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A quarterly roundup of key M&A/PE developments

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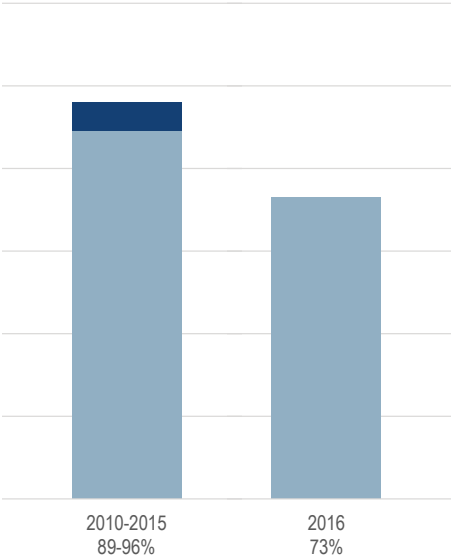
Where Things Stand With Corwin*—7 Decisions Issued in 2017*

The Delaware courts' broad application of the seminal 2015 *Corwin* decision, together with their more exacting review (since the 2016 *Trulia* decision) of traditional disclosure-only settlements, has resulted in a significant decline in Delaware-based M&A litigation.

In every *Corwin*-related decision issued in 2017 (other than *Saba Software*, which involved an unusual fact situation), the Delaware courts continued their trend of interpreting and applying *Corwin* broadly. The result is that it has become increasingly—and, indeed, extremely—difficult for a shareholder-plaintiff to prevail (even past the pleading stage) in a post-closing challenge to a non-controller stockholder-approved transaction.

2016 Decline in M&A Litigation, Particularly in Delaware

% of Completed M&A Deals Challenged in Litigation



% of These Challenges Brought in:

	2010-2014	2015	2016
Delaware	49-55%	61%	32%
Other States	73-88%	51%	65%
Federal Court	15-40%	20%	37%
Multiple Jurisdictions	41-69%	32%	37%

NOTE: %s SUM TO >100% DUE TO MULTI-JURISDICTION FILINGS.

Based on conclusions reached by Cain, Fisch, Davidoff Solomon and Thomas in "The Shifting Tide of Merger Litigation" (March 13, 2017), UC Berkeley Public Law Research Paper.

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Corwin established that the highly deferential business judgment standard of review would apply to a post-closing action seeking damages for directors' breach of fiduciary duties in non-controller stockholder-approved transactions, so long as the stockholder approval was "fully informed" and "uncoerced." The typical pattern in *all* of the *Corwin* cases (except *Saba Software*) has been: (i) a finding that the plaintiff's disclosure claims were without merit; (ii) application of the business judgment standard of review; and (iii) dismissal at an early stage of litigation.

To date, in 2017, the Delaware Court of Chancery and the Delaware Supreme Court have issued the following decisions interpreting *Corwin*:

- *Solera* (Del. Ch. Jan. 5, 2017)
- *Merge Healthcare* (Del. Ch. Jan. 30, 2017)
- *Volcano* (affirmed, Del. Sup. Ct. Feb. 9, 2017)
- *Columbia Pipeline* (Del. Ch. March 7, 2017)
- *Miami General Employees v. Comstock* (affirmed, Del. Sup. Ct. March 23, 2017)
- *Saba Software* (Del. Ch. March 31, 2017)
- *Paramount Gold and Silver* (Del. Ch. April 13, 2017)

The post-*Corwin* decisions have established the following:

- **"Irrebuttable" application of the business judgement standard.** When *Corwin* applies, it appears that the business judgment standard of review will apply "*irrebuttably" (Volcano).*
- **"Waste" standard**. Under business judgment review, the applicable standard is "corporate waste"—that is, a challenge to a transaction will be dismissed at the pleading stage unless it is reasonably conceivable that the transaction was so egregious that it constituted "corporate waste." "Waste" has been characterized by the courts as a standard that is so unlikely to be met that it is essentially "vestigial" and "theoretical" only. The courts have observed in a number of decisions that plaintiffs are unlikely ever to succeed on a claim of waste following a fully informed and uncoerced stockholder vote, as it is not conceivable that stockholders would approve a transaction that constituted waste. Vice Chancellor Glasscock has described in dicta the remaining relevance of the waste standard as follows: "[W]aste is best viewed [in the *Corwin* context] as a kind of 'judicial out,' a way around the strictures of the cleansing rule given a fact situation of some undefined level of egregiousness, such that equity would intervene" (*Merge Healthcare*).
- **Broad applicability**. The *only* types of transactions identified by the Delaware courts to date that would be excluded from "cleansing" *(i.e.,* application of business judgment review) under *Corwin* are controller transactions in which there is a controller who (a) "stands on both sides of the transaction" (such as a going-private transaction) and/or (b) extracts a personal benefit not shared by the other stockholders (such as receiving disparate merger consideration or material personal benefits) (*Merge Healthcare*).

  Although the Delaware Supreme Court has not yet ruled on the following issues, the Court of Chancery has held that *Corwin* cleansing would apply to:

  - **Directors who allegedly were *not* independent and disinterested.** Under *Corwin*, fully informed, uncoerced stockholder approval should cleanse even a transaction that would otherwise be subject to entire fairness review because a majority of the directors approving the transaction were not independent and disinterested (*Solera, Merge Healthcare*).

- **Directors who allegedly acted in bad faith or breached the duty of loyalty.** Under *Corwin*, fully informed, uncoerced stockholder approval should cleanse even a transaction that would be subject to entire fairness review because the directors had acted in bad faith or breached the duty of loyalty (*i.e.,* had acted in their own self-interest, rather than in the corporate interest, in approving the challenged transaction) (*Columbia Pipeline*).

- **Disclosure standards**. The decisions confirm the general, well-established principles relating to proxy disclosure that only "material" information must be disclosed; information is "material" only if a reasonable stockholder would find it to be important in deciding how to vote (or, stated another way, if it changes the "total mix" of information available to stockholders); information that is merely helpful or interesting is not necessarily material; and a "full and fair summary" requires only a *summary*. With respect to a financial advisor's work, the summary must disclose sufficient information so that the stockholders can *understand* the advisor's analyses but not so that they can *recreate* the analyses. These decisions have confirmed that there is a high standard for establishing the materiality of claims challenging proxy statement disclosure (*Solera*). In addition, it has been established that, while directors must disclose the facts *relating* to their self-interest in a transaction, there is no requirement that they expressly disclose *that* they acted for a self-interested purpose (*Columbia Pipeline*). Also, disclosure by a sell-side financial advisor in its Form 13F of its ownership of shares in the buyer is generally sufficient, without repeating the disclosure in the proxy statement (at least where there is not an actual "economic conflict") (*Columbia Pipeline*).

