THE NEWSLETTER
OF THE MERGERS AND
ACQUISITIONS COMMITTEE

Deal Points

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From the chair

Hello M&A Committee members!

Hybrid Meeting in Atlanta

Our first hybrid meeting, with in-person and virtual attendees, is about to start. We'll meet on Thursday, March 31, 2022, through Saturday, April 2, 2022, as part of the Business Law Section's spring meeting. You can attend in-person in Atlanta or by Zoom.

On Thursday, we're sponsoring a couple of great CLE programs, on

- *Case Law Matters: Drafting and "Control" Lessons that Every M&A Lawyer Should Learn, But Not the Hard Way*
- *The Use of AI and Data Analytics in the Legal Profession: The ABA Public Deal Points Study as a Case Study*

On Friday and Saturday, we'll have our usual meetings. We'll also have:

- a reception on Friday,
- a dinner on Saturday, and
- other more casual chances to get together and chat about M&A and other topics.

A detailed meetings and programs schedule is included in this edition of *Deal Points* on page 16 and available through the BLS meeting website.

As always, we encourage participation by everyone at the meetings, whether you're attending in person or by Zoom. Please add to the collective knowledge by sharing your experiences and voicing your questions as we go through evolving legal issues.

Either way, registration is free (for all BLS members), but you must register to attend in person or to get the Zoom link.

Joining and Participating in the Committee

If you'd like to get involved, or have other ideas or questions, just raise your hand during a meeting, or let me, one of the vice-chairs or any of the other Committee leaders know, or visit our website. Between the webinars (In the Know, Business Law Basics), videos (Hotshot), case reports (MACBriefs), *Deal Points* studies, and in depth memos and other publications there's plenty to do, and we're always eager to hear about new ideas and projects.

I look forward to seeing everyone in Atlanta, be it in-person or by Zoom.

Michael O'Bryan CHAIR

From the Editor

Welcome to the Spring 2022 issue of *Deal Points*, which coincides with the M&A committee's first in-person meeting in two years. Before jumping into this issue, I would like to introduce each of you to Luciana Griebel, an M&A lawyer in the London office of Covington & Burling LLP, and Janine Labusch, an M&A lawyer in the New York office of Donahue & Partners LLP, who both joined the *Deal Points* publication team this year. Luciana and Janine have hit the ground running as assistant editors and I am excited about their future contributions to *Deal Points*.

In this issue of *Deal Points*, we begin with a discussion on earn-outs in healthcare transactions and the implications under the Federal Anti-Kickback Statute. Next, our friends to the North give us a primer on the difference between the U.S. merger and the Canadian amalgamation, a distinction that has taken on growing significance in the wake of recent decisions by Delaware courts. Keeping with the theme of Delaware Courts, we next take a look at a recent Delaware Chancery Court decision in which the court made an upward adjustment to the synergy-adjusted merger price in an appraisal action to account for strong post-signing, pre-closing financial performance. We conclude this issue with a discussion of practical considerations for completing a closely held company deal.

Thanks to all who contributed to this issue of *Deal Points*. I encourage you all to continue your contributions to the M&A Committee's thought leadership by sending articles that have 1,500 words or less to the *Deal Points* publication team for consideration. Contributing to *Deal Points* is a great way to get introduced to the Committee's global membership and to showcase your expertise.

Have a great Spring Meeting!

Chauncey M. Lane EDITOR

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Earn-Outs in Healthcare Transactions and How They Might Implicate the Federal Anti-Kickback Statute

ARI J. MARKENSON J.D., M.P.H., Partner at Venable LLP / **EVELYNN XUAN BUI** J.D., M.P.H., Associate at Venable LLP
GISELLE YUNCONG LAI J.D., M.S.P.H., Associate at Venable LLP

Introduction

Healthcare mergers and acquisitions saw significant growth in 2021, with a 56% increase in deal volume. As volume increased, so did transaction values and competition. However, the COVID-19 pandemic exacerbates the challenging practice of valuation in healthcare deals. Many healthcare businesses that reported decreased revenue during the pandemic now want to sell at current valuations based on pre-pandemic financials. While buyers seem willing to contemplate such purchase price valuations, they are looking for creative ways to mitigate potential risks.

The mechanism for mitigating certain risks is often a seller earn-out. Earn-outs enable buyers to make a portion of the purchase price contingent on some type of metric relating to the performance of the business post-closing, such as reaching a revenue milestone during a specified period. The contingency also allows buyers to put off, and potentially forgo, a portion of the purchase price if the agreed target is not met. Although earn-outs were used pre-pandemic, they have gained popularity at a time when competition is fierce, and sellers have more leverage in the marketplace.

While useful, certain earn-out structures in transactions involving businesses that derive revenue directly or indirectly from federal health care programs (FHCP) may implicate the Federal Anti-Kickback Statute, 42 USC 1320a-7b(b) (AKS). As discussed below, the AKS is a federal statute that criminalizes business behavior that might otherwise be legal in transactions that do not involve FHCP business.

The Federal Anti-Kickback Statute, 42 USC 1320a-7b(b)

The AKS makes it a criminal offense to knowingly and willfully offer, pay, solicit, or receive any remuneration to induce, or in return for, the referral of an individual to a person for the furnishing of, or arranging for the furnishing of, any item or service reimbursable under a FHCP. The prohibition also extends to remuneration to induce, or in return for, the purchasing, leasing, or ordering of, or arranging for or recommending the purchasing, leasing, or ordering of, any good, facility, service, or item reimbursable by a FHCP. For purposes of the AKS, "remuneration" includes the transfer of anything of value, directly or indirectly, overtly or covertly, in cash or in kind.

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[1] See 42 U.S. Code § 1320a–7b(f), definition of "Federal health care program".
[2] Note: There are many states with similar "anti-kickback" prohibitions that may not solely be applicable to scenarios involving government reimbursement. However, this article is limited to a discussion of the AKS.

Spot the Difference: Delaware Mergers & Canadian Amalgamations

CAROLINE SAMARA Partner at Mcmillan LLP
WILLIAM BURKE Articling Student at Mcmillan LLP

In September 2020, a case that was decided by the Superior Court of Delaware included the application of the U.S. merger concept to an amalgamation completed under Canadian law, adding a layer of uncertainty to legal concepts that regularly arise in corporate transactions, which are already, and often, misinterpreted.

Corporate transactions take on many different forms, including arm's length mergers and acquisitions transactions and related-party corporate reorganizations. One common element of many corporate transactions is the combination of two or more corporations into a single successor corporation, often referred to by those involved with corporate transactions as a "merger." The legal concept of "merger" exists under U.S. law; under Canadian law, however, a typical method of combining two or more corporations is referred to under corporate statutes as an "amalgamation." Although an amalgamation is similar in principle to a U.S. merger, there are some key differences, that are relevant considerations, when structuring corporate transactions and completing diligence on target corporations.

Under Canadian law, the amalgamating corporations continue as one corporation, which shares each pre-amalgamating entity's rights and liabilities. Neither predecessor is dissolved – each survives in the resulting entity. The Supreme Court of Canada has analogized the legal concept of amalgamation to "a river formed by the confluence of two streams, or the creation of a single rope through the intertwining of strands,"[1] effectively maintaining their shared history, while taking on a new form.

