-acquisition procedures.

Our Committee Forum is entitled “*Retaining and Managing Your Investment Banker in the Aftermath of In re Del Monte Foods Company Shareholders Litigation.*” The program will be chaired by David Albin. The panel will feature the Honorable Myron T. Steele, Chief Justice of the Supreme Court of the State of Delaware, as well as Patricia Vella, Kevin Miller, and Michael O’Bryan. The panel will analyze portions of the court’s decision and stage a mock negotiation of a retention letter.

### Dinner

Our Committee Dinner will be held on Saturday night at L’Espalier Restaurant, 774 Boylston Street. Sincere thanks from the Committee go to Practical Law Company for their sponsorship of this event.

Looking forward to seeing you in (or communicating by conference call from) Boston!

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## FEATURE ARTICLES

### Delaware Continues Scrutiny of M&A Sales Processes: Merger Vote Enjoined Pending Corrective Disclosure on Banker Fees and Management Arrangements

By  
John K. Hughes<sup>1</sup>

The Delaware Court of Chancery continues to scrutinize and speak on M&A sales processes and proxy statement disclosure that raise potential conflicts of interest considerations concerning deal participants.

The Chancery Court’s latest pronouncement in *Atheros*<sup>2</sup> offers continuing instruction for all transaction participants -- boards, bidders, bankers, targets, and counsel. The decision comes in the aftermath of the Chancery Court’s February 14 Valentine’s Day card to deal participants delivered in the form of *Del Monte*, which touched on similar issues.<sup>3</sup> As such, this latest case represents the Chancery Court’s second decision in a month to enjoin a high-profile merger due, in part, to concerns around matters involving the target’s financial advisor. As noted later in this article, *Atheros* will not be the last case where actions of a target’s financial advisor are challenged.

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<sup>1</sup> Mr. Hughes is a Partner in the M&A and Private Equity Group at Sidley Austin LLP. Comments and views expressed are those of the author only and are not attributable to the author’s partners or firm or its clients.

<sup>2</sup> *In re Atheros Commc’ns, Inc. S’holders Litig.*, C.A. No. 6124-VCN, 2011 WL 864928 (Del. Ch. Mar. 4, 2011).

<sup>3</sup> *In re Del Monte Foods Co. S’holders Litig.*, Consol. C.A. No. 6027-VCL, 2011 WL 532014 (Del. Ch. Feb. 14, 2011).

More importantly, *Atheros* serves to remind practitioners that the Chancery Court will not hesitate to enjoin transactions and require corrective disclosure where there are perceived failures to fully disclose facts and circumstances that could raise conflicts of interest considerations for transaction actors -- including in deals where no competing third party bidder is present and where target shareholders are to receive a significant premium. The case also puts a klieg light on the significant spike in M&A-related litigation challenging just about every type of transaction format (strategic or financial sponsor-based) in the current market as the economy and deal-related markets recover from the 2007-09 torpor.<sup>4</sup> It also serves as a further punctuation point for deal participants that, in this market, litigation and the inquiries that go with it can follow in the train of any transaction, and their actions should be guided by that reality.

The *Atheros* decision arises from the proposed all-cash merger of Atheros Communications, Inc. (“Atheros”) and a subsidiary of Qualcomm Incorporated (“Qualcomm”) for \$3.1 billion. The decision referenced the following background facts: (i) the parties already had an existing, five-year strategic partnership; (ii) there was no competing third-party bidder; and (iii) by one report, Qualcomm’s winning bid represented a 23x EBITDA multiple, compared to a median EBITDA multiple for similar deals in the

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<sup>4</sup> See “*First, the Merger; Then the Lawsuit*,” D. Searcey and A. Jones, Wall Street Journal, January 10, 2011 (citing research from Securities Class Action Services that the number of lawsuits challenging M&A-related transactions that have been filed in state and federal courts has risen from 27 in 2006 to 191 in 2009 and 216 in the first 10 months of 2010).

industry over the past five years of 15x.<sup>5</sup> Nevertheless, within 24 hours of the deal being announced, 10 plaintiffs’ firms announced that they were looking into the fairness of the transaction on behalf of shareholders,<sup>6</sup> and subsequently challenged the deal price and the Atheros board’s negotiations and approvals.

Plaintiffs challenged both the sales process used by the Atheros board and public disclosures on certain aspects of the transaction that were referenced in the proxy statement. Based on the preliminary record, the Chancery Court granted limited injunctive relief and enjoined the stockholder vote on the merger pending distribution by Atheros of corrective disclosure to cure certain incomplete or misleading statements in its proxy statement.<sup>7</sup>

### The Sales Process

The Court in *Atheros* reviewed in detail the sales process run by the Atheros board, and found the board to be independent and non-conflicted, with “deep knowledge of the Company’s industry.”<sup>8</sup> The record also reflected that, as part of the process, the board entered into an exclusivity agreement with Qualcomm early on in the negotiations when Qualcomm conditioned its submission of an

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<sup>5</sup> “*Qualcomm Pays Higher-Than Average Premium in Cash Deal for Atheros*,” Bloomberg Brief: Mergers, January 7, 2011, at 3.

<sup>6</sup> See “*First, the Merger; Then the Lawsuit*,” *supra* note 4.

<sup>7</sup> *Atheros* also further highlights the trend in the Delaware courts toward issuing disclosure injunctions, particularly where conflicts are perceived. In addition to *Del Monte*, *supra* note 3, see, e.g., *In re Topps Co. S’holders Litig.*, 926 A.2d 58 (Del. Ch. 2007); *In re Lear Corporation S’holders Litig.*, 926 A.2d 94 (Del. Ch. 2007); and *Maric Capital Master Fund, Ltd. v. PLATO Learning, Inc.*, C.A. No. 5402-VCS, 2010 WL 1931084 (Del. Ch. May 13, 2010).

<sup>8</sup> *Atheros*, 2011 WL 864928 at \*8.



increased offer on receipt of exclusivity. Entering into the exclusivity arrangement occurred when no other bids were standing, although solicitation efforts were underway and another bidder was considering a bid. The Plaintiffs alleged that entering into the exclusivity agreement constituted a breach of the board's *Revlon* duties since it unreasonably foreclosed the possibility of a transaction with another potential bidder at a higher price.

The Court declined to issue an injunction based on Plaintiffs' sales process claims. Instead, the Court found that a "robust and sophisticated" process had been undertaken where 11 potential acquirers had been considered and the Atheros board oversaw negotiations on potential transaction terms and actively directed its advisors.<sup>9</sup> In that setting, and on the preliminary record presented, the Court found that, even though there was another potential bidder considering a bid, the board acted reasonably in agreeing to the exclusivity agreement so as to not risk losing an "increased offer from Qualcomm -- which was merely a non-binding proposal at that time and the only offer then available -- that had resulted from a careful negotiation process."<sup>10</sup> It is not clear the extent to which the exclusivity demand and Qualcomm's threat to abandon negotiations were reviewed (by Atheros or the Court) in the context of whatever realities may have surrounded the existing strategic partnership that existed between the two companies, or whether such an assessment would have altered any determinations by the Court in any event. But in his ruling, Vice Chancellor Noble emphasized that "the Court will not second-guess the Board's [reasonable] conduct, and the Plaintiffs have failed to

demonstrate any reasonable probability of success on the merits of their price or process claims."<sup>11</sup> The Court's ruling underscores earlier Delaware precedent setting forth the standard that, under *Revlon*, boards must undertake a reasonable sales process -- not necessarily a perfect one.

While the Court did not find fault with the sales process, it did find material deficiencies with disclosure on certain other aspects of the transaction referenced in the proxy. In the Court's view, that finding necessitated enjoining the merger from proceeding until corrective disclosure was made.

### **Financial Advisor Fee Disclosure**

Atheros disclosed in its proxy statement that it had entered into an engagement letter with its financial advisor. In terms of fees to be paid, however, and contrary to disclosure practices that have become somewhat standardized, the proxy statement only provided that the advisor would "be paid a customary fee, a portion of which is payable in connection with the rendering of its opinion and a substantial portion of which would be paid upon completion of the Merger."<sup>12</sup> In fact, the engagement letter provided the advisor would be paid \$24 million (plus \$7,500 for every

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<sup>9</sup> *Id.*

<sup>10</sup> *Atheros*, 2011 WL 864928 at \*7.

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<sup>11</sup> *Atheros*, 2011 WL 864928, at \*8. The Court's findings on the preliminary record in *Atheros* and the determination there as to the likely success on the merits on the price and process claims contrasts with the Chancery Court's findings on the preliminary record in *Del Monte* and determinations there as to Plaintiffs' likelihood of success on the merits with respect to alleged breaches of fiduciary duties. Space does not permit a complete review and analysis here comparing and contrasting the board and/or Strategic Committee activities in each, although certain aspects of *Del Monte* as to board approval of the sell-side financial advisor providing buy-side financing are commented on below.

<sup>12</sup> *Atheros*, 2011 WL 864928, at \*8.

