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Deal Points



THE NEWSLETTER
OF THE MERGERS AND
ACQUISITIONS COMMITTEE

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From the Chair

M&A Committee members,

Welcome back to Laguna! I look forward to seeing everyone (virtually or in person). It's been a long time (too long) since we last met here.

We kick off on **Thursday evening**, with a welcome reception. We then have our meetings on Friday and Saturday, starting with our International Subcommittee at 8:00 am on Friday and ending with our full Committee meeting on Saturday afternoon. We'll also have plenty of opportunities for more informal discussions and networking, taking advantage of our wonderful location.

If you're not going to join in-person, you still can join virtually, by Zoom. You'll need to register to get the Zoom link. You can register on the meeting webpage, here.

Please participate!

For everyone: Please participate, even if attending virtually. The strength of this Committee is our active membership. Chances are, something you found useful in your deals will be useful to someone else, and a question you have is a question others would like to see answered. So please share your views, tips and questions as we go through the sessions.

There are plenty of opportunities to participate between the meetings, too, with webinars, videos, model agreements, publications and other projects, not to mention preparing the presentations and discussions for our next meeting (in April in Seattle). We'll talk about the work our subcommittees, and the Committee, are doing, and you'll see some of the activities in the materials being distributed. Please reach out to the leaders of any subcommittee, or me or any of the vice chairs, if you'd like to help with something, or have an idea for something we're not doing yet.

Thanks to our sponsors – This meeting wouldn't be possible without the support from our sponsors. They're listed on page 24 of this *Deal Points*. Many of them will have representatives attending meetings, and in some cases helping with presentations, so if you get a chance be sure to thank them.

See you in Laguna!

Michael O'Bryan
Chair, ABA M&A Committee
mobryan@mofo.com



From the Editor

Welcome to the Winter 2023 issue of ***Deal Points***!

We begin this issue with a look back at market trends for de-SPAC transaction terminations for 2021/2022 and a cautionary tale from Delaware on restrictive covenants. Next, we take a look at how GP-led secondaries are poised to keep growing. Our Canadian colleagues then take us through trends in U.S. and Canadian cross-border transactions and departures from Delaware law on MAE clauses and ordinary course covenants. We follow with a piece on M&A considerations for management in small deals. Next, we receive great insights from our friends in New Zealand on their new legislation prohibiting 'unfair' contract terms. For those advising on healthcare transactions, do not miss the article on individuals and business excluded from federal healthcare programs or federal contracting. We finish this issue of ***Deal Points*** with a postcard highlighting trends in tech M&A in India.

Thank you to each of our contributors. I encourage each of you to consider contributing to future issues of Deal Points. Articles should be 1,500 words or less and should address a topic of general interest to M&A practitioners. All submissions should be sent to: lgriebel@cov.com

I look forward to seeing you in Laguna!

Luciana Griebel
Editor, ***Deal Points***
lgriebel@cov.com

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Market Trends 2021/2022: De-SPAC Transaction Terminations

By **JAMIE D. COLE**, Practical Guidance Team, LexisNexis

This article discusses recent market trends in the termination of business combinations involving special purpose acquisition companies ("**de-SPACs**") announced in 2021 and 2022. The discussion includes the basis for termination, prevalence of termination fees, and frequency of SPAC liquidations. The data analyzed in this practice note was obtained using Market Standards, the Practical Guidance database of publicly filed M&A deals that enables users to search, compare, and analyze transactions using 150+ M&A deal points to filter search results. For more information on Market Standards, click here.

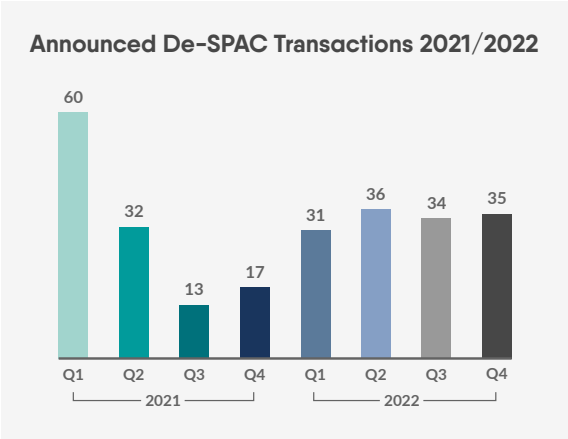
A special purpose acquisition company (SPAC) is a public shell company that raises funds through an initial public offering ("**IPO**") and uses the proceeds to acquire a private company. This business combination is commonly referred to as a de-SPAC transaction. A de-SPAC transaction must be consummated within a designated time frame, usually between 18 to 24 months from the date of pricing the IPO. If the SPAC is unable to consummate a merger in the designated time frame, the SPAC is required to liquidate and return the funds raised in the IPO (being held in an interest-bearing trust account) to investors or seek approval from stockholders for an extension.

The following analysis is based on 258 de-SPAC transactions announced between January 1, 2021 and December 31, 2022.

The Prevalence of De-SPAC Transactions in 2021 and 2022

More than 500 SPACs continue to actively seek private acquisition targets for de-SPAC transactions. Supply chain issues, inflation, acts of war and political conflicts, heightened regulatory scrutiny, and increased SPAC litigation have all impacted SPAC market conditions. The number of SPACs seeking private targets continues to outpace the number of completed de-SPAC transactions.

Of the 258 de-SPACs surveyed, 122 deals were announced and filed in 2021 as follows: 60 in Q1, 32 in Q2, 13 in Q3, and 17 in Q4. The remaining 136 deals were announced and filed in 2022 as follows: 31 in Q1, 36 in Q2, 34 in Q3, and 35 in Q4.



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WHAT'S NEW & TRENDING

Cautionary Tale From Delaware: Restrictive Covenants Binding Sellers Must Be Narrowly Tailored

By **ANDREW L. BAB**, Partner, **GREGORY V. GOODING**, Partner, **EMILY F. HUANG**, Partner, **SUE MENG**, Partner, **MAEVE O'CONNOR**, Partner, **WILLIAM D. REGNER**, Partner, **JEFFREY J. ROSEN**, Partner and **CAITLIN GIBSON**, Counsel at Debevoise & Plimpton LLP

A recent decision from the Delaware Court of Chancery in the case of Kodiak Building Partners, LLC v. Philip D. Adams (Del. Ch. Oct. 6, 2022) should give pause to buyers seeking to impose upon sellers non-competition and related restrictive covenants that go beyond the specific business of the target company. *The decision makes clear that more can indeed be less — and sometimes even nothing at all.*

The dynamic faced by Kodiak Partners — the buyer in this case — is a common one. Buyers usually wish to limit the ability of the sellers to compete with the business they have just sold. Moreover, where the buyer is itself engaged in the same or a similar business, and particularly when a seller is expected to continue as an employee of the business following closing, the buyer often will want restrictive covenants to apply to the entirety of the combined business, including activities in which the target did not engage and geographies in which it did not operate before closing. Even where the buyer acknowledges some uncertainty regarding its ability to enforce restrictions that go beyond the scope of the business being acquired, it often considers the risk well worth taking, on the basis that the existence of the restriction may have *in terrorem* effects and a view that, in the unlikely event of litigation, the worst that can happen is that the covenant might be narrowed by the court.

The selling stockholder in the *Kodiak Building Partners* case did not fear the covenant. When the buyer brought suit to enforce it, the court, rather than narrowing the covenant, held it unenforceable in its entirety on the grounds that its scope, by going beyond the business conducted by the target to include the buyer's own business, was unreasonable. Ironically, it appears that the selling stockholder's conduct would have breached even a narrow restriction, limited to the pre-closing business of the target, and that the broader covenant was in this instance unnecessary. Nonetheless, for want of a narrower scope, the entire covenant was lost.

Background

The case involved the sale of Northwest Building Components, Inc., a small manufacturer of roof trusses ("**Northwest**"), to Kodiak Building Partners, a much larger construction business ("**Buyer**"). Philip Adams ("**Adams**") was the general manager and 8% shareholder of Northwest. In connection with the sale, Adams entered into a restrictive covenant agreement having a 30-month term, which included non-competition and non-solicitation covenants for Buyer's benefit. Adams agreed not to engage in any activity that competed with the "Business" and not to solicit any customers or clients of Northwest or any other member of the deadline, or as a result from an increase in stockholder redemptions that significantly decreased the funds held in trust to fund a business combination.

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GP-Led Secondaries Poised to Keep Growing

By **ANDREW CAPITMAN**, Manager Director, Transaction Opinions at Kroll, LLC

The private equity ("**PE**") secondaries market has grown dramatically over the last decade. In 2021, it reached an all-time high of $132 billion, which is more than triple its size in 2015. It is a market which hardly existed 15 years ago and now is an important part of the PE ecosystem.

Most of the activity has been led by limited partners ("**LPs**") seeking to buy and sell their equity stakes in PE funds, which used to be viewed as highly illiquid. But a significant driver of the market's recent growth has been general partner-led secondaries, in which the general partner ("**GP**") spearheads the transactions. Those deals can take a variety of forms. But the most popular involves the GP of a PE firm selling assets in one of its funds to a new fund, managed by the same GP, but with a significantly different LP investor group, while giving LPs in the old fund the option to liquidate or roll over into the new one. Last year, GP-led secondaries made up more than 50% of the overall PE secondaries market; in 2015, they made up just 18%.

Forces Driving Demand

Two forces have propelled the increase in GP-led secondaries. One is related to the shifting investment landscape where GPs find it harder than ever to identify businesses that fit the profile of their traditional targets.

Two forces have propelled the increase in GP-led secondaries. One is related to the shifting investment landscape where GPs find it harder than ever to identify businesses that fit the profile of their traditional targets. Historically, those targets have included family-owned businesses, corporate carveouts and unfocused and underperforming public companies, and significantly, portfolio companies of other PE sponsors. Over the last two decades, PE firms have held their portfolio companies for roughly three to five years on average.

As their traditional targets dwindled, PE firms shifted their focus to companies with potential for significant growth. But as GPs soon realized, some of their investments in those companies took longer to generate acceptable returns. Many also had potential to generate substantial returns past the fund's target holding period or expiration date. As an alternative to selling the assets before a fund's expiration date, GPs were looking for a way to hold onto the assets for a longer period. Establishing continuation funds allowed them to accomplish this while often raising additional capital to execute a value-creation plan.

The other force driving the rise of GP-led secondaries is the rapid growth of secondary funds that invest in LP positions. In a typical PE fund, LPs are not privy to which assets the fund will buy. That uncertainty often makes it harder to understand how the fund will perform. On the other hand, investors in a secondary

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[1] *Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, No. 354, 2020, 2021 WL 4165159 (Del. Sept. 13, 2021).



Trends in U.S. and Canadian Cross-Border Transactions: U.S. Governing Law and Unique Deal Terms

By **CEILIDH HEMMATI**, Partner and
KELLY HAMMEL, Student at Law at Bennett Jones LLP

Introduction

As global investment opportunities continue to flourish, so do cross-border M&A deals. These cross-border transactions can pose a unique set of challenges for Canadian counsel; particularly when a U.S.-based purchaser, represented by U.S. counsel, is purchasing a Canadian business.

A Unique Set of Deal Terms

The following is a non-exhaustive list of terms that may result in substantial negotiation in a cross-border deal:

- **Governing Law:** When a U.S. purchaser is acquiring a Canadian entity, it seems appropriate that Canadian law would govern the definitive agreement. However, U.S. purchasers and their counsel often insist on having U.S., such as Delaware or NY law, govern such agreements. This application of U.S. law to an otherwise Canadian transaction can lead to difficulties in the negotiation process, including a disconnect between U.S. and Canadian counsel between what is market practice, and a unique set of deal terms in such transactions.
- **Alternative Dispute Resolution Mechanisms:** Where the definitive agreement is governed by U.S. law, and disputes are to be resolved in U.S. courts, unique alternative dispute resolution mechanisms may be warranted. These unique resolution mechanisms assist not only to properly serve a Canadian-based client's best interests, but also to promote efficiency and cost-effectiveness for the benefit of both the purchaser and the seller. Examples of tailored dispute resolution mechanisms include using an independent third-party expert to determine not only purchase price adjustments, as would be common practice, but also any earn-out or milestone disputes, or specifying that a narrower suite of disputes would be heard in Canadian courts.
- **Transactional Insurance:** There has been a continued upward trend in the use of representation and warranty insurance in the United States. While also used in Canadian legal transactions, it is somewhat less common. Both purchasers and sellers in a cross-border transaction can benefit from the input of Canadian counsel who are familiar with transactional insurance. This Canadian counsel can assist the parties with the process of obtaining and making claims against such insurance, and can advise as to the reasons it may be useful in moving past sticking points in the negotiation of the definitive agreement.
- **Employment Law and Severance:** Canadian and U.S. employment law differs substantially, particularly with regard to severance entitlements. There is no "employment at will" concept in Canada and federal and provincial employment standards legislation prescribe mandatory minimum notice, or pay in lieu of notice, periods across Canada. Additionally, in Canada, common law severance entitlements must also be considered.