In contrast, under U.S. law, corporate mergers have the effect of one corporation surviving and the other(s) ceasing to exist. The surviving corporation absorbs the liabilities and assets of the other non-surviving entities. Consolidations are also available under U.S. law, as illustrated by the corporate statute in Delaware; although similar to Canadian amalgamations, a key distinction is that the resulting corporation is considered a "new corporation" under Delaware law. In neither case does the resulting corporation retain the histories of all its predecessors. As such, contractual obligations from any non-surviving entities legally undergo an assignment and could therefore be subject to anti-assignment provisions contained in contracts to which the non-surviving entities are a party.

If a potential corporate transaction triggers an anti-assignment provision in a contract, a corporation will need to obtain consent from the other parties to the contract, if it wishes to ensure the resulting entity can avail itself of that contract's benefit. In M&A transactions, the contracts that a target company is a party to may be a key component in the value that the purchaser attributes to the transaction. In corporate reorganizations, that are often implemented for tax purposes or to simplify corporate structures, it is important to avoid disrupting status quo with respect

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[1] Black and Decker Manufacturing Co. [1975] 1 SCR 411

Court of Chancery Determines That Fair Value of Company Exceeds Merger Price Because of Post-Signing Financial Performance

DAVID A. SEAL Associate at Potter Anderson & Corroon LLP
CHARLES R. HALLINAN Associate at Potter Anderson & Corroon LLP

In BCIM Strategic Value Master Fund, LP v. HFF, Inc., C.A. No. 2019-0558-JTL (Del. Ch. Feb. 2, 2022), the Delaware Court of Chancery awarded an appraisal petitioner $46.59 per share for the fair value of its shares of HFF, Inc. (HFF or the Company) in connection with a July 2019 merger (Merger) with Jones Lang LaSalle (JLL), a premium over the closing transaction price of $45.87 per share. Vice Chancellor Laster determined HFF's fair value by making an upward adjustment to the synergy-adjusted merger price to account for the Company's strong post-signing, pre-closing financial performance. HFF shows that, while it is difficult for an appraisal petitioner to obtain a fair value award above the transaction price for public company appraisals, situations where there is good performance between signing and closing may result in a fair value above the transaction price.

Background

Before the Merger, HFF connected real estate capital consumers with real estate capital providers. HFF relied on sales professionals, known as "producers," to facilitate transactions that generated the service fees constituting over 90% of its revenue.

In December 2017, JLL first contacted Mark Gibson, HFF's CEO and member of its Board of Directors (Board), to discuss a possible merger. On July 24, 2018, JLL continued these discussions with Gibson. Gibson emphasized that governance issues would be a priority and that HFF had rejected offers that lacked a cultural fit. In response, JLL proposed running the post-merger company as a partnership. Gibson reported the call to Joe Thornton, HFF's President, and other members of its Executive Committee. Between August and October 2018, Gibson and Thornton led negotiations with JLL. Those discussions focused primarily on governance issues, including leadership of the combined entity, retention of management and producers, and compensation models. The negotiations did not include price.

On October 25, 2018, the parties first discussed price during a call between Gibson and JLL, but Gibson said that he believed price would not be an issue. On November 7, 2018, JLL first floated a potential price range of between $45 and $46 per share. Gibson stated that further governance discussions were necessary before discussing price. On November 29, 2018, the Board discussed forming an independent committee to negotiate with JLL, but it decided that Gibson and Thornton were appropriate negotiators because they would not receive special compensation and were

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Make the Human Factors Work for You in Closely Held Company Deals

BETH F. ATKINS Attorney and Shareholder at Howard, Stallings, From, Atkins, Angell & Davis, P.A.

It is well understood that those of us who do work to get deals done are running ragged right now. The attorneys, investor representatives, bankers, and accountants, what I will call the Deal Makers, are handling levels of mergers and acquisitions that are in many ways unprecedented. Among the growing number of deals are more and more sales by baby boomers and or long-time business owners, who have built up good closely held companies and decided it is time to retire or get out. I will call them Founders. With pricing at levels and multiples many of us have not often seen, and equity investment becoming more and more common, there are more sales of closely held companies to buyers whose primary business is investing instead of the business of the companies they are buying into. How this impacts the economy in general long-term, and the continued success of the businesses, remains to be seen. However, one observation from the seller's side of these types of transactions, is that with the focus on getting the deal done, and moving on to the next one, many Deal Makers forget the human factors of dealing with Founders as sellers. It is understandable, and I can almost see your collective eye rolls, but bear with me, because I would posit that it is costing the buyer-side many deal points.

There are a few simple things Deal Makers on the buyer and investor side can do, or not do, as the case may be, to take the human factors into account:

1. Understand that Founders are generally not experienced in outside equity financing or selling a business. You know it, but really think about how it impacts the way they look at the deal; you do this every day, and can understandably forget how things look, when the process is unknown to you. They are facing fears of the unknown like any retiree, with the added concerns of selling a business they have built that is near and dear to them and probably part of their identity: What will I do without my company? Who will I be without my company? Am I doing the right thing for my employees and my family? Am I doing the right thing for me?.

2. If you understand the above, then you know that, while the buyer's business people have been wining and dining the Founder, to get him or her to the table, they have likely learned a lot about the Founders' fears and favorites, and about which things concern that Founder the most. So, when you have the meetings or discussions with the business people to determine the terms of the deal for papering and getting it closed, do not forget to ask about the Founder as a person and what the business people have learned or noticed about what the Founder cares or is concerned about most. Is it legacy? Is it employees? Is it family members (who may be employees)? Is it what direction the buyer may take the company after closing? Is it what the Founder retains for the future such as real estate that will be leased to the company? Is it net cash to the Founder at closing?

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TASK FORCE AND SUBCOMMITTEE REPORTS

Academic Subcommittee

The Academic Subcommittee of the Mergers & Acquisitions Committee encourages dialogue between the academy and the practicing bar. To do so, we invite law school professors to present recent articles (typically prior to publication) on topics that might impact the drafting and negotiation of M&A agreements—i.e., stuff that might really matter to the practicing bar. The divide between the actual practice of law and the academy is all too real, and the dialogue that occurs between M&A lawyers and the law professors presenting their theories and data is a real opportunity to bridge that divide. The feedback from our meetings is that the professors get a real opportunity to test some of their theories and the M&A lawyers get an opportunity to explain what is really happening in the real world. Both participants benefit from the sometimes lively discussion.

ATLANTA MEETING

At our Atlanta Meeting of the Academic Subcommittee we plan to have Joel Edan Friedlander discuss his article, *Performance of Equity: Why Court of Chancery Transcript Rulings Are Law*, that was published in the Winter edition of The Business Lawyer. Joel is not a pure academic as most of our presenters are, but a practitioner that also is an academic. His article raises some important questions as to what the practicing bar should consider caselaw for the purpose of altering their contract drafting and advising their clients in deals. Indeed, everyone has been told that transcript rulings are not precedent, but there are numerous examples of transcript rulings that foreshadowed later written opinions; and written opinions many times rely on transcript rulings. Have you heard of *Puda Coal and El Paso Pipeline*, both important transcript rulings that transactional lawyers needed to know about long before they were relied upon in rendering written opinions? But are we paying attention to transcription rulings; and how should we go about paying attention if we should since accessing transcript rulings is somewhat difficult and expensive? Probably something we need to discuss in the Jurisprudence Committee too.