\$0.01 above \$45 per share), of which amount \$3 million was allocable to providing a fairness opinion (and most of that fee was contingent as well). In all, 98% of the aggregate fee (\$23.5 million) was contingent on the transaction closing and \$500,000 was the fixed fee portion on the fairness opinion. While the SEC routinely provides comments on merger proxies and other similar documents and typically requires that specific disclosure on financial advisor fees be made (at least for those filings reviewed), not all such documentation receives full review and comment treatment by the SEC.

The Court noted that “financial advisors . . . serve a critical function by performing a valuation of the enterprise upon which its owners rely in determining whether to support a sale.”<sup>13</sup> The Court further noted that therefore, “[b]efore shareholders can have confidence in a fairness opinion or rely upon it to an appropriate extent, the conflicts and arguably perverse incentives that may influence the financial advisor in the exercise of its judgment and discretion must be fully and fairly disclosed.”<sup>14</sup>

The Court determined that the proxy statement failed “to provide the required disclosures regarding the contingent fee arrangement by which [the financial advisor] will be compensated, and this, if not remedied, would constitute irreparable harm to the Atheros shareholders’ right to an informed vote on the transaction.”<sup>15</sup> Vice Chancellor Noble noted that “Atheros asks its shareholders to rely upon the fairness opinion [the financial advisor] has provided; the shareholders, therefore, have the right to disclosure of material facts that might provide reason to question the reliability

of that opinion,” and that “[s]tockholders should know that their financial advisor, upon whom they are being asked to rely, stands to reap a large reward only if the transaction closes and, as a practical matter, only if the financial advisor renders a fairness opinion in favor of the transaction.”<sup>16</sup>

While the Court recognized that contingent fees are “undoubtedly routine” in the market and may “properly incentivize the financial advisor,” the Court determined the proxy disclosure incomplete and inadequate.<sup>17</sup> The Court declined to set any sort of bright-line test as to when contingent-fee disclosure is material or whether it is required in all cases, and stated “that it was not necessary to resolve the general debate here” as to when such disclosure is required.<sup>18</sup> But the Court did note that “it is clear that an approximately 50:1 contingency ratio required disclosure” so that shareholders could be informed on those details as part of their overall assessment of the opinion and on how to vote.<sup>19</sup>

The Court also found that, while Atheros and its financial advisor had been negotiating an engagement letter for nearly

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<sup>16</sup> *Id.* at \*8, 13. *Atheros* further reminds that, notwithstanding SEC disclosure requirements, in disclosing matters relating to a business combination to a Delaware corporation’s stockholders, a board must disclose fully all material information within its control that would have a significant effect of the stockholders’ decision to approve or reject the transaction. *See e.g., Arnold v. Sec’y for Sav. Bancorp, Inc.*, 650 A.2d 1270 (Del. 1994) (noting that “once defendants traveled down the road of partial disclosure of the history leading up to the Merger and used the vague language described, they had an obligation to provide the stockholders with an accurate, full, and fair characterization of those historic events”).

<sup>17</sup> *Atheros*, 2011 WL 768835, at \*8.

<sup>18</sup> *Id.* at \*9.

<sup>19</sup> *Id.*

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at \*13.

three months, they reached agreement on fee arrangement aspects just days before the merger agreement was signed. Given this unusually late timing on fee matters, coupled with concerns around the contours of the contingent fee payment, the Court required that more detail needed to be disclosed on the dollar amount of the fee as well. The Court again declined to create a bright line test on when the fee amount needed to be disclosed. But the Court did cite an article noting that, while disclosure that a fee is “customary” may be “fairly informative in the context of a \$200 million merger, it may be insufficiently detailed for a multi-billion dollar merger.”<sup>20</sup>

Plaintiffs also had claimed that the proxy statement contained material omissions regarding the use of street forecasts as part of the financial advisor’s financial analysis rather than financial projections prepared internally by Atheros, and that the financial advisor had used an incorrect discount rate on the discounted cash flow analysis that was performed in the financial advisor’s financial analysis for the Board as to fairness. While the Court sided with the Plaintiffs on the disclosure deficiencies around the financial advisor’s compensation, the Court rejected claims that the proxy statement contained material omissions regarding the components of the financial advisor’s analysis. In denying Plaintiffs’ claim on the use of the street forecasts, the Court reiterated its earlier observation that “[t]here are limitless opportunities for disagreement on the appropriate valuation methodologies to employ, as well as the appropriate inputs to deploy within those methodologies. Considering this reality, quibbles with a financial advisor’s work

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<sup>20</sup> *Id.* at \*9 n.68 (quoting Blake Rohrbacher & John Mark Zeberkiewicz, *Fair Summary: Delaware’s Framework for Disclosing Fairness Opinions*, 63 Bus. Law. 881, 899-900 (2008)).

simply cannot be the basis of a disclosure claim.”<sup>21</sup>

### **Management Employment-Related Conflicts**

The Atheros proxy statement also provided that its CEO “had not had any discussions with Qualcomm regarding the terms of his potential employment by Qualcomm” before the parties had reached an agreement on the transaction.<sup>22</sup> The Chancery Court found that this disclosure may have been “literally true” because the specific terms of employment had not been discussed before reaching agreement.<sup>23</sup> But the Court nevertheless determined that such a statement was misleading since the CEO clearly had an understanding well before that date that Qualcomm would employ him post-closing. The Court found that, since the disclosure “partially addresses the process by which [the CEO] negotiated his future employment with Qualcomm, the Board must provide a full and fair characterization of that process,” and “the date on which [the CEO] learned from Qualcomm that it intended to employ him after the transaction closed should be disclosed.”<sup>24</sup>

In this aspect, *Atheros* echoes themes raised in a 2010 Delaware Chancery Court decision involving private equity firm Thoma Bravo’s then-proposed acquisition of PLATO Learning, Inc. There, PLATO had referenced in its proxy statement that one of the factors that PLATO’s board had considered in approving the merger was that the private equity firm and PLATO management “did not negotiate terms

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<sup>21</sup> *Id.* at \*10 (quoting *3Com S’holders Litig.*, C.A. No. 5067-CC, 2009 WL 5173804, at \*6 (Del. Ch. Dec. 18, 2009)).

<sup>22</sup> *Id.* at \*11.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at \*11-12.



of employment, including any compensation arrangements or equity participation in the surviving corporation.”<sup>25</sup> The Chancery Court found on closer inspection, however, that, while no formal negotiations had taken place, future arrangements had been discussed whereby the private equity buyer indicated to PLATO’s CEO that it typically retained top management after an acquisition in deals it has completed in the past. The Court determined that omission of these discussions from the proxy statement created a materially misleading impression that the decision to sell PLATO was unaffected by any understanding between management and the private equity buyer about future employment arrangements. As a result, the Chancery Court enjoined the proposed merger after a preliminary injunction hearing so that corrective disclosures were made on this and other issues around the financial advisor’s financial analysis.<sup>26</sup>

### **Post-Script; and Other Developments**

On March 18, after it had corrected the disclosure defects identified by the Court and circulated supplemental proxy materials, Atheros held its stockholders meeting to consider its transaction with Qualcomm. The transaction was approved by more than 75% of the shares voting. The injunction resulted in an 11 day delay since the originally scheduled vote was set for March 7.

While *Atheros* may be the latest Chancery Court decision where a sales process, proxy disclosure issues, and potential conflicts of interest involving a financial advisor and/or a management member gets scrutinized, it clearly is not going to be the last -- particularly where private equity participants are involved.

Another example post-*Atheros* where such issues have been put in play involves the proposed take-private of Emergency Medical Services Corporation (“EMS”) by affiliates of Clayton Dubilier & Rice LLC (“CD&R”). There, Plaintiffs are seeking to enjoin that transaction and have brought various breach of fiduciary duty claims against EMS directors based on the sales process undertaken by the board. Also, picking up on themes involved in *Del Monte*, Plaintiffs also have brought claims in the first instance against Onex Corporation (EMS’s controlling shareholder by voting power but not by equity interest), affiliates of CD&R, and EMS’s financial advisor, alleging that all such parties aided and abetted in the breach of the fiduciary duties by the directors.<sup>27</sup>

Among the sales-process-related claims in *EMS* are claims alleging financial advisor conflicts. Allegedly at the board’s request and so as to preserve confidentiality and avoid press leaks that the company was considering a sale, one of EMS’s financial advisors was asked at the outset to provide acquisition financing for bidders in the form of stapled financing. That financial advisor was not asked to provide a fairness opinion to EMS, which was being provided by another financial advisor (which was not providing acquisition financing). But

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<sup>27</sup> *In re Emergency Medical Services Corporation S’holders Litig.*, C.A. No. 6248-VCS (Complaint filed Feb 28, 2011). The basic theory being alleged by Plaintiffs in EMS is that Onex, which had already realized returns on portfolio company EMS post-its earlier buyout of the company, was experiencing financial losses and wanted to sell its stake in the portfolio company so as to improve its own IRR. Plaintiffs are alleging that since Onex controlled the EMS board and was eager to sell, it was willing to accept any price -- even a discount to current market as allegedly occurred in the transaction -- since even at that price Onex would realize a significant IRR and money-over-money gain based on its historical cost for the portfolio company.