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Caution: Where Canadian Law Departs From Delaware Law on MAE Clauses and Ordinary Course Covenants

By **GESTA ABOLS**, Partner, **NEIL KRAVITZ**, Partner, and **PAUL BLYSCHAK**, Counsel at Fasken Martineau DuMoulin LLP



Overview

The past two years have seen numerous bulletins on Canada's two monumental M&A decisions arising from the COVID-19 pandemic. Unfortunately, much of this analysis is substantially undermined by an incorrect or incomplete understanding of Delaware law by Canadian legal commentators. We cut through this noise to highlight the key departures by the *Fairstone* and *Cineplex* cases from Delaware law on material adverse effect ("MAE") clauses and ordinary course covenants requiring caution by U.S. counsel in cross-border deals.

Given the notoriety of the decisions cited (Canadian and American), we keep our treatment brief.

Departures regarding MAE Clauses

Fairstone departs from Delaware MAE clause case law in four important and *interrelated* areas.[1] Furthermore, and quite unhelpfully, *Fairstone* is silent regarding both the fact that it is making these departures as well as its rationale for doing so.

First, *Fairstone* sends mixed signals regarding whether an MAE analysis includes a subjective component.[2] By contrast, Delaware is clear the analysis is entirely objective.

Second, Delaware is equally clear that the concepts of a "material adverse effect" and "materiality" are "analytically distinct." *Fairstone* does not draw this distinction. Rather, it applies a "purchase decision" analysis of the type derived from *TSC Industries*[3] and firmly rejected in the MAE context in Delaware.[4] Specifically, *Fairstone* applies a "purchase decision" analysis to the question of "durational significance" and hints at it in relation to impact on "overall earnings potential."[5]

Third, since *Akorn*,[6] Delaware no longer requires the risk giving rise to an MAE to be of an "unknown" nature. Although *Fairstone* relies on *Akorn* more than any

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[1] For comprehensive analysis, see Paul Blyschak, "MAE Clauses in Canada: What U.S. Counsel Need to Know", (2022) 16(2) *Virginia Law & Business Review* 327.

[2] See *Fairstone Financial Holdings Inc. v. Duo Bank of Canada*, 2020 ONSC 7397 [*Fairstone*] paras. 66 and 86 note 36 citing *Inmet Mining Corp. v. Homestake Canada Inc.*, 2003 BCCA 610 para. 102.

[3] *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

[4] *Frontier Oil* at page 108; *Channel Medsystems, Inc. v Boston Scientific*, C.A. No. 2018-0673-AGB (Del. Ch., Dec. 18, 2019) at pages 48 and 68; *AB Stable VIII LLC, v Maps Hotels and Resorts One LLC et al*, C.A. No. 2020-0310 (Del. Sp. Ct., Dec. 8, 2021) [*AB Stable* DESC] at pages 35-36.

[5] *Fairstone* paras. 75-76 and 88.

[6] *Akorn, Inc v. Fresenius Kabi AG et al*, C.A. No. 2018-0300-JTL (Del. Ch., Oct. 1, 2018).



M&A Considerations for Management in Small Deals

By **CLARE M. LEWIS**, Partner and **PJ HARRIS**, Associate at McGuireWoods LLP

No matter the size of your M&A deal, it is critical for the management team of a company to get the legal elements of the transaction correct to avoid exposing your company to undue risk. A recent article in the Financial Times[1] profiled just how badly things can go when something as fundamental as due diligence is not sufficiently conducted. Other risks range from increased downside exposure as a result of neglected deal terms (things like indemnification, non-competes, etc.), to post-transaction litigation over poorly drafted representations and warranties. These are all considerations that you need to get right to ensure you walk away from an M&A transaction with the deal you are expecting, no matter if your company is a small and medium-sized enterprise (SME)[2] or forms part of the middle market.[3]

A difficulty faced by enterprises on the lower rungs of the valuation chain is that the time and effort required to negotiate and close an M&A deal is not always correlated to the size of the company; meaning, it is not necessarily the case that small deals result in a correspondingly small amount of legal work. In fact, it is often the case that smaller M&A deals require more time for a lawyer to navigate the diligence, deal structuring, and drafting processes for a client. This is because larger companies have often developed formal processes to streamline M&A activity that they can leverage on, and may even have in-house counsel or officers dedicated to M&A, while smaller deals are almost always bespoke.

While a smaller company may not have a Vice President of M&A or similar officer, there are things that management teams of smaller companies can still do to increase the likelihood of a successful and efficient transaction process in M&A transactions. What follows is an overview of considerations for companies engaging in small M&A deals.

What is essential?

Measure twice to cut once. Before you begin conducting management calls and trading draft documents with the other side, you want to understand the overall structure of the deal at hand. What is being bought and sold? Is the deal structured as an asset deal or an equity deal? In an equity deal, the buyer acquires the ownership interests in the target company, with the assets and liabilities remaining with the target post-closing. In an asset deal, the buyer acquires certain assets and may assume certain liabilities of the target company instead. Of course, from this most basic understanding, each deal takes on a structure of its own, but thinking through what you want, and talking through the implications of how to get there with your attorney, is an indispensable first step.

Know before you go. *"From a legal perspective, an M&A deal is a nexus of contracts (or agreements) that stand to generate value for the firm undertaking the deal."*[4] As such, it is essential to understand certain of the key terms and documents a company will be entering into

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[1] https://www.ft.com/content/e739d9ed-b8ee-4d8e-ad29-0d01889d5775

[2] https://corporatefinanceinstitute.com/resources/accounting/small-and-medium-sized-enterprises-smes/

[3] https://www.middlemarketcenter.org/Media/Documents/best-practices-to-facilitate-more-successful-merger-and-acqusition-deals-in-the-future_NCMM_MA_Report_FINAL_web.pdf

[4] https://dealroom.net/faq/m-a-legal



New Zealand Due Diligence Check in M&A Deals: New Legislation Prohibiting "Unfair" Contract Terms

By **DAVID QUIGG**, Partner, **ASHA STEWART**, Partner and **MATT WOOLLEY**, Associate at Quigg Partners

Standard form contracts are common across many industries in New Zealand and are often used for repeat business on a "take it or leave it" basis. A recent New Zealand law change prohibits the inclusion or enforcement of unfair contract terms in certain standard form contracts. In order for a buyer in an M&A deal to fully understand the risks involved in acquiring a New Zealand business that uses standard form contracts, it is prudent for the legal due diligence scope to now include confirming whether any such contracts include terms that could be prohibited or unenforceable on the basis that they are "unfair." In this update, we summarise the recent law change, and suggest matters to consider as part of legal due diligence.

A recent New Zealand law change prohibits the inclusion or enforcement of unfair contract terms in certain standard form contracts.

What contracts do the unfair contract terms rules apply to?

The unfair contract terms rules were recently extended to apply to standard form small trade contracts entered into, renewed or varied from 16 August 2022. A contract is a small trade contract if each party is engaged in trade, the contract is not a consumer contract, and the contract does not comprise or form part of a trading relationship that exceeds an annual value threshold of NZ$250,000 (including goods and services tax (GST), if applicable), when the trading relationship first arises. Accordingly, it is possible for a standard form contract between two large businesses to fall within the definition of a small trade contract, as the focus is on the value of the trading relationship between the businesses rather than the size of the business itself.

What kinds of terms are unfair contract terms?

A term can be declared unfair only if the court deciding the case is satisfied that the term would cause a significant imbalance in the parties' rights and obligations arising under the contract, the term is not reasonably necessary to protect the legitimate interests of the party that would be advantaged by the term, and the term would cause detriment (whether financial or otherwise) to a party if the term were applied, relied on or enforced. While it is for the party alleging that a term is unfair to prove significant imbalance and the potential for detriment, the onus is on the party advantaged by the term to persuade the court in relation to the requirement that its term is reasonably necessary to protect its legitimate interest. The starting point is a presumption that a challenged term is not reasonably necessary.

Some terms cannot be declared unfair. These are terms that define the main subject matter of the contract, set the upfront price payable under the contract

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Managing Risk in Healthcare Transactions: Individuals and Business Excluded from Federal Healthcare Programs or Federal Contracting

By **ARI J. MARKENSON**, J.D., M.P.H., Partner at Venable LLP

Introduction

Transaction documents relating to mergers, acquisitions, and financings in healthcare universally include industry-specific "healthcare matters" representations and warranties ("**HCRW**"). When a healthcare deal involves parties that are (will be or have been) providers in a Federal Health Care Program[1] ("**FHCP**") or have been parties to federal contracts, HCRWs, particularly of the seller, will include a HCRW regarding whether a party has been excluded (or "debarred") from FHCPs or federal contracting. A party excluded from FHCPs and or federal contracting is essentially a "persona non grata." While this will be discussed in more detail, the basic effect of an exclusion is that "*no payment can be made by any [FHCP] for any items or services furnished, ordered, or prescribed by an individual or entity that has been excluded*"[2] and significant penalties can be assessed on parties who have done business with an excluded party.

The enforcement of penalties for employing or contracting with excluded parties has been rising for years. Identifying violations is a low-hanging fruit for authorities, and the likelihood of enforcement activity subsiding is low.

The enforcement of penalties for employing or contracting with excluded parties has been rising for years. Identifying violations is a low-hanging fruit for authorities, and the likelihood of enforcement activity subsiding is low.

Excluded Parties

What Is an Excluded Party?

The Secretary of the U.S. Department of Health and Human Services ("**HHS**") has the authority[3] to exclude parties from participation in FHCPs. This authority is delegated to the Office of the Inspector General of HHS ("**OIG**"). Individuals who are excluded from FHCPs cannot participate in the provision of healthcare to individuals with coverage under an FHCP. The OIG maintains a searchable list of excluded individuals and entities ("**LEIE**") on its website.

In addition to OIG exclusions, the U.S. General Services Administration ("**GSA**") maintains a list of parties excluded from participation in federal contracts on its excluded parties list system ("**EPLS**"). These exclusions are a compilation of lists and information of parties that have been excluded by federal government agencies and therefore prohibited from receiving federal contracts, federally approved subcontracts, and certain types of federal financial and nonfinancial assistance and benefits.[4]

CONTINUE READING ON PAGE 43

[1] Federal Health Care Programs as defined in 42 U.S.C. § 1320a-7b(f).

[2] See 42 C.F.R. §1001.1901(b).

[3] See 42 U.S.C. §1320a–7.

[4] The exclusion actions that lead to a person or entity being listed in the EPLS may come from specific action taken under the Federal Acquisition Regulation (FAR), under specific federal agency regulations, or under the federal government-wide Nonprocurement Suspension and Debarment Common Rule, 68 FR 66533.



TASK FORCE AND SUBCOMMITTEE REPORTS

Academic Subcommittee

Stephen M. Bainbridge, the William D. Warren Distinguished Professor of Law at UCLA School of Law and the author of a popular business law blog, https://www.professorbainbridge.com, will be speaking at the M&A Committee's Academic Subcommittee Meeting in Laguna on Saturday, January 28, 2023, between 1:15 pm to 2:15 pm. His topic will focus on the much discussed question of what is the actual purpose of the business corporation. His recent article "Why We Should Keep Teaching Dodge v. Ford Motor Co.," 48 Journal of Corporation Law 77 (2022), available at https://ssrn.com/abstract=4076182, suggests a more traditional approach to corporate purpose than the various theories that have recently been promoted through the emphasis on "social responsibility, or environmental, social, and governance (ESG) metrics." He has even authored a yet to be published book, *The Profit Motive: Defending Shareholder Value Maximization*.

GLENN WEST Chair

Acquisitions of Public Companies Subcommittee

The last Acquisitions of Public Companies Subcommittee meeting held on September 16, 2022 in Washington, D.C. featured a presentation on the impact of Environmental, Social and Governance ("**ESG**") activism on M&A transactions and how ESG matters impact deal making.