GLENN WEST, Chair

Acquisitions of Public Companies

The last virtual Acquisition of Public Companies Subcommittee meeting held on January 27, 2022 featured a presentation on the launch of the interactive ABA Public Target M&A Deal Points Study — a novel collaboration between the ABA and the Atticus Project. The presentation showcased dynamic visualizations (or "vizzes") of the

data and featured a discussion of key highlights in merger agreements for the acquisitions of public companies that closed in 2021, including COVID-19 related provisions, deal protection provisions and remedies. The presentation also illustrated how the data may vary by industry, with a specific focus on how mergers in the banking sector (which experienced elevated levels of deal-making activity in 2021), differ from mergers in other industries.

The upcoming Acquisition of Public Companies Subcommittee meeting is scheduled to be held in Atlanta, Georgia on **Friday, April 1, 2022** at the Hyatt Regency Atlanta at **1:30 pm – 2:30 pm** ET. The meeting will feature Raaj Narayan, Partner at Wachtell, Lipton, Rosen & Katz, Kyle Seifried, partner at Paul Weiss, Rifkind, Wharton & Garrison LLP, and Daniel Zach, partner at Cravath, Swaine & Moore and former Assistant Director of the Federal Trade Commission. The panelists will discuss the current antitrust regulatory and enforcement environment and emerging drafting trends in merger agreements in response thereto, including efforts standards, commitments to litigate, outside dates and extension mechanics, ticking fees, reverse termination fees and closing conditions.

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

Joint Task Force on Model Short Form M&A Documents

The Joint Task Force on Model Short Form M&A Documents is a combined effort of the M&A Committee and the Middle Market and Small Business Committee with the goal of publishing a set of "short form" acquisition agreements (with ancillary documents and commentary) which would be more easily adapted for use in smaller M&A transactions. The Joint Task Force last met in September during the Business Law Section Virtual Annual Meeting. During this meeting the Joint Task Force took a break from working on documents and used the session to have an engaging discussion about trends in the lower middle market. This was a timely discussion as Joint Task Force members were in the throes of the most active deal year ever.

With the start of a new year the Joint Task Force will be back to drafting. If you are looking for a way to get more involved with the ABA, here is your opportunity. During the Business Law Hybrid Spring Meeting in Atlanta the Joint Task Force will be kicking off the drafting portion of the model short form asset purchase agreement. This is your chance to get in at the "ground level" of an ABA project and have a significant impact. Please plan on attending the Joint Task Force meeting to hear more about this opportunity.

The Joint Task Force will be meeting during the Business Law Hybrid Spring Meeting in Atlanta on Friday, April 1, 2022, from 10:00 am to 11:00 am (ET). See the schedule on page **16** for more details about how to participate. We look forward to seeing you (either in-person or virtually).

JASON BALOG Co-Chair
ERIC GRABEN Co-Chair

Legal Project Management in M&A Task Force

In connection with the recent virtual Laguna Stand Alone Meeting, the Task Force discussed a working draft of a new tool – a Competing Bid Analysis Chart. The purpose of the tool is to provide a handy way to evaluate final bids and acquisition agreement markups submitted by competing bidders in an auction. A working draft of the tool has been posted to the M&A Committee website. Just go to "Other Committee Materials" and then click on "ABA Connect." That will bring up a variety of posted materials including this Chart which would you can then download as a Word document. If you have any thoughts or comments regarding how this tool might be improved, please send them our way. The next meeting of the Task Force will be held on Friday, April 1, 2022, at 1:30 pm ET. Since neither of your co-chairs will be able to make it down to Atlanta, the hour-long meeting will be held virtually.

At the meeting, we will be discussing how corporate clients are, with increasing frequency, issuing Requests for Proposals, which ask how law firms will utilize legal project management in handling the

assignment in question. We will have as guests several legal project managers/value officers who are on the front lines in responding to such RFPs and learn how they have integrated legal practice management into their firms' practices and client interactions. We will also learn about the Corporate Legal Operations Consortium (CLOC) and how in-house law departments have deployed "legal operations" into how they engage and manage the law firms that they use.

Featured panelist will include Jennifer Phillips, Associate Director of Legal Operations for Novartis Services, Inc.; Jonas Svedlund, Esq., Vice President and Deputy General Counsel and Chief Counsel – M&A for Thermo Fisher Scientific; Kathryn Davis (Cleary), Client Operations and Legal Project Management (LPM) Manger for Ropes & Gray LLP; and Steven G. Manton, Client Value Officer for McDermott Will & Emery LLP. We are also please to include David Rueff, a Partner with Baker, Donelson, Bearman, Caldwell y Berkowitz PC, who has been involved in developing and shaping LPM since its early days, and will be able to trace how its has evolved over the years, from an acronym that few recognized, to a widely utilized methodology for the delivery and pricing of legal services. It will be a thought-provoking program and we hope you will be able to join us.

BYRON KALOGEROU Co-Chair
DENNIS WHITE Co-Chair

Market Trends Subcommittee

At our virtual Laguna meeting, we were able to recap the robust M&A activity in 2021 and explore factors that promised for an active 2022. But a lot has transpired since the end of January.

At the Market Trends meeting in Atlanta, we are pleased to have speakers that will highlight changes in the M&A market since the beginning of the year and how recent market volatility and the conflict in Ukraine is leaving an impact on the M&A market.

- Emily Maier of Woodruff Sawyer will join us to discuss trends in the Representations and Warranties Insurance (RWI) market since the beginning of the year, including with respect to pricing, underwriting availability and areas of heightened risk. She will also discuss how recent volatility in the market is likely to impact RWI in the coming months.

- Megan Greene of Kroll, LLC, will speak to the implications of the war in Ukraine on counterparty risk, dollar funding stress and interest rates.

- Kip Wallen of SRS Acquiom Inc. will discuss findings from their soon to be released survey, exploring the impact that the conflict in Ukraine may have on deal volume, deal terms and contract terms in 2022 and beyond.

Although not specifically related to changes in the first quarter of 2022, we are excited to be joined by Gerald Audant of Fenwick & West LLP and Ryan Redekopp of K&L Gates LLP, who will discuss the intersection of M&A transactions and restrictive covenant agreements. In particular, they will discuss how new state laws and challenges by the Federal Trade Commission (FTC) are changing the way that M&A practitioners should think about non-competes and other restrictions in the context of deals.

Before we launch into our substantive presentations, we will open the floor for a new segment that we are debuting. We are asking for your real-time feedback about trends that you are seeing in your practice over the past few months, particularly trends that may surprise you.

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

The Subcommittee will meet on Saturday, April 2, 2022, from 10:30 am to noon ET. 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 Atlanta.