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<sup>25</sup> See *Maric Capital Master Fund, Ltd. v. PLATO Learning, Inc.*, 11 A.3d 1175, 1179 (Del. Ch. 2010).

<sup>26</sup> *Id.* at 1178-79.

the financial advisor providing the stapled financing was evidently providing sell-side advisory advice on the transaction. Plaintiffs in *EMS* are alleging that the financial advisor providing the stapled financing aided and abetted the breaches of fiduciary duty by the board in helping to persuade the board to accept a negative-premium deal so as to ensure that the financial advisor received the stapled financing-related fees in the transaction.<sup>28</sup>

*Atheros* involved a strategic buyer and not a financial buyer as is the case in *EMS*. Consequently, *Atheros* did not involve allegations of financial advisor conflicts based on the financial advisor providing buy-side acquisition financing at the same time it is providing sell-side advice.

Such claims, however, were very much on display in *Del Monte*. Based on a preliminary record, the Chancery Court found there that the financial advisor that was providing sell-side advice had “planned from the outset to seek a role in providing buy-side financing” when it expressed the goal early-on in an internal Screening Memo that it “would look to participate in the acquisition financing once the Company has reached a definitive agreement with a buyer.”<sup>29</sup> The Court noted in *Del Monte* that the board there did not learn of the financial advisor’s early intent to provide

buy-side financing until litigation arose around the transaction.<sup>30</sup>

The Court in *Del Monte* also criticized the financial advisor for later requesting permission from the Del Monte board toward the final stages of negotiation to be one of the private equity consortium’s lead financing banks, which request was made prior to the time a definitive agreement was signed and during the period when negotiations between the parties on price and terms were still ongoing. The Court found, again based on the preliminary record, that the board acquiesced in this request, and criticized the board for, among other things, failing to ask, perhaps among other things, whether the financial sponsors could fund the deal without the financial advisor’s involvement. The decision at this stage of the transaction to allow the financial advisor to participate in the buy-side financing further necessitated that Del Monte engage another financial advisor to provide a fairness

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<sup>28</sup> *Id.* Other deal terms in the EMS transaction according to Plaintiffs’ Complaint included the following: (i) no majority of the minority provision; (ii) a no-shop; (iii) perpetual match rights for CD&R (on any unsolicited bid); (iv) a voting agreement by Onex to vote in favor of the transaction thereby locking-up the deal; and (v) a 3.6% break-up fee. While there appears to have been a limited pre-signing market-check according to the Complaint where four parties submitted bids, the transaction does not include a go-shop provision.

<sup>29</sup> *In re Del Monte Foods Co. S’holders Litig.*, Consol. C.A. No. 6027-VCL, 2011 WL 532014, at \*4 (Del. Ch. Feb. 14, 2011).

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<sup>30</sup> *Id.* The wording in the financial advisor’s Screening Memo that it would look to participate in the financing “after” the company entered into a definitive agreement suggests in the first instance that the financial advisor was mindful of and sensitive to earlier concerns the Chancery Court had raised around sell-side advisors providing buy-side financing as articulated in *In re Toys “R” Us, Inc. S’holders Litig.*, 877 A.2d 975 (Del. Ch. 2005) (determining that a sell-side advisor providing buy-side financing where the advisor’s request to the board to participate in such financing was made two months “after” the merger agreement was entered into, but generally suggesting sell-side advisors should avoid such participation in light of the conflict issues involved). While the inclusion of sort of statements found in the financial advisor’s screening memorandum in *Del Monte* raises serious questions about the contents of such internal communications as well as who is monitoring such documentation, it is also not clear at all that the absence of any such statement (or similar statement) in any internal screening or heads-up memoranda would necessarily translate into a lack of interest in providing such financing or absolve bankers from harboring such designs looked at from a real-world perspective.

opinion (at an additional transaction cost of \$3 million), which resulted in still further criticism of the financial advisor and the board by the Court. The Court determined that, with no “justification reasonably related to advancing stockholder interests,” the Del Monte board’s decision to allow the adviser to provide buy-side financing was “unreasonable” and contributed to a determination on the preliminary record that the Plaintiffs in *Del Monte* had “established a reasonable likelihood of success on the merits of their claim that the director defendants failed to act reasonably in connection with the sale process.”<sup>31</sup>

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<sup>31</sup> *Del Monte*, 2011 WL 532014, at \*18, 20. Reading that portion of *Del Monte* on the board’s consideration of the financial advisor’s request to participate in the acquisition financing, one gets the impression the board gave the request little consideration before simply approving it. Reading the version of events as described in Defendants’ Opposition to Plaintiffs Motion for Summary Judgment, however, one comes away with a far more contextualized impression as to the environment within which the board may have been evaluating the request. Looking at the transaction timeline, at the time the request was made to the board (the week of November 15 according to the proxy supplement), negotiations had been underway for some time. They were to continue just another week or so until November 24. KKR’s bid at the time was \$18.50 per share (already representing a significant premium), but the financial sponsors had been informed by Del Monte’s financial advisor that the board would not accept that price. The Strategic Committee also appears to have been mindful that Del Monte was scheduled to announce quarterly financial results on December 2, and evidently knew those results would be lower than earlier-provided guidance, as well as provide lower future guidance. Those concerns on financial results appear to have been borne out by a subsequent Del Monte filing. See Del Monte Foods Co., Current Report on Form 8-K (Dec 2, 2010) (noting a quarterly net sales decline of approximately 2% and lower FY 2011 net sales growth guidance of -1% to 1% vs. prior guidance of 1% to 3% (but also noting higher operating income)). There also appeared to be awareness that the lower-than-expected financial results could well translate into a lower stock price, which in turn could easily undercut Del Monte’s

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negotiating leverage and play straight into the hands of KKR in further price negotiations, and would provide ammunition for the financial sponsors to either balk at any further price increases at best, or possibly even result in a price reduction from the sponsors then-current bid. The Defendants’ Opposition further notes that, at the time of the request, the Strategic Committee also understood that the financial sponsors needed one last funding source to wrap-up the funding commitment process (which was required before the merger agreement could be signed), and that the financial advisor would be the ninth (and, significantly, final) participating bank in the syndicate and the financial advisor could complete the related diligence work quickly given its familiarity with the company. The financial advisor would also be required to offer acquisition financing to any third party that might bid in the go-shop process. Members of the board appear to have considered the risks and benefits as part of waiving the potential conflicts with the advisor. The per share bidding subsequently moved to \$18.75 (which was rejected) and then finally \$19.00 (a 40% premium) -- after the board approved the financial advisor’s request. The definitive agreement was executed on November 24. See Defendants’ Opposition to Plaintiffs Motion for Summary Judgment at 15-20, *Del Monte* (C.A. No. 6027-VCL) (referencing foregoing facts). To be sure, it is unclear whether the picture painted in Defendants’ Opposition around the sequencing of events and considerations referenced is supported by the complete record. Clearly, other readily apparent deficiencies exist with respect to Del Monte’s sales process. But if facts along the lines of the foregoing are supportable, query (for *Del Monte* or other transactions) whether the board’s decision at that stage of the transaction to allow the financial advisor to participate in (and complete) an almost-complete multi-member lending syndicate, which action could be viewed as part of a broader effort to sequence events, get as many price concessions as possible, wrap-up final negotiations, and get the definitive agreement signed, all prior to the release of the negative financial results that conceivably could result in a reduced price for shareholders, should be viewed as constituting unreasonable or uninformed action. It also raises the question more generally whether any set of facts could be found to exist that would support a board agreeing to let a sell-side advisor participate in acquisition financing prior to the time a definitive agreement is entered into. Viewed in this light, query whether such actions by the board at such a time and under such circumstances, rather than constituting a failure of *Revlon* duties, instead represent action of the

To be sure, as outlined in Plaintiffs' Complaint in *EMS*, the background facts there with respect to the financial advisor providing buy-side financing may paint a different picture than those presented on a preliminary record in *Del Monte*. It will remain to be seen how the Court in *EMS* views the financial advisor's actions and those of the board (especially in the aftermath of *Del Monte*), and what practical effect those two rulings cumulatively may have on the future of stapled financing structures. Also of interest to observers is that Vice Chancellor Strine, the author of *Toys "R" Us*,<sup>32</sup> is presiding in *EMS*. Vice Chancellor Laster noted in *Del Monte* that financial advisors had been on notice since *Toys "R" Us* in terms of the conflicts of interest that the Chancery Court sees as present when sell-side advisors provide buy-side financing.<sup>33</sup>

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sort *Revlon* calls for in terms of a board trying to chart a reasonable path (albeit perhaps not perfect in execution) so as to try to obtain the highest price achievable under the circumstances and in the context they find themselves. It is also interesting to contemplate what shareholder claims might have surfaced if negative news had been reported prior to the time a definitive agreement was entered into and the sponsors successfully leveraged those events into a price reduction, recognizing, of course, that such an inquiry would be speculative in nature.

<sup>32</sup> *In re Toys "R" Us, Inc. S'holders Litig.*, 877 A.2d 975 (Del. Ch. 2005).