The upcoming Acquisitions of Public Companies Subcommittee meeting is scheduled to be held in Laguna Beach, CA, on Friday, January 27, 2023 at the Montage Laguna Beach at 1:15 p.m. – 2:30 p.m. PST. The meeting will feature Daniel Lee, Managing Director at Moelis & Company where he chairs the firm's Fairness and Valuation Committee, and Katherine Krause, Partner in the Corporate Department at Simpson Thacher & Bartlett LLP. The panelists will discuss the most recent trends and key considerations in take-private transactions, including financing LBOs in the current uncertain market environment, acquisitions of recently de-SPACed companies and special committee situations.

RITA-ANNE O'NEILL Co-Chair
ANN BETH STEBBINS Co-Chair
JENNY HOCHENBERG Vice-Chair

International M&A Subcommittee

The meeting will be divided as follows:

- Update on Cross-border M&A Market Trends (by Jennifer Muller)

- Two Country Bites – Presentation of developments in the M&A practice (featured countries will be The Netherlands and Switzerland)
- Feature Program – Obstacles and practical issues in dealmaking by in-country compliance/KYC regulations (feature countries will be the US, Canada, Germany and Mexico)
- Open Mike session for attendees who want to share quick bites or comments regarding their local practice.

M. JORGE YÁÑEZ V. Chair

M&A Jurisprudence Subcommittee

The M&A Jurisprudence Subcommittee will meet at the M&A standalone meeting in Laguna Beach on:

Friday, January 27, 2023
9:15 a.m. – 10:45 a.m. PST

At the meeting we will discuss recent developments in M&A case law. As we have at recent meetings, we will use the MAC Briefs now being published by this Subcommittee as our starting point to facilitate a deeper conversation on the practical impact of the cases they address. We will provide MAC Briefs in advance of the meeting for all cases to be covered, among them:

- Discussing a decision from England interpreting the use of "good faith" in a contract *(Faulkner v. Vollin Holdings Limited)* and how English law compares to American law on this topic;
- Two recent decisions discussing whether controllers complied with the *MFW* structure in the context of a reverse spinoff *(In re Match Group, Inc. Derivative Litigation)* and amending a certificate of incorporation to extend a dual-class structure *(City Pension Fund for Firefighters and Police Officers in the City of Miami v. The Trade Desk, Inc.)*; and
- The Court of Chancery's decision analyzing third-party beneficiary status in light of an anti-*Con Edison* provision in *Crispo v. Musk*.

The Subcommittee will also discuss opportunities for new member participation.

Please refer to the Subcommittee's website for the MAC Brief summaries (and accompanying opinions) of all cases we have identified for discussion since our most recent meeting.

We need cases!

We ask all members of the M&A Committee to send us judicial decisions they think would be of interest to M&A practitioners. Submissions can be sent by e-mail either to Nick Mozal at nmozal@potteranderson.com or Nate Cartmell at nathaniel.cartmell@pillsburylaw.com. Please state in your email why you believe the case merits inclusion in the survey. We rely on members to help identify important cases from all jurisdictions, so **we need you to help identify cases!**

More generally:

For those of you who don't know us, the M&A Jurisprudence Subcommittee keeps its members and the Committee up to date on judicial developments relating to M&A. Our Subcommittee includes:

- The Annual Survey Working Group -- identifies and reports to the Committee on recent decisions of importance in the M&A area, and prepares the Annual Survey of Judicial Developments Pertaining to M&A, which is published in The Business Lawyer. The 2022 Survey was published in the Summer issue and can be viewed here.
- The Annual Surveys also are posted in the on-line M&A Lawyers' Library, and **MAC Briefs** – one page summaries of the cases identified for discussion by the Committee and circulated in advance of each meeting – are posted on the Committee's website as well. Committee members can access the above from the Committee's home page on the ABA website.
- Members of the Subcommittee also organize and present CLE panels at Spring and Annual Meetings, which are available as on-demand CLE. Recent presentations can be found here.
- The Judicial Interpretations Working Group -- examines and reports to the Committee on judicial interpretations of specific provisions of acquisition agreements and ancillary documents, working from recent cases and also examining the deeper

body of case law. The Working Group produces memoranda summarizing their findings, which are circulated to Subcommittee members and, when finished, posted in the M&A Lawyers' Library.

We welcome all M&A Committee members to join our Subcommittee. The Jurisprudence Subcommittee is a good way to become involved in the Committee, especially for younger Committee members, because extensive M&A transactional experience is not necessary. To be included, a decision must:

1. Involve a merger, an equity sale of a controlling interest, a sale of all or substantially all assets, a sale of a subsidiary or division, or a recapitalization resulting in a change of control, and
2. (a) interpret or apply the provisions of an acquisition agreement or an agreement preliminary to an acquisition agreement (*e.g.*, a letter of intent, confidentiality agreement or standstill agreement), (b) interpret or apply a state statute that governs one of the constituent entities (*e.g.*, the Delaware General Corporation Law or the California Limited Liability Company Act), (c) pertain to a successor liability issue, or (d) decide a breach of fiduciary duty claim.

We are currently excluding cases dealing exclusively with federal law, securities law, tax law, and antitrust law. But if you feel a case dealing with an M&A transaction is particularly **significant**, please send it for consideration, even if it does not meet the foregoing criteria.

We need more topics!

The Judicial Interpretations Working Group is actively soliciting suggestions for topics for new memoranda for the M&A Lawyers' Library and seeking volunteers to research and draft memoranda. If you have ideas for new topics or would like to work on a memorandum, please contact Frederic Smith at fsmith@bradley.com. To join the M&A Jurisprudence Subcommittee, please visit our website, email any of us, or simply come to the next Subcommittee meeting and say hello.

NATE CARTMELL Subcommittee Chair
NICK MOZAL Chair - Annual Survey Working Group
FREDERIC SMITH Chair - Judicial Interpretations Working Group

Market Trends Subcommittee

Please join us for the Market Trends meeting in Laguna Beach, which will take place on Saturday, January 28, 2023 from 10:30 a.m. to 12 p.m. PST. As we did in Washington, D.C., we will start our meeting with a guided group discussion. Please be prepared to share your real time feedback about trends that you are seeing in your practice over the past few months, particularly trends that may surprise you.

The main substantive portion of our meeting will focus on a look at trends within specific industry verticals, including life sciences and technology. Kip Wallen of SRS Acquiom will begin with a discussion of the trends in these industry verticals based on their database of deals.

Then we will move to a panel discussion with practitioners from each of the industry verticals offering their insight as to what trends they are seeing in practice and how that compares with the data presented.

Our meeting will conclude with an update with respect to ongoing Subcommittee projects including the Hotshot Video Series (Ian Nelson), the Canadian Public Target Deal Points Study (Paul Davis and Sandra Zhao), the Canadian Private Target Deal Points Study (André Perey and Gesta Abols), the U.S. Private Target Deal Points Study and the European Private Target Deal Points Study (Reid Feldman).

Location and dial-in / Zoom information are located later in this edition of Deal Points. To maximize the benefit of these meetings, please let us know if you have any suggestions for topics or comments on how to improve our meetings. We can be reached at cmenden@willkie.com and lhedrick@hirschlerlaw.com.

We look forward to seeing you in person or virtually at our meeting in Laguna Beach.

CRAIG MENDEN Chair
LISA HEDRICK Vice-Chair

Membership & Diversity Subcommittee

Membership Rise and Shine!

Join us for a healthy start to your Saturday morning

with a brisk walk or run around the scenic Montage coastline. You set the pace - whether you are a marathon runner or dusting off your trainers to make good on new years' resolutions – all are welcome!

Coffee and light breakfast will be provided. Meeting point at 7:30 a.m. PST, more details will be shared during our Friday meetings. Contact Caitlin Rose (crose@fasken.com) and Sarah Cole (scole@taylorwessing.com) for any questions.

TRACY WASHBURN BRADLEY Co-Chair
CAITLIN ROSE Co-Chair

Private Equity M&A (Joint Subcommitee of the Venture Capital and Private Equity Commitee)

The Private Equity M&A Joint Subcommittee last met in Washington, DC on Friday, September 16, 2022, at 2:30 p.m. eastern time, as part of the ABA Business Law Section's Annual Meeting. It was great to see so many of you in person for the first time since COVID.

We started the program with two small discussions. First, I updated everyone on two recent Delaware Chancery cases --- *Level 4 Yoga, LLC v. CorePower Yoga LLC*, 2022WL 601862 (Del. Ch. March 1, 2022), and Arwood v. AW Site Services, LLC, 2022 WL 705841 (Del. Ch. March 9, 2022) – which, in the aftermath of the Delaware Supreme Court's footnotes in Eagle Force, provided at least some comfort to those of us who worried whether Delaware was still a "pro sandbagging" jurisdiction. Then, with the help of Jeffrey Korenblatt of Holland and Knight and Chris Campbell of Kroll, we reviewed the proposal to tax carried interests of Private Equity firms that President Biden and Senator Manchin had agreed upon before Senator Sinema prevented the proposal from being adopted.

Following the two brief presentations, for our principal panel presentation I was joined by our Vice Chair, Samantha Horn of Stikeman Elliott in Toronto, Ontario, and Glen West of Weil, Gotshal & Manges in Dallas, Texas, for a presentation entitled "An Advanced Discussion of Fraud Waivers and **Third Party** Beneficiaries in M&A Agreements." The panel focused on how far fraud waivers can go, what they can't accomplish, and provided some drafting tips (including how to make sure that third party beneficiary clauses do not interfere with getting sellers the deal they think they negotiated).

The next meeting of our Joint Subcommittee will be at the Merger and Acquisitions Committee's Stand-Alone Meeting at The Montage in Laguna Beach, California on Friday, January 27, 2023, at 10:45 a.m. pacific time. While there will be the option to attend remotely, I hope to see as many of you there in person as possible.

We will have two programs in Laguna Beach. First, I will be joined on a panel by Bill Monat, Global Head of Transactional Liability for Mosaic Insurance, Julia Papastavridis, a Managing Director for Aon, and Caitlin Rose of Fasken in Toronto, Ontario, to discuss "Trends and Updates on Representation and Warranty Insurance." Representation and Warranty Insurance has become an important part of the toolbox of Private Equity M&A practioners, and as we do **periodically** we will revisit the product and discuss recent trends. Then, as has become an annual tradition, Andrew Morrow of Houlihan Lokey will provide us with a review of the state of the Private Equity Markets.

Samantha Horn and I continue to seek **YOUR** feedback as to the meetings and the Joint Subcommittee. We are always looking for ideas for future programs, presentations and projects, as well as volunteers for all of them. And, as I've said before, if you haven't met me and you attend the meeting, please feel free to introduce yourself in person or shoot me an email afterwards and introduce yourself. Especially as we continue with remote meetings, I would love to know who is listening (and have a chance to recruit your participation).

DAVID ALBIN Chair
SAMANTHA HORN Vice-Chair

Technology in M&A Subcommittee

The Technology in M&A Subcommittee met on Saturday, September 17, 2022 as part of the Business Law Section's Hybrid Annual Meeting in Washington, DC. The meeting primarily comprised:

- Scott "SJ" Jablonski of Berger Singerman gave a presentation on the change management aspects of introducing legal technology; and

- Rhys Hodkinson of Definely demonstrated their drafting and reviewing solution, which enables users to access and edit documents without losing the context of their review and which includes a proofreading solution, all within a Word environment.

Please join us in person or by Zoom at our forthcoming meeting at the M&A Committee's hybrid Standalone Meeting in Laguna Beach, CA. Our Subcommittee meeting will take place from 2:15 pm to 3:15 pm PT on Saturday, January 28, 2023 and our agenda will include:

- A panel presentation on the Subcommittee's recently published MAC Digital Documentation Protocol: Best Practices to Effect eSignings and Closings for M&A (available in the Subcommittee's Communities Library and also at https://businesslawtoday.org/2022/02/mac-digital-documentation-protocol-best-practices-to-effect-esignings-closings-ma). The panel will comprise Sahil Zaman of iManage Closing Folders (moderator) and Protocol authors Tom Romer of Greenberg Traurig LLP (who co-chaired the working group that produced it), Kathy Woeber Gardner of Montgomery Pacific LLP and Ian Palm of Gowling WLG.
- A live demonstration by Kayla Zachariassen of Stikeman Elliott LLP of the iManage Closing Folders product.
- Tom Romer will provide a brief summary of *Sorenson Impact Foundation v. Continental Stock Transfer & Trust Company*, 2022 WL 986322 (4.1.2022). Also known as the *Hacked M&A Payout Case*, this unpublished Delaware Court of Chancery opinion provides a valuable cautionary tale of a serious breach in M&A deal security and the handling of M&A documents in a closing.

