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Market Trends, Legal Developments, and Their Effect on M&A Documentation

Irwin A. Kishner

Partner

Herrick Feinstein LLP

ASPATORE

Introduction

Attorneys who focus their practice on mergers and acquisitions (M&A) must stay abreast of the overall economic climate, new laws, and regulations affecting M&A activity and structuring, developing case law, and trends in M&A documentation. This chapter explores these factors and their effect on an attorney's M&A practice and clients.

Market Trends

Current financial information and studies provide a hazy picture of the general direction of the US and global economies and overall M&A activity.

According to the most recently available statistics, the economy of the United States grew at a rate of 2 percent in the first quarter of 2012, 1.3 percent in the second quarter of 2012, and 2 percent in the third quarter of 2012.[1] As we look to 2013 and the near future, economists are predicting continued slow economic growth at a global level and slightly improved growth in the United States. The Federal Open Market Committee, for one, estimates that the gross domestic product of the United States will grow at a rate of 2.5 percent to 3 percent in 2013.[2] Also, outside of monthly data fluctuations, the US job market has produced 150,000 jobs per month since early 2010.[3] Despite the apparent good news, however, many experts recognize that the falling jobless rate is the result, not just of job growth, but of a decrease in the labor force stemming from individuals who have stopped searching for work or who are underemployed.[4] A review of the performance of the US stock market yields similarly unclear results. Through the fourth

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[1] *See* Nelson D. Schwartz, *U.S. Growth Rate Picks Up to 2%,* N.Y. TIMES, Oct. 26, 2012, http://www.nytimes.com/2012/10/27/business/economy/us-economy-grew-at-2-rate-in-3rd-quarter.html?ref=unitedstateseconomy&_r=0.

[2] Jeff Kearns, *Fed Officials Upgrade Economic Growth Outlook in 2013, 2014*, BLOOMBERG (Sept. 13, 2012), http://www.bloomberg.com/news/2012-09-13/fed-officials-upgrade-economic-growth-outlook-in-2013-2014.html.

[3] *See* Mark Zandi, *U.S. Macro Outlook: Slow and Steady Isn't Enough*, MOODY'S ANALYTICS, Oct. 9, 2012, http://www.economy.com/dismal/article_free.asp?cid=234640&tid=F0851CC1-F571-48DE-A136-B2F622EF6FA4&src=economy_homepage.

[4] *See* Jeff Cox, *Jobs Growth Rises 114,000 as Rate Slides to 7.8 Percent,* CNBC.COM (Oct. 5, 2012, 10:26 AM), http://www.cnbc.com/id/49299718/Jobs_Growth_Rises_114_000_as_Rate_Slides_to_7_8_Percent.

quarter of 2011, the NASDAQ Stock Market and the New York Stock Exchange were up 105 percent and 77 percent, respectively.[5] As of November 30, 2012, the NASDAQ Composite was up 14.28 percent year to date and the S&P 500 was up 14.29 percent year to date[6]; however, the US stock market has yet to return to its peak in 2007. Also, although the political uncertainty arising from the 2012 presidential elections has dissipated, economists and the population at large are now focused on issues and choices that will be faced by the US government when the terms of the Budget Control Act of 2011 go into effect at the end of 2012.[7] Popularly referred to as the "fiscal cliff," beginning in 2013, various tax cuts will end, taxes relating to President Obama's health care law will take effect, and many government agencies and programs will see large budget cuts.[8] Now that the presidential election has been decided, the US stock markets are reflecting this fiscal uncertainty. In addition, the financial and business sectors are bracing themselves for the possibility of additional regulation.[9]

Economic uncertainty and fears of a double dip recession have made companies cautious. As a result, for the past few years, companies have kept more cash on hand. According to the US Federal Reserve, at the end of the first quarter of 2012, corporate balance sheets reflected $1.7 trillion in available cash or liquid assets. Other sources, such as the US Internal Revenue Service, suggest that US companies hold at least three times the amount of cash and liquid assets as reported by the Federal Reserve.[10]

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[5] *See* HOULIHAN LOKEY, ABA M&A COMMITTEE – MARKET TRENDS MEETING 2011 MARKET REVIEW (Feb. 4, 2012), *available at* http://www.google.com/url?sa=t&rct=j&q=houlihan%20lockey%202011%20purchase%20agreement%20study&source=web&cd=2&ved=0CDcQFjAB&url=http%3A%2F%2Fmeetings.abanet.org%2Fwebupload%2Fcommupload%2FCL560003%2Frelatedresources%2FHoulihanLokeyM%26AMarketOverview2011-Q4.pdf&ei=AzGgUKTIKZKy8QSJ2YHYAQ&usg=AFQjCNHRBql_HMEzzktCjpu4_0jiMaMikA.

[6] T. Rowe Price, *Monthly Market Wrap-Ups* (Nov. 2012), http://individual.troweprice.com/public/Retail/Planning-&-Research/T.-Rowe-Price-Insights/Market-Analysis/Monthly-Wrap-Ups.

[7] Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240.

[8] *U.S. Fiscal Cliff Looms: Business Uncertainty Indicated in Two Recent Polls*, PRWEB (Oct. 23, 2012), http://www.prweb.com/releases/2012/10/prweb10026503.htm.

[9] Ryan Vlastelica, *Wall Street Sinks After Election as "Fiscal Cliff" Eyed*, REUTERS (Nov. 7, 2012, 6:58 PM) http://www.reuters.com/article/2012/11/07/us-markets-stocks-idUSBRE89T0LN20121107.

[10] David Cay Johnston, *Idle Corporate Cash Piles Up*, REUTERS BLOG (July 16, 2012), http://blogs.reuters.com/david-cay-johnston/2012/07/16/idle-corporate-cash-piles-up/.

With respect to the global economic outlook, as of October 2012, the International Monetary Fund predicted global economic growth of about 3.3 percent for 2012. While the US economy is slowly growing, the Euro area is expected to contract by 0.4 percent in 2012.[11] Given the challenges facing Europe and the slow pace of growth in the United States at the start of 2012, most revenue growth and increased M&A activity were expected to come from Asia, with Japan and China continuing to be the most frequent acquirers and targets for the Asia Pacific region. However, not all emerging markets—e.g., Brazil—were expected to enjoy an increase in M&A activity.[12] Now, in the fourth quarter of 2012, it is troubling to note that, although China's economy continues to grow, the rate of growth for the past few quarters has steadily decreased. In fact, as of the third quarter of 2012, the growth rate of 7.4 percent represented the slowest growth rate for China since early 2009.[13] Given that China is now the second largest economy in the world, these developments give investors pause and point to economic uncertainty at a global level.