- **Disclosure claim burdens of pleading and proof**. A plaintiff has the *burden of pleading* that a stockholder vote was not "fully-informed"; and, if a valid claim is made, then the defendant company or directors have the *burden of proving* that the vote *was* fully informed (*Solera*).

- **Aiding and abetting claims**. In a number of cases, the court has dismissed aiding and abetting claims against third parties (such as bankers) on the basis that, under *Corwin*, there was no predicate breach by directors of their fiduciary duties that was established.

- **Tender offers**. *Corwin* applies not only to a one-step merger, but also to a tender offer followed by a second-step merger (*Volcano*).

- ***Saba* decision**. In *Saba*, the Supreme Court reversed the Court of Chancery's *Corwin*-based dismissal of an action, holding that the prerequisites for the application of *Corwin* had not been met. As far as we are aware, this is the first post-*Corwin* case in which it has been found that the stockholder vote was *not* "fully informed" and "uncoerced." However, importantly, *the court's judgments in* Saba *were based on the unusual and egregious facts of the case* (which, we note, may have been so egregious that they, arguably, could have satisfied even the almost-impossible-to-satisfy "waste" standard that would have been applicable had the court applied *Corwin* business judgment review). In our view, nothing in the opinion suggests that *Saba* represents any retrenchment of the courts' general approach in interpreting and applying *Corwin* broadly.

Continued importance of good process. While *Corwin* sets a very high bar for successfully challenging a non-controller stockholder-approved transaction, we note that parties to M&A deals, and their advisors, will nonetheless be advantaged by continuing to take their responsibilities seriously and adhering to best practices. Notwithstanding *Corwin*, M&A parties should act in the best interests of the fiduciaries and clients to whom they owe duties and obligations. Among other things, they (i) will want to preserve their good reputations, (ii) will want to avoid pre-closing injunction of a proposed transaction—where *Revlon*, *Unocal*, or entire fairness standards, if applicable, will not be eliminated under *Corwin* (which applies only to post-closing damages actions); and (iii) will not know with certainty where, in any specific case, the court will draw the line in finding the fact situation to be so egregious as to warrant a remedy.

Open issues.

- **Duty of loyalty cases.** As noted, while the Court of Chancery has held that *Corwin* cleanses even transactions where the directors were not independent and disinterested, breached the duty of loyalty, or acted in bad faith, the Delaware Supreme Court has not yet addressed the issue.

- ***Unocal* cases**. The Court of Chancery has noted that there is an issue, but has not yet definitively ruled on, whether *Unocal* heightened scrutiny may apply notwithstanding fully informed and uncoerced stockholder approval of a transaction. Chancellor Bouchard (in *Paramount Gold and Silver*) noted that there is "apparent tension" between *Corwin* and the 1995 opinion in *Santa Fe Pacific Corp. Shareholder Litigation*, where the Delaware Supreme Court held, in the context of a post-closing action, that stockholder approval of the transaction did *not* constitute ratification of the deal protection devices put into place *before* the stockholder vote. The Chancellor noted that the Supreme Court, in *Corwin*, did not discuss or expressly overrule this aspect of *Santa Fe* and that, therefore, it is uncertain whether a post-closing challenge to deal protection devices under *Unocal* would or would not survive if *Corwin* were applicable.

- **Coercion claims**. As the Delaware courts have clarified and confirmed the high standard of materiality that will be applicable to making valid disclosure claims in the *Corwin* context, the plaintiffs' bar may be considering more focus on potential claims that a stockholder vote has been coerced. This emerging approach appears to be based on: (i) the finding in *Saba* that the stockholders had been coerced by reason of the difficult situation, which had been created by the board, that the company was in (*i.e.*, deregistration of its stock following fraud and a years-long, ongoing and explained failure of the company to produce remedial financial statements); (ii) the fact that, in other contexts, the courts have found certain deal structures to be inherently coercive (such as a merger agreement that provides for an unreasonably high termination fee); and (iii) a view that where on completion of a merger the stockholders will still own equity, the stockholders may feel coerced to approve the merger if the merger price represents a premium to the anticipated post-merger trading price (even if, say, the board breached its duty of loyalty in the process).

  In our view, the courts are likely to continue to view "coercion" narrowly and its relevance will generally be limited to controller transactions (where *Corwin* is not applicable in any event). We note that (i) *Saba* was decided based on the highly unusual fact situation; (ii) there has been a high bar to claiming coercion based on a transaction structure (and, indeed, that was so in contexts which would more readily lend themselves to the coercion concept than the *Corwin* context); and (iii) the idea that a premium price in and of itself would be coercive is contrary to judicial precedent and, arguably, would have a base in logic only if, absent the transaction, the company would find itself in a difficult situation (so that rejection of the transaction would not lead to the stockholders simply having what they had beforehand but, rather, would lead to their having something less valuable).

- **Appraisal**. As the likelihood of success for plaintiffs (and the possibility of settlement) in Delaware M&A litigation has declined dramatically over the past couple of years due to *Corwin* (and *Trulia*), appraisal cases have increased. With the Court of Chancery now more frequently relying on the merger price to determine "fair value" in appraisal cases, and with recent statutory amendments that are intended to reduce appraisal "arbitrage," it remains to be seen whether the uptick in appraisal cases that has been seen over the past couple of years will continue.

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Practice Points Arising from Delaware Supreme Court's Williams v. ETE *Decision—"Reasonable Efforts" Obligations; Closing Certainty; and Tax Opinion Condition Formulations*

In *The Williams Companies v. Energy Transfer Equity, L.P.* (Jan. 11, 2017), in a 4-to-1 majority opinion written by Justice Vaughn, the Delaware Supreme Court, while it reversed certain of the Court of Chancery's holdings, affirmed the Court of Chancery in denying a request by The Williams Companies, Inc. that Energy Transfer Equity, L.P. be ordered to close a merger agreement pursuant to which ETE was to have acquired Williams. ETE had refused to close the cash-and-stock merger (which was valued initially at more than $30 billion), on the basis of a failure of a condition to closing that ETE's own tax counsel deliver to ETE an opinion that one of the steps in the merger "should" be treated by the tax authorities as a tax-free exchange. At the same time, there was evidence that a dramatic post-signing change in market conditions in the energy industry had made the transaction unfavorable for ETE and that ETE wanted to exit the deal.

The Supreme Court's holdings:

- **Interpretation of "efforts" covenants.** The Supreme Court found that the Court of Chancery had adopted an "unduly narrow view of the obligations imposed by the [efforts] covenants" in the merger agreement. It reversed the Court of Chancery's holding that the "commercially reasonable efforts" and "best reasonable efforts" standards set forth in the merger agreement required only that ETE not take steps to prevent the merger. To the contrary, the Supreme Court held, these efforts standards also affirmatively "obligated the parties to take all reasonable actions to complete the merger."

