Fried Frank

M&A/PE Quarterly

Fried Frank's quarterly roundup of key M&A/PE developments

Recent Delaware Decisions Indicate a Judicial Shift in Buyer Aiding and Abetting Cases and Entire Fairness Cases

Two separate emerging Delaware judicial trends suggest a shift to some degree in the courts' approaches—(i) increasing the potential for buyers to be liable for aiding and abetting sell-side breaches of fiduciary duties and (ii) increasing the potential for controller-buyers to establish that conflicted transactions meet the stringent entire fairness standard. While there is still a high bar to plaintiff success on buyer aiding and abetting claims, and still a high bar to a controller-buyer's success is establishing entire fairness, the Delaware courts' recent decisions are likely to affect results in—and thus the parties' respective leverage in negotiating settlements of—stockholder challenges to certain types of M&A transactions. Below, we discuss these developments and offer related practice points.

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Court of Chancery Again Finds a Buyer Liable for Aiding and Abetting Sell-Side Breaches of Fiduciary Duties—*Columbia Pipeline*

In *In re Columbia Pipeline* (June 30, 2023), the Delaware Court of Chancery held, in a post-trial decision, that a buyer was liable for aiding and abetting the target executives' breaches of fiduciary duties during the target's sale process. *Columbia Pipeline* follows two other recent cases—*Mindbody* (2023) and *Presidio* (2021)—in which the Court of Chancery also found the buyer liable, or (at the pleading stage) potentially liable, for aiding and abetting sell-side fiduciary breaches. In a related development, in two other cases in recent years, the court found a target's financial advisor liable for aiding and abetting target directors' or executives' breaches of fiduciary duties in a sale process—*Morrison v. Berry* (2020) and *In re Rural/Metro* (affirmed by the Delaware Supreme Court in *RBC Capital Markets v. Jervis* (2015)). These decisions stand in contrast to the courts' historic trend of virtually never holding a buyer or other third party liable for aiding and abetting sell-side fiduciary breaches.

Key Points

- **There is now increased potential for buyer aiding and abetting liability for sell-side breaches of fiduciary duties**—particularly for private equity buyers (given the greater likelihood of target executives' conflicts of interest), and particularly with respect to target breaches of the duty of disclosure in connection with the description of the sale process in the merger proxy statement.
- **Nonetheless, there is still a high bar for plaintiff success on such claims**—as a plaintiff must establish that the buyer acted with scienter, which requires showing that the buyer "knowingly participated" in the sell-side fiduciary breaches (by creating, exacerbating, or exploiting the breaches for its own benefit at the expense of the target stockholders).
- **Aiding and abetting claims will subject the buyer to the potential for:** expansive discovery demands (creating pressure to settle the claims early); liability even when the breacher has no liability (for example, due to exculpation or settlement); and joint and several liability for possibly significant damages (which may not be covered under standard insurance policies). Of note, a buyer will *not* have aiding and abetting liability for fiduciary breaches that have been "cleansed" under *Corwin* (through the target's disclosure to its stockholders).
- **Buyers should consider taking steps to mitigate the risk of aiding and abetting liability**—which could include seeking confirmation from the target that the sale process was free of breaches of fiduciary duties, and/or informing the full target board of possible sale process fiduciary breaches when the buyer becomes aware of them. (See "Practice Points" below.)

Discussion

Increased potential for buyer aiding and abetting liability. The recent cases underscore that, while a buyer has a right to seek to pay the lowest possible price achievable through arm's-length negotiations, it is not permissible for a buyer to achieve a lower price by aiding and abetting sell-side fiduciary breaches. Also, the cases serve as a reminder that, while a target board has very broad leeway

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in crafting its sale process, it is not permissible for target directors or executives to base their decisions on their personal interests rather than the interests of the target stockholders.

Three factual patterns have supported aiding and abetting claims. The court has found a buyer, or the buyer's financial advisor, liable (or, at the pleading stage, potentially liable) for aiding and abetting sell-side fiduciary breaches when it: (i) created an "informational vacuum" that led to the sale process fiduciary breaches, by concealing information from the board that was material to the sale process; (ii) "exploited" the sale process fiduciary breaches, by using for its own advantage, at the expense of the target stockholders, information that it knew was impermissibly tipped to it or favoritism toward it in the process that it knew was based on target executives' or directors' personal interests; and/or (iii) participated in breaches of the duty of disclosure by not correcting material misstatements or omissions in the target's draft merger proxy statement (when it reviewed the draft, as required under the merger agreement).

There is still a high bar to buyer aiding and abetting liability. We note that, in both *Columbia Pipeline* and *Mindbody*, the alleged fiduciary breaches were, in the court's view, blatant and persistent—the sale process was so titled in favor of the buyer over the other bidders that any experienced M&A participant would have recognized that it was not unfolding in a normal way to seek to maximize price; and, in *Presidio*, the breach involved a sell-side tip to the buyer of clearly material insider information about the sale process. Further, in these cases, the court emphasized that the buyer would not have had aiding and abetting liability but for its having *taken advantage of* the tipped information or favoritism it received, to obtain a better deal for itself at the expense of the minority stockholders. Notably, in *Columbia Pipeline*, the court stressed the totality of the circumstances, observing that the buyer had not made mere foot faults nor taken just a small number of isolated problematic actions. Rather, the court stated, the buyer had "pushed on" the target executives for months, while knowing of their conflicts based on their personal interests; had repeatedly violated the don't-ask-don't-waive provisions in its standstill agreement; and then, at the last minute, had reduced its offer price and made coercive threats, which "caused the tower of actions [the buyer] had taken over the preceding months to topple across the line of culpability."

The potential for *disclosure*-related aiding and abetting liability is particularly heightened. The court concluded in each of these three recent aiding and abetting cases that the buyer knowingly participated in the target's breach of the duty of disclosure to the target's stockholders. In each case, the court found that the buyer knew that the proxy statement omitted material information relating to the buyer's own interactions with the target in the sale process; and that the buyer participated in the disclosure violations by having reviewed the draft proxy statement (as the merger agreement required it to do) but not having corrected the omissions. Further, the court, in *Columbia Pipeline*, building on recent precedent, established a new, rebuttable presumption that stockholders rely on a public company's proxy statement disclosure when it is provided in connection with the company's seeking a vote of stockholders. With this presumption, going forward, individualized proof of reliance on merger proxy disclosure will no longer be required for rescissory damages to be awarded. (The court did not apply this new presumption in *Columbia Pipeline*—and thus held that there was not buyer aiding and abetting liability for the disclosure violations—because the issue arose at the end stage of the litigation and the court viewed it as unfair to the plaintiffs to apply the presumption because the plaintiffs would not have had the opportunity to rebut it.)

The recent cases finding buyer aiding and abetting liability:

- ***Columbia Pipeline.*** In *Columbia Pipeline*, the Court of Chancery, after trial, held the buyer liable for breaches by the target's executives of their fiduciary duties in the sale process by favoring the buyer over the other bidders for the executives' own personal reasons. Notably, the merger price represented a 32% premium; the target's board was advised by two independent financial advisors; and over 95% of the target's outstanding shares voted in favor of the merger. Vice Chancellor J. Travis Laster concluded, however, first, that the target's executives wanted a transaction with the buyer over other bidders because only the buyer's transaction would trigger their change-in-control benefits and thus enable them to retire in the near future on their desired schedule. Second, the Vice Chancellor found that the buyer had at least constructive knowledge of the breaches—because the favoritism accorded to the buyer in the sale process was blatant and persistent, such that it would have been obvious to anyone that the process was unusual and inconsistent with facilitating competition among bidders. Third, the Vice Chancellor concluded that the buyer had exploited the breaches—by repeatedly violating the don't-ask-don't-waive obligations in its standstill agreement and then, at the last minute, when no other bidders remained, and in violation of its non-disclosure agreement, lowering its offer price and making coercive threats to the target to pressure it into accepting the lower offer.

  Separately, the Vice Chancellor concluded that there were material omissions in the target's merger proxy statement, as the target's actions favoring the buyer in the sale process were not disclosed; that the buyer had knowledge of

the omissions, as they related to the buyer's own interactions with the target; and that the buyer had participated in the breaches, as it had reviewed the draft proxy statement (as required under the merger agreement) but did not correct the omissions. The Vice chancellor held that there was *not* aiding and abetting liability, however, as the plaintiffs had not proved reliance by the target's stockholders on the proxy statement disclosure. As noted, the Vice Chancellor established a new rebuttable presumption of target stockholder reliance on the proxy disclosure under these circumstances—although the new presumption was not applied in this case, and so the buyer was not held liable for aiding and abetting the disclosure violations.

(See here the Fried Frank Briefing, "Buyer Found Liable for Aiding and Abetting Target's Sale Process Fiduciary Breaches—*Columbia Pipeline*.")

- ***Mindbody.*** In *Mindbody*, the Court of Chancery, after trial, held the buyer was not liable for aiding and abetting the target CEO's breaches of fiduciary duties in the sale process, but only due to a "procedural foot fault" by the plaintiffs in asserting the claim too late in the litigation. Chancellor Kathaleen St. J. McCormick court found that, before a formal sale process began, the CEO had discussions with the buyer (a private equity firm), in which he indicated that he was tired of being a public company CEO and he wanted liquidity, a quick sale of the company, and to continue as CEO for a couple of years. At the buyer's invitation, the CEO attended a conference the buyer held annually at which the buyer trumpeted the wealth it had created for its portfolio company CEOs. Thereafter, the CEO expressed great "love" for the buyer; and for over a week did not share with the board the buyer's oral expression of interest that he received. Also, without authorization from or disclosure to the board, the target's financial advisor tipped the buyer about the minimum price the CEO expected to receive, and the CEO tipped the buyer about when a formal sale process would commence. With this information, the buyer was able to make its formal offer before other bidders could, creating a lack of competition in the sale process. The court found that the board was "in the dark"—unaware of the CEO's conflicts, the CEO being "uniquely" enamored of the buyer, and the tipping of information to the buyer, all of which significantly tilted the sale process in favor of the buyer.