According to available financial information, the volume of global M&A activity in 2011 increased 9 percent from the prior year; however, the increase in M&A activity was a result of a strong first half of the year. The second half of 2011 was marked by a slowdown in M&A activity.[14] Global M&A activity continued to stagnate in the first half of 2012. Furthermore, in the third quarter of 2012, though the overall value of M&A transactions has increased, overall M&A activity by volume was down in comparison to the second quarter of 2012. As of the end of the third quarter of 2012, global M&A activity had fallen to the lowest levels since 2008.[15] It should be noted that not all regions have fared the same. While areas such as

[11] Elizabeth Campbell & Debarati Roy, *Commodities Erase 2012 Gain on Global Economic Woes*, BLOOMBERG (Oct. 23, 2012, 4:57 PM), http://www.bloomberg.com/news/2012-10-23/commodities-erase-gains-for-year-as-oil-to-metals-retreat.html.

[12] *See 2012 M&A Outlook*, BLOOMBERG, http://www.bloomberg.com/article/2011-12-08/a6a6z1oVzygI.html (last visited Nov. 11, 2012).

[13] Charles Riley, *China's GDP growth slides to 7.4%*, CNN MONEY (Oct. 17, 2012, 10:23 PM), http://money.cnn.com/2012/10/17/news/economy/china-gdp/index.html.

[14] *2012 M&A Outlook,* BLOOMBERG, http://www.bloomberg.com/article/2011-12-08/a6a6z1oVzygI.html (last visited Nov. 11, 2012).

[15] *Global M&A Activity Drops Sharply in Q3, According to Thomson Reuters Business Law Advisor*, THOMSON REUTERS (Oct. 16, 2012), http://thomsonreuters.com/content/press_room/legal/730842.

Europe have experienced a steep decrease in transaction volume, the volume in US M&A activity has actually slightly increased since the beginning of the year.[16]

The increased number of companies holding large amounts of available cash on their balance sheet and the continued growth of the largest world economies are positive indicators of future M&A activity; however, the potential for increased regulation and the looming fiscal cliff are cause for concern. In this environment, we anticipate that the general M&A activity, both at a global and a domestic level, will slightly decrease in the near future.

Developments in the Law

Although market trends and market outlook affect deal flow and can result in significant challenges to the consummation of an M&A transaction, recent developments in the law are also affecting the M&A landscape. In the paragraphs below, we discuss a new set of regulations affecting one merger technique as well as various cases that provide new drafting points for M&A attorneys.

New Listing Rules for Reverse Mergers

At the end of last year, the US Securities and Exchange Commission (SEC) approved new listing rules for the NASDAQ Stock Market, the New York Stock Exchange, and the NYSE Amex Stock Exchange (collectively, the "Exchanges" and each, an "Exchange") relating to companies seeking to go public after completing a reverse merger. Finding that many such companies, particularly those based overseas, were not accurately reporting financial results, the SEC determined that heightened requirements on reverse merger companies prior to their listing on an Exchange would provide greater protections for investors. Under the new rules, prior to applying to list with any of the Exchanges, the shares of such reverse merger companies must trade in the US over-the-counter market, on another national securities exchange, or on a regulated foreign exchange for

[16] *U.S. and UK M&A Activity Up in Q2 Despite Global Slowdown, According to Thomson Reuters Business Law Advisor*, THOMSON REUTERS (July 27, 2012), http://thomsonreuters.com/content/press_room/legal/697186.

at least one year after filing all required information with the SEC, including, but not limited to, information regarding the reverse merger transaction and audited financial statements. Additionally, the new rules require that a company going public through a reverse merger maintain a minimum share price for a sustained period and for at least thirty of the sixty trading days immediately prior to submitting a listing application and the Exchange's decision to list such company. The SEC anticipates that the required seasoning period and increased disclosure requirements associated with the new rules will provide greater protection for investors and help prevent fraudulent accounting disclosures.[17] Because of these new listing rules, we anticipate that, in the near future, fewer overseas companies will use reverse mergers to go public in the United States.

Shareholder Litigation

The majority of legal developments affecting M&A for practitioners in the United States come from litigation arising from prior mergers or acquisitions. Before the global economic crisis that began at the end of 2007, a little more than half of M&A transactions involving a public company valued at more than $500 million resulted in shareholder litigation. The amount of M&A related litigation thereafter surged. In 2010 and 2011, an astonishing 95 percent and 96 percent, respectively, of every acquisition of a US public company valued at more than $500 million, resulted in shareholder litigation. Although most litigation—more than 80 percent—results in a settlement, the cases that do go to trial serve as road maps to better M&A practices for attorneys.[18]

In the United States, Delaware is generally the venue of choice for companies.[19] According to the Division of Corporations of the Secretary of State of the State of Delaware, more than 50 percent of US publicly traded companies and 63 percent of Fortune 500 companies are incorporated in Delaware. Most lawsuits brought outside of Delaware State Court are

[17] NYSE AMEX LLC Notice & Order Granting Accelerated Approval to Proposed Rule Change to Adopt Listing Requirements for Cos. Applying to List after Consummation of a "Reverse Merger" with a Shell Co., Release No. 34-65710 (Nov. 8, 2011).
[18] Robert M. Daines & Olga Koumrian, *Recent Developments in Shareholder Litigation Involving Mergers and Acquisitions,* CORNERSTONE RESEARCH (Mar. 2012).
[19] *Id.*

brought in California, Texas, and New York;[20] however, given the outsized influence that the Delaware State Court has on the M&A litigation practice, the focus of this chapter will be on recent developments in Delaware case law and how such developments cause attorneys to review various aspects of an M&A transaction including (1) the processes prior to entering into a merger or purchase agreement, and (2) our documentation.

Martin Marietta Materials, Inc. v. Vulcan Materials Co.

One interesting case decided earlier this year is *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*[21] In *Martin Marietta*, the Delaware Supreme Court upheld a Delaware Chancery Court finding that a violation by Martin Marietta Materials, Inc. of a non-disclosure and confidentiality agreement (NDA) and a joint defense and confidentiality agreement (JDA) with Vulcan Materials Co. could be used as a basis to delay Martin Marietta's hostile tender offer of Vulcan. Prior to discussing a potential merger between the two companies, Martin Marietta and Vulcan entered into the NDA, which, among other things, prohibited certain uses and disclosures of "evaluation material" exchanged by the parties for purposes of their discussions. Additionally, the companies entered into the JDA, which prohibited the disclosure of "confidential materials" without consent. Neither the NDA nor the JDA contained a standstill provision restricting any hostile bidder from taking actions to take over the target company for a stipulated period. When merger discussions did not progress as expected, Martin Marietta ultimately decided to make an unsolicited offer for Vulcan and to pursue a proxy contest to elect four members of Vulcan's board of directors. At the same time, it sought a declaratory judgment from the Chancery Court that the NDA and the JDA were not a bar to its attempted hostile takeover. In a counterclaim, Vulcan sought an injunction, alleging the takeover attempt was in violation of the agreements because Martin Marietta improperly used confidential materials and evaluation materials obtained through friendly negotiations and released this information in a manner that breached the NDA and the JDA. The Chancery Court granted an injunction delaying Martin Marietta's hostile takeover bid for four months. Martin Marietta appealed the ruling to the Supreme Court on four claims of error, including that the Chancery Court:

[20] *Id*.
[21] *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, No. 254, 2012, 2012 WL 2783101 (Del. 2012).