If you use a type of technology that you'd like to demonstrate at a future meeting (or to produce a case study on for *Deal Points*) please let us know. **Similarly** if you are aware of additional technologies not listed in our Subcommittee's Technology in M&A Directory please also let us know.

Being a member of our Subcommittee is the only way to ensure that you receive updates on our Technology in M&A Directory and other relevant materials from our Subcommittee. If you are not already a member we warmly invite and encourage you to join, through the "M&A Subcommittees" page on the main ABA platform at this link.

If you have ideas for how we might take the Subcommittee forward, please share them with us. Please join us at our forthcoming meeting and if you can't do that please email my Vice-Chair Tom Romer at romert@gtlaw.com, our M&A Directory Project Leader Will Norton at will@simplyagree.com or me at daniel.rosenberg@crsblaw.com.

DANIEL P. ROSENBERG Chair
THOMAS B. ROMER Vice-Chair

Women in M&A Subcommittee

The last Women in M&A Subcommittee Meeting that was held on September 16, 2022 featured a presentation by Ally Coll, a civil rights lawyer and professor, who spoke on best practices developed by the Purple Campaign, a non-profit organization she co-founded to address workplace harassment in the wake of the #MeToo movement using the organization's four-part policy framework: Reduce, Respond, Rethink and Rebuild.

The upcoming Women in M&A Subcommittee Meeting is scheduled to be held on Friday, January 27, 2023 at 2:30 p.m. to 3:45 p.m. PST at the Montage, Laguna Beach and on ZOOM. It will feature a presentation of the results of the Subcommittee's updated law firm survey followed by a fireside chat on leadership and diversity.

Women in M&A Subcommittee is delighted to present an engaging discussion featuring Jeff Davis, Chief Legal & Corporate Affairs Officer of the Ontario Teachers' Pension Plan Board and Corinna Cherian, Senior Vice President and Deputy General Counsel of City National Bank, to discuss leadership and diversity. Join us for an open conversation about different leadership styles, how that results in greater diversity, and how leading with vulnerability leads to better performance, inspired people and resilient teams.

JOANNA LIN Co-Chair
CHARLOTTE MAY Co-Chair

MERGERS & ACQUISITIONS COMMITTEE MEETINGS

All meetings in hybrid in-person/remote format

The Montage
Laguna Beach, California
THU., JAN. 26 – SAT. JAN. 28, 2023
All times California time

Thursday, January 26, 2023

3:00 – 7:00 pm
Registration
Grand Ballroom Foyer

5:00 – 7:00 pm
Welcome Reception
Grand Ballroom Foyer & Courtyard
All meeting registrants & guests are welcome

Friday, January 27, 2023

7:00 am – 4:00 pm
Registration
Grand Ballroom Foyer

7:00 – 8:30 am
Breakfast*
Grand Ballroom Foyer

8:00 – 9:15 am
International M&A Subcommittee
Chair: M. Jorge Yanez V
Grand Ballroom

9:15 – 10:45 am
M&A Jurisprudence Subcommittee
Chair: Nate Cartmell
Grand Ballroom

10:45 am - noon
Private Equity M&A Subcommittee
Chair: David I. Albin
Grand Ballroom

Noon – 1:15 pm
Lunch*
Pacific Lawn

1:15 – 2:30 pm
Acquisitions of Public Companies Subcommittee
Co-Chairs: Rita-Anne O'Neill, Ann Beth Stebbins
Grand Ballroom

2:30 – 3:45 pm
Women in M&A Subcommittee
Co-Chairs: Joanna Lin, Charlotte May
Grand Ballroom

3:45 – 4:15 pm
Meeting of Subcommittee and Task Force Chairs and Vice Chairs
Chair: Mike O'Bryan
Grand Ballroom

4:30 – 5:30 pm
Wine and Cheese Reception
**Ticket Required ($50)

6:30 pm
Friday Night Dine-Arounds
Organizer: John Clifford

Saturday, January 28, 2023

7:00 am – 4:00 pm
Registration
Grand Ballroom Foyer

7:00 – 9:00 am
Breakfast*
Grand Ballroom Foyer

7:30 – 8:30 am
Fun Run/Walk
Meeting place and details to come

10:30 am – noon
Market Trends Subcommittee
Chair: Craig Menden
Grand Ballroom

Noon – 1:15 pm
Lunch*
Pacific Lawn

1:15 – 2:15 pm
Academic Subcommittee
Chair: Glenn West
Grand Ballroom

2:15 – 3:15 pm
Technology in M&A Subcommittee
Chair: Daniel P. Rosenberg
Grand Ballroom

3:15 – 5:00 pm
Mergers and Acquisitions Full Committee Meeting
Chair: Mike O'Bryan
Grand Ballroom

6:30- 9:30 pm
M&A Committee Reception & Dinner
Ocean Lawn at The Montage Laguna Beach Hotel
**Ticket Required ($180)

*Included in registration fee for registered Meeting Attendees. Guest passes are available for purchase.



Committee Structure and Leadership

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**Appointed by MM&SB Committee

ESG INITIATIVE
Chauncey Lane Chair
Chauncey.Lane@hklaw.com

Postcard from India







TRENDS IN TECHNOLOGY M&A IN INDIA

Introduction

India has emerged as the "poster boy" of technology mergers and acquisitions (M&A), and in the last 18 months, has witnessed emergence of 65 technology unicorns and 9 IPOs of new age technology companies. The level of M&A in the technology sector has been strong despite current macro-economic uncertainties, and growth is expected to continue.

The bulk of M&A activity in the technology sector has been in areas such as consumer internet; software as a service; and Information Technology services with a wave of consolidation being seen across these areas. The common theme across these sectors has been that an M&A deal is no longer evaluated on a scale and cost matrix and is rather being used as a value driver for businesses.

Regulatory Developments: Pros and Cons

The regulatory landscape has been a major enabler of technology M&A in India. Major highlights have been the pro-active steps taken by the Reserve Bank of India ("**RBI**") to set up the Umbrella Entity Framework which is expected to revolutionize the payments industry in India. Setting up of Gujarat International Finance Tec-City (GIFT) has also been perceived by the market as a regulatory enabler for financial services businesses in India. On the education technology front, the New Education Policy (NEP) has enabled the education focused tech businesses to grow beyond the traditional exam preparation and K-12 segments. However, the regulators have had their share of misses as well. Data localization norms introduced by the RBI have resulted in cumbersome compliance for several tech players and business models have required restructuring to ensure adequate compliance. Despite the misses, the Indian regulatory landscape continues to be conducive for M&A activity and has made substantial progress on this front in the recent past.

Postcard from India



Trends in M&A Landscape

Macroeconomic factors have led to emergence of several new trends in the Indian market with respect to technology M&A in India. Some of the key trends are highlighted below:

Addressing Valuation Gaps

Valuation gaps and exploring solutions in this regard have taken center stage over the last few months. An example is a deferred consideration structure which covers the risk of post-closing under-performance of the target and involves milestone-based payment of consideration.

Put and call options have also emerged as popular tools in this regard, where the seller is left with a minority stake post-closing and the buyer and seller have the benefit of an option to require the sale of such minority stake to the buyer on a later date at a pre-determined price. This structure allows the buyer to ensure that the valuation of the residual minority stake is backed by meaningful commercial performance, and it allows the seller to realize further upside.

Earn-out structures have also been used to cover the bid-ask gap. In earn-out arrangements, the consideration or a part thereof is linked to future performance of the target. This ensures that the seller has a skin in the game to meet the key performance metric basis which the valuation has been arrived at.

Non-cash consideration can also help the parties navigate valuation negotiations. However, the parties need to be mindful about tax issues arising from share swaps and the interim rights package needs to be watertight to avoid any value leakage.

Incentive Structures

Managing incentive structures has emerged as a key deal consideration. The option payment plans can involve heavy cash out-flow due to change in control provisions in the option plans of the target. A buyer must tactfully navigate through issues such as convincing the option-holders to shift to the new option pool and to negotiate a staggered payment plan for a potential bullet payment triggered under the option plan. Separately, issues relating to taxation also need to be solved for between the parties. Existing option plans can add to complexity by providing for option holders' consent for various actions in relation to the vested or unvested options on the capitalization table. Besides deal pricing, incentive structures are also crucial for post-completion integration and are often critical for maintaining the performance of the target.

Postcard from India



Offshore Structuring

Asset-light tech start-ups often prefer to flip offshore as it allows them access to a wider pool of investors that are more comfortable investing in offshore jurisdictions. Stage and scale of the businesses plays a key role in determining whether the flip structure is a viable option. With the new overseas investment regulations in place, flip structures have become more viable and, subject to certain conditions being fulfilled, can be implemented without prior RBI approval.

Commercial and Legal Due Diligence

The commercial due diligence on a target has come a long way from a "vanilla" analysis of the total addressable market and the financial and operational metrics of the business. The focus of commercial due diligence has shifted from identifying economies of scale and cost efficiencies to identifying key differentiation and value-added capabilities of the business. Buyers are increasingly more curious about the long-term resilience of the business.

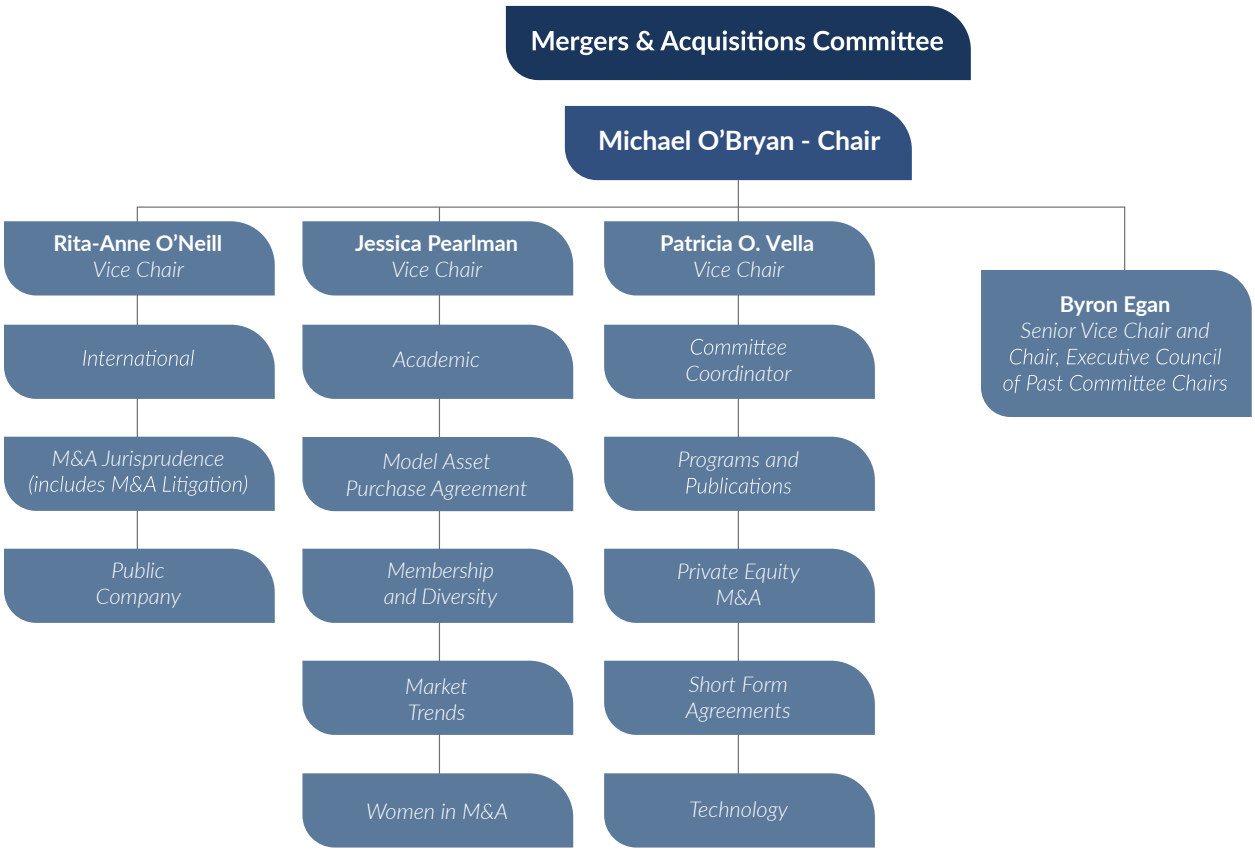
On the legal due diligence front, sector-specific regulations have taken center stage. With a rapidly growing regulatory landscape, the regulations can often be intertwined with each other and need to be complied with harmoniously. Besides regulatory concerns, technology M&A diligence often involves paying close attention to the intellectual property rights and registrations of the target and the intellectual property assignment by founders and employees to the target.