  The court concluded, first, that the CEO breached his fiduciary duties in the sale process by tilting the sale process in the buyer's favor based on his personal interests; second, that the buyer had knowledge of the breaches because the CEO's favoritism toward the buyer was blatant and persistent; and, third, that the buyer had "participated" in the breaches, as it had exploited the CEO's favoritism to it for its own advantage—by repeatedly touting to the CEO the buyer's history of providing lucrative benefits to its portfolio company CEOs, "pushing" the CEO for months while knowing of his conflicts, and using the tipped information to "sprint" to make a bid before other bidders could. As noted, the court ruled that the buyer did not have aiding and abetting liability for the sale process breaches, but only because the plaintiff brought the claim too late in the litigation.

  The court did, however, hold the buyer liable for aiding and abetting the CEO's breaches of the duty of disclosure. The court concluded: that the proxy statement should have disclosed the buyer's early discussions with the CEO, as well as the fact that information was tipped to the buyer—both of which provided the buyer with significant information and timing advantages; that the buyer knew about the disclosure breaches as the omissions related to the buyer's own interactions with the CEO; and that the buyer had participated in the disclosure breaches as it had reviewed the draft proxy disclosure (as required by the merger agreement) but did not correct the omissions.

  (See here the Fried Frank Briefing, "Decision Highlights the Limits of *Corwin* (and the Benefits of a Good Process) in the Sale of a Company to a PE Buyer—*Mindbody*.")

- ***Presidio.*** In *Presidio*, at the pleading stage of litigation, the Court of Chancery found the buyer potentially liable for aiding and abetting the target CEO's and the target financial advisor's breaches of fiduciary duties in the sale process. The target CEO allegedly favored a deal with the buyer because the buyer (a private equity firm) promised to retain company management post-closing, while the competing bidder did not. After the merger agreement was signed, during the go-shop period, a competing bidder emerged with a superior offer; and the target's financial advisor (without authorization from or disclosure to the target board) tipped the buyer as to the price offered by the competing bidder. The buyer then increased its offer price to just above the competing offer, and convinced the target, in exchange for the price increase, to shorten the negotiation period specified in the go-shop for a competing bid and to more than double the applicable termination fee—all of which led to the competing bidder dropping its bid.

  Vice Chancellor Laster found it reasonable to infer, first, that the CEO, by favoring the buyer based on his personal interests, and the financial advisor, by tipping the buyer, had breached their fiduciary duties; second, that the buyer

knew about the CEO's favoritism toward it, and knew that the only information to which it was contractually entitled under the go-shop provision in the event of a competing bid was the identity of the bidder (not the price); and, third, that the buyer had participated in the breaches by taking advantage of the tipped information in formulating its revised bid and in pressuring the board to amend other terms of the merger agreement that tilted the sale process in its favor.

The Vice Chancellor also held that the buyer was potentially liable for aiding and abetting materially flawed disclosure about the sale process in the target's proxy statement. The Vice Chancellor found it reasonable to infer that: the disclosure was materially flawed, as the fact that the buyer was tipped about the competing bid's offer price was not disclosed; the buyer knew of the omissions, as they related to its own interactions with the target; and the buyer had participated in the breaches, as it had reviewed the draft proxy statement (as required under the merger agreement) but did not correct the omissions.

Notably, with respect to aiding and abetting liability and damages:

- *There may be pressure on a buyer to settle such claims early*—as the buyer may become subject to extensive discovery relating to its process in considering and effecting the acquisition, and may face Section 220 demands by its own stockholders for investigation of the corporate books and records relating to its possible wrongdoing in the acquisition process.
- *A buyer may have aiding and abetting liability even when the target directors, executives, or advisors who committed the breaches do not have liability*—for example, because the breachers were dismissed from the case by reason of being exculpated under the company's charter (as permitted under DGCL Section 102(b)(7) for breaches of the duty of care) or having settled the claims against them.
- *A buyer will* not *have aiding and abetting liability for fiduciary breaches that have been "cleansed" under* Corwin—as *Corwin* cleansing (through approval of the transaction by an independent special committee *and* the minority stockholders in a fully informed vote) eliminates the underlying fiduciary breaches.
- *Aiding and abetting liability is joint and several with the breaching parties*—thus, depending on the circumstances, the buyer potentially could be liable for the full amount of damages for the sell-side fiduciary breaches.
- *Aiding and abetting damages can be significant*—the court has indicated that the calculation of damages when there is buyer aiding and abetting liability may be based on the difference between the merger price and what the merger price likely would have been absent the fiduciary breaches. In *Columbia Pipeline*, the court rejected the plaintiffs' request for recissory damages of $3 billion based on the disclosure violations given the plaintiffs' failure to establish reliance by the target stockholders on the merger proxy disclosure. Instead, based on the *non*-disclosure-related sale process fiduciary breaches, the court awarded damages of $1 per share, which amounted to more than $400 million—about 3% of the $13 billion aggregate merger price. However, as noted, the court created a rebuttable presumption of reliance that will apply in future cases, making recissory damages more likely.
- *A buyer may not be insured for aiding and abetting liability risk*—as standard insurance policies covering public companies frequently do not cover such risk.

Practice Points relating to buyer aiding and abetting liability:

- **A bidder should be wary of potential sell-side breaches of which it becomes aware**—for example, notable favoritism toward it in a sale process; back-channel communications with the bidder or its advisors by the target's directors, executives or advisors; receiving "tipped" information about the sale process or the other bidders; and/or other actions that appear to be inconsistent with a good faith sale process.
- **If a bidder becomes aware of possible sell-side fiduciary breaches, it should consider taking steps to mitigate the potential for buyer aiding and abetting liability.** Of course, a bidder does not have responsibility for, nor an obligation to conduct due diligence on, a target's sale process. However, if a bidder becomes aware of potential sell-side fiduciary breaches, the bidder should consider whether to seek to mitigate the risk of becoming liable for aiding and abetting them—by, for example, before it enters into the merger agreement, seeking confirmation from the target board that the process has been conducted in good faith and consistent with fiduciary duties, and/or, at the time it becomes aware of possible fiduciary breaches, informing the target board about them.
- **A bidder (especially a private equity bidder) should be sensitive to potential conflicts of interest of sell-side directors and executives.** If the bidder knows of sell-side conflicts of interest about which the target board may

not have knowledge, the bidder should consider informing the board and/or seeking appropriate confirmations from management or the board that the board is aware of and has addressed such conflicts. Private equity bidders in particular should be careful with respect to potential conflicts of interest of target executives who (as would be typical) may seek to continue in their employment post-closing and/or to roll-over their equity in the transaction. While a bidder can and should seek to foster a good relationship with a target's management team, it should ensure that all material facts, communications and developments in that respect are disclosed to the target board during the sale process and then to the target stockholders in the target's merger proxy statement. Such disclosure not only cleanses any related sale process fiduciary breaches by target directors (under *Corwin*), but reduces the risk of buyer aiding and abetting liability. A bidder should be alert to indications from a target CEO, founders, or other executives that they have a strong desire for a deal for personal reasons (such as to obtain liquidity, to trigger change-in-control benefits, or to obtain post-closing employment or other benefits).

- **A bidder should not "exploit" sell-side conflicts or fiduciary breaches.** If a bidder believes that target directors, officers or advisors have conflicts of interest or may be breaching their fiduciary duties in the sale process, the buyer should not take advantage of the breaches for its own benefit. A bidder's exploitation of sell-side breaches of fiduciary duties could include, for example, the bidder, in response to the breaches, "sprinting" to bid before other bidders can in order to shut out competition; lowering its offer price (particularly if at the last minute in the sale process when no other bidders remain); violating its standstill (or other similar) obligations; seeking to appeal to the target directors' or officers' personal interests; or making coercive threats. Also, a buyer should not, in its internal communications (including emails and texts), whether before, during or after a transaction, trumpet intentions or success based on target or buyer interests other than those with appropriate business rationales (for example, a buyer should not suggest that it will succeed or has succeeded by leveraging personal relationships with the target or exploiting target conflicts or sale process flaws). It bears constant repeating that emails, texts and other communications, whether formal or informal, should be drafted with care—and it should be assumed that they may become publicly available through litigation.
- **A buyer should understand the implications of its obligation under the merger agreement to review the target's draft proxy statement disclosure—and the "cleansing" effect of disclosure.** While the proxy statement is the target's document, a buyer's review of the draft (as is typically required under the merger agreement) should not be performed in a cursory or *pro forma* matter, but with extreme care. Every person acting for the buyer who played a substantial role in the sale process should be involved in the review; should be advised of the significant effects of material misstatements or omissions (including possible aiding and abetting liability for the buyer); and should be advised that, although there is a natural human reluctance to disclose sale process flaws the proxy statement provides a last-chance opportunity, under *Corwin*, to "cleanse" sale process flaws by disclosing them. The buyer should not only read the proxy statement, but should advise the target as to where, in the buyer's view, there is material information that is misstated or omitted. While the focus of the buyer's review will be on the "Background" section, and in particular on the buyer's own interactions with the target, the buyer may wish to consider making comments on other matters in addition to the extent that it has knowledge that they are or may be materially false or misleading. In addition, a buyer, when negotiating the merger agreement, should consider whether to seek to limit, or to specifically delineate, its obligation to review the proxy disclosure—such as by stating that its obligation to make comments or suggest corrections will be limited to those topics that expressly relate to its own interactions with the target in the sale process.
- **A buyer should consider whether it is adequately insured for potential aiding and abetting liability.** As noted, standard insurance policies issued to public companies may not cover aiding and abetting liability risk.
- **A target's directors, executives and advisors should not favor a particular bidder in the sale process based on personal (rather than corporate) interests.** The board, at the outset of a sale process and then on a regular basis, should proactively determine whether directors, officers, advisors, or others with a significant role in the process, have a conflict of interest. A board should recognize that, even when, for example, a CEO holds a significant amount of target company stock, that does not automatically align the CEO's interests with those of the stockholders. The CEO may have (or ultimately be perceived by a court as having had) an overriding interest in obtaining liquidity, triggering change-in-control benefits, obtaining post-closing employment or other benefits from the buyer, and so on. A board should act to safeguard the process from conflicts—for example, by removing the conflicted person from the process or more formally overseeing the conflicted person's role. Target directors and executives should not favor a specific bidder in a sale process based on their personal reasons. Importantly, a record should be maintained (for example, in