- **Burden of proof on whether breach of "efforts" covenants led to failure of a closing condition.** The Supreme Court also found that the Court of Chancery had erred by apparently assigning to Williams the burden of proving that ETE's alleged breaches had materially contributed to the failure of the tax opinion condition. Rather, the Supreme Court ruled, the burden was *on ETE* (the alleged breaching party) to prove that any alleged breach had *not* materially contributed to the failure of the condition.

- **Good faith of ETE's tax counsel who decided that it could not issue to ETE the tax opinion required for closing.** The Supreme Court found that ETE's tax counsel had "independently" made the determination that the tax opinion required for closing could not be delivered to ETE. The Court noted that, although there was evidence that ETE wanted to terminate the transaction and that its counsel knew that, "the record [was] barren of any indication that the action or inaction of [ETE] (other than simply drawing [the tax counsel]'s attention to the problem) contributed materially to [the counsel]'s inability to issue the [tax] opinion."

- **Conclusion that, even if ETE had breached its "efforts" obligations, the breach did not "materially contribute" to the failure of the tax opinion condition.** The Supreme Court concluded that—even with application of the correct, broader interpretation of the efforts standards, and with the burden of proof correctly placed on ETE—the trial record nonetheless established that ETE had met its burden of proving that its action or inaction (even if in breach of its efforts obligations) *had not* materially contributed to the failure of the satisfaction of the tax opinion condition. The Supreme Court relied on the testimony of the tax counsel who refused to deliver the opinion that he had "independently" made the determination that the opinion could not be issued and was not influenced by his client, ETE.

Key Point: "Commercially reasonable efforts" and "reasonable best efforts" standards impose an affirmative obligation "to take all reasonable actions" to complete the merger. Williams argued, on appeal, that the Court of Chancery had erred by improperly interpreting the efforts obligations in the merger agreement "as imposing only a negative duty not to thwart or obstruct performance of the Agreement, rather than…an affirmative duty to help ensure performance." Williams argued that the efforts obligations imposed an affirmative obligation "to try to obtain the [tax] opinion." The Supreme Court held that the Court of Chancery had taken "an unduly narrow view of [its precedential] *Hexion* [decision]." The Court of Chancery had distinguished *Hexion* by reasoning that, there, the buyer had "actively and affirmatively torpedoed its ability to finance" the transaction. Here, by contrast, the record did not reflect any steps taken by ETE to withhold information from, misrepresent information to, or coerce the tax counsel so that it would not issue the opinion.

The Supreme Court wrote: "With respect to the financing requirement [in *Hexion*], the [Court of Chancery] there observed that 'to the extent that an act was both commercially reasonable and advisable to enhance the likelihood of consummation of the financing, the onus was on the buyer to *take that act*.'" When the *Hexion* buyer later developed serious concerns about its solvency, the Court of Chancery observed there that the buyer "was then clearly obligated to approach the seller's management to discuss the appropriate course to take to mitigate the solvency concerns." Because the buyer chose not to approach the seller's management, the court reasoned in *Hexion*, "that choice alone would be sufficient to find that the buyer had knowingly and intentionally breached its covenants under the merger agreement." The Supreme Court, stating that it agreed with *Hexion*, wrote that *Hexion* recognized that covenants "like the ones involved [in ETE] impose obligations to take all reasonable steps to solve problems and consummate the transaction." The covenants in *ETE* "not only prohibited the parties from preventing the merger, but obligated the parties to take all reasonable actions to complete the merger."

The Chief Justice's dissent:

In a 19-page dissenting opinion, the Chief Justice agreed with the majority on the meaning of the efforts covenants and on the burden of proof as to whether breach of the covenants led to a failure of the closing condition. However, he strongly disagreed with the majority's acceptance of the Court of Chancery's "terse conclusion" that ETE's conduct had not influenced its tax counsel's decision not to issue the tax opinion. When the ETE Head of Tax (Whitehurst), months after the merger agreement was signed, "started musing about the potential tax law implications of a provision in the agreement that is kind of hard not to know about, it is difficult to imagine that he was not putting implicit, but undeniably extant, pressure on the [tax counsel] to have doubts about whether he could give the opinion," the Chief Justice wrote. One needs to consider "whether Whitehurst was credible in claiming that by gosh, the part-fixed, part-floating nature of the exchange just occurred to him when his employer no longer wished to do the deal, and he had just become curious about its tax implications then." The Chief Justice noted that, while the tax counsel's purported concerns arose from the post-signing change in market conditions, the tax counsel and ETE knew the structure of the deal (including the fixed cash component of the merger consideration that would create the concern that arose if there were a significant market decline), knew that a significant market decline would affect the tax treatment, and knew that a significant market decline is always possible. "The consideration portion of a definitive acquisition agreement like the Merger Agreement here is about as fundamental as it gets," he wrote. "[I]f, as ultimately happened, the [tax counsel] was unable to issue the [tax] opinion based on his post-signing recognition of facts known pre-signing," he reasoned, there would have been a failure of the condition, "quite unexpectedly, and with more than the whiff of either a lack of care or less innocent causal factors, including improper client pressure."

The Chief Justice noted numerous examples of ETE's engaging in apparent "covenant-breaching behavior" by not seeking to cooperate in restructuring the transaction or taking other steps to redress the tax concerns. "Stuff like this happens in complex mergers. But, what also typically happens then is that both parties work together to resolve those problems in good faith. If one party does not," the Chief Justice wrote, then it may have breached a covenant to use "a particular level of efforts to fulfill such condition." The Chief Justice characterized ETE's actions as "the opposite of encouraging …cooperation and making absolutely clear to [the tax counsel] that ETE wanted it to get to yes and to be supple and open-minded about noodling with others about the issue." Most important, he wrote, was that Whitehurst and the tax counsel "kept the other side of the transaction in the dark" for two weeks about there being an issue with the tax opinion, did not contact them until a definitive decision not to issue the opinion had been reached, and, just six days later, filed an amended proxy stating that the tax counsel would not deliver the opinion. That "urgent" timing and the inclusion of the tax counsel's view that the opinion could not be delivered "easily could be read as another tactic by ETE to pin the [tax counsel] down," the Chief Justice commented. Moreover, although Williams' counsel responded within two days with proposals for addressing the ETE tax counsel's concerns, there was no response to those proposals until fifteen days later, well after the proxy amendment had been filed. The proposals were then "given little consideration."