1. Went beyond the plain language of the NDA;
2. Misinterpreted some of the NDA provisions;
3. Misinterpreted the JDA; and
4. Granted injunctive relief without proof of an actual injury.

In affirming the Chancery Court's decision, the Supreme Court rejected Martin Marietta's arguments finding that, despite the absence of an express standstill, the parties intended for the NDA and the JDA to cover only a negotiated transaction between the then-sitting boards of both companies, and that the use of "evaluation material" for purposes other than such a consensual transaction was prohibited.[22] *Martin Marietta* teaches us that, even when the parties have not agreed to an express standstill provision, provisions in non-disclosure agreements may have the same effect as a standstill provision where the confidential information relating to a target provided to a potential acquirer would need to be disclosed in connection with an unsolicited offer of the target. Attorneys should counsel their clients that, even before entering into a merger agreement, there are potential unforeseen consequences to acquirers who agree to broad "use restrictions" in non-disclosure agreements. Parties agreeing to use restrictions should consider drafting changes to mitigate some of these unanticipated outcomes—e.g., seeking express acknowledgment that the buyer may pursue similar deals or opportunities.

Other Important Cases and *Revlon* Duties

Two other recent cases, *In re Del Monte Foods Co. Shareholders Litigation*[23] and *In re El Paso Corp. Shareholder Litigation*,[24] address conflicts of interests relating to financial advisors in the context of M&A transactions and fiduciary duties of a board of directors in the context of a sale of a company—commonly known as Revlon duties.[25] In the Del Monte case, in

[22] *Martin Marietta Materials Inc. v. Vulcan Materials Co.*, No. 7102-CS, 2012 WL 5757252 (Del. Ch. 2012), *aff'd*, No. 254, 2012, 2012 WL 2783101 (Del. 2012).
[23] *In re Del Monte Foods Co. Shareholders Litig.*, 25 A.3d 813 (Del. Ch. 2011).
[24] *In re El Paso Corp. Shareholder Litig.*, 41 A.3d 432 (Del. Ch. 2012).
[25] In the seminal case *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, the Supreme Court of Delaware held that, in the context of a sale of the corporation, the duty of the board of directors of such corporation shifts from the preservation of the corporation "as a corporate entity to the maximization of the company's value at a sale for the

connection with a cash sale of Del Monte to a consortium of private equity buyers, the Delaware Chancery Court found that the directors of Del Monte violated their fiduciary duties by failing to act reasonably in connection with the sale of Del Monte because the directors:

1. Had relied on the conflicted advice of Del Monte's financial advisor, Barclays Capital;
2. Did not adequately oversee the sale process; and
3. Allowed Barclays Capital to take advantage of its lack of oversight.[26]

Barclay Capital had sought permission from Del Monte to provide buy-side financing before a price was agreed between the buyers and the directors of Del Monte and failed to disclose to the board of Del Monte the fact that Barclays had intended to seek to provide buy-side financing since the beginning of the process. The court emphasized that an advisor's conflicts of interests may smirch and contaminate the director's process.[27] Full and complete disclosure of a financial advisor's conflicts of interest and compensation is required because of the integral role played by a company's financial advisors in choosing and pursuing alternatives in connection with a sale of the company.[28]

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stockholders' benefit." *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 at 182 (Del. 1986).

[26] In reviewing the actions of a corporation's directors, courts generally apply the business judgment rule that is "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). When the business judgment rule applies, the decisions of a board of directors will not be second-guessed. Such decisions will be upheld if "they can be attributed to any rational business purpose." *Sinclair Oil Corp. v. Levien*, 280 A. 2d 717, 720 (Del. 1971). Generally, in the performance of a director's duties, such director may rely on information and reports provided by persons, such as officers, employees, advisors and experts, who such director reasonably believes are competent in the relevant matters. *See* N.Y. BUS. CORP. LAW § 717 (McKinney 2010). *See also* DEL. CODE ANN. tit. 8, § 141 (West 2010). However, where the board of directors does not adequately oversee the sale of a company and others are able to engage in misconduct as a result of the lack of oversight, such board of directors is not entitled to the presumption of the business judgment rule with respect to the sale transaction. Instead, the transaction is evaluated under the entire fairness standard (discussed in footnote 28 below).

[27] *In re Del Monte Foods Co. Shareholders Litig.*, 25 A.3d 813 (Del. Ch. 2011).

[28] *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A. 2d 1261 (Del. 1988). After the decision in Del Monte, the shareholders of Del Monte settled with Barclays and Del Monte. Pursuant to the settlement terms, Del Monte and Barclays paid $65.7 million and

In *El Paso*, El Paso Corp. agreed to be acquired by Kinder Morgan, Inc. for stock and cash. El Paso Corp.'s usual financial advisor, Goldman Sachs & Co., owned a substantial interest in Kinder Morgan. Therefore, El Paso reduced Goldman's role in the transaction and engaged Morgan Stanley & Co., LLC to provide advisory services in connection with the transaction. Morgan Stanley's compensation provided that it would receive a large fee only if El Paso completed a deal with Kinder Morgan. The Delaware Court of Chancery refused to enjoin the sale but criticized the negotiating process. The court further reasoned that, upon completion of the transaction, the shareholders of El Paso could obtain relief by pursuing damages.[29]

These two court decisions highlight the heightened scrutiny on conflicts of interest, especially conflicts of interests arising from financial advisors standing on more than one side of a transaction. Companies considering an M&A transaction should seek the advice of counsel early in the process. Effective counsel can help a company pay close attention to the sale process and ensure that the company engages in fair process and manages conflicts of interest. Mere disclosure of conflicts of interest may not always be enough to ensure a fair process.