meeting minutes or supplements thereto) of any acts taken that significantly favor, or provide other special treatment for, particular bidders, together with the specific *corporate* reasons therefor.

- **A target's directors, executives and advisors should not take the following types of actions, unless there is a clearly articulated and recorded *corporate* reason therefor** (as, at least in combination, these may lead the court to find sell-side breaches of fiduciary duties in a sale process): tipping material information to a bidder or its advisors; engaging in one-off or back-channel communications (*i.e.*, communications outside the formal process established by the target's board or special committee) with a bidder or its advisors; providing to a particular bidder more extensive or different due diligence materials, or providing due diligence materials on a faster time schedule, than is provided to other bidders; permitting a bidder to violate its standstill agreement (or similar) obligations, without permitting the other bidders to do so; extending a bidder's exclusivity when inquiries are being received from potential competing bidders; conveying to a bidder that the target is eager to sell; conveying to a bidder that the executives are seeking a quick sale or a sale that would trigger their change of control benefits; conveying to a bidder that the bidder will not face competition in the process; acceding too readily to a bidder's decreasing its offer price; or not countering at all a buyer's last-minute decrease of its offer price.

Delaware Supreme Court Affirms Conflicted Transaction Satisfied "Entire Fairness," Despite Serious Sale Process Flaws—*BGC Partners*

In *In re BGC Partners* (Aug. 10, 2023), the Delaware Supreme Court, in an *en banc* decision, without commentary, affirmed the Court of Chancery's post-trial decision (Aug. 19, 2022) holding that the acquisition of a company indirectly controlled by the buyer's controller met the entire fairness standard—notably, notwithstanding the lower court's finding that there were serious flaws in the sale process. *BGC Partners* follows two other decisions in recent years in which the Court of Chancery also has found entire fairness satisfied in conflicted-controller transactions despite serious flaws in the transaction process—*Hsu Living Trust v. Oak Hill* (2020) and *ACP Master v. Sprint/Clearwater* (2017). These decisions stand in contrast to the Delaware courts' historic trend of virtually never finding, when the entire fairness standard applies, that it has been satisfied.

Key Points

- **There is now increased potential for a buyer to establish that a transaction meets the stringent "entire fairness" standard—even if the sale process was seriously flawed.** *BGC Partners* furthers the court's evolution toward an emphasis on the fairness of the price over the fairness of the process in the "unitary" entire fairness analysis. Notwithstanding this evolution, however, in our view, even after *BGC Partners*, in the event of a clearly materially unfair price *or* process, it would be unlikely that the court would find entire fairness satisfied.
- **There is still a high bar to establishing entire fairness**—in each of the recent decisions, the court found that, although there were serious process flaws, there was strong evidence that the special committee and its advisors *had functioned effectively* and had achieved a fair price.
- **Buyers should consider taking certain steps to maximize the potential of a finding of entire fairness**—see "Practice Points" below.

Discussion

Increased potential for a buyer to establish "entire fairness," even of a transaction in which the sale process was seriously flawed. *BGC Partners* involved an acquiror and target that both were indirectly owned by the same controller. A special committee of the acquiror's board, comprised of the four outside directors, approved the acquisition. Minority stockholders of the acquiror brought suit, alleging that the controller had presented the transaction as a "fait accompli" and had caused the acquiror to overpay because the controller owned a far larger stake in the target than in the acquiror. The court rejected the defendants' motion to dismiss at the pleading stage; and also rejected a shift of the burden of proof to the plaintiffs given uncertainty about the independence of the special committee members. After trial, Vice Chancellor Lori Will found that there were serious process flaws—the controller having identified the financial advisors for the special committee, having asked the committee's co-chairs to serve, and having engaged in "one-off" discussions about the transaction with a member of the committee. The Vice Chancellor concluded, however, that the transaction nonetheless met the entire fairness standard. The Vice Chancellor determined that the special committee members were independent,

and emphasized that the committee had negotiated the price paid and that the price was within the range of fairness as determined by the committee's financial advisor.

Historically, application of the entire fairness standard was outcome-determinative in favor of plaintiffs challenging a conflicted transaction. Entire fairness, which is Delaware's most exacting standard of judicial review, is applicable to transactions involving a conflicted controller or conflicted board of directors (unless the *MFW* prerequisites for business judgment review were met). For a transaction to meet the entire fairness test, the court conducts a "unitary" analysis to determine if there was *both* a "fair price" *and* a "fair process." As the standard requires intensive factual inquiries into both the economics of the transaction and the process leading to the transaction, a determination by the court at the pleading stage that entire fairness is the applicable standard has usually led to prompt settlement by the parties given the near impossibility of meeting the standard.

The court's entire fairness jurisprudence has been evolving toward an emphasis on fairness of the price over fairness of the process. As the parameters for the entire fairness analysis have evolved in recent years, the Court of Chancery has indicated an inclination to elevate the "price" prong of the analysis over the "process" prong, reasoning that the purpose of a fair process is simply to arrive at a fair price. At the same time, however, the court generally has emphasized the unlikelihood of arriving at a fair price *without* a fair process—and thus generally has found entire fairness not satisfied when there were indications that the price was fair but there were serious flaws in the process. *BGC Partners* reinforces the emphasis on price over process in the analysis. The court stated: "Price…is often the paramount consideration because procedural aspects of the deal are circumstantial evidence of whether the price is fair."

A board should not underestimate the critical importance of a fair process in the entire fairness analysis, however. Of note, in *BGC Partners*, the Court of Chancery found that, notwithstanding the apparently significant process flaws, the special committee *had functioned effectively* on behalf of the minority stockholders. The court wrote: "[There was] no evidence that th[e] problems [with the process] rendered the process unfair." The court noted that the controller's over-involvement had occurred at the early stages of the process and that he had separated himself from the process once the special committee was formed and functioning. Further, the court concluded that the committee and its advisors were independent of the controller; were fully informed (with all of their diligence requests having been met); had worked tirelessly and "bargained hard" for the minority stockholders, over a period of several months; had successfully "pushed back" against the controller on certain points (including timing of the process); and ultimately had achieved a structure and price that were fair to the minority stockholders.

Other conflicted-controller cases in which the court has found entire fairness satisfied despite serious flaws in the sale process have involved unusual fact situations.

- In *Hsu v. Oak Hill* (2020), the court applied the entire fairness standard to a controller's and its board designee's decision to pursue a cash-accumulation strategy in anticipation of redeeming the controller's preferred shares, rather than investing in the company's business for long-term growth for the possible benefit of the common stockholders. In a post-trial decision, the court found that, although an independent special committee had been utilized, the members were subject to subtle influence of the controller that undermined their independence. The court emphasized, however, the price aspect of entire fairness and found that, because the defendants proved that a growth strategy likely would not have been successful, what the common stockholders received (which was zero) was the same as what they would have received had a different strategy been pursued. Although the process raised concerns, the court noted that the controller "spent countless hours" working to enhance the value of the company and, as the majority stockholder, had a "counterbalancing incentive not to harm the value of the common stock." (We note also an earlier case, *In re Trados* (2013), which involved a similar rationale for a finding of entire fairness despite process flaws. The court stressed that the value per share that the common stockholders received in the conflicted-controller merger (zero) was equal to the value of the common stock prior to the merger (zero).)
- In *ACP Master v. Sprint/Clearwire* (2018), the court, in a post-trial decision, held that a presumed controller's cash-out merger was entirely fair. Although the court found serious flaws with the process, the court emphasized that the price ultimately achieved "exceeded wildly" what the board had expected could be achieved. In this case, the flaws occurred early in the process, before a competing bid emerged that led to a renegotiation and ultimately the higher price that was achieved. Moreover, the court viewed the special committee as having taken their responsibilities seriously and having bargained at arm's length; and sophisticated stockholders with deep knowledge of the company's business had agreed to sell their shares even at the initial, lower price. (Notably, in the related appraisal action, the court determined that the appraised value of the dissenting shares was less than half the deal price.)