<sup>33</sup> In *Toys "R" Us*, the sell-side financial advisor asked the board there if it could provide buy-side financing while deal negotiations were underway. The board denied the request. Two months later, after a definitive merger agreement had been entered into, the financial advisor asked again if it could participate in the financing syndicate. At that point, the board approved the request. The Court in *Toys "R" Us* concluded that, given the fact that the decision to allow the financial advisor to participate in the financing occurred two months after the definitive merger agreement was executed, the financial advisor's potential conflict did not have a "causal relationship" on the board process. Nevertheless, the Court cautioned that "[i]n general, however, it is

Its important to note that the foregoing merely references claims made in a Complaint involving the EMS transaction. The Chancery Court has made no findings of fact or issued any rulings in the litigation as of this date. Nevertheless, the litigation again underscores the increased litigation risk around all deals and types of claims all deal participants can expect.

### **Take-Aways From Atheros**

*Atheros* and other cases that will surely follow challenging sales processes, proxy disclosure matters, and potential conflicts by deal participants against a backdrop of increasing transaction volumes post-recession manifest the changing face of a constantly changing M&A landscape. But there are a number of key take-aways from *Atheros* for those working on transactional matters. Among them:

- *First*, as a general matter, transaction actors must bear in mind that the Chancery Court continues to look closely at and scrutinize M&A sales processes and the manner in which boards or committees are running every aspect of those exercises.
- *Second*, the Chancery Court also is closely reviewing proxy disclosure language bearing on arrangements that transaction participants may have currently or expect to have in the future to ensure that the disclosure contained in the proxy statement accurately reflects the real-world state-of-play, does not create misleading impressions, and instead affords shareholders the

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advisable that investment banks representing sellers not create the appearance that they desire buy-side work, especially when it might be that they are more likely to be selected by some buyers for that lucrative role than by others." *Id.* at 1006 n.46.



ability to fairly evaluate any real or potential conflict of interest considerations in deciding how to vote. The Court's focus is particularly keen around conflicts involving financial advisor matters and management employment arrangements. In that regard, parties preparing proxy materials will need to keep *Atheros* in mind when making judgment calls around such things as whether and/or to what extent to provide disclosure of financial advisor fees and management arrangements as weighed against attendant risks of receiving a possible injunction.

- *Third*, companies engaging financial advisors (and their counsel) need to closely oversee and be aware of the activities of their bankers (as *Del Monte* reminds). In addition, companies must be sensitive to proxy disclosure considerations around their arrangements with financial advisors, rather than just defer to the financial advisor's counsel.
- *Fourth*, although *Atheros* did not find fault with the financial advisor's fairness opinion analysis or the disclosure around the opinion, Plaintiffs had pressed such claims no doubt in light of the closer focus the Chancery Court has brought to bear in this area in a series of rulings during the past few years looking more closely into financial advisor matters generally, and the details of the financial analyses and the nuances attendant to those analyses

in particular.<sup>34</sup> Transaction participants should expect this focus to continue.

- *Fifth*, time will tell if bidders (of all stripes) try to use Vice Chancellor Noble's rationale around approving the board's use of the exclusivity agreement early in the sales process in *Atheros* as part of their own deal negotiation repertoire.
- *Sixth*, transaction participants must appreciate that disclosure missteps can result in injunctions, leading to closing delays, thereby increasing deal execution risk where intervening events may arise that disrupt closing schedules and undercut the full benefit of hard-fought, negotiated transaction terms.

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<sup>34</sup> Recent cases in this regard have reviewed such matters as the following: (i) valuation methodologies (see, e.g., *In re Sunbelt Beverage Corp. S'holders Litig.*, C.A. No. 16089-CC, 2010 WL 26539 (Del. Ch. Jan. 5, 2010); *Global GT LP v. Golden Telecom, Inc.*, 993 A. 2d 497 (Del. Ch. 2010); *Berger v. Pubco Corp.*, C.A. No. 3414-CC, 2010 WL 2025483 (Del. Ch. May 10, 2010)); (ii) disclosure concerning financial analysis (see, e.g., *In re 3Com S'holders Litig.*, C.A. No. 5067-CC, 2009 WL 5173804 (Del. Ch. Dec. 18, 2009); *Maric Capital Master Fund, Ltd. v. PLATO Learning, Inc.*, 11 A.3d 1175 (Del. Ch. 2010)); (iii) disclosure of financial advisor fees and relationships (see, e.g., *In re Art Technology Group S'holders Litig.*, C.A. No. 5955-VCL, 2010 Del. Ch. LEXIS 257 (Del. Ch. Dec. 21, 2010); *Steinhardt v. Howard Anderson*, C.A. No. 5878-VCL (Del. Ch. Jan 24, 2011)); (iv) legal privilege (see, e.g., *3Com Corp. v. Diamond II Holdings, Inc.*, C.A. No. 3933-VCN, 2010 WL 2280734 (Del. Ch. May 31, 2010)); and (v) choice of law (see, e.g., *Shandler v. DLJ Merchant Banking, Inc.*, C.A. No. 4797-VCS, 2010 WL 2929654 (Del Ch. July 26, 2010)).



## Indemnification Claims In M&A Transactions: Whose Tax Is It Anyway?

By  
Mark B. Vogel<sup>1</sup>

Not all M&A transactions end at closing. In certain M&A transactions, a substantial portion of the consideration might be set aside in an escrow or a holdback irrespective of whether there is contingent consideration in the form of an earnout. M&A practitioners and their clients should consider common claims and disputes that may arise in that context so that they might anticipate such claims and disputes and position themselves to better protect their interests.

### Sales Tax Exposure

One type of indemnification claim that comes up repeatedly relates to sales tax exposure of the target company. Such claims tend to be complicated because they often involve an assessment of the target company's interactions with customers in multiple states and the application of each state's tax laws. Additionally, the exposure on these claims can be significant because tax issues, including sales tax, generally fall outside of the standard limitations of time or amount provided for in the indemnification sections of the merger or sale agreement. That means that the indemnification obligation of the shareholders may extend well beyond any escrow period, may not be subject to a deductible or basket otherwise applicable to losses, and may exceed

the caps on indemnification generally applicable to other kinds of claims.

Because the analysis is so difficult, buyers often are uncertain what the exposure might be after closing. After taking over the company, they may learn that the target company was selling its products or services in many states and that sales taxes were not collected. Often, the buyer may know nothing further and might assert in good faith an indemnification claim for estimated or uncertain damages. In most cases, the buyer just wants to ensure that it will not suffer penalties or losses should there be noncompliance with any tax laws. If the representative is able to demonstrate that less is owed in taxes, the buyer is usually happy to reduce the amount of the indemnification claim. The problem is that many representatives have no idea where to start in trying to navigate this mess. Below is our outline of the issues to consider in attempting to reduce this sales tax exposure should you find yourself in this quandary.

#### *Whose tax is it?*

The first question to ask is whether any tax that may be due was or is the responsibility of the target company. Under most state laws, and as stated in most sales contracts, taxes on the purchase of goods (and, in some cases, services) are the responsibility of the purchaser. Failure to collect sales taxes may result in penalties and interest assessed against the vendor, but, in the end, the purchaser generally is responsible for the payment of the applicable taxes.

#### *Has the Statute of Limitations Period Expired?*

The shareholder representative should get a detailed account on a state-by-state basis to determine where the buyer believes it has potential exposure and for what tax years the buyer believes such exposure exists. In some cases, the statute of limitations for sales tax

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<sup>1</sup> Mark B. Vogel is a Managing Director of SRS | Shareholder Representative Services. The views expressed are those of the author and may not be representative of those of SRS or its clients.

collection may have already expired and no further action is required for those tax periods. This can quickly narrow the scope of the exposure and open issues.

#### *Does Nexus Exist?*

In other cases, the target company may have had no sales tax nexus. In states where the vendor has nexus (typically where (i) the vendor has a physical location; (ii) there are resident employees working in the state; (iii) the business has real or personal property in the state; or (iv) there are employees who regularly solicit business in the state), the vendor may have the responsibility to collect sales tax as an agent of the state. Simply selling a product or service in a state does not in itself mean there was a collection obligation. In states where the vendor does not have nexus and, therefore, typically has no obligation to collect sales tax, the purchaser might still have the obligation to pay taxes on its taxable purchases. The obligation to report those purchases and pay use tax falls on the purchaser and not the vendor. Nexus is, however, quite complex and it is not unusual for emerging companies to inadvertently trip the nexus requirement and not realize that it had an obligation to collect taxes on its sales in other states.

#### *Who was the Purchaser of the Goods or Services?*

Even if it is determined that nexus did exist and the statute of limitations has not expired, there still may be no sales tax exposure. Many sales are exempt from sales tax in specific circumstances. For example, if a customer is a reseller and does not consume the product, the sale might be exempt from the requirement to collect and remand the tax. Certain other customers, such as schools, may be exempt from sales tax in some jurisdictions. Lastly, certain products and services also might be exempt, such as training or hardware and

software maintenance. It is important to perform an analysis of each purchaser and each invoice. Reseller certificates from purchasers exempt from sales tax may be in the target company files or can be obtained from the purchaser as evidence that no sales tax was due.