<u>Don't-Ask-Don't-Waive Standstills and Non-Solicitation Provisions</u>

In re Celera Corporation Shareholder Litigation, also addressed the fiduciary duties of directors. In connection with the approval of a settlement of claims arising from the acquisition of Celera Corp. by Quest Diagnostics, the Court of Chancery of the State of Delaware addressed a shareholder's claim of breach of fiduciary duty by the Celera board of directors. In that

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$23.7 million, respectively, to the shareholders. More than $20 million of Del Monte's settlement payment was comprised of fees it would otherwise have owed to Barclays for its work on the buyout. *See* Jef Feeley & Phil Milford, *Del Monte, Barclays Pay $89.4 Million to Settle Suits Over Private Buyout*, BLOOMBERG (Oct. 6, 2011, 4:50 PM), http://www.bloomberg.com/news/2011-10-06/del-monte-barclays-pay-89-4-million-to-settle-lawsuits-over-buyout.html.

[29] *In re El Paso Corp. Shareholder Litig.*, 41 A.3d 432 (Del. Ch. 2012). In September of 2012, Kinder Morgan announced a $110 million settlement with the shareholders of El Paso which also provided that Goldman Sachs would not receive its $20 million fee or any indemnity payments. *See* Jef Feeley, *Kinder Morgan to Pay $110 Million to Settle El Paso Suits*, BLOOMBERG (Sept. 8, 2012, 12:01 AM), http://www.bloomberg.com/news/2012-09-07/kinder-morgan-to-pay-110-million-to-settle-el-paso-suits.html.

case, the board had sought bids for a purchase of Celera from various potential bidders and, in each instance, required each such potential bidder to enter into confidentiality agreements that expressly prohibited them (i) from making offers for Celera shares without the express invitation from the board, or (ii) asking the board to waive the prior restriction (Don't-Ask-Don't-Waive Standstills). The board subsequently entered into a merger agreement with Quest, which required the board to terminate all discussions with all other potential bidders and prohibited the members of the board from soliciting competing offers (Non-Solicitation Provision) except when required to do so by their fiduciary duties. In discussing the benefits of the settlement, the court stated that while individually Don't-Ask-Don't-Waive Standstills and Non-Solicitation Provisions may serve legitimate purposes, the combination of the Don't-Ask-Don't-Waive Standstills and the Non-Solicitation Provision could be problematic. Don't-Ask-Don't-Waive Standstills prevent potential bidders from informing the board of their willingness to bid on a target company and the Non-Solicitation Provision prevents the board from asking potential bidders whether they are interested in placing bids. This could increase the risk that a board may lack relevant information including information necessary to consider whether continued compliance with the merger agreement would constitute a breach of the board's fiduciary duties.[30] To the extent that a provision prevents the board from exercising its fiduciary duties, such a provision may be found unenforceable. Attorneys advising a target company should focus on providing ways for the directors of such target company to effectively exercise their fiduciary duties. This case serves as a reminder that go-shop provisions, superior proposal provisions, matching rights, and change of recommendation provisions should be negotiated into the provisions of a merger agreement on behalf of the target company.

A Closer Look at Fiduciary Duties

It should be noted that fiduciary duties are not solely applicable to the directors of a company. It is an established principle of corporate law—in Delaware and other states—that a controlling shareholder may also

[30] *In re Celera Corp. Shareholder Litig.*, C.A. No. 6304-VCP, 2012 WL 1020471 (Del. Ch. March 23, 2012).

owe fiduciary duties to minority shareholders.[31] In a recent Delaware case, *Frank v. Elgamal*, the court also held that a group of shareholders could be considered a control group and, as a control group, such shareholders would owe duties to minority shareholders.[32] The decision arose out of a suit brought by a minority shareholder challenging the merger of a wholly owned subsidiary of AH Holdings, Inc. with and into American Surgical, Inc. The plaintiff alleged that the board of directors and a group of four stockholders, acting as a controlling stockholder, breached their fiduciary duties by agreeing to a merger that disproportionately benefitted those four stockholders and awarded such stockholders an interest in the surviving entity. The Delaware Court of Chancery held that four shareholders who received an interest in the surviving entity acted in concert, and therefore constituted a control group owing fiduciary duties to the minority shareholders. None of those shareholders individually held more than 30 percent of American Surgical's common stock, but the members collectively held more than 70 percent of the common stock and were key employees. Even though the control group did not "stand on both sides" of the merger, the court held that because the control group and the minority shareholders were "competing" for consideration to be paid in the transaction, the entire fairness standard should be applied unless the merger was conditioned on "robust procedural protections."[33] While the merger had been negotiated by a special committee of independent and disinterested directors, since the approval of a majority of the minority shareholders was not required to consummate the merger, the court determined that entire fairness would apply.[34]

[31] Delaware case law provides that a shareholder owes a fiduciary duty to a corporation if it (i) exercises control over the corporation and its affairs or (ii) owns a majority interest in such corporation. *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A. 2d 1334, 1344 (Del. 1987).
[32] *Frank v. Elgamal*, C.A. No. 6120-VCN, 2012 WL 1096090 (Del. Ch. March 30, 2012).
[33] In *Weinberger v. UOP, Inc.*, the Supreme Court of Delaware held that "[t]he concept of fairness has two basic aspects: fair dealing and fair price. The former embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained. The latter aspect of fairness relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock." *Weinberger v. UOP, Inc.*, 457 A. 2d 701, 710 (Del. 1983).
[34] *Frank v. Elgamal*, C.A. No. 6120-VCN, 2012 WL 1096090 (Del. Ch. March 30, 2012).

For M&A attorneys, the case highlights the fact that procedural protections such as the vote of a special committee and a majority of the minority vote should generally be built into merger agreements. When representing a controlling shareholder or a target company, it is an attorney's duty to communicate to his client that certain procedural requirements must be followed to comply with applicable obligations.

Post-Closing Disputes

Other Delaware cases have addressed post-closing disputes. In *Viacom International, Inc. v. Walter A. Winshall*, a Delaware court specifically addressed the use of experts to resolve post-closing disputes with respect to earn-outs—conditional payments contingent on the future performance of a company.[35] The merger agreement between Viacom, as acquirer, and Harmonix Music Systems, Inc., as the target company, provided for contingent earn-out payments to the shareholders of Harmonix based on profits of the acquired business after the consummation of the merger. The merger agreement stated that "[t]he resolution of the dispute by the Resolution Accountants will be a final, binding and conclusive resolution of the parties' dispute, shall be non-appealable, and shall not be subject to further review." After a dispute arose with respect to certain contingent payments, Viacom and Harmonix engaged a third-party accounting firm to resolve the dispute. Viacom was ordered by the resolution accountants to pay an earn-out to the selling stockholders of Harmonix. Viacom filed suit seeking to vacate the order of the resolution accountants. Court granted summary judgment in favor of the shareholders of Harmonix. In granting the summary judgment, the court held that the accountant's award was to be reviewed under the Federal Arbitration Act (FAA). The FAA allows a court to vacate an arbitration award only when such award "was procured by fraud" or is subject to "manifest error."[36] *Viacom v. Winshall* teaches us that courts are unlikely to second-guess the scope of a reviewer's inquiry with respect to post-closing purchase price adjustments. Awards made by accountants and other third parties in resolving disputes arising from earn-out and other purchase price adjustment provisions will generally be reviewed as arbitration decisions pursuant to the FAA. Such decisions will