Practice Points relating to entire fairness:

- **A controller should consider the benefits of the *MFW* framework when structuring a proposed transaction.** *MFW* provides for business judgment review (Delaware's most deferential standard of review) of conflicted-controller or conflicted-board transactions when, from the outset of negotiations, the transaction was conditioned on approval by a special committee of independent directors and by the minority stockholders. A controller may decide to forego the business judgment rule protections available under *MFW* because the controller does not want to subject the transaction to the uncertainty of a vote by the minority stockholders. Compliance with *either* of the two *MFW* prerequisites (for example, approval by a clearly independent special committee but not by the minority stockholders), while not providing business judgment review, shifts the burden of proof under the entire fairness standard to the plaintiffs (so that they must prove the transaction was unfair, rather than the defendants having to prove that the transaction was fair).
- **In cases in which the entire fairness standard is applied, dismissal at the pleading stage is highly unlikely given the highly facts-intensive nature of the entire fairness inquiry.** The possibility of dismissal at the pleading stage may be maximized (or at least the burden of proof may be shifted to the plaintiffs to prove unfairness)—and thus the parties' respective negotiating leverage may be affected—when a clearly independent special committee, advised by independent and experienced advisors, considered and negotiated the transaction and maintained a clear record establishing the committee's effective functioning and fairness of the price. *BGC Partners* highlights that, even if claims are not dismissed at the pleading stage, entire fairness may be proved at trial (albeit after what is likely to be protracted, expensive and distracting litigation).
- **A special committee should be actively engaged and a record of its efforts should be maintained.** Committee members should ask questions, request information, keep abreast of process developments, and so on. These efforts should be documented, for example in the committee's meeting minutes (which can also reflect information provided or actions taken outside of the committee's meetings). A special committee should "push back" against the controller in negotiating the transaction on behalf of the minority stockholders and, most importantly, should be prepared to "say no" to a transaction if it is not fair to the minority stockholders.
- **Special committee members should be independent of the controller.** In selecting members of a special committee, the board should be mindful that even outside directors may be viewed by the court as non-independent if they are "beholden" to, or otherwise subject to the influence of, the controller. A controller should consider having at least one or more unquestionably independent directors on the board so that a special committee, if needed, can be formed that will be clearly independent. In *BGC*, although there were issues about the independence of some of the outside directors, the court ultimately found them to be independent—perhaps, we surmise, at least in part due to their particularly distinguished credentials (which the court detailed in its opinion). Efforts should be made, where possible, to document the independence of outside directors so that an appropriate determination can be made at the early pleading stage of litigation. For example, consideration should be given to reflecting in committee minutes that directors (especially those as to whom there could be some question about independence) were deeply engaged, asked questions, sought information, and at times "pushed back" against the controller's interests or requests.
- **A controller should not seek to influence a special committee's work.** A controller should remove himself from the process to maintain the independence of the committee. Such removal would involve not only abstaining from voting on the transaction at issue, but also not attending board or committee meetings at which the transaction is discussed, not engaging in one-off discussions about the transaction with committee or board members, and not participating in the process of selecting advisors to or chairs of the committee.
- **However, a controller's involvement to some degree in the process is not necessarily fatal to satisfying the entire fairness standard.** For example, if the controller played a role in selecting or recommending the committee's advisors, then the committee, once fully empowered, should itself reconsider the selection of advisors and choose for itself (and, if it reaffirms the controller's selection or recommendation, the reasons for the committee's judgment should be documented). If the controller engaged in one-off discussions with members of the special committee, the discussions should be reported to the full committee, the committee should consider reporting the discussions to the full board, and the committee should consider whether any actions should be taken to counteract any disadvantages to the process resulting from the discussions and to prevent further such discussions. At times, there may be a special need for a controller's involvement (due to, for example, special knowledge about the company or a counterparty's insistence on the involvement). In these situations, the special committee should consider whether the controller's involvement will

outweigh concerns about the conflicts. The committee should consider the extent to which the controller's interests may be unaligned with the interests of the other stockholders with respect to the transaction, and what actions can be taken to seek to manage the conflicts, including the committee's active and effective overseeing of the process. Such actions could include establishing specified parameters for the controller's role (such as limiting the role so that it does not include, say, price negotiations), and/or having a special committee member join the controller in any discussions (or in any discussions that relate to specified topics).

- **A special committee and its financial advisor should consider the benefits of a "detailed" fairness opinion.** In *BGC Partners*, the court's determination that the merger price was fair was based largely on its being "in line with what [BGC's] financial advisor determined to be appropriate…[in] a detailed fairness opinion" that was delivered "after more than a month of additional due diligence" by the banker. (The court also stressed that the price "was forged in the crucible of objective market reality," coming after "months of arm's length negotiations.")

Important MFW Developments

The *MFW* framework provides a pathway to business judgment review, rather than entire fairness review, of transactions involving a conflicted controller or a conflicted board (*i.e.*, where a controller, or a majority of the board, has a personal interest in or will receive a non-ratable benefit from the transaction). The *MWF* prerequisites for business judgment review of such a transaction are that the transaction was, from the outset, conditioned on approval by *both* (i) an independent special committee of directors that fulfilled its duty of care *and* (ii) a majority of the unaffiliated stockholders in a fully informed, uncoerced vote. If such a transaction is challenged, and the *MFW* prerequisites were met, then any fiduciary breaches by the controller or directors are "cleansed"—with the result that any claims of breach of fiduciary duties are dismissed at the early pleading stage of litigation.

Delaware Supreme Court Considers Eliminating *MFW* Prerequisites for Business Judgment Review of Conflicted Transactions Other than in the Squeeze-Out Merger Context—*Match Group*

Since *MFW* was affirmed by the Delaware Supreme Court in 2014, the Delaware courts have expanded the doctrine to apply to a broad variety of conflicted transactions, both within and outside the M&A/PE context. In various cases, the court has applied the *MFW* framework to, for example, a reverse spin-off initiated by a controller, a de-SPAC merger, a charter amendment that prolonged a company's dual class structure, a redemption of tracking stock, consulting arrangements with a controller, and a compensation package for a controller. Then-Chancellor Bouchard, applying *MFW* to a stock reclassification (in *Ahmed v. Crane* (2017)), stated that there was "no principled basis on which to conclude that the dual protections in the *MFW* framework should apply to squeeze-out mergers but not to other forms of controller transactions." In the Court of Chancery's 2022 *Match Group* decision, Vice Chancellor Zurn observed that, with each new application of *MFW*, the Delaware courts offer "incentive for controllers to embrace the procedural approach most favorable to minority investors, with the incentive of obtaining the protection of the business judgment rule standard of review."

Recently, however, a debate has emerged as to whether the *MFW* prerequisites should have to be met to cleanse fiduciary breaches in *all* conflicted transactions (as has been the case), or whether the *MFW* prerequisites for cleansing fiduciary breaches should be required only in going private mergers (so-called squeeze-out mergers), which was the context in which *MFW* itself was decided—and all other types of conflicted transactions should be subject to business judgment review without compliance with *MFW* so long as the merger was approved either by the independent directors or the minority stockholders.

This narrower approach to *MFW* applicability was advocated in a 2021 article by Delaware law experts Lawrence Hamermesh (Professor of Law at University of Pennsylvania), Jack B. Jacobs (former Chief Justice of the Delaware Supreme Court), and Leo E. Strine, Jr. (former Chancellor of the Court of Chancery). The authors concede that fiduciary breaches in a controller's freeze-out merger should be subject to the higher *MFW* standards because, in such a transaction (in which a controlling stockholder acquires complete ownership of the company), by definition, the controller benefits at the expense and to the exclusion of the minority stockholders. In this context, "the dangers of overreaching are particularly grave" and it makes sense to apply the *MFW* prerequisites which replicate the protections afforded to stockholders in a third-party arms-length merger. However, they argue, in today's world, with primarily institutional stockholders, sophisticated independent directors, and robust disclosure requirements, outside the controller freeze-out context, *MFW* procedures are

not necessary to protect minority stockholders from a controller's influence or conflicts, and *either* independent directors' *or* minority stockholders' approval should be sufficient to invoke business judgment review.

In a significant recent development, the Delaware Supreme Court, *sua sponte*, requested that parties in the appeal of the Court of Chancery's decision in *In re Match Group* brief for the Supreme Court the issue whether *MFW* should apply to all conflicted controller transactions or only to squeeze-out mergers. In the litigation below, Vice Chancellor Morgan T. Zurn had held that the *MFW* prerequisites were satisfied in the challenged reverse spinoff in which the controller allegedly obtained a non-ratable benefit—and she thus applied business judgment review and dismissed the case. On appeal, the Supreme Court, conceding that the parties had waived this very issue in the litigation below, stated that it was requesting briefing on this issue because "resolving the issue…is in the interests of justice to provide certainty to boards and their advisors who look to Delaware law to manage their business affairs."

We note the following:

- *Open issue for now*. Pending the Supreme Court's decision in *Match Group*, the court may now question in stockholder challenges to conflicted-controller transactions whether *MFW* cleansing applies in a non-squeeze-out context—or, instead, business judgment standard applies so long as the transaction was approved by the independent directors *or* the minority stockholders.
- *Context matters when the court determines* MFW *applicability*. We note that, when *MFW* potentially applies, the Court of Chancery must make numerous relatively subjective determinations in concluding whether the *MFW* prerequisites have been met. As a court of equity, the Court of Chancery takes into account the overall factual context when making its determinations. When the facts and circumstances enerally suggest exploitation of the minority stockholders (or, conversely, suggest a good faith effort and hard work on behalf of the minority stockholders), these will tend to influence the court's conclusions as to whether, for example, the directors were independent of the controller; the controller did not exert influence that tainted the process; the approval conditions were in place from "the outset"; the special committee functioned effectively; the disclosure was sufficient for a "fully informed" stockholder vote; the vote was not subject to implicit coercion; and so on. That said, we note that *even* when *MFW* has been applied, some cases involving apparently egregious fact situations have passed judicial muster (see, for example, the discussion of *BridgeBio* below).
- *Reincorporation in Nevada*. There has been much public commentary over the reincorporation of some Delaware companies to Nevada—a state that has sometimes been referred to as the "legal wild West" for, among other things, its more permissive standards of review for conflicted controller transactions. Elon Musk (the controller of Twitter and other companies) recently reincorporated Twitter (now X Corp.) in Nevada following results unfavorable to him in various Delaware litigations. The controller of TripAdvisor has also stated that he is reincorporating his companies in Nevada, explicitly for the purpose of being able to engage in transactions with his companies under less stringent standards than afforded under Delaware law. While Nevada may attract some number of controlled companies, we do not expect non-controlled companies to seek to leave Delaware given the unlikelihood of stockholder approval for such a move. Moreover, any company reincorporating to Nevada would be foregoing the benefits provided by Delaware's established and expansive body of corporate law and highly specialized and sophisticated judiciary.