#### *Did the Purchaser Already Pay the Tax?*

Prior to paying sales tax on any particular sale, the parties should contact the customers to see if they have already paid the applicable use tax. Many corporate purchasers will pay this tax even if the seller fails to collect the related sales tax. If the purchaser has done so, no further tax should be owed. If it has not, the target company should first try to collect the sales tax. The easiest way to do this is to re-invoice the customer assessing sales tax against taxable items, but reflecting that the invoice was partially paid. Included with the invoice should be an affidavit for the customer to confirm whether they had separately paid use tax on the purchased items. Any sales tax received can be remitted to the taxing authority taking advantage of amnesty and other provisions to minimize or abate interest or penalties on late filing and payment.

#### **Conclusion**

The bottom line is that the potential tax liability can often be reduced significantly if the related facts are investigated and the proper steps are taken to mitigate the exposure. In connection with going through this process, it is important to note that supporting documents, including exemption and resale certificates, invoices, and other records, must be available to defend the company in the event of a sales tax audit. Without proper documentation, a vendor can be held liable for tax not collected from a customer.

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## TASK FORCE REPORTS

### Task Force on Distressed M&A

The Task Force on Distressed M&A has been active in tracking issues relevant to distressed deals and in moving forward with our Deal Points Study!

At our previous meeting in Miami, Henry Fields, Larry Engel, and Alexandra Steinberg Barrage from Morrison & Foerster led a discussion on the recent ground-breaking *AmericanWest Bank 363 Transaction* where they used Section 363 of the Bankruptcy Code to effectuate the sale and recapitalization of FDIC-insured AmericanWest Bank by its parent bank holding company, AmericanWest Bank Corporation. This private equity-backed deal was the first of its kind and illustrative of how private equity groups are consummating distressed M&A deals by utilizing the Bankruptcy Code. Jennifer Muller from Houlihan Lokey also provided an update on Distressed M&A. We also discussed our pending Section 363 Deal Points Study.

Our next meeting is scheduled for Friday, April 15, from 8:30 a.m. until 9:30 a.m., in Boston (Marriott Copley Place). The agenda will include a presentation titled “*Making Sense of the Current Restructuring Market*,” by Alan D. Holtz and Spencer Ware of Alix Partners. An excerpt from a recent article they authored on the topic reads as follows:

“With unemployment hovering around 10%, the stock market at 2005 levels, the trade deficit trending upwards and the massive bankruptcies of 2009, one could have reasonably expected corporate restructuring activity to be at very high levels in 2010 and into 2011. Yet most restructuring professionals would tell you that this seemingly intuitive conclusion is

simply not accurate. Actually, many of these professionals are finding that the past year has evidenced a dramatic slowdown in restructuring activity. Why is it that in the midst of potentially the most difficult economic era since the Great Depression there is not more work for bankruptcy attorneys, turnaround consultants and restructuring bankers? Let us try to explain.”

Hank Baer of Finn Dixon will then present on *Intercreditor Agreements: Is a Sale Process Different from the Sale?* The presentation will center on the Delaware Bankruptcy Court’s decision in *American Safety Razor*, and its finding that a prohibition on objecting to a 363 sale does not prohibit objecting to a 363 sale process. Hank also will provide an update on the sale of Blockbuster. Finally, Peter Fishman and Jennifer Muller will cover the Section 363 Deal Points Study.

A few more words on the Study. We have received interest from many people to participate in the Study. The Study will be focused on completed transactions authorized under Section 363 of the Bankruptcy Code for the years 2007 through YTD 2011. We have identified approximately 350 transactions that closed during those periods and have developed a questionnaire to be completed in connection with each. The questionnaire focuses on the key issues of importance to legal and other professionals involved in Section 363 transactions. The final report resulting from the Study will detail how key issues in Section 363 transactions are being dealt with, provide an indication of what is “market,” and also examine trends over the past four years. We hope that the Study will prove helpful to the Bankruptcy Bench and Bar, lawyers in related disciplines, as well as other professionals involved in the space, as they each address this

increasingly important aspect of the bankruptcy practice.

I hope to see you in Boston!

Hendrik Jordaan  
Chair

## **Task Force on New Projects**

The inaugural meeting of the Task Force on New Projects was held in Miami at the Committee's stand-alone meeting in January. The meeting was attended by far more Committee members than we anticipated, and we thank each of those who attended for their time, interest, and excellent ideas.

The leadership of the Committee, based on the feedback and ideas from the Task Force's meeting, has thus far officially designated two new task forces. The Task Force on Two-Step Auctions, to be Co-Chaired by Rick Alexander and Michael O'Bryan, and the Task Force on Financial Advisor Disclosures, to be Chaired by Yvette Austin Smith, will each hold their inaugural meetings at the Spring Meeting in Boston.

The Task Force on New Projects will hold its second meeting in Boston. We are presently scheduled to meet from 10:30 a.m. until 12:00 p.m. in the Falmouth Room, which is located on the 3<sup>rd</sup> floor of the Marriott Copley Place.

At our meeting, we will continue discussing projects currently being considered by the Committee. We also encourage suggestions from the members of the Committee for new initiatives, and will reserve ample time for discussion of the ideas presented. We look forward to seeing all interested members in Boston.

Bruce Cheatham  
Chair

## **SUBCOMMITTEE REPORTS**

### **Acquisitions of Public Companies Subcommittee**

I am happy to report that we have sent the Model Agreement and Ancillary Agreements to the ABA publication staff! We hope to have presales of our Model Agreement at the Spring Meeting. The Editorial Board worked very hard to finalize the agreements over the last few months. We received excellent comments from Eileen Nugent and Joel Greenberg, as well as Professor Steve Davidoff. All have praised the quality and usefulness of our work product – so we can be very proud of our publication.

We have a program in Boston designed to introduce the ABA to our Model Agreement. I hope you will make plans to attend. Our program is on Thursday afternoon from 2:30 p.m. until 4:30 p.m. The program is entitled "*Breaking Away - Negotiating the Termination Provisions in Public Company Merger Agreements,*" and the panelists are myself, Jim Griffin, Mark Morton, and Rick Alexander.

Our Subcommittee meeting is on Friday, from 1:30 p.m. until 2:30 p.m. I have invited Dan Burch to return and talk about the proxy season, which will be kicking off. We also will have a general discussion about deal trends and recent cases. Joel Greenberg and Steve Bigler will lead a discussion about the recent *Del Monte* decision. Bring your favorite deal questions or new trends for discussion.

Our new Task Force on Two-Step Auctions has its inaugural meeting on Saturday, from 9:30 a.m. until 10:30 a.m. Michael

O'Bryan and Rick Alexander are co-chairing this task force. I know they have been busy planning a great kick-off meeting, so I encourage all who are interested in auctions or tender offers to attend and be ready to pitch in.

What meeting would be complete without a Subcommittee dinner? Hal Leibowitz and Jay Bothwick have found us a great place for dinner on Friday, April 15, with cocktails at 7:00 p.m. and dinner at 7:30 p.m. We will be at Davio's, 75 Arlington Street, Boston (approximately 4 - 5 blocks from the Copley Place hotels). Space is limited so please let Hal Leibowitz know if you plan to attend.

We also have arranged with Chief Justice Myron Steele for a repeat trip to Wilmington, Delaware – this time in beautiful May! Active Subcommittee members are invited. Contact either Mark Morton or me for details.

Diane Holt Frankle  
Chair

Jim Griffin  
Lorna Telfer  
Vice Chairs

## **International M&A Subcommittee**

The International M&A Subcommittee met in connection with the stand-alone meeting of the Committee in Miami.

### **BHP Billiton's Attempted Takeover of Potash Corporation**

The meeting began with a presentation by Nick Dietrich on issues arising in relation to BHP Billiton's attempt to take over Potash Corporation, which was followed by a Q&A session.

## **Public Company Takeovers Project**

Franziska Ruf summarized the current state of play on the Subcommittee's Public Company Takeovers Project she is leading with Daniel Rosenberg.

## **International JV Agreement Project**

Freek Jonkhart summarized the current state of play on the Subcommittee's International JV Project he is leading with Mireille Fontaine.

## **Task Force on New Projects**

Bruce Cheatham summarized the objectives of the Committee's new Task Force on New Projects. It was noted that the Subcommittee had four current projects underway but was always willing to undertake new projects, not only where they were intended for external publication by the ABA (*e.g.*, the Model Agreement) but also where they could add value to members even if they were not to be externally published (*e.g.* the Subcommittee's current Foreign Direct Investment Laws and Post-Closing Dispute Resolution projects).

The Subcommittee would serve as a potential source of input for the international component of new projects proposed by the Committee and in particular would, at the appropriate time, update its prior published works, including the international appendices to the Model Stock and Asset Purchase Agreements.

## **London Global Business Law Conference September 2011**

Daniel Rosenberg reported that the Business Law Section was planning a Global Business Law Conference to take place in London in September 2011. The conference will be similar in format to the conference presented by the Section in Frankfurt in May



2008. Daniel was a co-chair of the conference alongside former Section chair Charlie McCallum. The Committee will be proposing a number of programs for the conference.