[35] *Viacom Int'l, Inc. v. Winshall,* No. 7149-CS, 2012 WL 3249620 (Del. Ch. 2012).
[36] *Id.*

be not be overturned for mere error. Any party seeking to overturn the resolution of an independent party will be required to prove fraud or an "evident material mistake." In addition, careful attention should be paid to initial calculation statements and dispute notices. Parties may want to consider including multiple or alternative bases for their positions on disputed items; however, parties should assume that awards determined by a third-party reviewer are final.

Developments in M&A Documentation

The court's decision in *Viacom v. Winshall* seems timely given certain recent developments in M&A documentation.[37] While most provisions of merger and purchase agreements must be tailored to fit the needs of your client and the transaction, we can discern certain trends in such documentation. Given the limited scope of this chapter, we focus on:

1. The greater use of contingent payments, such as earn-outs, to properly value a transaction;
2. The increased sophistication of indemnification provisions; and
3. The increase in termination fees.

Greater Use of Contingent Payments to Properly Value a Transaction

Overall, the use of contingent payments in M&A transactions is on the rise. Contingent payments generally consist of:

1. Earn-outs;
2. Escrows and holdbacks; and
3. Working capital adjustments.

As described above, earn-outs typically refer to provisions that provide for the payment of additional funds to a seller in the event that certain targets are met by the acquired business. According to the American Bar Association's (ABA) Subcommittee on M&A Market Trends, in 2011, 38 percent of private target transactions included an earn-out. The subcommittee's study demonstrates that the number of private transactions

[37] *Id.*

that do not include an earn-out has markedly decreased from 81 percent of deals in 2006, to 71 percent of deals in 2008, and only 62 percent of deals in 2011.[38] In addition, the value of earn-out consideration in relation to the overall deal value has continued to increase.[39]

Escrows and holdbacks refer to a provision in the purchase agreement or a separate agreement that provides for the establishment of an escrow account into which the buyer deposits a portion of the purchase price. An escrow agent will control the distribution of funds from the escrow account to the buyer and seller in accordance with the instructions provided to the escrow agent. Generally, funds in escrow will be disbursed to the buyer where the buyer has indemnification claims. Otherwise, funds in escrow will be disbursed to the seller at the end of the survival period for the representations and warranties in a purchase agreement. Of the transactions that have representations and warranties that survive the transaction closing, about two-thirds contain escrow provisions. According to Houlihan Lockey, a financial advisor, in the transactions where they serve as a financial advisor, the amount escrowed has generally averaged 7 percent to 8 percent of the transaction purchase price.[40] According to Shareholder Representative Services, a shareholder representative, the median escrow in the private target M&A transactions they were involved in throughout 2011 was 11.7 percent of the transaction value.[41]

Lastly, working capital adjustments refer to a mechanism by which a preliminary purchase price, set as of the transaction closing date, is adjusted to the extent of any change in the value of the purchased company or assets as determined after the closing date.

[38] *See* M&A Market Trends Subcommittee, Mergers & Acquisitions Committee, *2011 Private Target M&A Deal Points Study*, *available at* http://apps.americanbar.org /dch/committee.cfm?com=CL560003 (last visited November 11, 2012).

[39] *J.P. Morgan Mergers Insight*, JPMORGAN.COM (March 4, 2011), http://www. jpmorgan.com/tss/DocumentForE-mail/MandA_trends-contingent_earn-outs/130425 7505366.

[40] Houlihan Lokey, *2011 Purchase Agreement Study*, http://www.slideshare.net/ MMMTechLaw/2011-purchase-agreement-study (last visited Nov. 11, 2012).

[41] *Deal Terms Study Download,* SRS, http://www.shareholderrep.com/study (last visited Nov. 11, 2012).

Contingent payments are especially useful when a buyer is concerned about appropriately valuing a target company or the assets of a target company. From the buyer's perspective, using contingent payments allows such buyer to manage its cash flow and in effect finance the transaction by stretching out the buyer's payment schedule. For the target company or seller, contingent payments may allow it to delay tax payments that are due upon receipt of consideration. In addition, contingent payments align the interests of the seller and the buyer by giving both parties an interest in the future performance of the purchased assets or company. Also, when the buyer and the seller or target company cannot agree on a final price, contingent payments may assist both sides of the transaction in hammering out an agreement. Lastly, contingent payments can help allocate risk arising from the future performance of the company between a buyer and seller.

Given the uncertain economic outlook for 2013 and the near future, we expect that a greater percentage of transactions will employ contingent payments, whether in the form of earn-outs, escrows, or working capital adjustments.

Increased Sophistication of Indemnification Provisions

Indemnification provisions generally provide a party entitled to indemnification (indemnified party) with recourse against another party (indemnifying party) to a transaction for losses arising or resulting from:

1. Such indemnifying party's conduct prior to or in the course of the transaction;
2. Breaches of representations, warranties, or covenants agreed to in the M&A agreement; or
3. Third-party claims against the indemnified party.

Indemnification provisions are thus a risk allocation tool used by parties in a transaction to determine who bears the monetary loss upon the occurrence of certain enumerated events. In the last few years, indemnification provisions have easily become the most complex and heavily negotiated provisions in any merger or purchase agreement. Attorneys must consider many aspects of a proposed indemnification provision, including time limits, the amount of damages, tax consequences, and the methods for resolving indemnification claims. We discuss some of these considerations in the following.