A Board's Ignoring a Superior Competing Offer Does Not Defeat Business Judgment Review for a Merger Approved Under the *MFW* Framework—*Smart Local Union v. BridgeBio Pharma*

The Delaware Supreme Court, in a decision issued August 9, 2023, affirmed the Court of Chancery's decision, in *Smart Local Unions & Councils Pension Fund v. BridgeBio Pharma, Inc*. (Dec. 29, 2022), that a conflicted controller merger satisfied the *MFW* prerequisites for business judgment review (leading to dismissal of the plaintiffs' claims), even though a credible competing bidder made a substantially higher offer than that made by the controller and that bid was rejected by the controller and not considered by the board. The Supreme Court's one-page decision, without commentary, upheld the dismissal based on the reasoning set forth in the lower court's opinion.

The case reinforces that Delaware law does not require a controlling stockholder to accept a sale of the company or the controller's shares to a third party. The court of Chancery had expressly rejected the plaintiff's policy argument that business judgment review under MFW should never be applicable where a bid superior to the controller's is made and the

controller refuses to sell. The decision clarifies that such a refusal by a controller does not preclude business judgment review of the controller's transaction under the *MFW* framework.

The court then found that the *MFW* prerequisites were satisfied—that is, the controller's transaction had been approved by an effectively functioning independent committee and by the stockholders unaffiliated with the controller in a fully informed and uncoerced vote. Therefore, business judgment review applied and the plaintiff's claims were dismissed.

The court rejected the plaintiff's argument that the special committee's failing to pursue the competing bid and accepting the controller's lower priced bid indicated that the committee had not fulfilled its fiduciary duties in the sale process. The court observed that the special committee had responded to the competing bidder's proposals, had pushed the controller to consider selling its shares, and had caused the full board to discuss the proposals. The court also rejected the plaintiff's argument that the disclosure to stockholders was inadequate as the competing bidder's identity was not revealed. The court noted that the disclosure informed the stockholders that the competing bidder was a bona fide purchaser that could close the transaction and that its bid was superior to the controller's offer. Finally, the court rejected the plaintiff's argument that the minority stockholders' vote was subject to situational coercion. The court stated that, in this case, the target was not a distressed company and had other viable alternatives to the controller's proposed merger, and the status quo was not so "undesirable or unpleasant" that it forced the minority stockholders to vote for the merger.

Other Developments of Interest

Delaware Supreme Court Affirms Invalidation of "Conclusive and Binding" Charter Provision for Good Faith Board Determinations—*CCSB Financial v. Totta*

In *CCSB Financial Corp. v. Totta* (Jul. 19, 2023), the Delaware Supreme Court affirmed the Court of Chancery's post-trial decision that, although a corporation's charter provided that certain determinations made by the board in good faith were to be conclusive and binding, the determinations nonetheless were subject to judicial review for the directors' compliance with their fiduciary duty of loyalty. The charter capped at 10% the stock that could be voted by any stockholder or group of stockholders acting in concert, with the board's determinations as to whether stockholders were acting in concert to be conclusive and binding so long as made in good faith based on reasonably available information. The board determined that certain stockholders were acting in concert and capped their combined vote at 10%, which defeated the election of three insurgent directors to the staggered board. The Court of Chancery determined that the stockholders were not acting in concert and the votes therefore should not have been restricted. The Delaware Supreme Court explained that, in this context, the Court of Chancery must, as it did, first, review the claim first to test the legality of the board's action under the charter and, second, to apply enhanced scrutiny review. The Supreme Court reasoned that the conclusive-and-binding provision was inconsistent with DGCL Section 102(b)(7) as it effectively exculpated directors for breaches of the duty of loyalty. The Supreme Court wrote that the provision "would render any breach of the duty of loyalty relating to a self-dealing transaction beyod the reach of a court to remedy by way of damages." While such a provision could be included in an LLC's or partnership's organizing documents, "where freedom of contract is the guiding and overriding principle," it was prohibited, by statute and public policy, in a corporate charter, the Supreme Court stated. The Supreme Court also affirmed that the insurgents' efforts in obtaining a judicial construction of the charter provision constituted a corporate benefit and therefore they were entitled to be reimbursed for their attorneys' fees and expenses.

An Arbitration Award May Be Judicially Upheld Even if the Award and the Arbitration Process Were Clearly Flawed—*Evolve Growth v. Equilibrium Health*

In *Evolve Growth Initiatives v. Equilibrium Health* (July 26, 2023), the Delaware Court of Chancery refused to overturn an arbitration award although the court found that the arbitration proceeding and the resulting award were flawed. The court emphasized the "narrow window of judicial oversight" when parties agree to arbitration to resolve disputes. Indeed, the court stated that "[a]rbitral awards are nearly impervious to judicial oversight." Parties agreeing to binding arbitration thus take a risk that an arbitration decision they receive may be "questionable under the law and facts" but will nonetheless be "not reviewable."

In *Evolve Growth*, purchasers of a health care company brought suit against the sellers, and a "seller representative" that had been granted power of attorney for the sellers, claiming that misrepresentations had been made during the sale process. The seller representative owned one of the sellers, but was not a party to the purchase agreement and only

the sellers had made representations and warranties in the purchase agreement. The purchase agreement specifically provided that the seller representative would have no liability except in cases of fraud, intentional misconduct or gross negligence. The purchase agreement provided that any disputes would be resolved through binding arbitration.

The seller representative initially sought a declaratory judgment that the claims against him were not arbitrable, but he ultimately consented to arbitration. In the arbitration, the parties' focus was on the alleged breach of the representations and warranties in the purchase agreement (and not on the purchasers' intentional fraud and gross negligence claims). The issue whether the seller representative could be liable for the contract claims although he was not a signatory to the agreement was not raised by any party in the arbitration. Of note, in the arbitration, the parties requested a "reasoned award lite" (rather than a full reasoned award that would set forth the grounds for the award in some detail).

The final arbitration order found all of the defendants jointly and severally liable for breaches of the representations and warranties in the purchase agreement. The order did not mention that the seller representative was not a party to the purchase agreement.

In reviewing the arbitration award, Vice Chancellor Glasscock stated that, unlike in the case of an appellate court reviewing lower court decisions, "[q]uestionable legal support or a misreading of the law alone are insufficient to vacate an arbitration award." The Vice Chancellor noted that the seller representative failed to raise as a defense in the arbitration proceeding lack of contractual liability for simple representation and warranty breaches. Further, the Vice Chancellor stated, the seller representative knew or should have known that the claims before the arbitrators included alleged fraud and misrepresentations that could support his liability. The Vice Chancellor explained that, although there were no findings stated in the arbitration award that the seller representative had acted intentionally or with gross negligence, the Vice Chancellor could not determine from the "lite" reasoned award whether the seller representative had been found liable under the fraud or gross negligence theories. As the court could not determine with certainty that the arbitrator had *not* reached such a finding, the court could not set aside the award.

The case highlights that, when parties agree to resolution of disputes by arbitration, and agree to limited review of such an award, and particularly when they then request a "lite" reasoned award, the court generally will not disregard the parties' agreement—potentially even if the arbitration award reflects clear error, so long as there is some basis in the record on which the award may be justified. Parties should consider carefully the benefits and disadvantages of agreeing to arbitration; state clearly the legal standards and other parameters governing the arbitration, as well as review of the award; keep in mind the potential pitfalls of requesting a "lite" (instead of full) reasoned arbitration award; and assert, or respond to, all claims made in an arbitration proceeding. We also note that, as always in the Court of Chancery, the overall factual context matters—in this case, the court observed that the arbitration award indicated "[a] compelling picture of intentionality support[ing] a finding of fraud, intentional misconduct or gross negligence."

Company that Acted Egregiously in Denying LLC Manager's Access to Books and Records Must Pay His Litigation Fees—*Bruckel v. TAUC Holdings*

In *Bruckel v. TAUC Holdings, LLC* (July 17, 2023), the manager of an LLC, who was one of the LLC's co-founders, sought inspection of books and records of the company to which he was entitled under the Delaware LLC Act and the LLC's operating agreement. His demand was made following "extreme disdain" between him and the other managers of the LLC, which "impeded necessary information between the two managerial factions." The company resisted providing access to the LLC's books and records both during the trial and afterward.