CRAIG MENDEN Chair
KEVIN KYTE Vice Chair
LISA HEDRICK Vice Chair

M&A Jurisprudence Subcommittee

The M&A Jurisprudence Subcommittee will meet at the Business Law Section Spring Meeting in Atlanta on

Friday, April 1, 2022
Centennial Ballroom II, LL1 – Ballroom Level
10:30 am – 12:00 pm ET

At the meeting, we will discuss recent developments in M&A case law. As we have in 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:

- Important non-Delaware jurisprudence, including:
  - a discussion of the Seventh Circuit's ruling in *Seafarers Pension Plan v. Bradway*, which held that an exclusive forum bylaw provision requiring all derivative cases be brought in the Delaware Court of Chancery was unenforceable as to derivative cases under the federal proxy laws for which there is exclusive federal jurisdiction; and
  - a discussion of a Ninth Circuit ruling in *Bladeroom Group Ltd v. Emerson Electric* concerning the expiration of confidentiality obligations under non-disclosure agreements.
- Further developments in Delaware case law, including:
  - Recent decisions interpreting the requirements of advance notice bylaws and articulating the standard of review for board responses under those bylaws (*Rosenbaum v. Cytodyn* and *Strategic Investment Opportunities LLC v. Lee Enterprises Incorporated*); and
  - the importance of contract drafting with respect to indemnification and fraud claims, as highlighted in the latest decisions including *Spay, Inc. v. Stack Media Inc.* and *Blue Cube Spinco LLC v. The Dow Chemical Company*.

The group 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 that 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 do not 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 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 – 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, which you can access **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 our 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:

- 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
- (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, 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 email any of us, or simply come to the next Subcommittee meeting.

NATHANIEL CARTMELL Chair
NICK MOZAL Chair – Annual Survey Task Force
FREDERIC SMITH Chair – Judicial Interpretations Working Group

Women in Mergers and Acquisitions Subcommittee

The last virtual Women in M&A Subcommittee meeting held on January 27, 2022 featured a presentation with Jessica Hernandez, JD, CPCC, Certified Coach and former M&A attorney. Ms. Hernandez led an interactive session on Increased Effectiveness through Resilience and Self Compassion. The program focused on leveraging specific tools to counteract negative self-talk in order to stay focused on goals and achieve greater productivity in the M&A context. Through the presentation, we learned more about how to move through real-life disappointment and obstacles with greater ease and how to build a stronger resilience during difficult times.

The upcoming Women in M&A Subcommittee meeting is scheduled to be held in Atlanta on Friday, April 1, 2022 at the Hyatt Regency Atlanta at 3:30 pm – 4:30 pm ET. The meeting will feature Michelle Silverthorn, a best-selling author, keynote speaker, and Founder & CEO of Inclusion Nation. Ms. Silverthorn will speak on how to navigate difficult conversations surrounding race, bias and equity in a legal workplace and commit to being an upstander in firms and companies where everyone is able to rise, thrive and succeed.

JOANNA LIN Co-Chair
CHARLOTTE MAY Co-Chair

Private Equity M&A Joint Subcommittee

The Private Equity M&A Joint Subcommittee last met remotely on Thursday, January 27, 2022, as part of the Business Law Section's Spring Meeting.

We had two presentations:

1. We started the meeting with three mini-presentations that hopefully led us to a better understanding of whether 2021's surge in Private Equity M&A activity was likely to continue, and how our practices may continue to be modified. First, Jen Muller, Youmna Salameh and Rachel Schaller from Houlihan Lokey presented on "How Long Can this Continue – The Current Boom in Private Equity M&A," summarizing what the Private Equity M&A market was like in 2021, and what they expected for the market in 2022. Second, Stephanie Biderman of Major, Lindsey & Africa presented on "The Market for M&A Associates – Will We Be Able to Keep Up with Demand," discussing what we saw happen to our ability to hire M&A associates in 2021, and what that looks like for 2022. Finally, Andrew Zimmerman of Willis Towers Watson presented on "Has the P.E. M&A Boom Changed R&W Insurance," discussing how we saw the market and processes for Representations and Warranties Insurance change during the end of 2021, and whether we should view those changes as permanent, a basis for further change or just a blip that will go away, when the market slows down.

2. I, as a Chair of the subcommittee, was then joined by Andrew Capitman of Duff and Phelps and my funds partner at Finn Dixon & Herling in Stamford, Connecticut, Reed Balmer, to discuss Continuation Funds. We discussed what Continuation Funds are, why they are increasing in popularity and what Private Equity lawyers need to know if their client wants to engage in such a transaction.

The next meeting of our Joint Subcommittee will be held on Friday, April 1, 2022, from 2:30 pm to 3:30 pm ET. Finally, after more than two years, we will be able to meet in person at the Atlanta, Georgia Hyatt Regency, and with the option to participate remotely as well. I hope to see many friends, old and new, in person, but also look forward to the participation of those who cannot make it in person.

We only have one hour in Atlanta, so the program will have one panel presentation – "When Private Equity Meets the Small, Family Owned Business." I will be joined by Samantha Horn, my Vice-Chair from Stikeman Elliott LLP in Toronto, Ontario, Jason Balog, of Miles & Stockbridge of Baltimore, Maryland, who is Chair of the M&A Committee's Short Form Model Acquisitions Agreement Joint Task Force and Tom Walsh of Brody Wilkinson PC in Southport, Connecticut, and former Chair of the Business Law Section's Middle Market and Small Business Committee, for a panel discussion on the culture shock and legal issues that Private Equity M&A lawyers may encounter when trying to negotiate the acquisition of a family-owned business. We hope that the presentation will be interesting and entertaining.

My Vice-Chair, Samantha Horn, from Stikeman Elliott LLP in Toronto, Ontario, 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 have said before, if you have not met me and you attend the meeting, please feel free to shoot me an email afterwards and introduce yourself. Especially, as we continue with holding remote meetings, I would love to know who is listening (and have a chance to recruit your participation).

DAVID I. ALBIN Chair

Technology in M&A

The Technology in M&A Subcommittee met on Friday, January 28, 2022 at the M&A Committee's "Virtual Laguna" Standalone Meeting. The meeting primarily comprised:

- Will Norton of SimplyAgree launched the latest version of the Subcommittee's Technology in M&A Directory, of which he is the lead editor. The Directory is available in the Subcommittee's library on the Communities website (in the Non-CLE Presentation Materials folder).

- A presentation by David Curle and Jen Tsai of Kira Systems with a short preview of the soon-to-be-published inaugural version of an annual survey which measures the current and future state of technology usage in M&A legal practice. The survey uses our Subcommittee's Technology in M&A Directory for its taxonomy and accordingly should be of interest to everyone who has looked at our Directory but has asked themselves how much use is actually made of these technologies in practice.

- Casey Flaherty of LexFusion gave a presentation entitled *What might constitute an end-to-end, process-driven, tech-enabled M&A transaction utilizing innovative offerings already available in market?* with a holistic look at the M&A workflow covering not only what is new and what comes next, but also how all the pieces fit together to the benefit of both clients and law firms. His slides and a recording of his presentation are again available in the Subcommittee's library on the Communities website.

Following that meeting the final version of the Subcommittee's paper entitled *The MAC Digital Documentation Protocol: Best Practices to Effect eSignings and Closings for M&A* was published in the February 15, 2022 issue of *Business Law Today*[1]. The Protocol sets out four guiding principles and it is intended that including a reference to it in a transaction document will be sufficient to document the parties' intent to execute and deliver documents in accordance with those guiding principles, creating a presumption that the parties have done so (absent clear evidence to the contrary). The Protocol also includes sample language reflecting each of these principles.