Conclusion

Technology M&A has been active over the last two years and has been contributing significantly to deal volumes in India. The key driver for technology M&A has been the focus on acquiring specializations and niche products and it's no longer a scale game. Deal making has also matured over the years which can be evidenced through set market standards for transaction documents and the introduction of several playbooks in relation to valuation, as well as deal management. Players are open to adopting innovative deal structures to address the various challenges involved in getting a deal over the finish line. While experts are expecting a downturn in deal volumes in general due to the impending market uncertainty, the technology M&A space is anticipated to continue its outperformance compared to other industry sectors.

From **Prasenjit Chakravarti**, Partner and **Nidhi Killawala**, Partner at Khaitan & Co

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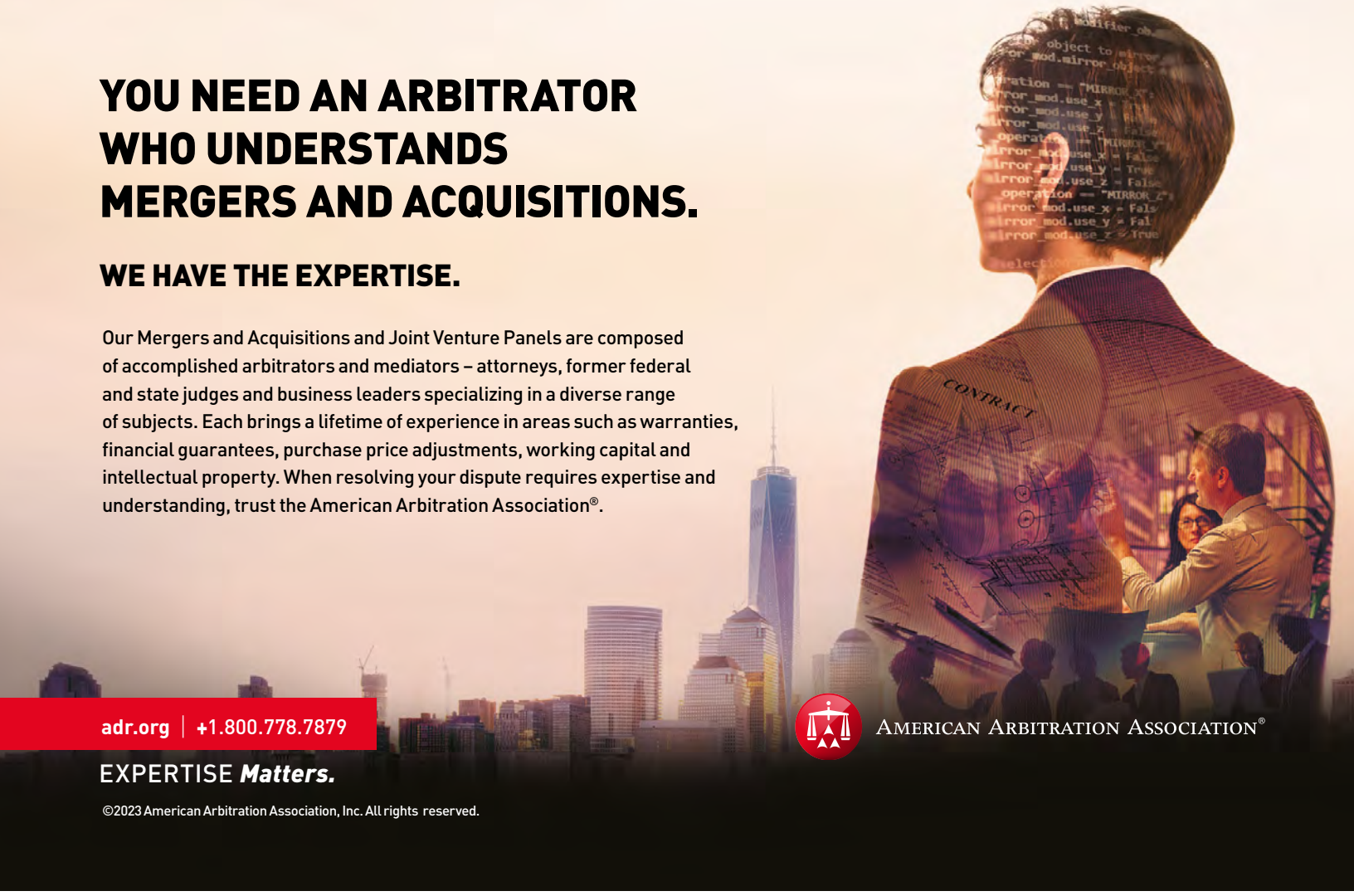
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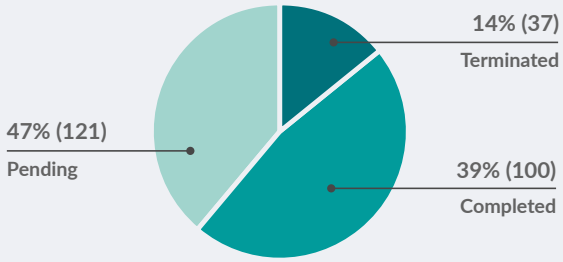
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Termination of De-SPAC Transactions in 2021 and 2022

The data illustrates that the SPAC market is reactive to changes and uncertainties in market conditions. Between the period of January 1, 2021 and December 31, 2022, supply-chain issues, inflation, acts of war and political conflicts, heightened regulatory scrutiny, and increased SPAC litigation have affected the market. As a result, the market for de-SPAC transactions has slowed significantly. Of the surveyed transactions, only 39% of the de-SPACs announced and filed during the survey period were completed by the parties.

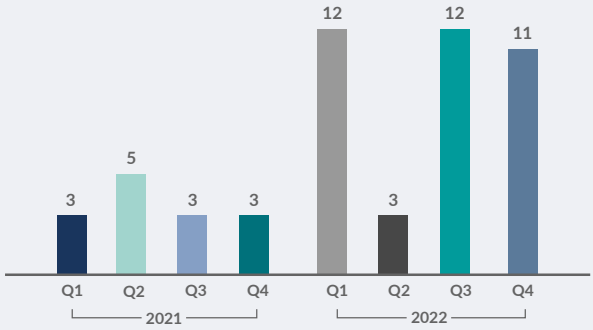
Of the 258 de-SPACs surveyed, 37 deals (or 14%) announced after January 1, 2021 were terminated on or before December 31, 2022, 100 deals (or 39%) were completed, and 121 deals (or 47%) are pending.

Transation Status of Announced De-SPAC Transactions 2021/2022



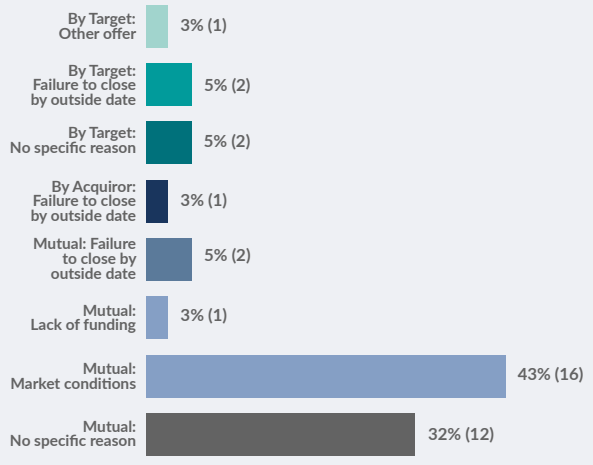
Of the 37 terminated de-SPACs surveyed, terminations of pending transactions are increasing. The rise in terminations correlates with increasing concerns about and measures to counteract the effects of inflation, including the recent Inflation Reduction Act ("**IRA**"). The number of de-SPAC terminations and liquidations in 2023 is expected to increase.

Number of Terminated De-SPAC Transactions by Quarter in 2021/2022



Six (or 16%) of the 37 terminated de-SPACs surveyed were terminated by the target company. Press releases indicated that the targets most frequently terminated the de-SPAC for a failure to close the transaction by the outside date, but in some cases the reason for termination was not specified. Only one de-SPAC transaction (Blue Nile/Mudrick Capital Acquisition Corp. II) was terminated by a target company to pursue a strategic acquisition by a public company. Almost all of the remaining terminated de-SPAC transactions surveyed were terminated by mutual agreement.

Reasons for De-SPAC Transaction Terminations



However, only one of the surveyed de-SPAC terminations triggered a break-fee (Blue Nile/Mudrick Capital Acquisition Corp. II). In that de-SPAC, the target company, Blue Nile, terminated the transaction with a SPAC and instead entered an all-cash transaction with a strategic public company.

In four (or 11%) of the 37 terminated de-SPACs surveyed, a termination and settlement agreement included break-fee provisions to be triggered by future transactions during a settlement period.

- Eleusis Holdings Limited/Silver Spike Acquisition Corp. II
- Essentium, Inc./Atlantic Coastal Acquisition Corp.
- Fertitta Entertainment, Inc./Fast Acquisition Corp.
- Surf Air Mobility Inc./Tuscan Holdings Corp. II

De-SPAC Liquidations and Business Combination Deadlines

Each SPAC is formed with a specified business combination deadline. A de-SPAC transaction must be consummated within that designated time frame, usually between 18 to 24 months from the date of pricing the IPO. If the SPAC is unable to consummate a merger or other business combination within the designated time frame, the SPAC is required to liquidate and return the funds raised in the IPO (being held in an interest-bearing trust account) to investors or seek approval from stockholders for an extension. During the course of 2021 and 2022, the market has seen a number of SPACs exercise their rights to extend their business combination deadlines, and in many cases, once those extensions are exhausted, the SPACs have to seek the requisite stockholder approval to seek further extensions in lieu of liquidation. More that 30 SPACs were liquidated in 2022.

Of the 37 terminated de-SPAC transactions surveyed, nine (or 24%) were liquidated for various reasons, including the failure to satisfy the business combination The following SPACs were, or have announced they will be, liquidated after the de-SPAC termination:

- Mudrick Capital Acquisition Corp. II
- Benessere Capital Acquisition Corp.
- Yunhong International
- SCVX Corp.
- Fast Acquisition Corp.
- Ackrell SPAC Partners I Co.
- SPK Acquisition Corp.
- Concord Acquisition Corp.
- Far Peak Acquisition Corp.

It is expected that more SPACs will liquidate in 2023 for failing to complete business combinations amidst challenging market conditions in a market saturated with more than 500 SPACs seeking private targets for de-SPACs.

The uncertainty created by the recent IRA may have also resulted in an increase of SPAC liquidations prior to the IRA going into effect. The IRA, which was signed into law on August 16, 2022, imposes a 1% excise tax on any publicly traded company's stock repurchase from stockholders after December 31, 2022. The term "repurchase" is defined broadly to include any redemption by a publicly traded corporation of stockholders' stock for either cash or property, and any transaction that the Secretary of the Treasury determines is economically similar to such a redemption.

It is not yet clear how the IRA will impact SPAC redemptions in 2023. In an effort to clarify the application of the excise tax provisions under the IRA, the Internal Revenue Service ("**IRS**") released interim guidance (Notice 2023-2) on December 27, 2022. The IRS also announced that it will issue proposed final regulations that track the interim guidance.

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"Company Group," which included Buyer, its subsidiaries and their respective affiliates. "Business" was defined broadly, encompassing more services than Northwest actually offered, while the geographic scope of the covenant also extended beyond Northwest's operations: it restricted any competition by Adams within 100 miles of any location where a Company Group member sold products or services in the year prior to closing. In the agreement, Adams acknowledged that the covenants were reasonable in scope and agreed that he would not contest them. Approximately 16 months following closing, Adams resigned from Northwest, and two months later joined a competing company, located in a different state but less than 25 miles from Northwest's operations. Buyer sued to enforce the restrictive covenant.

Court's Analysis

Provisions Limiting a Party's Right to Contest Reasonableness of Restrictive Covenants Violate Public Policy

At the outset, the court held that neither the waiver by Adams of his right to contest the scope of the restrictive covenant nor his acknowledgement that the covenant was reasonable precluded him from challenging the covenant or the court from considering its reasonableness. The court stated that "*mechanical submission to an employee's promise not to challenge a restrictive covenant would fly in the face of the public policy that compels [the court to] review that covenant*" and that the court cannot "*decline to apply a common law test simply because one party stipulates the test is not necessary*."