The Court of Chancery found that: (i) the manager had "unfettered rights" to the books and records the company had withheld; (ii) the company failed to identify whether formal board materials existed; (iii) the company "altered the way the board function[ed] in an attempt to duck the company's production obligations"—by ceasing to meet as a full group and, instead, over sixty times during the trial, holding "weekly group updates," in which the CEO and other managers would meet as a subgroup to manage the LLC, but would "rotate out one participant to avoid the appearance they were holding board meetings without the Plaintiff"; (iv) the company "manufactur[ed] weeks-long delays" in conveying books and records"; (v) the company "overdesignated documents and communications as privileged"; and (vi) the company was in contempt of orders the court issued in the case.

The court appointed a receiver to produce the documents and granted only a limited privilege waiver. Most notably, the court ordered that the manager's fees incurred in the action be shifted to the company, in light of the company's egregious conduct.

Chancery Declines to Order a Buyer to Close a de-SPAC Merger with a Non-U.S. Target—*26 Capital Acquisition v. Tiger Resort Asia*

The Court of Chancery rejected a SPAC's request that the court order specific performance by the buyer to close the parties' agreed $2.6 billion de-SPAC merger that would have taken a Philippine resort casino public. Although the merger agreement provided for specific performance, and the court assumed for purposes of its decision both that the buyer had not fulfilled its merger agreement obligation to use best efforts to close and that the target was ready, willing and able to close, the court exercised its discretion not to grant specific performance. "The existence of [a specific performance] provision [in a merger agreement] is sufficient to support a decree of specific performance but does not mandate its issuance," Vice Chancellor Laster explained.

While specific performance would be awarded if this were a domestic transaction, the Vice Chancellor would not order it in this case where "the target is a Philippine corporation that owns a casino in Manila," the parties were neither domiciled nor had significant assets in the U.S., and the parties were unable to identify "any sanction [to noncompliance with a specific performance order by the court] that could be deployed effectively in the Philippines."

In addition to considerations relating to difficulties involving jurisdictional, enforcement, and political issues with respect to the Philippines, the Vice Chancellor cited additional problematic features in granting specific performance. First, specific performance may be inappropriate where the tasks that must be completed in order to close are complex. Here, the principal tasks remaining were preparation of audited financial statements and filing a registration statement for the shares that would be issued. These would not ordinarily, in the domestic context, be viewed as so complex as to counsel against a decree of specific performance, but in this case "dealing with the SEC will be more complex than usual, because the transaction does not contemplate the issuance of securities by an already listed domestic issuer, or even a domestic entity." Further, the registration statement would have to "address the securities of a Philippine corporation engaged in the gaming industry, which suffered a forcible takeover last year, and which has a history of internal corporate governance issues," with those governance problems exacerbated "as a result of [a] dodgy bargain" involving interference by a senior political official in the Philippines that enabled the casino's controller to regain control. The Vice Chancellor observed that it would be "awkward, to say the least, to craft disclosures that truthfully describe" that situation, which included, among other problematic features, the controller having "delivered an item to [the government official] to secure his intervention in [the controller]'s favor."

In addition, the merger was potentially tainted by a $2.5 million investment in the SPAC by a New York hedge fund, as the hedge fund had been retained as an advisor to the casino and purported to be working in the casino's interest but in reality was working behind the scenes on the SPAC's behalf. The Vice Chancellor stated that the hedge fund and the SPAC had t"acted as partners to gain and exploit their inequitable advantage over [the target; and had] concealed their relationship and misled [the target] about its existence," and they were "exceedingly aggressive, demonstrated terrible judgment, knew about the dodgy bargain, and engaged in other questionable transactions of their own"—all, "the type of conduct that should not be rewarded with a decree of specific performance." The Vice Chancellor noted that the SPAC had attempted to disclaim responsibility for the hedge fund's actions, "but the SPAC and the hedge fund worked as partners," he wrote. "The SPAC kept the hedge fund's double-dealing secret and lied about its relationship to the hedge fund." Although the SPAC's stockholders were potentially damaged, they "cannot truly claim the status of innocent victims," as they had "signed up for the ride." If, however, "they think they have claims [(such as for damages)] against…members of [the SPAC]'s management, then they can bring them," the Vice Chancellor wrote.

The court has scheduled a second phase of the trial to determine damages arising from the broken deal.

SEC Discloses Its Process for Selecting Which Investment Advisers to Examine

On September 6, 2023, the SEC's Division of Examinations issued an alert describing its process for which SEC-registered investment adviser firms it decides to examine, how it determines the focus areas of an examination, and what documents it typically requests from the firms being examined.

The Division stated that the information is being provided to assist investment adviser firms in their compliance efforts. The alert states that an adviser may be selected, and the focus of examinations may be determined, may be selected, for example, for firm-specific reasons; to respond to market events and risks; or to assess how advisers are adapting to new regulatory requirements. Firm-specific factors prompting an examination may include, for example, tips or complaints about a firm; the firm's activities, conflicts or regulatory history; indicators of vulnerability to financial or market stressors;

or material changes in leadership or other personnel. The Division characterized its approach as "risk-based" and "dynamic" in that "it adapts to changes in market conditions, industry practices, and investor preferences." The Division stated that it collects and analyzes large sets of industry- and firm-level data to help identify risks, and it also reviews advisers' disclosure documents and various regulatory filings.

The pre-examination initial request for documents generally seeks: (i) general information to provide an understanding of the adviser's business and investment activities; (ii) information about the compliance risks the adviser has identified and the written policies and procedures the firm has adopted and implemented to address each of them (including, among others, with respect to custody and safekeeping of client assets, valuation, portfolio management, fees and expenses, and brokerage and best execution); (iii) information facilitating testing with respect to advisory trading activities; and (iv) information for the SEC staff to perform its own testing for compliance in various areas. Attached to the alert is a detailed list of the specific disclosures and other records the SEC staff requests during a typical examination.

Two Large Settlements of Note—Tesla Directors Return $735 Billion of Over-Compensation; and CBS/Viacom/Redstone Litigation is Settled for $127.5 Million

Tesla. In mid-July 2023, directors of Tesla Inc. (including Oracle co-founder Larry Ellison; Elon Musk's brother, Kimbal Musk; and Rupert Murdoch's son, James Murdoch) agreed to settle claims, brought by a pension fund holding Tesla stock, that Tesla's directors had grossly overcompensated themselves through massive stock option awarded over three years beginning in 2017. The directors agreed to return $735 million in stock grants (about 62% of the total amount being returned) and cash for already exercised options (about 38% of the total amount). The settlement amount is one of the largest ever in a Delaware derivative suit. The directors also agreed not to receive any compensation for 2021 through 2023, and agreed to engage an independent compensation consultant to advise on board-level compensation issues.

The plaintiff had claimed that the stock option grants grossly exceeded norms for a corporate board. For example, the plaintiff alleged, in 2018, the two non-employee directors received stock awards worth together more than $8.7 million, and the board chair was the second-highest paid board chair in the U.S. Tesla had argued that the compensation aligned the directors' interests with the stockholders' interests, was crucial in motivating the board to pursue the company's aggressive growth objectives, and was justified given the almost unprecedented growth the company had experienced, with the stock price having gone up more than ten-fold. (A separate suit challenging a $55 billion compensation plan for Elon Musk is unaffected by this settlement. That case is still pending, with a decision expected soon.)

CBS/Viacom/Redstone. On September 6, 2023, two months short of a scheduled trial date, and after four years of litigation, the Court of Chancery approved a $167.5 million settlement of derivative challenges to CBS's 2019 $30 billion acquisition of Viacom. The plaintiffs had claimed, among other things, that Shari Redstone and National Amusements were conflicted controllers who, standing on both sides of the transaction, had violated their fiduciary duties by engaging in an unfair transaction process and agreeing to share exchange terms that significantly overvalued Viacom relative to CBS. Shari Redstone is the daughter of the late Sumner Redstone. Sumner Redstone was the longtime Chairman of CBS, had founded Viacom, and was the majority stockholder and Chairman of National Amusements. The market had assessed the merger as reflecting an overpayment of $500 million to $800 million. The $137.5 million settlement represents roughly 0.5% of the purchase price. Vice Chancellor Glasscock called the settlement "extraordinary" and his decision to approve it "easy."

Update on Proposed New York Law Broadly Banning Non-Competes

Reflecting widespread recent attention to the negative effect of non-compete agreements on employees, in June 2023, the New York State legislature passed a sweeping Bill that, if enacted as drafted, would broadly prohibit most non-competes. It has recently been reported that it is unlikely that the Governor will sign the Bill in its current form. It is expected that later this year the Governor will request amendments to the Bill that would provide certain exceptions, making the law more consistent with legislation already adopted in other states. As currently drafted, the Bill does not contain any exceptions permitting non-competes under common circumstances, such as when entered into by high-level employees or in connection with a severance package. With respect to non-competes entered into in connection with the sale of a business, there is no express exception, but practitioners generally have advised that the Bill appears not to be intended to prohibit such non-competes except to the extent the seller enters into an employment arrangement with the

buyer. See here the Fried Frank article, "Ambiguities in New York's Prospective Noncompete Ban," which discusses the current draft of the Bill.

Fried Frank Briefings Issued This Quarter

Delaware Supreme Court Affirms* BGC *Decision Finding Conflicted-Controller Transaction Entirely Fair Despite an "Imperfect" Sale Process

The Delaware Supreme Court, in a decision issued August 10, 2023, affirmed the Court of Chancery's dismissal of *In re BGC Partners Inc. Derivative Litigation*. See the article above, "Delaware Supreme Court Affirms Conflicted Transaction Satisfied 'Entire Fairness'—Despite Serious Flaws in the Sale Process." The Fried Frank Briefing discusses the Court of Chancery opinion and offers related practice points.