### **Programs and Projects**

The Subcommittee had been asked to present a program at the Annual Meeting, which would take place in Toronto in August 2011. It also was noted that the International Law Section's International M&A & Joint Ventures Committee had approached the Subcommittee with a view to co-sponsoring a program at that meeting, as had the International Law Committee of the Business Law Section. It was further noted that a Canadian flavor to the Toronto program would be welcome.

The following subjects were discussed as possible topics:

- A possible program on IFRS, a topic proposed at former meetings, was discussed. John Elder and Jim Walther had previously raised this, but it was noted that there were relatively few members of the Subcommittee with specialist knowledge in that area.
- Comparative issues in poison pills, including a reference to the issues that arose in BHP Billiton's attempted takeover of Potash Corporation (Nick Dietrich and others).
- Proposed changes in the UK Takeover Code, including a comparison with developing US (and other) takeover practice (Daniel Rosenberg and others). Daniel noted that the UK Takeover Panel had yet to issue detailed proposals on the changes and that accordingly this might be a more suitable topic once those details had been made public.

- Tax issues on international M&A (Freek Jonkhart & Barry Horne). It was noted that the Subcommittee had run a program on this in April 2008.
- Public company M&A where the principal business and assets of the target are in a different jurisdiction to where it is incorporated and listed (André Perry).
- Director liability issues post closing (Jim Walther had originally raised this and Richard Blanchet expressed an interest).
- FCPA/anticorruption law compliance: How to assess the risks before committing to a transaction and how to fix what you bought. It was noted that this was a topic of interest to the International Law Committee (see above) and that the UK's new Bribery Act was a relevant development.

Other suggestions remaining on the agenda from earlier meetings were the following:

- Use of New Supranational Corporate Entities in M&A (Societas Europas, etc.).
- Mock Negotiation of Cross-Border Acquisition (using results of International Deal Points study).
- Cross-border distressed company acquisitions.
- Return of nationalization risk in cross-border M&A.
- Impacts and risks of privacy regimes in the EU and elsewhere.
- International comparison of disclosure requirements and restrictions on "stake-building."

- Off-shore Holding Company Structures for M&A.

### **Current Developments Discussion**

The meeting concluded with our customary general discussion by Subcommittee members regarding legal developments in their jurisdictions relevant to M&A practice. Points raised included the following:

- Richard Blanchet updated the meeting on recent developments in Brazil, including (i) a recent orientation rule issued by the Brazilian securities regulator (with influence coming from Delaware practice) recommending directors of public companies being merged into controlling companies to establish independent bargaining structures, including the use of a special and independent committee to evaluate and discuss the offer on an arm's length basis, (ii) a Bill of Law aimed at changing the Brazilian anti-trust rules which, among other provisions, replaces the current post-acquisition approval process by a previous approval decision as a condition for closing and establishes revised thresholds for the filing, and (iii) the obligation of public companies to disclose their economic group's consolidated financial statements under IFRS.
- Yvon Dreano described developments related to LVMH's accumulation of a 20% stake in Hermes, the permission given by the French AMF for the numerous members of the Hermes family to pool their shares (as a defensive strategy) without triggering a mandatory takeover offer under the French takeover rules, and the related review by the AMF.

- Daniel Rosenberg updated the meeting on the UK's Bribery Act 2010, where the UK's Coalition Government had announced a review of the new regime before it comes into force (which is expected to be in April 2011).
- Daniel also updated the meeting on proposed changes to the UK public company takeover regime which were intended to redress the balance away from the current tactical advantages which a hostile bidder is considered to hold. Proposed changes include restrictions on "virtual" offers (where a bidder announces a possible offer without launching it at the time), a prohibition on break fees and other deal protections, increased disclosure of bidder financials, increased disclosure of transaction fees (including the breakdown of advisers' fees by category), steps to facilitate employee commentary on a bid, and a clarification that the Code does not restrict a target board from taking account of factors other than the offer price in evaluating an offer.

### **Future Meetings**

The Subcommittee's next meeting will be held in connection with the Spring Meeting of the Business Law Section, which will take place at the Marriott Copley Place and The Westin Copley Place, from Thursday, April 14, through Saturday, April 16. The Subcommittee meeting will be on Friday, April 15, at The Westin Copley Place, from 11:30 a.m. until 1:30 p.m., in the St. George C and D meeting room.

### Subcommittee Website

The Subcommittee's website may be accessed at the following address: [www.abanet.org/dch/committee.cfm?com=CL560016](http://www.abanet.org/dch/committee.cfm?com=CL560016). The website contains the following information:

- Presentation notes of Nick Dietrich on BHP Billiton's attempt to take over Potash Corporation.
- The latest materials from the Subcommittee's Foreign Direct Investment Project and International Dispute Resolution Project.
- A note by Yvon Dreano expanding on his comments made at the meeting on the stake in Hermes built up by LVMH.
- Details of the Subcommittee's publications, future meetings, other work-in-progress, and other past program materials.

We look forward to seeing you in Boston.

Daniel P. Rosenberg  
James R. Walther  
Co-Chairs

### Membership Subcommittee

In January 2011, our total Committee membership was at 4,054 compared to a 3,682 membership as of July 15, 2010, indicating a 10% increase. Since January, membership has dropped by 3% for a total Committee membership of 3,946. That is still an increase of more than 7% since July 2010, but we need to remain focused on programs and events that will keep our members engaged!

Since January 2011, our membership is still in 49 states but now throughout 51 countries, a 4% increase which shows how "international" the M&A world is becoming.

Unfortunately, there is a slight decrease in our in-house counsel members from 391 to 368, as well as in our "associate" members (non-lawyers), which are now at 325 from 330. We need to keep our energy focused on those "associate" members!

Indeed, the Membership Subcommittee has been formally expanding its ties with the Association for Corporate Growth (ACG). This effort is ongoing. We explored our ACG relationship since and, as announced, members of the ACG are eligible to register for the Spring Meeting at the Section member meeting rate (and registration for the meeting is even less if a first time attendee). The Diversity Initiative and the Membership Committee have put together a reception in Boston and we hope all will attend the joint Committee/ACG reception on Friday April 15, at the America North Ballroom in The Westin Copley Place, from 4:30 p.m. until 6:30 p.m. Also invited are young lawyers and minority members of the Bar from the area to support our important efforts to increase the number of younger members and diversity of the Committee. We hope you will stop by to support these efforts and help spread the good word about our Committee to these potential younger and minority members. They will be identified by special name tags and we need your support to help make them feel welcome. Note that the registration for this event for ACG members is free! Spread the word!

A word on our Subcommittees – the M&A Market Trends Subcommittee is still our largest group with 1,404 members. Below is a list of the other larger subcommittees and their membership numbers:

Private Equity M&A	1,215
Public Companies	772
International M&A	800
M&A Jurisprudence	659

These subcommittees have seen their membership decrease since January 2011. The Task Force on Distressed M&A, however, had a slight increase in membership. We cannot stop our efforts to attract new members and are working at new events, associations, and programming to keep you interested and involved. Please share your ideas with us.

Women continue to represent 17% of the total membership of the Committee. This does not reflect the target the Committee has set for itself and we therefore need to double our efforts and urge you to invite female associates and partners to become involved.

We thank you for your involvement and hope to see you all very soon.

Mireille Fontaine  
Ryan Thomas  
Tracy Washburn  
Co-Chairs

## **M&A Jurisprudence Subcommittee**

The M&A Jurisprudence Subcommittee has two working groups. The Annual Survey Working Group identifies and reports to the Committee on recent decisions of importance in the M&A area, and prepares the Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions, which is published annually in *The Business Lawyer*. The Judicial Interpretations Working Group examines and reports to the Committee on judicial interpretations of specific provisions of acquisition agreements and ancillary documents, looking not only for recent M&A cases of special interest, but also examining the entire body of case law on the specified type of provision. The work product of the Judicial Interpretations Working Group consists of memoranda summarizing our findings regarding these acquisition agreement

provisions and M&A issues. The memoranda are posted in an extranet library, to which only M&A Jurisprudence Subcommittee members have access currently, but which we are preparing to make available to all members of the Committee.

The Annual Survey Working Group will meet in Boston on Friday, April 15, from 10:30 a.m. until 11:30 a.m., in the Wellesley Room at the Marriott Copley Place. The Judicial Interpretations Working Group will meet immediately thereafter, from 11:30 a.m. until 1:00 p.m., in the same room. Dial-in information for the meetings will be sent to members of the Subcommittee as soon as it becomes available from the ABA.

### **Annual Survey Working Group**

The eighth Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions will be published in the February 2011 issue of *The Business Lawyer*. We thank all Committee members who participated in that effort. At the Committee meeting in Boston, we will discuss the *Patriot Rail* case, summarized below. At the Working Group meeting we will continue our efforts to select cases for inclusion in the 2011 annual survey.

We are asking all members of the Committee to send us significant judicial decisions for possible inclusion in the survey. Submissions can be sent by email either to Jon Hirschhoff ([jhirschhoff@fdh.com](mailto:jhirschhoff@fdh.com)) or to Michael O'Bryan ([mobryan@mofo.com](mailto:mobryan@mofo.com)). You may fax cases to Jon at (203) 325-5001 or to Michael at (415) 268-7522. Please state in your email or on the fax cover sheet why you believe the case merits inclusion in the survey.