Representations and Warranties

In a transaction involving the acquisition of a publicly traded company, frequently the representations and warranties do not survive the closing; however, for private companies, representations and warranties in an M&A agreement tend to survive for a specific length of time after a transaction closing. Indemnification provisions provide that claims must be brought or must arise within a specified timeframe—the survival period of the representations and warranties. Attorneys for the seller will usually request that indemnification for general representations and warranties be limited to a period shorter than the statute of limitations. Buyers are usually required to bring an action for indemnification within one to two years after closing. From a buyer perspective, however, representations, warranties, and indemnification rights relating to breaches of such representations and warranties should survive for a period sufficient for problems to be discovered. Most M&A transactions relating to private companies provide that representations and warranties survive, and parties may request indemnification, for a period of one to three years after closing, with the current average at about one-and-a-half years after closing.[42] Quite often, representations that are considered integral to the transaction are carved out of the survival period. According to one study by the American Bar Association, fraud was the most regularly used carve-out to the survival period, followed by breach of the seller's covenants, due authority and taxes.[43]

Generally, representations such as having good and marketable title to the assets being sold and corporate authority to enter into a transaction, may survive indefinitely. Similarly, other areas of concern, such as tax and environmental liability, may require representations and warranties with longer survival and indemnification periods that can extend to the

[42] *Id.*

[43] *2011 Private Target Deal Points Study*, ABA, *available at* http://apps.americanbar.org/dch/committee.cfm?com=CL560003&edit=1 (last visited Nov. 11, 2012).

statute of limitations. On average, the survival period for environmental provisions was thirty-six months; twice as long as general indemnification provisions. According to one study, special indemnification provisions for environmental representations and warranties are present in about 18 percent of middle-market private target M&A transactions.[44] Examples of special environmental provisions include the exclusion of environmental claims from the cap, increasing the cap for environmental claims, changing the basket size, and lengthening the survival period.

Caps

Besides the survival period, the most common limitations on indemnification provisions are caps and baskets. Caps generally refer to provisions that limit an indemnifying party's liability for a breach by providing an upper monetary limit on the indemnification payments that an indemnified party may be required to make. Caps are generally set below the purchase price of a transaction and are based on a percentage of the purchase price. When M&A agreements provide that representations and warranties survive the closing, almost three-quarters of such agreements also employ a cap to limit a seller's exposure.[45] An attorney for an indemnified party should usually request that losses caused by fraud or gross negligence and that breaches of representations and warranties known prior to the closing but not disclosed be excluded from the cap.

Baskets

Baskets are provisions that require a party seeking indemnity to suffer losses in excess of a certain threshold before causing the indemnifying party to be liable for damages. Baskets protect indemnifying parties from small and nuisance claims. Generally, there are deductible baskets and tipping baskets. In the case of a deductible basket, the indemnifying party is only responsible for damages that exceed a threshold amount. For example, if an agreement provides for a deductible basket of $1,000 and the party seeking indemnification claims $1,500 in damages, then the indemnified party is

[44] *See* Houlihan Lokey, *2011 Purchase Agreement Study*, *supra* note 38.
[45] *See* Houlihan Lokey, *2011 Purchase Agreement Study*, *supra* note 38.

entitled to receive $500. In the case of a tipping basket, the party providing an indemnity is responsible for all damages once the damages reach a threshold amount. Tipping baskets are also often referred to as dollar one threshold baskets. When M&A agreements provide that representations and warranties survive the closing, most agreements have a basket provision.[46] Attorneys for the indemnified party may seek to limit baskets to certain categories of claims. In addition, different types of losses or breaches may be subject to varying sizes and types of baskets depending on the needs of the client.

Additional Limitations on Indemnification Provisions

Other negotiated limitations on indemnification provisions include the use of "anti-sandbagging" provisions. Sandbagging provisions provide that a buyer's recourse under an indemnification provision is not affected by a buyer's prior knowledge of a breach of an M&A agreement's representations and warranties. In contrast, "anti-sandbagging" provisions limit the liability of a seller for losses arising from a breach of a representation or warranty when the buyer has knowledge of such breach prior to the transaction closing.

We also urge attorneys to consider the scope of damages that may be covered by an indemnification provision. Specifically, when representing the indemnifying party, an attorney should consider whether consequential or punitive damages should be excluded. On the other hand, when representing the indemnified party, an attorney may use the indemnification provision to enlarge the scope of recoverable losses to include attorney's fees and costs incurred to enforce the indemnity provisions. Also, attorneys may consider whether materiality qualifiers should be: disregarded for all indemnification purposes; for calculation of damages and losses arising from a breach of representations and warranties, but not in determining whether a breach has occurred; or for determining whether a breach has occurred, but not in calculating damages.

[46] According to Houlihan Lockey's *2011 Purchase Agreement Study*, *supra* note 38, 74 percent of the transactions where they served as financial advisors contained a basket. According to the SRS 2011 M&A Deal Terms Study, only 1 percent of the transactions in which they served as a shareholder representative did not contain a deductible or tipping basket provision (or a combination thereof).

For an attorney representing an indemnifying party, such attorney should also attempt to include language that obligates the indemnified party to act in good faith and in a commercially reasonable manner to mitigate damages. Another way in which an attorney representing an indemnifying party may limit his client's exposure is to include a contributory negligence provision that insulates indemnifying party from liability to the extent that a loss was attributable to gross negligence or willful misconduct of the indemnified party.

When considering limitations on damages, it is also helpful to keep in mind that, in the absence of an express provision to the contrary, a buyer's remedies for inaccuracies in a seller's representations and warranties may not be limited to those provided by the indemnification provisions. A buyer may have separate causes of action based on breach of contract, fraud and misrepresentation, and securities laws. Even where a seller's attorney negotiates a provision stating that the indemnification provisions of an agreement are the sole and exclusive remedy for breaches of such agreement, liabilities arising under federal securities laws cannot be waived pursuant to such an exclusivity provision.

In a growing number of indemnification provisions, attorneys are considering not just the legal ramifications of such provisions, but the tax consequences as well. Attorneys should consider whether the amount of the indemnifiable loss should be reduced to take account of benefits to the indemnifying party in the form of tax deductions resulting from the loss. They should also consider whether the amount of the indemnifiable loss should be increased to cover an additional amount to offset any taxes the indemnified party will be required to pay because of an indemnity payment. In other similar instances, parties can consider whether an indemnified party has insurance that will cover a loss for which such party may also seek indemnity. In such cases, parties may agree to reduce the amount of the indemnifiable loss to take into account any insurance recoveries.

Another thing to keep in mind is that indemnification provisions allow an attorney to expand the class of protected parties entitled to indemnification. While attorneys may customize the list of indemnified parties to a transaction, generally, indemnification provisions provide for indemnification of directors, officers, employees, shareholders, affiliates, successors, and assigns.

Besides addressing the scope of indemnification, attorneys should also focus on the mechanics for making an indemnification claim. While many less complicated M&A agreements are silent with respect to how to pursue an indemnity claim, we recommend that attorneys draft provisions addressing notice requirements, as well as how the defense of claims brought by third parties will be managed. For notice provisions, the M&A agreement should require that the party seeking indemnification give the indemnifying party notice of any third-party claims. The attorney for the indemnifying party should negotiate language to the effect that failure to provide such notice will result in a waiver of indemnification rights with respect to such third-party claims. With respect to controlling a defense in response to a third-party claim, from the seller's point of view, the party with ultimate responsibility for paying damages should control the proceedings. From the buyer's point of view, insofar as litigation may affect an ongoing business, the buyer should be able to share control of the proceedings. A carefully drafted indemnification provision will contain language that addresses who controls the defense and when the parties should be entitled to separate counsel.