***Chancery Finds a Buyer Liable for Aiding and Abetting the Target's Sale Process Fiduciary Breaches*—Columbia Pipeline**

The Delaware Supreme Court, in a decision issued August 24, 2023, affirmed the Court of Chancery's holding in *In re Columbia Pipeline* that a buyer was liable for aiding and abetting fiduciary breaches by the target company's officers and directors during the target's sale process. See the article above, "Delaware Supreme Court Affirms Buyer Aiding and Abetting Liability for Sell-Side Breaches of Fiduciary Duties." The Fried Frank Briefing discusses Vice Chancellor Laster's (196-page!) post-trial opinion and offers related practice points.

***Second Circuit Holds that Syndicated Loans Are Not "Securities"*—Kirschner**

In *Kirschner v. JP Morgan Chase Bank, N.A.*, the United States Court of Appeals for the Second Circuit reaffirmed the recently challenged doctrine that syndicated loans are not securities. The decision is significant in that arrangers and lenders traditionally have relied on an established market view, as well as well-settled case law, that syndicated loans are not securities subject to federal or state securities regulations. A holding that syndicated loans were securities would have subjected arranging banks and other financing sources to federal and state securities law disclosure requirements and potential liabilityes in connection with loan syndication, and would have disrupted a market that observers have estimated sees over a trillion dollars of trading activity each year. Such a ruling may also have chilled lending activity by CLOs—a major source of liquidity in the syndicated loan market—if categorizing syndicated loans as "debt securities" caused CLOs to reevaluate their ability to comploy with the Volcker Rule. The Court of Appeals applied federal securities law analysis to determine that the syndicated loans at issue were not "securities" under the state law blue sky claims asserted in *Kirschner*.

***Delaware Supreme Court, for the First Time, Upholds a Board Action that Has a Disenfranchising Effect on a Stockholder—and Clarifies the Standard of Review for Such Actions*—UIP**

Coster v. UIP (affirmed by the Delaware Supreme Court on June 28, 2023) is the first case, so far as we know, in which a Delaware court, in the context of a contested board election, has validated a board of directors' action that had the effect of disenfranchising a stockholder. Notably, the case presented a highly unusual factual setting. The Supreme Court addressed in detail the overlapping applicability of the *Schnell*, *Blasius* and *Unocal* standards in this context and, combining these doctrines, established a unitary standard for review of board actions that have a disenfranchising effect.

The new standard appears to be, essentially, a heightened *Unocal* standard—namely, a board action that has the effect of disenfranchising a stockholder in the face of a contested director election or stockholder vote touching on board control is permissible if it is a "reasonable and proportionate" response to a threat to the corporation (the *Unocal* standard), but the court will apply the "special sensitivity" toward stockholder disenfranchisement issues that the *Schnell* and *Blasius* doctrines bring. The decision furthers the Delaware courts' longstanding trend of blending these doctrines, with the effect, clarified in *UIP*, of essentially relegating *Schnell* and *Blasius* to being specific applications of the *Unocal* standard rather than being standards of review themselves.

In our view, there will still be a very high bar to judicial validation of board action that has the effect of disenfranchising a stockholder in the face of a contested director election or stockholder voting touching on board control. The standard of review articulated in this case may appear to be less stringent than the *Schnell* and *Blasius* standards that have often been applied in this context. However, we believe it likely that the new standard will not significantly change the court's general approach to or outcome in these cases—first, because the decision just reaffirms the court's evolution toward a

combination of the *Schnell*, *Blasius* and *Unocal* doctrines in this context; and, second, because, as the Supreme Court emphasized, the facts in *UIP* were highly unusual.

The Fried Frank Briefing analyzes the decision and offers related practice points.

Chancery's* Disney *Decision Provides Guidance for Boards When Responding to Political and Social Issues

In *Simeone v. The Walt Disney Company* (June 27, 2023), a stockholder of The Walt Disney Company made a demand under DGCL Section 220 to inspect books and records of the company to investigate possible wrongdoing by Disney's board and officers in connection with the company's decision to speak out publicly against Florida's so-called "Don't Say Gay Law," which restricts the discussion of sexual orientation and gender identity in Florida schools. The stockholder-plaintiff contended that Disney's directors and officers may have breached their fiduciary duties in acting based on their own political beliefs rather than on the interests on the corporation and its stockholders, particularly as Florida's Governor had threatened repercussions against the company if it publicly opposed the Act. Such repercussions were in fact imposed after Disney spoke out against the Act, with Disney losing the special tax status for its Disney World theme park in Orlando, following which the company's stock price declined significantly.

The Court of Chancery rejected the plaintiff's request for email communications among the directors and the CEO that related to the legislation. The court concluded that: (i) the plaintiff had not established that he had a proper purpose to seek a Section 220 inspection; (ii) there was no basis on which the court could infer that the board had engaged in wrongdoing; and (iii) even if the plaintiff had established a proper purpose, Disney *had* already provided sufficient books and records in response to the Section 220 demand.

In the current politically-charged environment, boards should expect stockholder challenges to their decisions with respect to social and political issues—but the court generally will accord business judgment deference to such decisions. The court acknowledged that corporate speech on external policy matters (such as those involving political, social, or religious issues) involves both risks and opportunities for companies. The court emphasized that, in light of the diversity of viewpoints on these types of issues that may be held among the company's stockholders, directors, management, employees, and other stakeholders, it is the board's responsibility to weigh the competing corporate considerations and decide what policy is in the best interests of the corporation and its stockholders. The court made clear that a board's significant discretion in guiding corporate strategy includes decisions as to whether to speak out or not (or take other action or not) on political or social issues. Such decisions, even if they led to negative effects on the company, generally will be subject to judicial deference under the business judgment rule; and a stockholder's disagreement with such a decision will not, without more, provide a basis for the court to infer potential wrongdoing by the board such that the stockholder is entitled to an inspection of books and records under DGCL Section 220.

Also of note, the court found that the board's heavy weighting of employees' views on the political matter at issue was permissible. The court acknowledged that a board may conclude, in the exercise of its business judgment, that addressing interests of "the workforce that drives the company's profits" is rationally related to building long-term value. Finally, the opinion reinforces a recent trend in which Delaware courts have looked favorably on a company that, rather than rejecting a Section 220 demand outright, provides the relevant formal, board-level materials to the stockholder prior to any Section 220 litigation. Depending on the circumstances, a board should consider providing such materials in response to a Section 220 demand, even when it appears that the demand may be deficient.

The Fried Frank Briefing discusses the decision and offers related practice points.

***Court of Chancery Amplifies Circumstances Under Which the Court Will Not Enforce an Advance Notice Bylaw's Deadline—* Sternlicht v. Hernandez**

In *Sternlicht v. Hernandez* (June 14, 2023), the plaintiff-stockholders sought a preliminary injunction against enforcement by Cano Health, Inc. (the "Company") of its advance notice bylaw deadline for the nomination of directors at its then-upcoming annual stockholders meeting. The plaintiffs were three of the directors on the Company's nine-member board, who together had resigned six weeks after the deadline for nominations had passed and then sought to make director nominations. The plaintiffs contended that it would be inequitable to permit enforcement of the deadline, due to the radical

change in circumstances at the Company after the deadline for nominations (namely, the fracturing of the board and the plaintiffs' resignations). The court did not grant the plaintiffs' request to enjoin enforcement of the nominations deadline.

The decision serves as a reminder that, generally, the court will enforce an advance notice deadline for director nominations unless there are "compelling circumstances." A material change at the company occurring after the deadline has passed may—but does not necessarily—constitute compelling circumstances for this purpose. The court generally will not enjoin enforcement of an advance notice bylaw deadline based on post-deadline changes at the company *unless*: the post-deadline changes were material in the sense that they altered the "policies and direction" of the company, and, critically, the changes were caused by the board of directors (not, for example, a minority faction of the board).

The Fried Frank Briefing discusses the decision and offers related practice points.

SEC Adopts Sweeping New Rules for Private Fund Advisers

On August 23, 2023, the SEC adopted highly anticipated new rules under the Investment Advisers Act of 1940 that regulate private fund advisers (the "Final Rules"). In response to industry comments, the SEC made significant changes to the rules it had proposed on February 9, 2022 (the "Proposed Rules"), and modified or eliminated some of the more controversial elements of the Proposed Rules. Notably, the Final Rules do not include the proposed prohibition on reimbursement, indemnification, exculpation, or limitation of liability for ordinary negligence. In addition, certain parts of the Final Rules now include a "grandfathering provision" or "legacy status." However, notwithstanding some industry-favorable changes to the proposal, we still expect the Final Rules to alter longstanding business and legal practices in the private funds industry and to significantly increase the regulatory compliance burden on private fund advisers. The Fried Frank Briefing provides a high-level comparison of the Final Rules and the Proposed Rules, based on remarks from the SEC Commissioners and Staff during the Open Meeting at which the Final Rules were adopted and also on our initial review of the Final Rule text and the 660-page Adopting Release. A future Briefing will provide an in-depth analysis of the additional complex legal and commercial issues arising under the Final Rules and the Adopting Release.

President Biden Issues Long-Awaited Executive Order to Create Outbound Investment Regime

On August 9, 2023, President Biden issued an Executive Order to establish a regime restricting certain types of outbound investment to China. The EO directs the U.S. Department of the Treasury to promulgate rules that would require the notification of, and in some instances would outright prohibit, certain investments by U.S. persons in Chinese companies that are engaged in specific activities related to semiconductors and microelectronics, quantum computing, and artificial intelligence. Pursuant to the EO, the Treasury Department has issued an Advance Notice of Proposed Rulemaking ("ANPRM") that provides preliminary information on how Treasury may implement the EO and seeks public comments until September 28, 2023. Since the EO is not self-executing, the new regime will not take effect until Treasury's regulations are finalized—presumably in 2024. Treasury expects that the investment restrictions will only apply prospectively. While the restrictions currently will only apply to China (including Hong Kong and Macau), future executive orders could potentially expand the regime to other "countries of concern." The Fried Frank Briefing provides an overview of the EO.