Compounding his skepticism, the Chief Justice wrote, was "the number of people who seemed to think Whitehurst's theory was, at best, strained." He noted that "initially no one on either side shared Whitehurst's view or that of [the tax counsel] who adopted it"; that two law firms representing Williams "thought there was either no issue or potential solutions to the issue Whitehurst identified"; that Williams' expert testified that "no reasonable tax attorney would refuse to issue the [tax] opinion; and, "indeed, ETE's own experts…didn't buy into the [tax counsel]'s theory—they had their own reasons for warning the transaction risked not receiving tax-free treatment, and those experts conceded that hanging certain questionable factual assumptions provided to them by ETE might reverse their conclusion entirely."

Practice Points Arising from *Williams V. ETE*

- **Focus on deal certainty.** Although a number of unusual characteristics of the ETE-Williams transaction (including the novel deal structure, the dramatic post-signing market decline, and the tax opinion closing condition for ETE being based on ETE's receiving the opinion from its own, single named counsel) led to both the issue in the case and the judicial result, *ETE* highlights that merger parties should understand and seek to redress the risk of (and detriment from) non-satisfaction of closing conditions. Depending on the facts and circumstances, it may advantage a company—particularly a target company (and even more so if the company is foregoing an alternative transaction)—to take an aggressive approach in seeking to narrow closing conditions when negotiating a merger agreement. *ETE* underscores that even customary conditions can lead

to deal termination. A merger party should assess the degree of risk associated with closing the transaction, evaluate whether there are any unusual risks, and consider whether (and, if so, how) it will seek greater certainty of closing and/or remedies in the event of a failure to close. Attention should be paid to *each* condition, including conditions that have been considered customary and have not typically been the subject of dispute—as non-satisfaction (real or alleged) of any condition may later be used by the other party as a pretext to exit the transaction due to a change in market conditions or other development that results in post-signing remorse.

- **"Red flags" as to closing uncertainty.** The evaluation described above is particularly important when a condition involves action by the counterparty itself or the counterparty's own advisor (such as, in *ETE*, receipt by ETE of an opinion from its own tax counsel), or when a novel deal structure is being utilized. Consideration should also be given at the outset as to whether and how changes in market or other conditions may affect the certainty of closing.

- **Ability to exit based on non-satisfaction of conditions.** We note that it is *not* usual that a party that experiences a change of heart after entering into a merger agreement can utilize non-satisfaction of conditions as a pretext for exiting a transaction. For example, the courts have tended to interpret "material adverse change" conditions, and other conditions requiring judgment with respect to *subjective* events, to provide buyers with a right to terminate a transaction only under circumstances involving fundamental changes with long-term negative effect. By contrast, conditions that *objectively* have not been satisfied (such as delivery of a tax opinion by a specified counsel, which, on an objective basis, either will have been delivered or not) are likely to permit exit from a transaction unless the non-satisfaction of the condition is on account of a breach of the contractually required efforts to satisfy it.

- **No black letter law; analysis will be intensely fact-based.** Parties should be aware that there is no definitive rule as to the content of "commercially reasonable efforts," "reasonable best efforts," "reasonable efforts," or "best efforts." In *ETE*, both the majority and the dissenting Supreme Court opinions emphasized that, as a concept, "commercially reasonable efforts" and "reasonable best efforts" (which were characterized as being "similar" standards) imposed an affirmative obligation to take "all reasonable actions" to satisfy the conditions and complete the merger. However, as *ETE* underscores, the factual content of this command is subject to varying interpretations. Importantly, the courts will interpret efforts covenants based on the specific drafting and facts and circumstances, and subtle differences in any of those can lead to significantly different judicial results. Chief Justice Strine's dissenting opinion highlights that the overall factual context can influence the "lens" through which the courts view a situation.

  Importantly, a critical factor in *ETE*, in the view of the majority, was that, although there was substantial evidence that ETE wanted to exit the transaction, there was no evidence that ETE tried to influence its counsel not to provide the opinion or that the tax counsel did not do substantive, detailed work in evaluating whether it was able to provide the opinion. As we often note, companies must keep in mind that emails and other contemporaneous communications can and will be an important part of the evidentiary record when litigation is brought relating to a transaction.

- **Potential obligation to restructure in order to close.** Neither the Court of Chancery nor the Supreme Court opinions in *ETE* addressed in depth the issue of an obligation to restructure a transaction to permit closing—primarily because the tax counsel who refused to deliver the tax opinion that was a condition to closing concluded that the restructuring proposed by Williams' counsel would not have resolved the tax counsel's concerns. We caution that, where the issues are less uncertain than were the tax issues raised by ETE's counsel, and to the extent that a restructuring proposal involves changes that are not significant, a party *may* have an obligation to restructure to facilitate satisfaction of a condition. In this respect, we note that even a "commercially reasonable efforts" standard requires that "all reasonable actions" be taken.

- **Consider specifying "back-up" transaction structures to facilitate closing.** M&A parties may wish to specify alternative transaction structures that would be put into place in the event that issues arise with respect to certain conditions being satisfied. In connection with a tax opinion condition, the parties could specify that they would have to seek alternative counsel and/or consider restructuring the transaction, or would be obligated to effect a specified pre-agreed restructuring (that might, for example, reduce cash and substitute equity, possibly at a fixed ratio). At a minimum, parties should review and consider possible alternatives. In connection with a stockholder approval condition, the parties might wish to explore the feasibility

of providing that, if approval of the acquiror's stockholders were required and could not be obtained, the parties would restructure the transaction (including by converting equity consideration to cash or non-voting securities) so that a stockholder vote would not be legally required.

- **Alternative formulations of tax opinion condition.**

  - ***Alternative counsel.*** In addition to a party's named tax counsel that will be engaged to provide the tax opinion to it, the parties may wish to name more than one firm and/or to provide that any nationally recognized law firm may be engaged to provide the opinion. Parties may wish to consider the feasibility of providing that their respective counsel will select a third firm to determine whether an opinion can be issued (and to issue it) if one party's counsel cannot deliver the opinion but the other party's counsel can; or, alternatively, they may consider agreeing that the condition will be satisfied if either party's counsel delivers the opinion to both parties.

  - ***Opinion delivered at signing.*** In lieu of a tax opinion condition, the parties may wish to agree that the tax opinions be delivered *at signing*. The condition would then be that there has been no change in the tax laws from signing to closing that would materially adversely affect the validity of the opinions already delivered. (Note that this formulation does not protect the parties against changes in the factual context that could affect the tax outcome, and would necessarily turn the closing condition opinion into a "hypothetical" opinion in that the opinion would express a view as to the tax results of a future transaction based on assumed facts the accuracy of which could not be known with certainty until the closing actually occurred.)

  - ***Pre-agreed back-up structure.*** As noted, parties could agree in advance that they will restructure, convert the form of consideration, and/or take other steps necessary to address any substantive tax issue that may arise and prevent issuance of the opinion.

  - ***Waiver.*** The parties could agree in advance to waive a tax opinion condition if the potential tax liability (or *net* tax liability) is not "material" or does not exceed a specified amount or other standard.