Increase in Termination Fees

Any attorney whose practice is focused on M&A transactions can tell you that the best laid plans for an M&A transaction often go awry. We conclude the chapter by addressing termination fees. Termination fees have become the most common type of lock-up device in M&A transactions. They are intended to serve as liquidated damages imposed on either the seller or buyer in the event that an acquisition does not close. By pre-determining damages in the event of a breach, parties add certainty to a transaction. Termination fees also serve as insurance and deter breaches of an M&A agreement by a party having second thoughts about the deal it has struck. Under Delaware law, the facts and circumstances of each particular transaction must be evaluated to determine whether a fee is reasonable. Termination fees will be enforced so long as they are not considered coercive by making a performance break unreasonably expensive.[47] Under New York law, termination fees are enforceable if:

1. Parties had the intention to liquidate damages rather than penalize the breaching party;
2. The amount of liquidated damages requested reasonably corresponds to the anticipated loss; and
3. The actual loss is hard or impossible to identify or estimate.[48]

There are two types of termination fees: forward termination fees and reverse termination fees. Forward termination fees are paid by a target to an acquirer to terminate the acquisition. These fees often arise when the target company is presented with a more favorable offer after entering into a merger or purchase agreement and the target company wishes to accept the higher offer. Typically, forward termination fees are equal to 2 percent to 4 percent of the transaction value.[49] Reverse termination fees—also known as reverse breakup fees—are paid by the acquirer in the event that the acquirer is unable to close on the acquisition. Reverse termination fees compensate a target company for the loss of key customers or employees and negative market perception of such target arising from the failed transaction. Reverse breakup fees often become payable by the acquirer to the target in the event that the seller's financing falls through. Sometimes, reverse termination fees are two tiered, with varying reverse termination fees for willful breaches of the provisions of the transaction agreement and for inability to obtain the required debt financing. These sorts of breakup fees used to be in the same range as forward termination fees; recently, however, reverse termination fees have increased.

Take, for example, the proposed merger of AT&T and T-Mobile, originally announced in March of 2011. According to the stock purchase agreement filed by AT&T with the SEC, AT&T agreed to acquire T-Mobile USA from

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[47] *In re Cogent, Inc. Shareholder Litig.*, C.A. No. 5780-VCP, 2010 WL 4146179 (Del. Ch. 2010).
[48] *Walter E. Heller & Co. v. Am. Flyers Airlines Corp.*, 459 F.2d 896, 899 (2d Cir. 1972).
[49] Schulte Roth & Zabel, *Private Equity Buyer/Public Target M&A Deal Study 2011 Year-End Review*, http://www.srz.com/files/News/07205317-b75f-41cd-8090-10de62e96bd7/Presentation/NewsAttachment/77d4330c-761c-478a-9ef6-137d668dd1ffb/SRZ_PE_Buyer_Public_Target_M%26A_Deal_Study_2011_Yr_End_Review.pdf (last visited Nov. 11, 2012).

Deutsche Telekom AG for a purchase price of $39 billion. In the event that AT&T did not close on the acquisition of T-Mobile, Deutsche Telekom was entitled to a breakup fee of $3 billion and certain spectrum rights. After encountering opposition from the Justice Department and the Federal Communications Commission, in December of 2011 AT&T announced that it was abandoning its bid to take over T-Mobile. AT&T said that it would "recognize a pretax accounting charge of $4 billion"—which includes the $3 billion breakup fee as well as spectrum rights worth another $1 billion. In that situation, the reverse termination fee represented 15 percent of the purchase price.[50]

Similarly, one can look to the merger agreement between Google, Inc. and the mobile telephone maker, Motorola Mobility Holdings Inc., pursuant to which Google agreed to acquire Motorola for $12.5 billion. That merger successfully closed in May of 2012 after clearing several regulatory hurdles; however, had the transaction not closed, the merger agreement provided that Motorola was entitled to a reverse termination fee of $2.5 billion if Google did not close on the purchase of Motorola and Motorola would have paid a $375 million forward termination fee if it decided not to sell to Google. The potential reverse termination fee represented 20 percent of the purchase price. This fee is more than six times the typical amount. In contrast, the potential forward termination fee represented 3 percent of the purchase price.[51] While the average reverse termination fee may not have increased to the levels seen in the Google-Motorola transaction, according to various studies, as of 2011, reverse termination fees now average more than 5 percent of the transaction value.[52]

The discrepancy in size between forward termination fees and reverse termination fees can be attributed to the focus of the courts on fiduciary duties of a target company's board of directors and controlling shareholders.

[50] Stock Purchase Agreement by and between Deutsche Telekom AG and AT&T Inc. (Mar. 20, 2011), *available at* http://sec.gov/Archives/edgar/data/732717/000119312511072458/dex21.htm.

[51] Agreement and Plan of Merger by and among Google Inc., RB98 Inc. and Motorola Mobility Holdings, Inc. (Aug. 15, 2011), *available at* http://sec.gov/Archives/edgar/data/1495569/000119312511225797/dex21.htm.

[52] *See* Houlihan Lokey, *2011 Transaction Termination Fee Study*, http://www.hl.com/e-mail/pdf/2011TransactionTerminationFeeStudy.pdf (last visited Nov. 11, 2012). *See also* Schulte Roth & Zabel, *supra* note 47.

In the context of an M&A transaction, courts have found that a target company's board of directors has a duty to act in good faith, with due care, and loyalty. Generally, that is translated to mean that boards of directors must try to maximize shareholder value. Courts are generally more concerned with forward termination fees paid by a target to an acquirer, because the size of such fees may preclude a target company from pursuing another transaction that may be advantageous to the target company's shareholders.

Another factor contributing to the size differential between forward and reverse breakup fees is the disparity in consequences for a target company and an acquirer in the event that a merger transaction falls through. When a proposed merger fails, an acquirer suffers minimal damage. The acquirer may pay a reverse termination fee and be free to scope out other potential acquisition targets. Future potential acquirers of the target company are not damaged by the reverse termination fee. On the other hand, a target company has subjected itself to the intense due diligence scrutiny of the acquirer and failed to consummate a transaction. The marketplace may perceive the target company to be in play and, to a certain extent, damaged goods. Also, during the due diligence process, employees of the target company may feel uncertain about their post-transaction job prospects and look for new jobs. In addition, the composition of the target company's shareholders may shift from long-term investors to short-term traders looking to make a quick buck on the consummation of an M&A transaction. The imposition of a forward termination fee can have an additional negative effect on the economic outlook of the target company and discourage future potential acquirers. Given that the consequences of a reverse termination fee are much lower and that the judicial scrutiny on forward termination fees is much higher, it is no surprise that reverse terminations fees have continued to increase while forward termination fees have remained at less than 5 percent of enterprise value.