The project group was led by our Subcommittee Vice-Chair Thomas B. Romer of Greenberg Traurig LLP and by Anshu Pasricha of Astec Industries, Inc. (formerly of Koley Jessen, P.C., L.L.O.), with the other key contributors being W. Ian Palm and Stefan Nasswetter of Gowlings, Kathy Woeber Gardner and Karen Masterson Dienst of Montgomery Pacific, Tali Sealman of White & Case, Brittany Sakowitz of Kirkland & Ellis LLP and our Subcommittee Chair Daniel Rosenberg of Charles Russell Speechlys LLP, with thanks going to all of them and peer reviewer David Albin of Finn Dixon & Herling.

Please join us in person or by Zoom at our forthcoming meeting at the Business Law Section's "Hybrid" Spring Meeting in Atlanta, GA. Our Subcommittee meeting will take place from 2:30 pm to 3:30 pm ET on Saturday, April 2, 2022 and the main item on our agenda will be a presentation by our Subcommittee Vice-Chair Thomas B. Romer of Greenberg Traurig LLP on the Subcommittee's recently published paper, *The MAC Digital Documentation Protocol: Best Practices to Effect eSignings and Closings for M&A*, referenced above, of which he was a project leader.

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.

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

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

[1] https://businesslawtoday.org/2022/02/mac-digital-documentation-protocol-best-practices-to-effect-esignings-closings-ma

DEAL PEOPLE

M&A Committee Leadership Team

Our first (almost) post-Covid in-person meeting of 2022 is a great opportunity to connect with the still somewhat new M&A Committee leadership team: Committee Chair Mike O'Bryan and his appointed Vice-Chairs Rita-Anne O'Neill, Jessica Pearlman and Patricia Vella. Be sure to watch out for them and say hello in Atlanta!

Michael O'Bryan
Chair
MORRISON & FOERSTER
San Francisco, CA

Rita-Anne O'Neill
Vice-Chair
SULLIVAN & CROMWELL
Los Angeles, CA

Jessica Pearlman
Vice-Chair
K&L GATES
Seattle, WA

Patricia Vella
Vice-Chair
MORRIS, NICHOLS, ARSHT & TUNNELL
Wilmington, DE

But, oh, how the children have grown! Can you spot the younger versions of our leadership team memebers in the pictures below?

About Deal People – **Deal People** is a feature in ***Deal Points*** that highlights members of the M&A Committee and things that interest them, other than doing deals. Ideas for future features in Deal People are welcomed.

If you have pictures from Committee meetings that you would like to suggest for inclusion in a future issue of Deal Points, please send them to me:

JOHN F. CLIFFORD, McMillan LLP
Toronto, Canada
john.clifford@mcmillan.ca

COMMITTEE MEETING MATERIALS

Please note that times listed are Eastern Time.

Mergers and Acquisitions Committee

Atlanta Meeting 2022

March 31 – April 2, 2022

MEETINGS AND PROGRAMS SCHEDULE

Thursday, March 31, 2022

CLE: Case Law Matters: Drafting and "Control" Lessons that Every M&A Lawyer Should Learn, But Not the Hard Way
10:00 AM – 11:30 AM EST

CLE: How AI Is Helping Shape M&A: Lessons from the 2021 Public Target Deal Points Study
4:00 PM – 5:30 PM EST

Friday, April 1, 2022

Short Form Model Acquisition Agreement Joint Task Force
10:00 AM – 11:00 AM EST

M&A Jurisprudence Subcommittee
10:30 AM – 12:00 PM EST

Legal Project Management Task Force
1:30 PM – 2:30 PM EST

Acquisitions of Public Companies Subcommittee
1:30 PM – 2:30 PM EST

Private Equity M&A Subcommittee
2:30 PM – 3:30 PM EST

Women in M&A Subcommittee
3:30 PM – 4:30 PM EST

Meeting of Subcommittee and Task Force Chairs and Vice Chairs
4:30 PM – 5:00 PM EST

M&A Committee Reception
5:00 PM – 6:00 PM EST

Saturday, April 2, 2022

International M&A Subcommittee
10:00 AM – 11:00 AM EST

Market Trends Subcommittee
10:30 AM – 12:00 PM EST

Academic Subcommittee
1:30 PM – 2:30 PM EST

Technology in M&A Subcommittee
2:30 PM – 3:30 PM EST

Mergers and Acquisitions Full Committee Meeting
3:30 PM – 5:00 PM EST

M&A Committee Dinner at Ray's
6:00 PM – 7:00 PM EST
Separate ticket required – capacity limited

CO-SPONSORED PROGRAMS

Friday, April 1, 2:00 PM – 3:30 PM EST
Corporate Counsel Committee
How to Maximize the Value and Reduce the Cost of Post-Pandemic Corporate Legal Services

Friday, April 1, 4:00 PM EST
Business and Corporate Litigation Committee
Succession Liability: Legal & Ethical in M&A Transactions

All times are listed in Eastern Standard Time.

Committee Structure and Leadership

ACADEMIC SUBCOMMITTEE
Glenn West Chair

ACQUISITIONS OF PUBLIC COMPANIES SUBCOMMITTEE
Rita-Anne O'Neill Co-Chair
Ann Beth Stebbins Co-Chair
Jenny Hochenberg Vice-Chair

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

JUDICIARY LIAISON SUBCOMMITTEE
Lisa Stark Co-Chair
Patricia Vella Co-Chair

M&A JURISPRUDENCE SUBCOMMITTEE
Nathaniel Cartmell Chair
Nick Mozal Chair – Annual Survey Task Force
Frederic L. Smith Chair – Judicial Interpretations Working Group

MARKET TRENDS SUBCOMMITTEE
Craig Menden Chair
Kevin Kyte Vice-Chair
Lisa Hedrick Vice-Chair

MEMBERSHIP & DIVERSITY SUBCOMMITTEE
Tracy Washburn Bradley Co-Chair
Caitlin Rose Co-Chair

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

PROGRAMS AND PUBLICATIONS SUBCOMMITTEE
Ashley Hess Chair (Programming)
Chauncey Lane Chair (Deal Points)