The first criterion for inclusion is that the decision must involve a merger, an equity sale of a controlling interest, a sale of all or substantially all assets, a sale of a subsidiary or division, or a recapitalization resulting in a

change of control. The second criterion is that the decision must (i) interpret or apply the provisions of an acquisition agreement or an agreement preliminary to an acquisition agreement (e.g., a letter of intent, confidentiality agreement, or standstill agreement), (ii) interpret or apply a state statute that governs one of the constituent entities (e.g., the Delaware General Corporation Law or the Louisiana Limited Liability Company Law), (iii) pertain to a successor liability issue, or (iv) decide a breach of fiduciary duty claim. We are currently excluding cases dealing with federal law, securities law, tax law, and antitrust law. But if you feel a case dealing with an M&A transaction is particularly significant please send it, even if it does not meet the foregoing criteria.

To join our working group, please send an email to Jon Hirschhoff ([jhirschhoff@fdh.com](mailto:jhirschhoff@fdh.com)) or to Michael O'Bryan ([mobryan@mofo.com](mailto:mobryan@mofo.com)), or simply attend the working group meeting in Boston.

### **Decision to be Discussed at the Boston Committee Meeting**

*Patriot Rail Corp. v. Sierra Railroad Company*, 2011 WL 318400 (E.D. Cal. Feb. 1, 2011).

In *Patriot Rail Corp. v. Sierra Railroad Company*, the Court addressed, under California law, claims that a potential buyer breached covenants implied into an otherwise non-binding letter of intent and claims of intentional misrepresentation and fraud asserted against both the potential buyer and an individual employee of the potential buyer.

The claims arose following negotiations over the purchase by Patriot Rail Corp ("Patriot") of the short-line railroad operations of Sierra Railroad Company ("Sierra"). Patriot and Sierra signed a Non-Disclosure Agreement ("NDA") in connection with the potential

purchase. During the negotiations, Sierra sought a long-term contract to replace the short-term contract it already had to provide rail services to McClellan Business Park ("McClellan"), and introduced Patriot to McClellan as a potential buyer of Sierra that could fund Sierra's expansion at the McClellan site. Shortly thereafter, McClellan announced that it was starting a Request For Proposal ("RFP") process for the long-term contract. Patriot submitted a RFP response and won the contract. Sierra sued Patriot, claiming, among other things, breach of the NDA.

Sierra dismissed its complaint, however, after Patriot and Sierra agreed to continue their acquisition talks and entered into a letter of intent ("LOI"). The parties ultimately terminated their negotiations and further litigation ensued, with Pacific claiming breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, and unfair competition. Sierra counterclaimed on the same bases, as well as for negligent and intentional interference with prospective economic advantage. The opinion addressed Patriot's motion for summary judgment.

### *Claims Allowed against the Potential Buyer*

*Implied Covenant of Intent.* The Court noted that the LOI contained language providing that it was non-binding, and that accordingly the failure to acquire Sierra by itself would not breach the LOI. The Court held, however, that the LOI included an implied covenant that Patriot have the intent to purchase Sierra. Specifically, the Court stated that "implied covenants will be found if after examining the contract as a whole it is so obvious that the parties had no reason to state the covenant, the implications arise from the



language of the agreement, and there is a legal necessity.”<sup>1</sup>

As evidence that Patriot lacked the implied intent to purchase, Sierra cited Patriot’s RFP proposal, in which Patriot named a contractor other than Sierra as the group it would partner with on the McClellan project. Sierra argued that Patriot would have named Sierra in its RFP proposal if it had intended to purchase Sierra. The Court noted that whether the parties were still in negotiations was not an undisputed fact, and thus not suitable for summary judgment.

*Implied Covenant of Good Faith and Fair Dealing.* The Court stated that the obligations under the LOI included the implied covenant of good faith and fair dealing, which could be violated by a “conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party,” even with respect to a covenant that was merely implied, rather than expressed.<sup>2</sup> The court accordingly denied summary judgment with respect to that claim.

*Torts, Unfair Competition, and Other Claims.* The Court allowed claims of intentional and negligent interference with prospective economic advantage to continue on the basis that Sierra could have won the McClellan contract. Sierra also asserted claims of unfair competition under Section 17200 of California’s Business and Professions Code, which prohibits any unlawful, unfair or fraudulent act or practice, and which the Court stated could be supported by the claims of fraud and breach of implied covenant with respect to the acquisition negotiations.<sup>3</sup> The Court also

denied Pacific’s motion for summary judgment with respect to Sierra’s fraud claim.

#### *Claims Allowed against an Individual Employee*

Sierra claimed that misleading statements made by an employee of Patriot induced Sierra to provide the employee with confidential information that he then passed along to Patriot, which aided Patriot in the McClellan RFP, and that the employee had instructed Sierra not to take any action that could “jeopardize the buyout transaction.” The court stated that “in cases involving intentional misrepresentation or fraud, an employee or agent may be individually responsible for the commissions of that tort,”<sup>4</sup> and that the employee could be personally liable if he was aware that Patriot lacked the intent to purchase Sierra’s operations from Sierra but continued to obtain confidential information.

#### **Judicial Interpretations Working Group**

The primary project of the Judicial Interpretations Working Group is to create for members of the Committee an online research library of memos on acquisition agreement provisions and M&A issues. Our goal is to launch the library in 2011, with memoranda summarizing the judicial interpretation of the following: (i) financial statement representations, (ii) no undisclosed liabilities representations, (iii) full disclosure (“10b-5”) representations, (iv) material adverse change clauses, (v) survival clauses and contractual statutes of limitations, (vi) tortious interference claims in M&A transactions, (vii) attorney-client privilege and conflicts issues in M&A transactions, (viii) best efforts/reasonable efforts clauses, (ix) earn-out provisions, (x) exclusivity and standstill provisions and/or

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<sup>1</sup> 2011 U.S. Dist LEXIS 61131 at 17.

<sup>2</sup> *Id.* at 19 (citations omitted).

<sup>3</sup> *Id.* at 31.

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<sup>4</sup> *Id.*

agreements, (xi) choice of law provisions, (xii) bringdown conditions, (xiii) no third-party beneficiaries provisions, (xiv) non-reliance provisions, (xv) rescission claims based on fraud when indemnification is stated to be sole remedy, and (xvi) dispute resolution clauses in purchase price adjustment provisions.

We have working group teams in various stages of preparation of memoranda regarding additional acquisition agreement provisions and M&A issues, and we have a virtually unlimited pool of topics to work on in the future. We welcome all interested Committee members to join our Working Group. The Judicial Interpretations Working Group is a good way to become involved in the Committee, especially for younger Committee members because extensive M&A transactional experience is not necessary.

The Judicial Interpretations Working Group met during the Committee's stand-alone meeting in Miami. During the meeting we had a spirited discussion of the memo on non-reliance provisions authored by Joe Kubarek and Pat Leddy, and Nick Dietrich's paper on rescission claims based on fraud when indemnification is stated to be the sole remedy. We also discussed the architecture and functionality of the internet library website.

As indicated above, the Boston meeting of the Judicial Interpretations Working Group will be held on Friday, April 15, from 11:30 a.m. until 1:00 p.m., in the Wellesley Room on the 3<sup>rd</sup> floor of the Marriott Copley Place, immediately following the Annual Survey Working Group meeting. We plan to discuss the memo on dispute resolution clauses in purchase price adjustment provisions authored by Alan Sachs. We also will discuss some of the other memoranda in progress, and continue our discussion of the architecture and functionality of the internet library.

To join our working group, please send an email to either Scott Whittaker ([swhittaker@stonepigman.com](mailto:swhittaker@stonepigman.com)) or Jim Melville ([jcm@kskpa.com](mailto:jcm@kskpa.com)), or simply attend the working group meeting in Boston.

Jon T. Hirschhoff  
Subcommittee Chair

Michael G. O'Bryan  
Chair - Annual Survey Working Group

Scott T. Whittaker  
James C. Melville  
Co-Chairs - Judicial Interpretations  
Working Group

## **M&A Market Trends Subcommittee**

At our meeting in Miami, we heard from the following: (i) Jennifer Muller on updated data on the state of the M&A market; (ii) Mark Morton on the latest in Delaware litigation; (iii) John Clifford on selected data points in the 2010 Canadian Deal Points Study; and (iv) Hal Leibowitz on selected data points in the 2010 Strategic Buyer/Public Company Target M&A Deal Points Study.

Our next meeting will be held in Boston on Friday, April 15, from 2:30 p.m. until 4:00 p.m. At that meeting, we will hear from the following:

- Rick Lacher and Jen Muller of Houlihan Lokey on the M&A Market from the banker's perspective;
- Bill Anderson of Goldman Sachs on deals in the private equity and hostile activity areas; and
- Steve Kotran of Sullivan & Cromwell discussing the Practical Law Company study of remedies in public company deals.