  - ***Reverse termination fee.*** Where there is a higher potential than usual that issues may arise with respect to satisfaction of the tax opinion condition—such as when the opinion is to be delivered by the counterparty's own counsel, or when the standard of certainty for the opinion is high (for example, at the "will" or "should" end of the spectrum rather than the "reasonable basis" or "not frivolous" end)—a party may seek to negotiate that a meaningful reverse termination fee will be payable in the event the condition is not satisfied.

  - ***Non-reciprocal condition.*** If one party has the predominant underlying economic interest with respect to a tax opinion, consideration should be given to only that party being protected by the condition, rather than having a reciprocal condition that both parties will receive tax opinions. We note that, in *ETE*, Williams was the party with the greater interest in the tax treatment for the transaction, yet it was ETE who invoked the condition as a basis for not closing.

- **Negotiating possibilities.** The possibility of the following negotiating alternatives will depend on the relative negotiating power of the parties. (In the case of efforts covenants with respect to obtaining regulatory approvals, it may also be a relevant consideration whether the standard or formulation chosen will influence the regulators' response.)

  - **Specify steps that must be (or need not be) taken to meet the efforts obligation.** Parties seeking to ensure certainty of closing may wish to specify steps that would be required to be taken as part of the contractually required standard of efforts by the parties to satisfy the conditions. For example, an agreement may specifically provide that the efforts obligation includes a requirement that the target company and/or the acquiror divest assets necessary to obtain regulatory approvals, subject to the limitation that assets need not be divested to the extent that they would have a "material adverse effect" on the target company (or, alternatively, on the target and the acquiror combined). "Material adverse effect" could be defined (for example, by reference to a specified percentage of revenues or net income). Also, subject to an evaluation of the sensitivities relating to the regulators being influenced by the formulation of the divestiture

standard, the parties could agree on a list of specified assets or types of assets that would (or would not) have to be divested if necessary.

- **Less specificity tends to favor the buyer.** In our view, without a specific formulation of the obligations to be imposed on a buyer or seller to consummate an agreement, the buyer seems to be advantaged as compared to the seller. For example, the Court of Chancery's 2014 decision in *Cooper Tire v. Apollo* suggests that, absent specific obligations, so long as a buyer makes the effort to fulfill its contractual obligations within the transaction's timeframe, a "reasonable best efforts" standard will not require a buyer to act against its good faith business judgment or make unprofitable decisions. Of course, the buyer will still be subject to the burden of ordinary costs and expenses to comply with regulatory reviews or other expected requirements; should not violate any explicit requirement of the merger agreement; and should appreciate that a "reasonable efforts" covenant imposes an obligation to "take all reasonable steps" to complete the merger.

- **Specificity regarding a financing obligation.** We note that, if financing is an issue, specifying the obligations of the buyer may be desirable. Absent specified obligations, disputes may arise about, for example, the amount of equity that a private equity firm must contribute to the transaction if lenders require less leverage. (In fact, this has been a source of contention with lenders in a number of broken private equity deals. In addition, litigation has arisen between a seller and a private equity firm over whether the private equity firm had to provide a guarantee to satisfy a regulator's concerns about the leverage of the post-acquisition company.) Similarly, changes in the key terms of financing, such as the interest rate, may be required to complete the financing. The extent to which specific obligations are likely to be accepted by the buyer will depend on the negotiating leverage of the parties, the amount of leverage, and the state of the lending market at the time. Whether the remedy for failure to obtain financing and/or funding will be based on damages for breach of the financing covenant or by payment of a reverse termination fee is always subject to negotiation.

- **Precatory language underscoring the commitment to closing.** Parties seeking to maximize deal certainty could consider including precatory language in the merger agreement that expresses their strong commitment to closing and that requests, in the event of a future dispute, that a court interpret the merger agreement provisions to favor respecting the parties' intent that the transaction close. This language could be evidence of the parties' intentions and should influence a court's interpretation of the agreement provisions.

- **"Hell-or-high-water" approach.** This efforts standard—*i.e.,* requiring that a party do "whatever it takes" to ensure closing—may be desirable when there is a real risk of non-closing, and particularly when a company has abandoned an alternative transaction. A target company seeking to impose this standard on the buyer could, for example seek to provide:

  - that the only bases on which the parties would not be obligated to close would be legally required approvals not being obtained, or the other party willfully breaching its obligations set forth in the merger agreement, with a material adverse effect;

  - that a larger than usual termination fee would be paid and/or that the termination fee would be payable if the transaction is terminated for any reason other than failure of a short list of specified conditions—(we note, however, that, if termination is in favor of a competing bid, then, generally, only a usual termination fee should be applicable); and/or

  - that a topping bidder would pay directly any breakup fee that the target may have to pay in connection with a transaction that the target will be terminating to accept the topping bid (so that, even if the topping transaction does not ultimately close for any reason, the termination fee payable by the target with respect to the abandoned transaction would have been paid by the topping bidder).

* * * *

The Risk of "Strategic Silence" In the Face of a Looming Contract Dispute—Simon-Mills

In *Simon-Mills v. KanAm USA* (March 30, 2017), the Delaware Court of Chancery addressed the applicability of the implied covenant of good faith and fair dealing in the context of a contract interpretation dispute involving a development that both parties had anticipated but chose not to address with each other.

The joint venture agreements at issue provided one party, Simon, with a right to purchase the interest of the minority joint venture partner, KanAm (the "Call Right"). Upon Simon's exercise of the Call Right, KanAm was entitled to elect cash or "Mills Units" (limited partnership units in the Mills REIT) as payment for its interest. The agreements had been entered into with respect to different ventures and over a period of years. During that time, Simon acquired Mills and "Mill Units" ceased to exist. Nonetheless, the agreements entered into thereafter (with one exception) continued to include the same Call Right, referring to Mills Units as the form of payment that KanAm could elect. (There would never be an actual election for cash payment as that would have significant negative tax consequences; thus, "Mills Units" was the only form of payment that would be chosen, as a practical matter.)

The contract interpretation issue was whether, as KanAm contended, there was no way to effectively exercise the Call Right (*i.e.,* it was rendered meaningless once Mills Units no longer existed), or, as Simon argued, the Call Right could be exercised and Simon Units (which, arguably, were materially similar to Mills Units) could be substituted for Mills Units as the form of payment. For several years, both parties had been aware of the potential for dispute over this issue, but chose not to discuss it with each other, not to amend the existing agreements to change the reference to Mills Units (notwithstanding other amendments to the agreements), and not to change the reference in new agreements that were entered into. When the Call Right ultimately was exercised and the parties disagreed, they sued each other.