By raising the transaction cost of terminating an M&A transaction, termination fees offer a little more certainty in the M&A transaction process. In these uncertain economic times, we expect to see an overall increase in the use of termination fees overall. Buyers who have committed to purchase a target company or the assets of a target company, want to ensure that they obtain their prize; and target companies who have subjected themselves to the due diligence process wish to maximize shareholder return. When broken out into forward and reverse termination fees, we expect that forward termination fees will remain at 3 percent to 4 percent of the transaction value whereas reverse termination fees will continue to grow.

Conclusion

Levels of M&A activity are inextricably linked to the economic health and stability of the economy. In the short term, we expect to see a slight decrease in M&A activity in the United States and a slight increase in global M&A activity. Though we see some modest economic growth in the United States, we expect that M&A activity will be hampered by the potential for additional regulation and uncertainty arising from the looming fiscal cliff and uncertain prospects of the US economy. Around the globe, M&A activity in Asia is expected to continue to grow while M&A activity in Europe languishes.

Regardless of the prospects for M&A activity, in preparing documentation, we are mindful that courts are focused on conflicts of interests between the company and its shareholders, directors, officers, and advisors, as well as on the processes implemented by a company's board of directors in connection with the sale of such company. When the sale process is properly managed and a board of directors is adequately advised, then directors can be sure that they have complied with their fiduciary duties and maximized shareholder value.

Experience teaches us that the practice of law is ever changing. Even so, certain trends in M&A documentation are apparent. In the near future, we expect to see an increase in the use of contingent payments and termination fees, as well as increased sophistication in indemnification provisions. These changes are a response by buyers and sellers to the current economic uncertainty. Contingent payments, termination fees, and indemnification provisions are only a few of the multiple techniques used by M&A participants to allocate risk and better value target companies. As attorneys, we keep adapting, revising, and modifying M&A documentation to keep up with market trends, developments in the law, recent case law, and the needs of our clients. The more informed we are about these current developments, the better prepared we are to serve our clients.

Key Takeaways

- Because of economic uncertainty, especially during an election year, many companies have proceeded cautiously, choosing to keep more cash on hand and engage in less M&A transactions. As a result, the volume of M&A activity at the end of the third quarter of 2012 fell to the lowest levels since 2008 despite an increase in the overall value of those M&A transactions.
- Assist your clients in paying close attention to the sale process to ensure they are engaging in fair process and managing any potential conflicts of interest.
- When advising a target company, focus on ways for directors to effectively exercise their fiduciary duties. Go-shop provisions, superior proposal provisions, matching rights, and change of recommendation provisions should all be negotiated into the merger agreement.
- When representing a controlling shareholder or target company, you must communicate to your client that there are procedural requirements that must be followed to comply with applicable obligations. Procedural protections including the vote of a special committee and a majority of the minority vote should be built into any merger agreements.
- Pay careful attention to initial calculation statements and dispute notices. Parties may want to consider including multiple or alternative bases for their positions on dispute notices. Parties should also assume that any award determinations are final and would be upheld by the courts.
- Whether you are representing the buyer or the seller in a transaction, discuss the benefits of contingent payments with your client. Contingent payments stretch a buyer's payment schedule, delay a seller's tax payments, allocate risk and provide all parties with an interest in the future performance of the target.
- Indemnification provisions are powerful risk allocation tools that should be carefully drafted to meet the needs of your client. When representing the indemnifying party, exclude consequential and punitive damages and limit the indemnifying party's liability through caps and baskets. When representing the indemnified

party, use the indemnification provision to enlarge the scope of recoverable losses.

- Focus on the mechanics for making an indemnification claim in addition to addressing the scope of indemnification. Draft provisions that address notice requirements and how the defense of claims brought by third parties will be managed.

Irwin A. Kishner concentrates his practice in general corporation law with an emphasis on sophisticated transactional work, including mergers and acquisitions, sports law, private equity, securities law, corporate restructurings and reorganizations, new media law, venture capital, joint venture, entertainment law, corporate finance and lending, intellectual property and licensing employment law, equity and debt offerings and syndications in both the public and private context.

He has handled numerous mergers and acquisitions, both hostile and friendly, on behalf of acquirers, targets, and investment banks. The range of transactions includes proxy contests, joint ventures, self-tender offers, third party and spin-offs, taking public companies private and other forms of corporate restructurings. His practice also includes advising financial institutions on regulatory issues and on derivatives and other financial instruments, as well as representation of private equity and venture capital funds and investors in fund formation (onshore and offshore), acquisitions and sales of portfolio companies. Mr. Kishner has successfully structured, negotiated, supervised and closed many financing and capital raising transactions, including private placements, initial public offerings, PIPEs, hedge fund convertible security investments, secured and mezzanine loan facilities, project finance, workouts, reorganizations, equity and debt restructurings and negotiation of inter-creditor relationships. He has also represented clients in a number of high profile senior executive employment and severance agreements and compensation packages as well as numerous corporations in the administration and establishment of employee compensation plans. Corporate boards and audit and special committees also turn to him for advice on such matters as corporate governance and corporate restructurings.

He represents a number of professional sports franchises and has acted as primary counsel on several high profile team acquisitions, cable television and radio contracts, Internet and intellectual property rights, joint ventures, credit facilities, advertising and sponsorship contracts, development and naming rights agreements, franchise transfers and financings, major event and tournament promotions and seat license agreements for stadiums and *arenas. Mr. Kishner also represents financial institutions and bond insurers in stadium finance matters and loans to teams and team owners.*

He advises clients in transactions throughout North America, South America, Europe (including Eastern Europe) and Asia. His clients are involved in a wide range of industries including sports, e-commerce, real estate, engineering, entertainment, manufacturing franchise, retail, distribution, consumer products, natural resources, consulting, health care, and other service businesses.

Mr. Kishner frequently lectures, and appears on television and radio, on such topics as M&A, private equity, venture capital, sports financing structured premium finance and life settlements transactions, and executive compensation, among others.

Before joining Herrick, Mr. Kishner was an associate in Shearman & Sterling's mergers and acquisitions department, where he participated in several high-profile hostile tender offers and numerous public and privately negotiated divestitures and acquisitions.

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