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

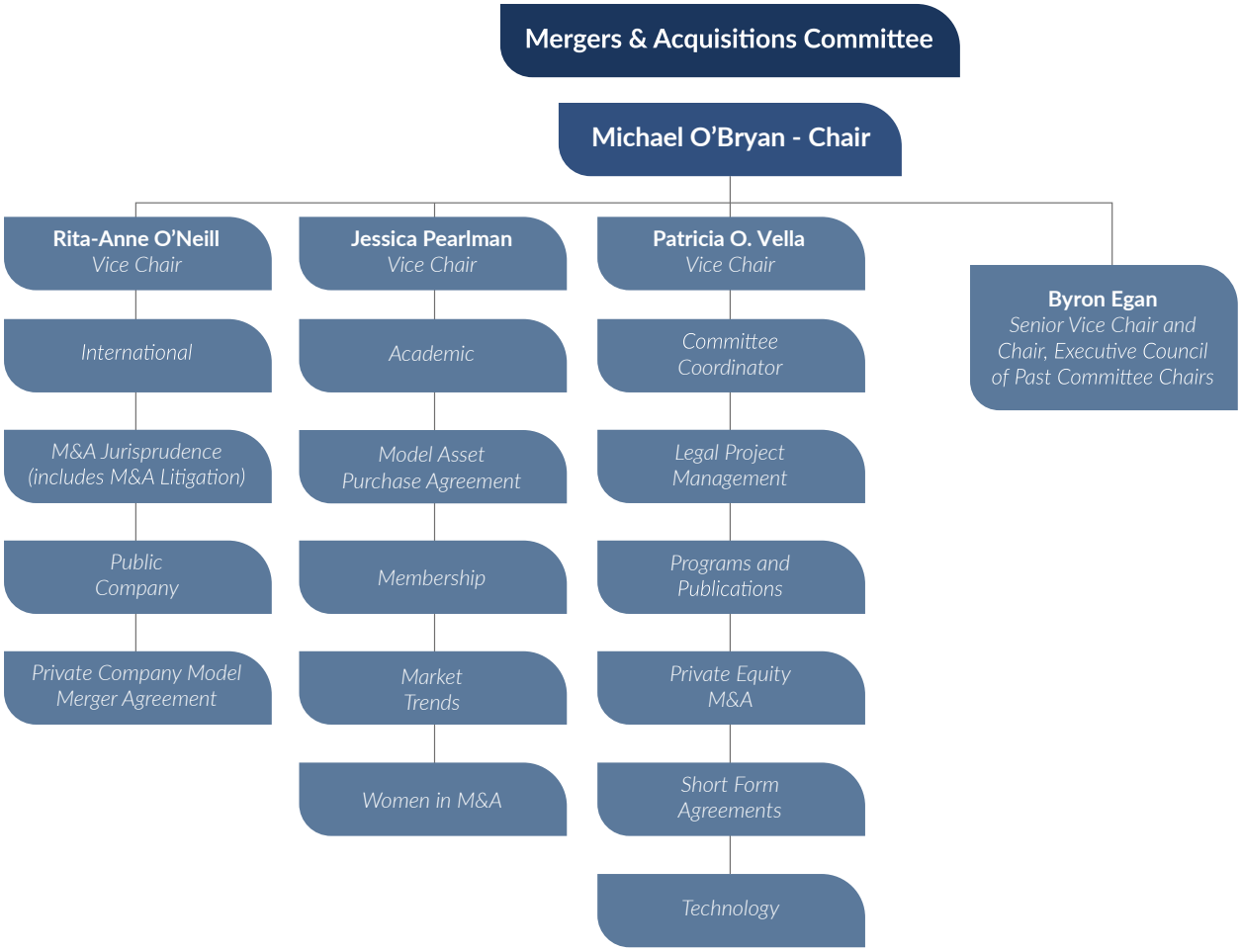
WOMEN IN M&A SUBCOMMITTEE
Joanna Lin Co-Chair
Charlotte May Co-Chair

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

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

SHORT FORM MODEL ACQUISITIONS AGREEMENT TASK FORCE
Jason Balog Co-Chair
Eric Graben Co-Chair**
**Appointed by MM&SB Committee

ORGANIZATIONAL CHART



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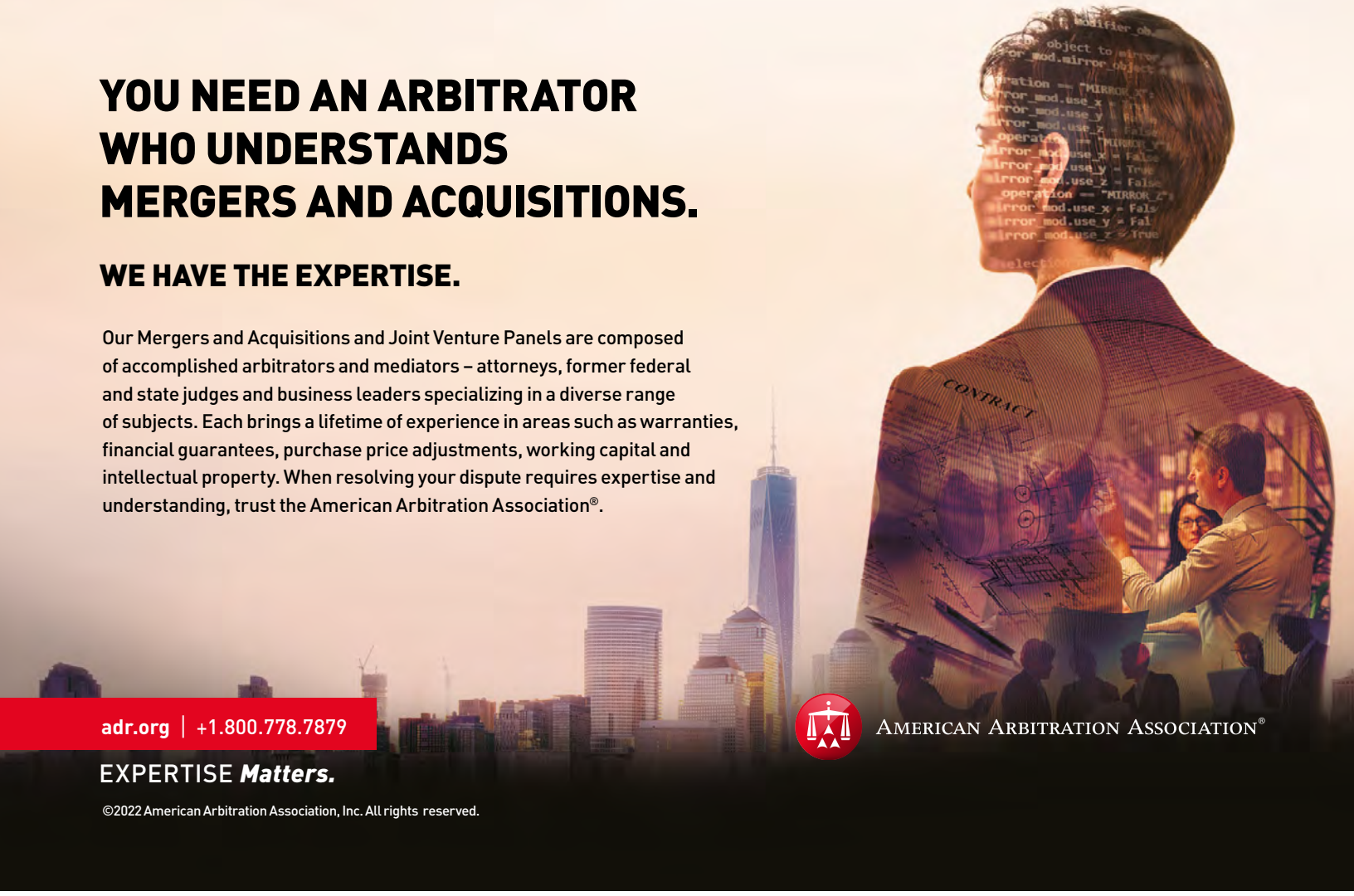

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The AKS has been interpreted to cover any arrangement where one purpose of the remuneration is to induce referrals for items or services reimbursable by a FHCP. Violation of the statute constitutes a felony punishable by a maximum fine of $100,000, imprisonment of up to 10 years, or both. Conviction also will lead to exclusion from FHCPs, including Medicare and Medicaid.