Vice Chancellor Glasscock concluded that, in his view, based on the record developed at trial, "the parties engaged in a strategic game of musical chairs, dancing around the contractual silence in the hope that the music would stop at a period of time advantageous to their own purposes. The music has stopped." The court ruled that, as the extrinsic evidence did not establish that the parties had reached a meeting of the minds to substitute some other form of payment for "Mills Units," and as Mills Units no longer existed, the contract terms should be enforced as written. Therefore, Simon could exercise its Call Right, but once KanAm elected payment in Mills Units, Simon could not effect the Call because Simon could not deliver Mills Units. The Vice Chancellor ruled that the covenant of good faith and fair dealing was inapplicable because both parties had anticipated the express issue and had chosen not to address it.

Key Points

- **"Strategic silence" in the face of a looming contract dispute creates a risk of uncertainty as to the ultimate outcome.**
- **The court will consider extrinsic evidence to determine the parties' intent where a contract term (even if stated unambiguously) does not address an issue.**
- **The implied covenant of good faith generally has limited applicability.**

Discussion

Where "unambiguous language" is "silent" with respect to an issue, the court may consider extrinsic evidence to determine the parties' intent at the time of contracting. The court had previously held, in dismissing the summary judgment motion, that the contracts at issue "unambiguously" provided that the "default consideration" when exercising the call was Mills Units; and that the contracts did not address the consequences of a change in control or restructuring of Mills leading to the unavailability of Mills Units. Accordingly, the court stated, it could "not conclude from this unambiguous language whether the parties intended the call right to lapse if and when Mills Units satisfying the contractual criteria became unavailable." Instead, the court stated, it had to "resort to extrinsic evidence to determine how the parties intended to proceed in the circumstances in which

they now find themselves." The "determinative question," the court explained, was "whether there was ever a meeting of the minds between the parties about whether Simon Units were a contractual substitute for Mills Units in the present circumstances." The parties' negotiations, actions and communications prior to the time a dispute arose will be considered as evidence of their intention at the time of contracting. In this case, over a nine-day trial, the court evaluated more than 900 exhibits of extrinsic evidence submitted by the parties.

Extrinsic evidence will be reviewed within the context of the contract language. In reviewing extrinsic evidence, the court emphasized, "the text [of the agreements at issue] remains important." The evidence should be "reconciled" to the text to the extent possible, and "[g]enerally, the parties' undisclosed and private views of a contract's meaning are irrelevant and unhelpful to the Court's consideration of a contract's meaning, because the meaning of a properly formed contract must be shared or common." The court reaffirmed that extrinsic evidence "may include statements and conduct of the parties, business circumstances surrounding the execution of the contract, any course of dealing between the parties, and any usage of trade or industry custom."

The parties' respective positions. Simon contended that "Mills Units" really meant "Mills Units or similar, including Simon Units." Simon argued that its ability to call KanAm's interest was a fundamental right that the parties did not intend to lapse; observed that Mills Units became unavailable due to Mills' own financial difficulties, not anything that Simon did; and questioned why KanAm waited five years to "first communicate its current position." Simon argued that there was no evidence that the parties intended that, if the Mill Units "became unavailable," the Call Right, which was a fundamental aspect of the agreement, would lapse. KanAm relied on the plain, unambiguous terms of the contracts, which provided, on their face, that Mills Units were the default currency. The Call Right did not lapse, KanAm argued, but effectively became a right to seek KanAm's agreement to sell its interest for cash or to renegotiate for other non-cash consideration. KanAm argued that "[t]he sole reason there has been no agreement as to substitute non-cash consideration is because Simon refused to address the issue."

The court's evaluation of the extrinsic evidence. Most of the 106-page opinion relates to the court's evaluation of the extrinsic evidence. It is important to note that the court's analysis was highly fact-specific and the decision very likely would have been different if the facts had, in the court's view, established that the parties *had* reached a meeting of the minds that Simon Units could be substituted for Mills Units once Mills Units became non-existent. The court stated: "All sides knew consideration for the call was an unresolved issue, but failed to bargain for a substitute tender…. [Based on the extrinsic evidence,] these sophisticated parties never mutually agreed to substitute Simon Units for Mills Units."

The court's conclusions about the extrinsic evidence included the following:

- **The unambiguous contract terms.** The original three agreements between KanAm and Mills were amended when Simon joined as a partner of those joint ventures, to provide for Simon Units or Mills Units as consideration on exercise of the call. However, those agreements were later amended or restated to remove references to Simon Units when Simon exited the joint ventures and they were not amended to add Simon Units back in when Simon later rejoined the joint ventures. The agreements governing the three other joint ventures to which Simon was not an original investor did not mention Simon Units. When a Simon joint venture acquired Mills, the contract did not mention Simon Units. Throughout these years, there was evidence that "all sides knew consideration for the call was an unresolved issue, but failed to bargain for a substitute tender." Compounding the issue, when the parties drafted the only joint venture entered into after Simon had exited and then returned as a joint venture partner (which was characterized by the court as "the best chance to address and fully settle the issue"), both parties "punted on the issue," the court wrote. At various points in the opinion, the court emphasized the "unambiguous" nature of the contract language providing for Mills Units as the contract-compliant consideration" and that there was no "showing of a mutual intent regarding the substitution of Simon Units."

- **The exception does not necessarily prove the rule.** Simon had argued that the parties' decision in one joint venture agreement (the last one they entered into) to specifically provide that Simon would be considered as a successor to Mills reflected their mutual intention that that would be how the issue would be resolved. The court reached the opposite conclusion, stating: "The fact that KanAm and Mills bargained for successor units to be tender in one JV Agreement makes more significant the fact that they omitted the same provision in the other Agreements." (The court held that Simon Units *could* be used as payment upon exercise of the Call Right under this one agreement.)

- **Communications to third parties.** KanAm's occasional comments to third parties that Simon Units would be received in lieu of Mills Units if Simon exercised the Call Right were not indicative of an agreement between KanAm and Simon, the court concluded. "[These communications were] not so widespread within KanAm as to convince me that KanAm had a corporate understanding that Simon Units were acceptable tender, in light of the other evidence…," the Vice Chancellor wrote. Further, there was no "course of dealing between [the] two contractual parties [on the issue], and there is no evidence in the record that this information [that KanAm had so communicated to third parties] was relied on by Simon."

- **Equivalency of the Simon Units to the Mills Units.** In the court's view, Simon's argument that the Simon Units were materially equivalent to the Mills Units, and so should be sufficient substitute consideration, did not overcome the facts that (i) the Call Right was an option, and options are to be "construed strictly" with respect to the consideration payable, and (ii) there were important differences between the two forms of consideration, primarily that KanAm had a longstanding relationship with Mills which it did not have with Simon (making the Mills Units preferable to KanAm as compared to Simon Units).