Scope of Restrictive Covenants Held Unreasonable

Finding that both the scope of the restricted activities and the geographic scope were overly broad, the court held that the restrictive covenants were unenforceable against Adams. In reaching its conclusion, the court acknowledged that buyers have a legitimate interest in protecting the goodwill of businesses they acquire. However, the restrictive covenants in dispute went far beyond that objective, attempting to protect the goodwill of Buyer and the other members of the Company Group, in addition to that of Northwest. This, the court held, was not permitted under Delaware law. "*Restrictive covenants in connection with the sale of a business legitimately protect only the purchased asset's goodwill and competitive space that its employees developed or maintained.*"

"Blue Pencil" Provisions Won't Save an Overly Broad Covenant

The court declined to "blue pencil" the covenant — despite the parties' agreement that "*any provision of [the] Agreement deemed invalid or unenforceable by a court of law […] shall be considered to be automatically deleted from this Agreement; any such deletion [to] apply only to that portion of any provision so adjudicated*" — holding that to do so would be inequitable. The court cited multiple Delaware cases declining to reform overly broad restrictive covenants. The court reached this decision despite its acknowledgment that portions of the agreement were supported by Buyer's legitimate business interests and that Adams appeared to have breached those provisions.

Key Takeaways / Practice Points

Because restrictive covenants entered into in connection with the purchase of a business are generally subject to less exacting judicial scrutiny than those contained in employment agreements, buyers often prefer to make such covenants as broad as possible, often covering business activities of the buyer, in addition to those of the target. However, the *Kodiak Building Partners* decision makes clear that restrictive covenants given in consideration for the sale of a business may be held unenforceable in their entirety if their scope goes beyond the business actually carried on by the acquired company. Moreover, common provisions, such as a waiver of the right to contest the scope of the restrictive covenant or an agreement that the covenant is reasonable are, per *Kodiak Building Partners*, largely ineffective as a means to protect the covenant. Some buyers may still seek a broader restriction, perhaps because they believe that the seller will not risk breaching the covenant, that a future employer will not risk a claim for tortious interference with it, or that a future court, including the Delaware Supreme Court, will not agree with the Court of Chancery's decision in

Kodiak Building Partners. A more conservative approach, though, would be to limit the scope of the restrictive covenant agreement to the business carried on by the target. If a seller has a post-closing employment relationship with or equity interest in the buyer, the agreements governing those relationships — such as an employment agreement or a stockholders agreement — could include restrictive covenants applicable to activities carried on by the buyer. While restrictions agreed to in those contexts may be subject to greater judicial scrutiny than those given as consideration for the sale of a business, bifurcating the restrictive covenants in this manner will avoid the risk that the restrictions applicable to the target's business will fall victim to the desire to get the enforceability benefits of a seller non-compete for activities not engaged in by the seller. While some buyers may consider an overbroad covenant to be a "no-lose" proposition, *Kodiak Building Partners* demonstrates that, at least in Delaware, this is not necessarily the case.

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fund, while still not knowing at the outset the specific assets the fund will buy, know that the fund will invest in seasoned LP positions; while the returns of continuation funds are not likely to be as high as the original funds, in principle, they pose less risk.

The growth of dry powder devoted to the secondaries market underscores the appeal of this asset class. In 2013, there was $49 billion in near-term available capital devoted to the secondaries market; by 2021, that figure had more than quadrupled to $236 billion. In addition to secondary market funds, primary PE sponsors have emerged as new sources of GP-led secondary capital, as sponsor-to-sponsor M&A volume continues to decline partly from cannibalization by the growing GP-led market.

Addressing Conflicts of Interest

GP-led secondaries are a specific type of PE related-party transactions that present an inherent conflict of interest for GPs. There is a risk, for example, that the old fund sells assets to the new fund at an artificially low price, inflating the returns of the new fund. At the same time, there is also a risk that the old fund sells to the new fund at an artificially high price, boosting the returns of the old fund. Even though GPs will generally allocate their own money at risk in continuation funds by rolling over their initial investment and their carry, if earned, their interests may not necessarily align with all the LPs in the transaction.

Despite this potential conflict, the market has generally come to accept GP-led secondaries. An essential reason has been market participants recognizing the need to establish and follow sound procedures that foster transparency and underscore trust in the process. To that end, the *Institutional Limited Partners Association* issued guidance on best practices. Those recommendations include the following:

- GPs should explain the transaction's rationale as soon as possible to the limited partnership advisory committee ("**LPAC**"), and under certain circumstances, a broader subset of LPs.
- GPs should provide LPs in the existing fund and the acquirer equal access to financial information about the projected value of the remaining assets in the fund.
- GPs should give LPs at least 30 calendar days or 20 business days to evaluate the transaction. GPs should disclose retention and incentive plans for key investment professionals involved in managing the assets in the continuation fund.
- The LPAC should have the right to avail itself of an experienced independent legal and specialist advisor, separate from the GP-selected advisor.

The Role of Fairness Opinions

Each GP-led secondary offers a set of unique challenges, including identifying the right purchase price to offer LPs of the existing fund. Many of these transactions take place without formal sale processes. There is no investment banker, for example, hired to market the portfolio company in its entirety to investors. So, GPs should consider a transparent process that investors can trust.

Typically, a GP-hired broker issues a memorandum about the original fund's assets to potential investors in a continuation fund. The memorandum primarily targets the largest secondary funds, which lead most deals and take the largest equity stakes. But brokers will also target other funds and investors.

LPs in the original fund can either take the offer and liquidate their interest or decide to roll their interest over to the continuation fund. Even if the process is well designed, it often does not cure the GP's conflict of interest.

Because of this conflict, GPs are encouraged to hire an independent financial advisor to provide a fairness opinion on the price offered to LPs of the old fund. Fairness opinions have long played a prominent role in significant traditional takeovers and acquisitions. But their role in PE related-party transactions is relatively new. In a GP-led secondary transaction, the LPAC relies on the analysis in the fairness opinion as it weighs whether to waive the conflicted transactions prohibition of most PE limited partnership agreements.

Last year, the volume of PE related-party transactions obtaining fairness opinions reached an all-time high, exceeding the prior two years combined, according to proprietary data from the Duff & Phelps Opinions Practice of Kroll. The opinions have assessed a variety of deals, including fund-to-fund transfers of assets, capital transfers among funds, and merging assets of different funds.

But the biggest category of transactions was GP-led secondaries, with 30 fairness opinions issued. Over the last seven years, we have seen dramatic growth in that category. In 2015, just two fairness opinions were issued for GP-led secondaries.

Strong Outlook

We will likely see strong demand for those fairness opinions over the long term despite a projected slowdown in the second half of 2022. The PE secondaries market in the first half of 2022 jumped 23% from last year to $59 billion, with GP-led deals making up 47%.

But the total volume of deals in 2022 will not likely match the blockbuster year of 2021. Fears of a global recession combined with Russia's war on Ukraine and persistent inflation have injected high levels of uncertainty into the market.

Nonetheless, the outlook for secondaries remains strong. Lazard Private Capital Advisory estimates the secondaries market will reach a new high in 2023 of more than $150 billion. GP-led secondaries will continue to make up a large share of that market.

As traditional exit opportunities slow, GPs will likely continue to see value in returning to the secondary market to hold onto their preferred assets and provide liquidity options to their LPs.

At the same time, an increase in secondary fund closings will likely spur demand for continuation funds.

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Conversely, in the United States, severance is typically a matter of agreement between the employer and the employee. This can lead to misalignment between U.S. counsel, Canadian counsel and their respective clients regarding how employee severance is treated in the context of a cross-border transaction – whether it is assumed by the purchaser, categorized as indebtedness of the seller (and an adjustment to the purchase price) or a hybrid of the two (where a specified amount of severance entitlements reduces the purchase price and the remainder is assumed by the purchaser). Ensuring that both U.S. and Canadian counsel are alive to these differences in severance entitlements can streamline negotiations and avoid unintended outcomes for either the seller or the purchaser.

- **Sandbagging Provisions:** In Canada, the current market trend is to remain silent on the issue of sandbagging within the definitive agreement. Canadian courts have taken a contextual approach to interpreting this silence – sometimes allowing a purchaser to rely on a representation or warranty it knew to be untrue and other times not.[1] The principle of good faith and duty of honest performance, which forms a part of Canadian contract law, can also have implications for a purchaser's ability to "lie in the weeds." In comparison, many U.S. states are generally classified as pro-sandbagging or anti-sandbagging jurisdictions.[2] As a result, the purchaser can find that silence on the purchaser's ability to sandbag does or does not bar it from bringing a claim for a known breach of a representation or warranty, depending on the

[1] See *Eagle Resources Ltd. v MacDonald*, 2001 ABCA 264, 2001 CarswellAlta 1438 and *Transamerica Life Canada Inc. v ING Canada Inc.*, 2003 CarswellOnt 4834, 2003 CanLII 9923 (ONCA) for two contrasting examples.

[2] As an example, Delaware has recently affirmed its stance as a pro-sandbagging jurisdiction: see *John D. Arwood, et al. v AW Site Services, LLC, et al.*, C.A. No 2019-0904-JRS (Del. Ch. March 9, 2022).

governing law of the definitive agreement. Parties to cross-border transactions must be aware of the default interpretation of such clauses in the jurisdiction that governs the definitive agreement to ensure it aligns with their client's expectations, while also being attune to what is common practice in both countries.

- **Defining Losses:** While the trend in both the United States and Canada is largely to remain silent on the recovery of consequential damages in purchase agreements, U.S. counsel and purchasers will often insist on an express inclusion of consequential damages. As a result, this may be a point of potentially contentious and lengthy negotiations in cross-border transactions. As with sandbagging provisions, counsel must be aware of the definition of consequential damages and the implications of the express inclusion, exclusion or silence with respect to such damages in the definitive agreement, both in the jurisdiction governing the agreement and the jurisdiction of the other party in order to ensure that the implications of the chosen approach are clear to all parties. There are jurisdictional differences with respect to courts' interpretation and treatment of consequential damages and failing to appreciate this may result in outcomes that differ from those intended by a party or their counsel. In Canada, for example, a reference to consequential damages may not be sufficient to exclude recovery of damages for lost profits if those lost profits are referred to in the definitive agreement solely as a subset of or included in consequential damages. If lost profits are found by a Canadian court to, in fact, be a direct rather than indirect loss they may be recoverable notwithstanding such exclusion.
- **Paying Agent:** The method chosen to facilitate an effective closing, and to secure post-closing payment obligations may, at least in the near future, be an additional point of difference in cross-border deals. The use of a third-party paying agent to facilitate closing and post-closing payments by a purchaser to the seller or third parties appears to be a much more common practice in the United States than in Canada. If a paying agent is used, Canadian counsel will need to familiarize themselves with the implications of this choice for typical closing mechanics in Canada. In particular, if a paying agent is conveying funds directly to multiple sellers, rather than sellers' counsel, on closing, counsel will need to determine how it will confirm funds have been received and the transaction can be considered closed.
- **Earn-Outs:** The inclusion of earn-out provisions, although used for various reasons, have become increasingly common as a means of bridging valuation gaps resulting in part from the economic uncertainty created by the COVID-19 pandemic and rising inflation. Although earn-outs are employed in both the United States and Canada, Canadian and U.S. counsel to cross-border deals should be aware of the jurisdictional differences with respect to earn-out drafting and structuring, including any differences with respect to covenants around post-closing operation of the business by the purchaser, the impact of a change of control or other fundamental change on the earn-out, and any ability to set-off against earn-out payments. Further, if used, counsel must ensure that the provisions which define the financial targets, timelines or milestones that must be achieved to trigger payment of the earn-out and the dispute resolution mechanism that applies in the event of a disagreement with respect to the same are clearly defined and understood by all parties.
- **Indemnification Terms:** It is well documented by annual deal-points studies that the approaches taken by U.S. and Canadian counsel with respect to the indemnification provisions in definitive agreements differ. In addition to sandbagging provisions, Canadian and U.S. practices diverge with respect to liability baskets and materiality scrapes. U.S. transactions are more likely to include a deductible basket, where once the quantity of losses reaches the negotiated threshold, the indemnifying party is only liable for the amount of losses in excess of the threshold amount. Conversely, Canadian transactions are more likely to include a threshold or "first dollar" basket, where once the quantity of losses reaches the negotiated threshold, the indemnifying party

is liable for the total amount of losses, without regard to the threshold. Further, U.S. counsel and purchasers will often insist on the inclusion of a double materiality scrape, being a highly purchaser-friendly provision in which all materiality qualifiers are excluded for the purposes of determining whether there has been a breach of a representation or warranty and also for calculating the amount of losses suffered. Canadian deals are much more likely to include a single materiality scrape, whereby materiality qualifiers are excluded only for the purpose of calculating damages, but not for the purpose of determining whether a breach occurred. As a result, both provisions may be significant points of contention between U.S. and Canadian counsel and the drafting of the same may ultimately come down to negotiating power between the parties and whether the deal is intended to be a truly Canadian or U.S. legal transaction.