Most importantly, the AKS is interpreted broadly by the courts and enforcement agencies.

Earn-Outs in Healthcare Transactions

Earn-outs in healthcare transactions raise potential AKS risk when the seller's business derives some of its revenue directly or indirectly from FHCPs. The risk becomes more significant when the earn-out structure is closely connected to the nexus of prohibited conduct in the AKS. In other words, the AKS prohibits knowing and willful conduct where there is a nexus between referral of FHCP business and receipt by the referring party of some type of remuneration for that referral.

Serious AKS risk can result from an earn-out that provides an additional purchase price to a seller in relation to the seller's business meeting a financial metric post-closing based in whole or in part on FHCP business. The structure of the earn-out is important to an assessment of whether and how much AKS risk exists. The following examples offer different earn-out structures with varying levels of risk.

A. *When the seller remains in a position to generate FHCP revenue during the earn-out period, the earn-out mechanism is more likely to violate the AKS.*

The CEO of a home health agency[4] sells her business for $1,000,000. Post-closing, she remains CEO and is responsible for the day-to-day operation of the business. The purchase price is structured as $700,000 at closing, and the remaining $300,000 is to be paid 18 months after the closing if the last 12 months EBITDA[5] (LTMEBITDA) of the business is equal to its pre-closing LTMEBITDA plus 8%.

Here, significant AKS risk is likely because it appears as if the earn-out is being paid for the EBITDA growth of the business, the 8%. The growth includes FHCP business. More simply, if the parties agree to this structure in the transaction documents, there is evidence of intent to enter into the business arrangement. Because the revenue growth includes FHCP business, an enforcement agency could argue that the new owner is paying the additional $300,000 for the CEO's activities in generating additional FHCP business.

B. *When the earn-out is structured to bridge a difference in valuation between the buyer and seller, such as being designed to validate the seller's pre-pandemic valuation, the earn-out mechanism is less likely to violate the AKS.*

The CEO of a home health agency believes her business should sell for $1,000,000 based on a 10× multiple of pre-pandemic EBITDA of $100,000. Buyer agrees to a 10× multiple, but given the lack of financials for the last two years that validate the seller's EBITDA of $100,000, buyer won't agree to the $1,000,000 purchase price. Post-closing, the CEO remains responsible for the day-to-day operation of the business. Buyer proposes a purchase price with an earn-out, $650,000 at closing, and the possibility of $350,000 to be paid 24 months after the closing if the LTMEBITDA of the business is equal to its pre-pandemic EBITDA of $100,000.

Here, there is less AKS risk because the earn-out is not tied to additional FHCP business. The intent of the parties is to address the difference in valuation and validate whether the business is worth its pre-pandemic EBITDA. As a result, the nexus in the AKS prohibition

[3] See, e.g., *United States v. Nagelvoort*, 856 F.3d 1117 (7th Cir. 2017); *United States v. McClatchey*, 217 F.3d 823 (10th Cir. 2000); *United States v. Davis*, 132 F.3d 1092 (5th Cir. 1998); *United States v. Kats*, 871 F.2d 105 (9th Cir. 1989); *United States v. Greber*, 760 F.2d 68 (3d Cir. 1985), cert. denied, 474 U.S. 988 (1985).

[4] Most, if not all, home health agencies take Medicare and Medicaid (FHCP) reimbursement for services.

[5] Earnings before interest, taxes, depreciation, and amortization (EBITDA).

between the referral of FHCP business and remuneration is not as clear, and it would be more difficult to substantiate an AKS violation.

C. *When the seller exits the business at closing, even if the earn-out structure is related to the generation of FHCP revenue, the arrangement is unlikely to violate the AKS.*

The CEO of a home health agency sells her business for $1,000,000. Post-closing, she retires. The purchase price is structured with an earn-out, i.e., $700,000 at closing, and the remaining $300,000 to be paid 18 months after the closing if the LTMEBITDA of the business is equal to its pre-closing LTMEBITDA plus 8%.

Here, there is likely no AKS risk because the nexus in the AKS prohibition between the referral of FHCP business and remuneration does not exist. Once the CEO has exited the business, she has no control over whether the business meets the earn-out target, and she is not in a position to "refer" in the broad AKS sense of the term. As a result, no violation of the prohibition would occur.

The key differences in the scenarios above are: (i) the relationship that might exist between the earn-out to be paid and the generation of FHCP business; and (ii) the control that the seller has or does not have over the "referral" of FHCP business.

Conclusion

Whether an earn-out in a healthcare transaction implicates the AKS, depends on several factors. As a threshold matter, the seller's business must directly or indirectly involve FCHP business that may be the subject of a "referral" (broadly construed) to the buyer, that is paying the earn-out. The seller must be able to make or influence the "referral." There must be a nexus between the buyer's earn-out dollars and the "referral" of FHCP business.

Violation of the AKS is criminal. M&A counsel should recognize that the statute also criminalizes the "offer" and "solicitation," such that parties should be mindful in preliminary discussions and the earn-out description in a letter of intent (LOI). Buyers often will include qualifying language in an LOI that "the terms of the deal are subject to review by health regulatory counsel" – but it's unclear whether such qualification negates the "intent" element under the statute.

Ultimately, buyers and sellers need to be careful, when navigating valuation and purchase price issues in healthcare transactions. They should seek health regulatory counsel advice, before finalizing business discussions, and certainly before executing an LOI or definitive transaction document.

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to contractual rights and obligations of the entities within the corporate group. For these reasons, among others, understanding the distinction between U.S. mergers and Canadian amalgamations, and the impact of anti-assignment provisions on such transactions, is crucial for determining whether anti-assignment provisions are triggered, so that any necessary third-party consents can be obtained.

The consequences of failing to obtain third party consent were considered in *MTA Can Royalty Corp v Compania Minera Pangea, SA de C.V.* ("MTA Can Royalty")[2], where the Superior Court of Delaware applied the U.S. merger concept to an amalgamation completed under Canadian law. Notably, the amalgamated party conceded that the amalgamation at issue in the case was "equivalent to a merger under Delaware law." As a result, the surviving entity was unable to benefit from a contract of the Canadian predecessor that included an anti-assignment clause, prohibiting assignment "by operation of law or otherwise." If the amalgamated party seeking to benefit from the contract had not conceded the equivalence of an amalgamation under Canadian law with a merger under Delaware law, but

[2] *MTA Canada Royalty Corp. v. Compania Minera Pangea, S.A. de C.V.*, C. A. No. N19C-11-228 AML, 2020 WL 5554161 (Del. Super. Sept. 16, 2020)

rather distinguished between the two types of transactions, the Court's decision regarding the inability of the "surviving entity" to benefit from its predecessor's contract may have been different.

Whether a corporate transaction involves an M&A transaction or an internal corporate reorganization, it is critical that parties remain cognizant of jurisdictional nuances, particularly when colloquial terms have the potential of failing to differentiate between legal concepts from different jurisdictions. In the case of U.S. mergers and Canadian amalgamations, the Delaware Court's decision in MTA Can Royalty serves as a cautionary tale.

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major stockholders. Between December 2018 and January 2019, the parties engaged in due diligence and continued negotiations. On February 16, 2019, HFF agreed to a sale for a combination of cash and JLL stock with an implied aggregate value of $49.46 per share.