The court's decision not to apply the covenant of good faith. Generally, the implied covenant of good faith and fair dealing is applied only where (i) the parties could not have anticipated a development that later occurred and (ii) it is clear what they mutually would have intended if they had anticipated it. In this case, while the exercise of the Call Right and the absence of Mills Units for payment had been anticipatable, the parties' decision to remain silent on the issue prevented the court from concluding that they had reached a "meeting of the minds" as to what to do. Simon asserted that KanAm had violated the implied covenant of good faith "by attempting to defeat Simon's exercise of the call right by purporting to 'choose' payment in non-existent Mills Units," and thereby "intentionally frustrated Simon's fundamental rights to exercise the call." Pointing to KanAm's position that its put right remained intact, Simon asserted that "the parties did not and never would have agreed to such an unfair arrangement had they thought to negotiate with respect to the matter." KanAm countered that "the parties expressly were aware that the JV Agreements required tender of Mills Units," but there was a decision on both sides to not address a replacement currency." The court concluded:

> "Simon's position… is not supported by our law or the facts of this matter. This is not a case where the parties never considered that exercise of an option would be frustrated by an unexpected happenstance. Dispositive, I think, of Simon's claim is the fact that while there was contractual silence on this issue from both sides, the issue was not unknown to the parties… [T]he circumstances the parties found themselves in—a call provision that explicitly provides the seller the option to require unavailable units a consideration—was recognized by all, but no agreement was reached. A party, after consciously avoiding an issue, cannot seek rescue through the implied covenant, and I may not provide through equity what the parties failed knowingly to provide for themselves. Further, nothing in the record supports the implication that the parties would have agreed to the automatic substitution [of Simon Units for Mills Units] that Simon seeks through the implied covenant. Since I cannot know what resolution the parties would have reached through negotiation, relief via the implied covenant is unavailable.

The court reaffirmed that "the implied covenant is a limited and extraordinary legal remedy" that is "limited to a gap filling role." The covenant can "infer[] contractual terms to handle developments or contractual gaps that. . . neither participant anticipated. However, it… only applies to developments that could not be anticipated, not developments that the parties simply failed to consider. . . ." Additionally, the court stated, "the covenant is not an equitable remedy for rebalancing economic interests after events that could have been anticipated, but were not, that later adversely affected one party to a contract."

Practice Points

- **Deliberate silence in the face of a looming contract dispute is a risky strategy—which, in most cases, likely will advantage the party who is favored by application of the contract term as written.** The decision suggests that, if a contract includes an unambiguous term, but a dispute as to its proper interpretation is likely to arise, the party who would benefit by enforcement of the term as written has more incentive to adopt a "silence strategy" than the other party. However, even for that party, silence in the face of a looming contract interpretation dispute can be a risky strategy. The court's evaluation will be highly fact-specific, and any party adopting a silence strategy may risk losing the equities being on its side. The decision whether to adopt a silence strategy will depend on the extent to which the term is stated unambiguously, the factual record with respect to the parties' intentions at the time of contracting and since then, and the parties' relative

negotiating leverage (if they were to negotiate an amendment). Even where one party may have the better legal arguments, a silence strategy can result in significant uncertainty.

- **Review and consider updating agreements after a change in circumstances.** Particularly where a standard agreement is used for a series of agreements over time, a change in circumstances should prompt a review of the agreements entered into to determine if any amendments are appropriate. In addition, with respect to future agreements, consideration should be given as to whether revisions of the standard agreement are appropriate. If amendments are not initially made to reflect the changed circumstances, but at some point later changes are made in future agreements, the court, as was the case here, may not view the later amendments as affecting the earlier agreements that were not amended.

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Key to Milestones/Earnouts is Precise, Specific, Business-Contextualized Provisions That Cover All Reasonably Expected Scenarios—SRS v. Gilead Sciences

In *Shareholder Representative Services LLC v. Gilead Sciences, Inc*. (March 15, 2017), the Delaware Chancery Court, based on its interpretation of a single word in a lengthy milestone payments provision of a merger agreement (the word "Indication"), held that Gilead did not have to make a $50 million milestone payment.

Key Points

- **Need for precise drafting.** The decision serves as a reminder of the need for precise drafting of milestone and earnout provisions. Clarity and specificity are required to mitigate the risk of future disputes. While issues may unavoidably arise based on unexpected developments, every reasonably anticipated development should be covered. Importantly, lawyers drafting these provisions should work closely with the business people who understand the product, business and industry at issue. The use of specific examples of possible developments and the intended outcome under the milestone/earnout provision, and/or a statement of guiding principles with respect to intended outcomes, should be considered. Based on *Gilead*, in pharma deals, a milestone trigger based on regulatory approval should specify whether approval for a subpopulation of patients would be included or not, and, if so, what the parameters for inclusion would be.

- **Drafting and negotiation history can be evidence of the parties' intent.** The decision highlights that, when an agreement is "ambiguous" as to when a payment is triggered, the parties' negotiating history—including the back-and-forth exchange of draft agreements, as well as contemporaneous communications—may be used by the courts to determine the parties' intent at the time they entered into the agreement. In this respect, a statement of guiding principles for interpretation of the milestones provision could be helpful in providing context for any review of the negotiating history. (For example, in *Gilead*, the parties could have indicated in precatory language in the agreement that the parties intended that the milestone payments would be triggered only by events that represented significant increased market value for Gilead.)

Background. Gilead Sciences, Inc. acquired Calistoga Pharmaceuticals, Inc. in 2011 pursuant to a merger agreement that provided for a $375 million upfront payment and three potential "milestone" payments based on regulatory approvals for Calistoga's main cancer drug compound, CAL-101 (which is now marketed as Zydelig). In August 2014, Gilead paid $175 million in satisfaction of the first two milestone payments after CAL-101 received certain U.S. regulatory approvals. In September 2014, CAL-101 received an EU approval (the "EU Approval"), which SRS, as the representative for the former Calistoga shareholders, claimed satisfied the requirements for the third milestone payment of $50 million. After a four-day trial, Chancellor Bouchard concluded that the third milestone payment was *not* required.

The dispute. Pursuant to the merger agreement, up to three milestone payments would be triggered each time Gilead "receiv[ed] [a] Regulatory Approval of CAL-101…as a first-line drug treatment…for a Hematologic Cancer Indication." A schedule specified a

list of diseases that constituted "Hematologic Cancer Indications." U.S. regulatory approvals were received for use of the drug for two of the diseases that were specified, and the first two milestone payments were made. The EU Approval was then received, for a third disease that was specified—chronic lymphatic leukemia (CLL). However, the EU Approval was for use in a subpopulation of patients with CLL, namely those patients who have a 17p gene deletion (as a result of which chemotherapy, the standard treatment for CLL, is ineffective). The issue arose as to whether a milestone payment would be triggered by an approval for use of the drug in a *subpopulation of patients* who had one of the specified diseases or would be triggered only by approval for use in *patients generally* who had one of the diseases.