Conclusion

The negotiation of the above deal terms in U.S. and Canadian cross-border M&A transactions can be a difficult, time-consuming and a costly task for both the clients, and their respective counsel. In addition to expert U.S. counsel, it is imperative to have competent Canadian legal counsel providing input and advice on both sides of a cross-border deal in order to facilitate a more efficient closing for both parties involved. An experienced Canadian counsel to such a deal can help to prevent unnecessary issues to arise between counsels and their respective clients by advising on differences in commonly accepted provisions, practices and views under Canadian and U.S. law in cross-border M&A transactions.

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other case (Canadian or American), *Fairstone* retains the "occurrence of unknown events" as its first element of an MAE clause. Moreover, this "unknown risk" requirement was subsequently endorsed in *Cineplex*.[7]

Fourth, Delaware courts routinely state that the buyer carries a "heavy burden" in seeking to establish an MAE. *Fairstone* makes several statements towards the opposite end, remarking that MAE clauses are "to be interpreted from the buyer's perspective", including to give the buyer the "benefit of the doubt."[8]

Departures regarding Ordinary Course Covenants

Delaware courts have held that, where an ordinary course covenant includes a "consistent with past practice" qualifier, the parties have adopted a standard that looks *exclusively* to the target's past practice and *precludes* consideration of the conduct of the target's peers in similar circumstances.[9] *Fairstone* and *Cineplex* muddy these waters. Both included a "consistent with past practice qualifier." *Fairstone* drove straight past it in holding that the ordinary course requires comparisons with industry standards before peppering its analysis with comparisons of the target's conduct with that of its peers.[10] *Cineplex* explained that its brief "consideration of peer companies" related *only* to that part of the target's interim period undertakings requiring it to use "commercially reasonable efforts" to preserve its business relationships and *not* to the ordinary course covenant.[11]

Similarly, Canadian and Delaware courts have sent conflicting signals regarding whether the ordinary course includes extraordinary measures in extraordinary times. *AB Stable* held the formulation "only in the ordinary course of business consistent with past practice" to effectively freeze the target to its past practice.[12] In contrast, *Fairstone* held that it is "part of the ordinary

[7] *Cineplex v. Cineworld*, 2021 ONSC 8016 [*Cineplex*] at paras. 105-106.
[8] Fairstone paras. 25-26, 72 and 86.
[9] *AB Stable VIII LLC, v Maps Hotels and Resorts One LLC et al*, C.A. No. 2020-0310 (Del. Ch., Nov. 30, 2020) [*AB Stable* DECH] page 160; *Snow Phipps Group, LLC v KCake Acquisition, Inc. et al*, C.A. No. 2020-0282-KSJM (Del. Ch., Apr. 30, 2021) pages 85-86.
[10] *Fairstone* paras. 182, 199, 202-203, 239-240.
[11] *Cineplex* para. 124 note 15.
[12] *AB Stable* DECH page 171; *AB Stable* DESC pages 27-29.

course of any business" to experience macroeconomic disruptions and to "take steps in response to those sorts of systemic economic changes."[13] It is arguable that these differing results are primarily attributable to differences in drafting, including the inclusion of the word "only" in *AB Stable*, but given the contemporaneity of the judgments we can ultimately only speculate.

A third important difference between *Fairstone* and *AB Stable* is their approach to the qualifier allowing deviation from the ordinary course with the buyer's consent. Both disputes involved such a qualifier, in both clauses the buyer's consent was "not to be unreasonably withheld", and both sellers admitted to never seeking buyer consent. *Fairstone* effectively held the "reasonableness" aspect of the qualifier could result in *deemed* or *constructive* consent.[14] *AB Stable* rejected arguments toward this end, repeatedly emphasizing that the qualifier was "not an empty formality" but rather played an important role by requiring dialogue among the parties where adverse events warranted such communication.[15]

Departure regarding the Interaction of MAE Clauses and Ordinary Course Covenants

Perhaps most importantly, *AB Stable*, *Fairstone* and *Cineplex* each scrutinized the appropriate interaction between MAE clauses and ordinary course covenants. Moreover, the courts once again came to different conclusions.

AB Stable held that the two clauses "serve different purposes" and "guard against different risks."[16] Specifically, it held that an ordinary course covenant protects against a change in how the target operates while an MAE clause protects against a significant decline in the target's operation. The result was that the two should be applied separately.

Fairstone and *Cineplex* held that the two clauses should be read together, including given the principle that "contracts should be read as a whole."[17] Further justification was that a more general provision (*i.e.*, the ordinary course covenant) should yield to a more specific provision (*i.e.*, the MAE clause) as well as preserving the risk allocation established by the MAE clause. Specifically, as both clauses were triggered by the COVID-19 pandemic, and as the MAE clause expressly addressed emergencies and allocated systemic risk to the buyer, the courts held the ordinary course covenant should not be read in a manner that conflicts with the MAE clause.[18]

It is reasonably arguable that different facts and drafting explain this divergence between Delaware and Canada court's interpretation, and this is the brief indication given in *Cineplex*.[19] However, other aspects of the decisions equally point to a more principled rift between the courts. For example, *AB Stable* in good part justified construing the clauses separately because Delaware law treats "materiality" and "material adverse effect" as "analytically distinct."[20] As mentioned above, Canadian courts do not.

Prominent U.S. Criticism of the Canadian Court's Approach

Notably, writing in the *Columbia Law Review* Professor Subramanian (Harvard) & Petrucci (Harvard) take *Fairstone*'s logic on two points discussed above to task.

Regarding *Fairstone*'s holding that the ordinary course includes extraordinary measures in extraordinary times, they essentially counter that "ordinary" means "ordinary."[21] Beyond this plain reading critique their arguments include encouraging "precise drafting", avoiding inviting the sort of "moral hazard" ordinary

[13] *Fairstone* paras. 178, 202 and 205.
[14] *Fairstone* paras. 158 and 297-302.
[15] *AB Stable* DECH pages 187-188; *AB Stable* DESC page 39.
[16] *AB Stable* DECH pages 166-171; *AB Stable* DESC pages 36-37.
[17] *Fairstone* paras. 188-190; *Cineplex* paras. 119-120 and 126-128.
[18] *Fairstone* paras. 188-190; *Cineplex* paras. 119-120 and 126-128.
[19] *Cineplex* para. 129.
[20] *AB Stable* DECH pages 166-168; *AB Stable* DESC page 35.
[21] Guhan Subramanian & Caley Petrucci, "Deals in the time of Pandemic", (2021) 121(5) *Columbia Law Review* 1405 [Subramanian & Petrucci] pages 1410 and 1470.

course covenants are intended to guard against, and avoiding the possibility of the seller being in breach for doing "too little."[22]

Regarding *Fairstone*'s holding that the buyer's consent to conduct outside the ordinary course can be *deemed* via a stipulation that consent not be "unreasonably" withheld, they describe it both as "concerning" and as "poor policy."[23] In particular, they argue *Fairstone*'s ruling is problematic as it "*short-circuits the negotiation between buyer and seller over the optimal mitigation approach.*"[24]

Concluding Comments

Fairstone is deceptive in that, read on its face, it states it is following Delaware law. This has lured many Canadian M&A lawyers into believing this is true, content to rely on the court and not dig deeper.

Cineplex is similarly tricky, but in somewhat different ways. Like *Fairstone*, it relies on *Akorn*, but then in direct conflict with *Akorn* states an MAE clause requires an "unknown" risk. Where *Cineplex* diverges from *Fairstone* (*i.e.*, regarding whether it is appropriate to consider industry peers' conduct amidst a "consistent with past practice" qualifier), it stays silent both regarding the fact it is doing so as well as why it is doing so. Finally, where *Cineplex* acknowledges it is departing from Delaware law (*i.e.*, regarding the interaction of MAE clauses and ordinary course covenants), it attributes this exclusively to drafting and factual differences without (knowingly or not) tackling *AB Stable*'s different conceptual footing.

[22] Subramanian & Petrucci pages 1470-1472.
[23] Subramanian & Petrucci page 1472.
[24] Subramanian & Petrucci page 1472.

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to execute a deal. Understand what is meant by "fundamental representations" and how they are different from general representations. Understand what is meant by disclosure schedules, and how they work in tandem with the representations and warranties you make either as buyer or target company. Understand which ancillary documents will be necessary for the context of your deal in addition to the purchase agreement. You will need to work with a corporate lawyer to avoid the risks highlighted above, but if you form a basic understanding of how these things operate, you will be better positioned to help your counsel close the deal on favorable terms.

What can you live without?

Not all due diligence is made equal. Though all deals require due diligence, in larger deals, it is becoming increasingly commonplace to obtain representations and warranties insurance ("**RWI**") to obviate the need for the seller to indemnify the buyer for breaches of the seller's representations and warranties. Instead, RWI is used to protect against losses arising due to a seller's breach.[5] The economics of RWI tends to only make sense for deals of a size where the insurance premium is affordable relative to legal fees (typically this negotiable cost is born by the buyer, and often, there is a minimum premium as well as underwriting fees involved). In order for an insurer to issue an RWI policy, there is naturally a heightened level of scrutiny compared to deals without it, so for smaller deals where RWI is unnecessary or unrealistic, the parties themselves can establish the level of sufficiency for due diligence.

[5] www.forbes.com/sites/allbusiness/2019/01/23/guide-mergers-acquisitions-representations-warranties-insurance/?sh=171105f567f3

Time is the enemy. *"The longer it takes a deal to close, the more risks it poses for both parties."*[6] One solid advantage that smaller private deals have over larger more complex deals is that the delta between signing and closing is almost always smaller. Often signing and closing a deal are thought of as the same thing. They are in fact very distinct. Signing is when the parties execute the purchase agreement and agree to move forward with the deal, but closing is when the economic exchange is completed. Every deal has certain closing requirements, but in large and complex deals these requirements can range from regulatory approvals such as Hart-Scott-Rodino Act reporting to obtaining third-party consents from multitudinous landlords and vendors. In smaller deals, you will need to obtain the same corporate approvals, but often these are far fewer, and in many cases a small M&A deal can close on the same day it signs, thereby reducing the risk of exposure or fallout between signing and closing.

What can you do yourself?

Preparation is the key to success. Something any management team can do to help manage the legal expense of an M&A transaction is to prepare for due diligence and disclosures. The more organized and thorough you are with your production of due diligence at the start of the deal, the more efficiently the process will go. Understand what intellectual property rights you own: what is or is not registered? Understand the historical capitalization of your company: who owns what? Gather organizational documents and material contracts. Know who your top suppliers and customers are. Prepare your financial statements. Gather employment agreements and policies. Prepare an employee census. Gather your lease agreements. Finally, be prepared to discuss the deal with third parties from whom you may need to obtain consent to a potential assignment of the contract or change of control (these third parties include lenders, creditors, landlords, and material vendors, suppliers and suppliers).

What do you need an attorney's help with?

Price is what you pay. *Value is what you get*. The value proposition that underpins all mergers and acquisitions is that value can be created from the transfer or consolidation of companies' business operating units. The goal of the M&A attorney is to structure and execute the deal so as to afford their client with as much downside protection and the most upside value as can be negotiated and papered. It is ill-advised to engage in an M&A transaction without experienced legal counsel to help you manage the deal process and help work through the legal issues that arise before, during, and even after the close. An attorney can help you avoid securities, tax, and industry-specific regulatory pitfalls, ensure the representations and warranties memorialized in the deal documents are structured to protect your liability exposure, and obtain necessary licenses and filings from various regulators. Preparing the primary deal documents (typically the purchase agreement and corresponding schedules) and determining the necessary ancillary deal documents are all critical legal considerations to get right, even on a small deal, to ensure that management ultimately realizes the value you are seeking from the transaction for stakeholders. While it may take considerable time and effort to get a small M&A deal across the finish line, it is worth keeping in mind that the cost associated with excellent legal assistance is a small price to pay for getting the deal done in the most advantageous and beneficial way for all stakeholders involved.