On March 18, 2019, the parties signed the merger agreement. On that date, the aggregate value of the consideration was $49.16 per share. On April 24, 2019, HFF reported financial results for the first quarter of 2019 that significantly exceeded analysts' expectations, including increases in revenue, adjusted EBITDA, and net income. Analysts reacted positively. On July 1, 2019, approximately 80% of the outstanding shares of HFF voted to approve the Merger, and the Merger closed later that day. The value of the consideration at closing was $45.87 per share.

The Decision

At trial, HFF argued that a fair price was a synergies-adjusted transaction price of $44.29 per share. Petitioner asserted that the fair value was $56.44 per share using a discounted cash flow (DCF) analysis, given 90% weight, and an adjusted trading price analysis that accounted for HFF's post-signing, pre-closing performance, given 10% weight.

The Court began its analysis by evaluating whether the merger price was a reliable indication of fair value. Three factors clearly indicated reliability: (1) the lack of affiliations with JLL, (2) the presence of publicly accessible information about HFF, and (3) that JLL obtained non-public information through due diligence. The Court also found that the merger agreement was sufficiently open to other bidders because HFF did not dissuade potential bidders pre-signing. The price negotiations and potential conflicts of the negotiators were more troublesome, but the Court found that neither factor rendered the merger price unreliable. Regarding price, the Court found that the negotiators bargained at arms' length, evidenced by the price increases that Gibson and Thornton obtained. Concerning conflicts, the Court acknowledged that three Board members—including Gibson and Thornton—faced conflicts. Gibson and Thornton took pride in building the Company and desired to see it continue as they had built it. They negotiated their own role at the post-Merger company before the price. Yet, Gibson and Thornton's conflicts did not render the merger price unreliable. HFF's value to JLL was in its human capital. By securing positions for HFF employees and management post-Merger, Gibson and Thornton ensured that they could negotiate for a higher price. Next, the Court deducted $4.87 per share from the transaction price based on net synergies, resulting in an adjusted price of $44.29 per share.

Because the Court must determine fair value per share as of the closing date, it made an adjustment to account for HFF's post-signing performance. The Court used the Company's expert's model that generated an implied price for HFF's stock on the closing date. That model relied on an event study that compared the change in market price of HFF stock to the S&P 500 index and an index of peer real estate companies.[1]

[1] Petitioner's expert performed a similar analysis, but the Court adopted the Company's expert's model because he used a more robust data set.

That model showed that the post-signing performance accounted for an approximate 5.2% increase over the trended price, and the Court made a corresponding adjustment to the merger price to reach a value of $46.59 per share. While the Court acknowledged the methodology was imperfect, it noted that there was strong corroborative evidence, including JLL's internal estimates of HFF's standalone value based on non-public information.

The Court rejected petitioner's DCF valuation because there were no reliable projections and there was superior market-based evidence of value. Thus, the Court adopted the merger price with adjustments for synergies and post-closing performance to determine a fair value of $46.59 per share.

Analysis

In recent years, public company appraisals have significantly decreased as Delaware courts have frequently determined that the transaction price per share, adjusted for synergies, is the fair value of a company. *HFF* shows, however, that there are certain circumstances in which stockholders seeking appraisal of a publicly traded company can obtain a fair value above the transaction price, even when that price is a reliable indicator of fair value. While earlier cases, such as *In re PetSmart, Inc. and In re Appraisal of Columbia Pipeline Grp., Inc.* rejected upward adjustments to account for post-signing performance, in *HFF* the Court found that the post-signing performance was "significant and durable" enough to justify an adjustment. Acquirors should consider the risk that financial results in the interim period between signing and closing could justify an award of fair value above the transaction price and should consider whether to bargain for additional protections to compensate for this risk. In particular, where there may be a long period between signing and closing, such as where antitrust approval may be lengthy, there is a greater risk of post-closing performance that would justify upward adjustments in a fair value determination.

Another important development in *HFF* was the Court's adoption of a but-for trading price methodology, to determine the upward adjustment for post-signing performance. Vice Chancellor Laster noted that he recently rejected the use of that methodology in *Bandera Master Fund LP v. Boardwalk Pipeline Partners, LP.* However, he only rejected the use of it in *Boardwalk* because there was an unreliable market price and the existence of material non-public information that the market price did not reflect. By contrast, the Court found that HFF traded in an informationally efficient market. Parties engaged in proceedings involving corporate valuation should consider whether but-for trading price would be a useful methodology. In doing so, parties should evaluate whether the company trades in an efficient market and whether there is a consistent pattern of stock price changes in response to financial results announcements.

The Court's decision is to accept the merger price as reliable despite Gibson and Thornton's conflicts of interest, which included negotiating their leadership roles in the combined company before price, is also notable. While Delaware courts are often concerned that company insiders leading negotiations will prioritize their own post-sale retention and compensation at the expense of obtaining the best price, that conflict did not render the merger price unreliable in *HFF*. *HFF* confirms that there is no single blueprint that a company must follow when negotiating a sale. However, before following HFF's path, boards should consider whether retention of personnel is an important part of the value to the potential acquirer. For companies where the value to the buyer is primarily in acquiring physical assets or intellectual property, a similar approach may result in the Court rejecting the transaction price as a reliable indicator of value (and potentially raise concerns regarding breach of fiduciary duty).

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3. If you keep the Founder's primary concerns in mind when handling negotiations and deal points, you are less likely to mishandle hot button issues. You will know what terms are likely to require the most well-thought-out approach, possible creativity, and consideration, when you are otherwise focused on getting the deal done as quickly and efficiently as possible. Keep a person with good people skills, or who has made a connection with the Founder, on the calls or in the meetings that involve the Founder, whenever you can. We can all acknowledge that the best number crunchers and document drafters among us are not always the best at that connection.

4. If you know an ask or deal point is one that is a subject of prime concern to the Founder, don't let it be one of those issues where you press for an immediate response, when immediate response is not required, just because you want to keep things moving or your client is pushing. Too much pressure on trigger issues, when timing pressure is not really critical, can turn the Founder's fears of the unknown into intransigence.

5. Keep the buzz words to a minimum, when dealing with the Founder. We Deal Makers all use buzz words to convey deal concepts in a shorthand way that other Deal Makers understand. It saves time; I get it. But remember the audience. Founders in general don't want to be googling Investopedia about waterfalls and materiality scrapes during a meeting, or to have to be asking their counsel what the people in the room are talking about. It is annoying. Yes, they do have advisors that can explain it to them, but you will likely get more respect from a Founder for direct talk than you will for using buzz words just because you can. Founders may not know deal terminology, or have deal experience in selling a business, but they know the most important thing about the situation, which is that they have something you want. Respect that, and the feeling can be mutual.

6. Founders have built something worth having or there would be no deal in the works. Although they are selling their company, it is a source of pride to them and deservedly so. You may consider it trite or obvious, but too many Deal Makers forget that Founders are humans first and sellers second, deserving of respect for what they have built and some sensitivity to the difficulties in letting it go. Remembering that can benefit both sides of the deal.

In the fast pace of M&A work, and all the technical complexities to get the mechanics of a deal done, it behooves us Deal Makers to keep human factors on the checklist.

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