CFIUS Releases 2022 Annual Report

The Committee on Foreign Investment in the United States delivered its unclassified Annual Report to the U.S. Congress for the calendar year 2022. CFIUS continued to be very busy, as reflected in the high number of notices and declarations filed, as well as its monitoring of non-notified transactions and signing and enforcement of mitigation agreements. The number of CFIUS filings in 2022 again reached an all-time high. The number of notices that were withdrawn and refiled also reached an all-time high and CFIUS was responsible for scuttling 12 deals in 2022—a 25% increase from the previous year. The timing of the CFIUS process also became a little more unpredictable in 2022 with increases in both the percentage of notices proceeding to investigation and the percentage of declarations that required a subsequent notice filing. While the Annual Report contains no information with respect to specific transactions, it nonetheless remains a remarkable window into the reach and operation of CFIUS and its impact on transactions involving U.S. businesses. The Fried Frank Briefing summarizes the key data points and discusses emerging trends in the CFIUS review process.

EU's Unprecedented Foreign Subsidy Regime Comes Into Force

On July 12, 2023, the European Commission adopted the implementing regulations for its new flagship regime, the Foreign Subsidy Regulation ("FSR"). The FSR is a novel trade policy instrument addressing a perceived legislative gap—namely, to control non-European Union subsidies that distort competition in the EU's internal market and thereby undermine its

level playing field (particularly with regards to the efficient allocation of capital. While, in the Commission's preparatory works, China was called out as an example for providing such distortive subsidies, the FSR itself is country-agnostic and thus applies to all foreign subsidiaries. The Fried Frank Briefing summarizes the jurisdictional thresholds and exclusions, as well as procedural steps (including a high-level flow-chart of the FSR's notification and *ex officio* investigation regimes); identifies areas requiring further clarification; and offers practical advice for navigating the legal and practical challenges associated with the new FSR regime.

Back to the Future? FTC and DOJ Propose New Merger Guidelines

On July 19, 2023, the Antitrust Division of the Department of Justice and the Federal Trade Commission issued their long-awaited draft Merger Guidelines describing how the agencies will evaluate and potentially challenge mergers. The release came on the heels of a district court's rejection of the FTC's attempt to enjoin Microsoft's proposed acquisition of Activision, as well as the DOJ's recent loss of its appeal of a district court decision rejecting the agency's attempt to block the US Sugar/Imperial Sugar transaction last year. Notwithstanding those recent court outcomes, the draft Guidelines seek to ground the Biden administration's continued aggressive antitrust scrutiny of mergers in Supreme Court and appellate caselaw. While the proposed Guidelines are currently subject to a 60-day public comment period, and will not be binding upon courts when finalized, they represent the Biden administration's most detailed statement yet regarding the antitrust agencies' current approach to merger enforcement. Transacting parties should therefore carefully consider the Guidelines as they evaluate potential mergers and craft strategies for overcoming potential regulatory scrutiny. The Fried Frank Briefing discusses the key requirements of the Guidelines.

Q3 2023—European Regulatory Update for Funds

The third quarter of 2023, like Q1 and Q2, has seen the promulgation of regulation that is significant—or at least potentially significant—to private fund managers active in and/or marketing into Europe. In this Client Memorandum, we discuss: the Provisional Agreement Reached on AIFMD 2; Private Fund Advisers Rules; Implementation of Consumer Duty; ESMA Paper on the Definition of Investment Advice Under MiFID II; the FCA Dear CEO Letter Regarding Liquidity Management; and the Proposed Amendment to the UK Securitization Regulation.

A New Era: DOJ Announces Structural Relief for Criminal Violations of the Antitrust Laws

On August 21, 2023, the Department of Justice announced that Teva Pharmaceuticals USA, Inc. and Glenmark Pharmaceuticals Inc., USA entered into deferred prosecution agreements ("DPAs" or "agreements") to resolve a multiyear, ongoing criminal antitrust investigation of generic drug manufacturers. Notably, each company must divest (under the supervision of a monitor) one of the main drugs at the center of the companies' price-fixing scheme. Teva must also donate $50 million of two other generic drugs involved in the conspiracy to "humanitarian organizations whose mission includes providing medication to those in need." Under the agreements, Teva will pay a $225 million criminal penalty, which the Antitrust Division of the DOJ has stated is "the largest to date for a domestic antitrust cartel." For its part in the conspiracy, Glenmark will pay a $30 million criminal penalty. Additional terms in the agreements are consistent with prior DPAs that the Antitrust Division has entered into with other generic drug manufacturers. Looking ahead, we expect that the DOJ will continue to use novel settlement terms, like the divestitures here, to remediate the harm caused by cartel conduct.

The Fried Frank Antitrust Alert discusses the Division's long-running investigation of anti-competitive conspiracies in the generic drug industry; the "extraordinary remedy" of mandatory divestiture by the companies of certain business lines; the "whole of government" approach being taken to antitrust enforcement; and warnings from the government that companies in regulated industries should no longer view compliance violations as "the cost of doing business."

FTC's Proposed HSR Form Expansion Would Drastically Increase Burden of the HSR Process

At the end of June 2023, the FTC and the DOJ's Antitrust Division issued a notice of proposed rulemaking ("NPRM") detailing fundamental changes to the scope of documents and information required to be filed under the Hart-Scott-Rodino Act. The proposed changes, which would drastically increase the burden of filing, is the latest significant step by the Biden administration to increase antitrust scrutiny of M&A activity generally, and in particular, acquisitions by private equity firms.

Under the HSR rules, most transactions valued above a relatively low threshold, currently $111.4 million, are required to be notified to the FTC and DOJ, and observe an initial waiting period, generally 30 days, prior to closing. While the new proposed rules do not change which deals are HSR reportable, the burden associated with the HSR process would

increase significantly for all reportable deals, including investments that raise no conceivable competitive concerns.

The result of these proposed rule changes is that preparing an HSR filing will require substantially more information from transacting companies, and take substantially longer to complete. Under the current rules, the HSR form can be completed in one to two weeks or less. Under these proposed revisions, the preparation process is likely to take much longer, and transacting companies will need to take that into consideration when setting closing timelines. The Fried Frank Briefing discusses the new requirements and the practical implications of the new Guidelines. We anticipate that any final rules will not take effect until late this year or early 2024.

FTC Requires Extensive Commitments from a Private Equity Investor to Resolve Director Interlock and Minority Stock Ownership Issues

In order to permit private equitey investor Quantum Energy Partners' sale of natural gas assets to a public company, EQT, the FTC prohibited Quantum from taking a seat on EQT's board, required Quantum to place 11% of EQT's stock that it would receive as consideration for the transaction into a voting trust (with a third-party trustee to vote the stock) and for the stock to be divested over a period of time, and required the parties to unwind a pre-existing joint venture and related non-competes. Although the FTC did not allege that the core transaction—EQT's acquisition of natural gas assets from Quantum—itself presented antitrust issues, the FTC expressed concerns about continued entanglements between the parties given that Quantum would continue to own natural gas assets that competed with EQT. While the FTC's willingness to resolve concerns through a negotiated remedy rather than litigating to block the transaction is encouraging for parties considering M&A transactions, the broad scope of relief obtained in this transaction and positions taken by the agency may require parties to be prepared to defend their transaction in court when settlement demands may be too costly to bear.

Also of note, the FTC Chair stated that this action was "reactive" to the Clayton Act's prohibition on interlocking directorships; that the prohibition applies not only to competing "corporations" but any form of corporate entity (in this case, a limited partnership); and that unwinding such directorships are a priority for the agency. The FTC extracted extensive commitments from Quantum and EQT to resolve the Section 8 issue, including imposing antitrust compliance monitoring and future reporting obligations, signaling that simply stepping off the board may not be sufficient to resolve a Section 8 issue in some situations.

The Fried Frank Antitrust Alert discusses the implications of this novel action that presents another example of the antitrust agencies under the Biden Administration pursuing new and aggressive positions to challenge transactions.

RoundUp

2023 Third Quarter Highlights

Deals:

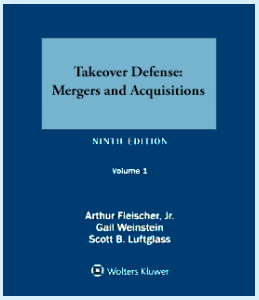
- Counsel to Blue Owl GP Strategic Capital, a division of Blue Owl Capital Inc., in connection with the £835 million (~ $1.0 billion) sale of Energy Capital Partners to Bridgepoint Group.
- Counsel to Goldman Sachs as financial advisor to Dominion Energy (Dominion) in its three separate definitive agreements to sell its three natural gas distribution companies to Enbridge, totaling more than $14 billion.

Recent Fried Frank M&A Quarterlies:

- Summer 2023
- Spring 2023
- Winter 2022

Takeover Defense: Mergers and Acquisitions

The Ninth Edition of Fried Frank's "Takeover Defense: Mergers and Acquisitions," a one-of-a-kind resource by corporate senior counsel Arthur Fleischer, Jr. and Gail Weinstein and partner Scott B. Luftglass, has recently been published. The treatise is a comprehensive, must-have resource for practitioners representing any participant in M&A activity, including bidders, sellers, senior management, sponsors, and investment banks.



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