Jay Bothwick also will update us on the returning Private Equity Buyer/Public Company Target M&A Deal Points Study (which will compare deal points in transactions from 2007 through 2010 to what we saw in the study looking at 2005 and 2006 agreements). Hal Leibowitz will discuss the next iteration of the Strategic Buyer/Public Company Target M&A Deal Points Study to be published in 2011 (which will compare deal points in transactions from 2010 to what we saw in prior iterations of the study). Finally, Wilson Chu will provide an update on the next iteration of the Private Target Deal Points Study to be published in 2011 (which will compare deal points in transactions from 2010 to what we saw in prior iterations of the study).

The dial-in number and passcode for the meeting for those of you who cannot attend in person is as follows:

Domestic: (866) 646-6488  
International: (707) 287-9583  
Passcode: 6848842007

We look forward to seeing you in Boston.

Jim Griffin  
Jessica Pearlman  
Co-Chairs

### **Private Equity M&A Subcommittee**

The Private Equity M&A Subcommittee met in Miami in connection with the stand-alone meeting of our Committee. At the gathering, the Subcommittee received materials and discussed events and developments related to the Private Equity and M&A markets generally during the past 6 - 12 months. The Subcommittee was joined by a number of guest speakers. Separate segments/speakers included the following: (i) "Update and Overview on Current Private Equity and General M&A

Market Conditions" by Jason Cunningham, Managing Director, Citigroup Financial Sponsors Group, which reviewed latest broader market data and trends; (ii) "Financing Markets for M&A and Private Equity" by Ken Kencel, President and CEO, Churchill Financial LLC, which reviewed the current market from the perspective of a provider of senior and subordinated debt to sponsor-backed companies; and (iii) "Private Equity Trends by the Numbers" by Andrew Greenberg, CEO of GF Data Resources, which reviewed valuation, leverage, and other data on recent transactions. The Subcommittee meeting was well-attended, and the Subcommittee thanks all attendees and participants for contributing to the session.

John K. Hughes  
Chair

### **Programs Subcommittee**

The 2011 Spring Meeting in Boston will feature one program sponsored by our Committee, an industry sector discussion, and a timely presentation to be featured as the Committee Forum. These programs and presentations include the following:

#### **"Breaking Away - Negotiating the Termination Provisions in Public Company Merger Agreements"**

Thursday, April 14, 2011  
2:30 p.m. - 4:30 p.m.

The program will be chaired by Diane Holt Frankle, Chair of the Acquisitions of Public Companies Subcommittee. Panelists also will include Jim Griffin, Mark Morton, and Rick Alexander. The program will not only highlight a hotly negotiated set of provisions that come up in virtually every public deal, but also will be an initial introduction of and glimpse into the soon-to-be released Model Agreement and work product.

**Industry Sector Discussion  
Full Committee Meeting**

“Smokestack Acquisitions” will continue our industry sector focus during the full Committee meeting in Boston. Jim Doub will lead a discussion on the acquisitions and sales of manufacturing businesses, highlighting key due diligence concerns, special contract provisions, and post-closing procedures and concerns.

**Committee Forum**

The Committee Forum, which will be held immediately following the full Committee meeting on Saturday, April 16, is entitled “*Retaining and Managing your Investment Banker in the Aftermath of In re Del Monte Foods Company Shareholder Litigation.*” David Albin will chair the Committee Forum. He will be joined in an anticipated lively discussion of the case and a mock negotiation by Kevin Miller, Michael O’Bryan, Patricia Vella, and the Honorable Myron T. Steele, Chief Justice, Delaware Supreme Court.

**Future Meetings**

The Programs Subcommittee is developing a slate of programs for the 2011 Annual Meeting and for our Committee stand-alone meeting to be held early next year. If any of you have ideas for programs, please contact one of the co-chairs of our Subcommittee – David Albin ([dalbin@fdh.com](mailto:dalbin@fdh.com)), Yvette Austin Smith ([ysmith@srr.com](mailto:ysmith@srr.com)), or Bob Copeland ([rcopeland@sheppardmullin.com](mailto:rcopeland@sheppardmullin.com)).

David Albin Co-Chair  
Yvette Austin Smith Co-Chair  
Bob Copeland Co-Chair

\* \* \*

**COMMITTEE MEETING  
MATERIALS**

**BUSINESS LAW SECTION MEETING**

**MARRIOTT COPLEY PLACE  
AND  
THE WESTIN COPLEY PLACE**

**APRIL 14-16, 2011**

**SCHEDULE OF MEETINGS AND OTHER  
ACTIVITIES**

**Thursday, April 14, 2011**

**Program** – “Breaking Away - Negotiating the Termination Provisions in Public Company Merger Agreements”

2:30 p.m. – 4:00 p.m.

Westin

Essex North Ballroom, 3<sup>rd</sup> Floor

**Friday, April 15, 2011**

**Task Force on Distressed M&A**

8:30 a.m. – 9:30 a.m.

Marriott

Wellesley Room, 3<sup>rd</sup> Floor

*Domestic:* (866) 646-6488

*International:* (707) 287-9583

*Passcode:* 5757728105

**Task Force on Financial Advisor Disclosures**

9:30 a.m. – 10:30 a.m.

Marriott

Exeter Room, 3<sup>rd</sup> Floor

*Domestic:* (866) 646-6488

*International:* (707) 287-9583

*Passcode:* 7351892238

**Annual Survey Working Group of the M&A Jurisprudence Subcommittee**

10:30 a.m. – 11:30 a.m.

Marriott

Wellesley Room, 3<sup>rd</sup> Floor

*Domestic:* (866) 646-6488

*International:* (707) 287-9583

*Passcode:* 5757728105

**Task Force on New Projects**

10:30 a.m. – 12:00 p.m.

Marriott

Falmouth Room, 3<sup>rd</sup> Floor

*Domestic:* (866) 646-6488

*International:* (707) 287-9583

*Passcode:* 2903447596

**Judicial Interpretations Working Group of the M&A Jurisprudence Subcommittee**

11:30 a.m. – 1:00 p.m.

Marriott

Wellesley Room, 3<sup>rd</sup> Floor

*Domestic:* (866) 646-6488

*International:* (707) 287-9583

*Passcode:* 5757728105

**International M&A Subcommittee**

11:30 a.m. – 1:30 p.m.

Westin

St. George C & D, 3<sup>rd</sup> Floor

*Domestic:* (866) 646-6488

*International:* (707) 287-9583

*Passcode:* 4492201396

**Acquisitions of Public Companies Subcommittee**

1:30 p.m. – 2:30 p.m.

Marriott

Suffolk Room, 3<sup>rd</sup> Floor

*Domestic:* (866) 646-6488

*International:* (707) 287-9583

*Passcode:* 9840141310

**M&A Market Trends Subcommittee**

2:30 p.m. – 4:00 p.m.

Westin

St. George A & B, 3<sup>rd</sup> Floor

*Domestic:* (866) 646-6488

*International:* (707) 287-9583

*Passcode:* 6848842007

**Meeting of Committee Chair and Vice Chairs, Subcommittee and Task Force and Working Group Chairs**

4:30 p.m. – 5:30 p.m.

Marriott

Wellesley Room, 3<sup>rd</sup> Floor

*Domestic:* (866) 646-6488

*International:* (707) 287-9583

*Passcode:* 5757728105

**Saturday, April 16, 2011**

**Task Force on Dictionary of M&A Terms**

8:30 a.m. – 10:30 a.m.

Marriott

Salon E, 4th Floor

*Domestic:* (866) 646-6488

*International:* (707) 287-9583

*Passcode:* 2162173359

**Task Force on Two-Step Auctions**

9:30 a.m. – 10:30 a.m.

Marriott

Yarmouth Room, 4<sup>th</sup> Floor

*Domestic:* (866) 646-6488

*International:* (707) 287-9583

*Passcode:* 4917649103

**Private Equity M&A Subcommittee**

10:30 a.m. – 12:30 p.m.

Marriott

Salon E, 4<sup>th</sup> Floor

*Domestic:* (866) 646-6488

*International:* (707) 287-9583

*Passcode:* 2162173359



**Full Committee Meeting**

12:30 p.m. – 3:00 p.m.

Marriott

Salon E, 4<sup>th</sup> Floor

*Domestic:* (866) 646-6488

*International:* (707) 287-9583

*Passcode:* 2162173359

**Committee Forum** – “Retaining and Managing Your Investment Banker in the Aftermath of *In Re Del Monte Foods Company Shareholders Litigation*”

3:00 p.m. – 4:00 p.m.

Marriott

Salon E, 4<sup>th</sup> Floor

**Committee Reception and Dinner**

L’Espalier Restaurant

774 Boylston Street

Boston, MA 02199

617-262-3023

*Sponsored by*

*Practical Law Company, Inc.*

Reception: 7:00 p.m.

Dinner: 8:00 p.m.

American Bar Association, Section of Business Law, Committee on Mergers and Acquisitions. The views expressed in the Committee on Mergers and Acquisitions Newsletter are the authors' only and not necessarily those of the American Bar Association, the Section of Business Law or the Committee on Mergers and Acquisitions. If you wish to comment on the contents, please write to the Committee on Mergers and Acquisitions, Section of Business Law, American Bar Association, 321 N. Clark Street, Chicago, Illinois, 60610.



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