The court's analysis. The answer, according to the court, hinged on the meaning of one word in the agreement: "indication." It was established at trial that "indication" has multiple meanings in the oncology industry. As acknowledged by the parties, depending on the context, the term could refer to a disease, a tumor, an indication for starting treatment in a patient, or a regulatory approval label restriction. The court, finding that use of the term was "ambiguous when construed within the four corners of the merger agreement," reviewed extrinsic evidence "to determine the parties' intentions at the time of drafting." The Chancellor concluded: "[T]he overwhelming weight of the evidence demonstrates in my opinion that the parties mutually understood when they entered into the Merger Agreement that the term 'indication' meant 'a disease' [and not a subpopulation with a disease]."

Extrinsic evidence the court found most persuasive. The court viewed the parties' "negotiating history" as the *most persuasive* evidence of their intention at the time of contracting. According to the court:

- **The parties' drafts of the merger agreement.** The back-and-forth drafts of the agreement indicated that the parties' had been "narrowing" the circumstances under which the milestones would be satisfied, providing for more and more significant events as triggers for the payments. In the court's view, the substantive evolution of the drafts indicated that the parties' intention was to provide for milestone payments only when there was an occurrence that represented "significant market value" to Gilead.

- **Contemporaneous communications about the merger agreement drafts.** The emails between the parties summarizing the proposed changes reflected in the new drafts, or responding to questions of the other party, supported the conclusion that the parties' intention was to provide for a milestone payment only when a regulatory approval would represent significant market value. In addition, "the parties were discussing disease-level regulatory approvals throughout their negotiations over the milestones," and there was no communication indicating that the parties had "discussed approvals for subpopulations of disease sufferers when negotiating the milestones," the court wrote.

- "**Structure" of the milestone payments provision.** The milestone payments provision provided for an additional trigger for the third milestone payment that was unrelated to regulatory approval—specifically, that annual net sales for CAL-101 had reached $6 billion within ten years. This "structure" of the milestone payment provision also was, in the court's view, corroborative of the conclusion that the parties intended the third milestone payment to be triggered only by events that represented significant market value to Gilead.

No duty in Delaware to ensure or maximize milestone/earnout payments. While the issue in *Gilead* related to the interpretation of the milestone trigger event, and did not relate to the buyer's post-closing efforts in achieving the milestone, the latter is frequently the basis for dispute in milestone/earnout cases. We note that recent Delaware decisions have clarified that, under Delaware law, there is no duty on a buyer's part to ensure or to maximize a milestone or earnout payment. The Delaware courts have held that a buyer cannot take "affirmative steps" to frustrate a payment; however, generally, the implied covenant of good faith and fair dealing is not applied to read into an agreement covenants that would obligate a buyer to take, or to refrain from taking, actions to ensure or maximize a payment. Nonetheless, it should be noted that the factual context can be critical and there is often a high degree of uncertainty as to the result in these cases. The law in other jurisdictions varies, with some, such as California and Massachusetts, imposing an obligation on the buyer of a business to use "reasonable efforts" to achieve a milestone/earnout—at least in the absence of an express disclaimer to the contrary. Thus, it is critical to consider—and to draft clear and specific provisions that reflect the parties' intent with respect to—post-closing covenants relating to running the acquired business, seeking regulatory approvals, and/or using a specified level of efforts to meet the milestone/earnout triggers.

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Fried Frank M&A/PE BRIEFINGS
1st Quarter 2017

We distributed the following Briefings in the first quarter of 2017. Please click on the title to see the full Briefing.

***Unusual Facts Preclude "Cleansing" of Stockholder-Approved Merger, But the Power of* Corwin *Continues*—Saba Software** (April 13, 2017)

***Delaware Supreme Court Applies "Entire Fairness" to An MLP Conflict Transaction and A Lower Bar to "Bad Faith" Claims—But Decision Is Likely to Have Limited Impact*—Brinckerhoff v. Enbridge Energy** (April 6, 2017)

***Court of Chancery Confirms Directors' Self-Interest Does Not Exclude "Cleansing" Under* Corwin—*And Disclosure Is Sufficient If Stockholders Can "Stitch Together the Facts" to Infer Self-Interest*—Columbia Pipeline** (March 21, 2017)

***Reaffirmation That Stockholder Vote Will Cleanse Non-Conflicted Controller Transactions and Even Those Transactions Approved By Boards That Allegedly Were Not Independent and Disinterested*—Merge Healthcare** (March 8, 2017)

***Importance of Careful Compliance by General Partner with MLP Requirements*—ETE** (March 7, 2017)

***In* Gordon v. Verizon*, New York Appellate Division Shows Greater Receptivity to Non-Monetary Settlements than Delaware Courts Have Shown Since* Trulia** (February 16, 2017)

***Delaware Supreme Court Confirms Business Judgment Rule Applies "Irrebuttably" After Disinterested Shareholder Approval In Non-Controller Transactions*—Volcano** (February 10, 2017)

Delaware Supreme Court Applies Good Faith Obligation to MLP General Partner in* Dieckman*—But We Believe the Decision Will Have Limited Impact on GPs (February 1, 2017)

SEC Fine To Be Paid By Allergan Underscores Obligation to Disclose Negotiations With White Knight Following an Unsolicited Tender Offer (January 20, 2017)

Solera *Decision Underscores (Again) Difficulties of Challenging a Transaction That Was Approved by Disinterested Stockholders* (January 10, 2017)

***Recent Appraisal Decision Relies Solely on Merger Price to Determine "Fair Value"—And May Suggest Greater Receptivity to Downward Adjustments to Exclude Value of Synergies* — Merion v. Lender Processing** (January 5, 2017)

Fried Frank M&A/PE *Round-Up*

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Highlights of our 2017 first quarter work include representations of:

Knight Transportation

Counsel to Knight Transportation in its agreement to merge with Swift Transportation Company in an all-stock transaction.

Community Education Centers

Counsel to Community Education Centers in its signing of a definitive agreement to be acquired by The GEO Group, Inc. for US$360m.

Genesys Telecommunications Laboratories

Counsel to Genesys Telecommunications Laboratories in its acquisition of Silver Lining Solutions Ltd.

Goldman Sachs

Counsel to Goldman Sachs as financial advisor to Cardinal Health Inc. in its definitive agreement to acquire Medtronic's Patient Care, Deep Vein Thrombosis and Nutritional Insufficiency businesses for US$6.1b.

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Fried Frank M&A/PE Quarterlies for 2016 / 2017

▶ 2nd Quarter 2016



▶ 3rd Quarter 2016



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