[6] https://www.linkedin.com/pulse/risk-allocation-between-signing-closing-ma-deal-kison-patel?trk=pulse-article

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(to the extent that the price term is transparent), or are required or expressly permitted by New Zealand legislation. If a term addresses multiple matters, part of the term may be exempt while the rest of the term could still be considered unfair.

Suggested matters to consider for "unfair" contract terms due diligence

As the unfair contract terms rules can apply to businesses large and small, and can apply irrespective of whether a business is supplying to consumers or to other businesses, it would be prudent to consider the unfair contract terms rules as part of the contract due diligence for a New Zealand business acquisition. As a starting point, the buyer should:

a. assess whether any "standard form contracts" are used;
b. assess whether terms in any standard form contracts could be "unfair", particularly by reference to whether the parties' rights and obligations are balanced and whether there are legitimate reasons for businesses to have terms that might be unfair;
c. document the reasons for why certain terms are reasonably necessary to protect the business' legitimate interests;
d. consider whether conduct and contractual terms align;
e. identify business relationships with significant imbalances in bargaining position; and
f. review sales policies and practices, including whether contractual arrangements and risks are adequately explained to customers during the sales process, and whether the use of commissions or incentives for sales staff is appropriate.

What are the potential consequences of non-compliance?

As noted by the Commerce Commission (New Zealand's anti-trust regulator), "*[c]onsumers or businesses can complain to [the Commerce Commission] regardless of any other dispute resolution mechanisms that might apply to the contract.*" If the Commerce Commission is successful in seeking a court declaration that a term in a relevant contract is an unfair term, fines of up to NZ$200,000 per offence per individual, and up to NZ$600,000 per offence per company could apply. A court may also direct that a non-compliant business refunds money, pays damages or publishes an advert disclosing its non-compliance. These consequences are in addition to the relevant unfair term being unenforceable. Accordingly, it is highly recommended that standard form contracts are reviewed and updated where required to be compliant with the unfair contract terms rules.

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What Are the Penalties for Employing or Contracting with an Excluded Party?

FHCP Exclusions

Medicare and Medicaid providers found to be contracting with excluded parties can be subject to significant penalties and recovery of funds. There is a payment ban[5] that provides:

"*[N]o payment will be made by Medicare, Medicaid or any of the other Federal health care programs for any item or service furnished…by an excluded individual or entity, or at the medical direction or on the prescription of a physician or other authorized individual who is excluded when the person furnishing such item or service knew or had reason to know of the exclusion…*"

Additionally, the Federal Civil Money Penalties Law[6] (the "**CMP Law**") includes provisions relating to doing business with excluded parties that provide for significant penalties.[7],[8],[9] The individual or entity submitting claims can be liable for $10,000 in CMPs per item or service claimed or "caused to be" claimed plus treble damages and subject to possible exclusion. Each of the activities listed in the CMP Law can also be the subject of administrative sanctions.[10]

In certain circumstances, there is also the possibility of liability under the Federal False Claims Act[11] if the activity that led to the submission of claims meets the elements of the statute.

Federal Acquisition Regulation — Government-Wide Debarment or Suspension

Section §2455 of the Federal Acquisition Streamlining Act of 1994[12] provides that "*No [Federal] agency shall allow a party to participate in any procurement or non-procurement activity if any agency has [excluded] (to the extent specified in the exclusion agreement) that party from participation in a procurement or non-procurement activity.*"

[5] See 42 C.F.R. §1001.1901(b).

[6] See 42 U.S.C. §1320a–7a.

[7] 42 U.S.C. §1320a–7a(a)(1)(D) provides that "*[a]ny person (including an organization, agency, or other entity, but excluding a beneficiary…) …that — (1) knowingly presents or causes to be presented to [a FHCP] …a claim …that the Secretary determines —… (D) is for a medical or other item or service furnished during a period in which the person was excluded from [a FHCP]…shall be subject, in addition to any other penalties that may be prescribed by law, to a civil money penalty of not more than $10,000 for each item or service … In addition, such a person shall be subject to an assessment of not more than 3 times the amount claimed for each such item or service in lieu of damages sustained by the United States or a State agency because of such claim… In addition, the Secretary may make a determination in the same proceeding to exclude the person from participation in the [FHCPs]…and to direct the appropriate State agency to exclude the person from participation in any State health care program.*"

[8] 42 U.S.C. §1320a–7a(a)(4) provides that "*[a]ny person (including an organization, agency, or other entity, but excluding a beneficiary …that— (4) in the case of a person who is not an organization, agency, or other entity, is excluded from participating in [a FHCP] … and who, at the time of a violation of this subsection— (A) retains a direct or indirect ownership or control interest in an entity that is participating in [a FHCP] and who knows or should know of the action constituting the basis for the exclusion; or (B) is an officer or managing employee …of such an entity…shall be subject, in addition to any other penalties that may be prescribed by law, to a civil money penalty of …$10,000 for each day the prohibited relationship occurs…In addition, such a person shall be subject to an assessment of not more than 3 times the amount claimed for each such item or service in lieu of damages sustained by the United States or a State agency because of such claim… In addition, the Secretary may make a determination in the same proceeding to exclude the person from participation in the [FHCPs] …and to direct the appropriate State agency to exclude the person from participation in any State health care program.*"

[9] 42 U.S.C. §1320a–7a(a)(6) provides that "*[a]ny person (including an organization, agency, or other entity, but excluding a beneficiary …that— (6) arranges or contracts (by employment or otherwise) with an individual or entity that the person knows or should know is excluded from participation in a [FHCP] …for the provision of items or services for which payment may be made under such a program…shall be subject, in addition to any other penalties that may be prescribed by law, to a civil money penalty of not more than $10,000 for each item or service … In addition, such a person shall be subject to an assessment of not more than 3 times the amount claimed for each such item or service in lieu of damages sustained by the United States or a State agency because of such claim… In addition, the Secretary may make a determination in the same proceeding to exclude the person from participation in the [FHCPs]…and to direct the appropriate State agency to exclude the person from participation in any State health care program.*"

[10] See, 42 C.F.R. §1003.102.

[11] See, 31 U.S.C. §3729.

[12] See, 31 U.S.C. §6101.

Additionally, 48 C.F.R §9.405 provides that -

"(a) Contractors debarred, suspended, or proposed for debarment are excluded from receiving contracts, and agencies shall not [contract] with these contractors, …[further] Contractors debarred, suspended, or proposed for debarment are also excluded from conducting business with the Government …

(b) Contractors included in the EPLS … are excluded from receiving [contracts]… under the conditions and for the period set forth in the statute or regulation. Agencies shall not solicit [contracts] …with these contractors under those conditions and for that period."

"*Any exclusion from [FHCPs]… on or after August 25, 1995…*" also becomes an exclusion from federal contracts and will cause a listing on the EPLS.[13]

For Medicare providers, the Centers for Medicare and Medicaid Services ("**CMS**") has the authority to deny or revoke Medicare enrollment for parties who either are, or are doing business with, parties that are listed on the EPLS.[14],[15],[16] Most providers and suppliers receive a significant portion of their revenue from Medicare and revocation, or denial can be a significant penalty. Furthermore, Section §6501 of the Patient Protection and Affordable Care Act requires state Medicaid programs to terminate any provider or supplier that has been terminated from the Medicare program.

What Does a HCRW Relating to Exclusions Look Like?

A HCRW on excluded parties covers three main issues: (1) the seller or borrower (and its employees, contractors and vendors, the "**Affiliates**") has not been excluded or threatened with an exclusion; (2) the seller or borrower (and its Affiliates) have been checked against publicly available data to ensure that they have not been excluded; and (3) there are no pending "actions" that could lead to an exclusion.

In certain circumstances, knowledge or material adverse effect ("**MAE**") qualifiers may be included. For example, a hospital that contracts with physicians may not be able to affirmatively state that there is no pending or threatened action against a physician because they practice independently. In that respect, a knowledge qualifier with respect to the physicians may be appropriate. Additionally, a seller or borrower may not want absolute liability, and a possible contractual default, for an immaterial matter, such as accidentally letting an employee work before a background check was completed and when completed, two days later, it was revealed that the employee was excluded.

Here is an example of an excluded party HCRW[17]:

Neither the Company nor any member, manager, shareholder, director or officer, employee, agent or vendor thereof (together the "**Company Parties**" or individually a "**Company Party**") has at any time been suspended or excluded or threatened to be suspended or excluded from participation in Federal Health Care Programs or federal contracts. The Company screens all Company Parties prior to employment or association with the Company, against the List of Excluded Individuals and Entities maintained by the Office of

[13] See, 45 C.F.R §76.110(d).

[14] 42 C.F.R. §424.530 provides that CMS may deny Medicare enrollment where *"[a] provider, supplier, an owner, managing employee, an authorized or delegated official, medical director, supervising physician, or other health care personnel furnishing Medicare reimbursable services who is required to be reported on the enrollment application, in accordance with section 1862(e)(1) of the Act, is—[e]xcluded from the Medicare, Medicaid and any other Federal health care programs, …[or] [d]ebarred, suspended, or otherwise excluded from participating in any other Federal procurement or nonprocurement activity …"*

[15] CMS requires Medicare providers and suppliers to certify compliance with certain standards pursuant to 42 C.F.R. §424.516. One of those standards, in 42 C.F.R. §424.516(a)(3), is that the provider or supplier is not "*…employing or contracting with individuals or entities that [are] …[e]xcluded from participation in any Federal health care programs … [or] [d]ebarred by the [GSA] from any other Executive Branch procurement or nonprocurement programs or activities…*" Pursuant to 42 C.F.R. §424.535(a)(1), CMS may revoke the billing privileges of any Medicare provider or supplier and any corresponding provider agreement or supplier agreement, where the provider or supplier is found to be out of compliance with certain requirements, including the certification requirements in 42 C.F.R. §424.516(a)(3).

[16] CMS may also revoke the billing privileges of any Medicare provider or supplier and any corresponding provider agreement or supplier agreement, . where CMS determines that "*[t]he provider or supplier, or any owner, managing employee, authorized or delegated official, medical director, supervising physician, or other health care personnel of the provider or supplier is—(i) [e]xcluded from the Medicare, Medicaid, and any other [FHCP]… or (ii) …debarred, suspended, or otherwise excluded from participating in any other Federal procurement or nonprocurement program or activity in accordance with the FASA implementing regulations and the [HHS] nonprocurement common rule at 45 CFR part 76.*"

[17] This example does not include knowledge or MAE qualifiers that often are negotiated into such a HCRW in certain circumstances.

Inspector General for the U.S. Department of Health & Human Services and the Excluded Parties List System maintained by the General Services Administration. There are no inquiries, investigations or monitoring of activities of any Company Party that could reasonably lead to a suspension, exclusion or debarment from participation in Federal Health Care Programs or federal contracts.

Transaction Diligence Issues

Buyers and lenders may approach this issue differently, but the result should be the same: a confirmation that there has been no exposure to excluded parties.

Buyer Diligence

Confirming that a seller has no exposure to excluded parties can be done with two processes: (1) the buyer requires the seller to affirmatively disclose: (a) whether they have any relationships with excluded parties; and (b) the seller's process for verifying whether they have any such relationships; and (2) the buyer acquires a list of employees, agents, and material vendors and conducts its own check of the LEIE and EPLS against the individuals and entities disclosed. Both of these systems are publicly available.

Lender Diligence

Lender diligence in transactions is often characterized as "over the shoulder" — essentially the lender is relying on the diligence that its borrower has done. Lenders should expect a borrower to have completed the diligence mentioned above. If the borrower (or its acquisition target) does not have a process to ensure that it has no exposure to excluded parties, a lender should require the borrower to provide affirmative evidence that it has run checks on current employees, agents, and material vendors. The lender should also require, through a post-closing covenant, that the borrower (or its acquisition target) implement processes to routinely (1) ask new employees or contractors, prior to associating with them, to affirmatively disclose whether they currently are, or ever have been, excluded from FHCPs or federal contracts and whether they are currently subject to any type of action that might lead to a possible exclusion; and (2) check employees, contractors, and vendors against the publicly available data.

Conclusion

While there are many other healthcare-specific items that are included in HCRWs, the exclusion HCRW is one of the most important. Taken together, the fact that enforcement is easy for government authorities, penalties can be severe, and it is also easy for individuals and entities doing business with FHCPs to ensure that they do not have exposure by checking public data, buyers and lenders will rarely accept any type of exposure to risk involving this issue.

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



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