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State of the Art: Critical Developments and Trends in M&A

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Outline

- Trends in Private M&A
  - Developments in Representation and Warranty Insurance
  - Delaware developments in exclusive remedy and non-reliance provisions
  - Post-closing purchase price adjustments
- Trends in Public M&A
  - Developments in Appraisal Rights Claims
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- Attorney-client privilege considerations in M&A

Developments in Representation and Warranty Insurance

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Representation and Warranty Insurance: Overview

- Provides coverage for financial losses resulting from breaches of representations and warranties made by the target company or sellers in an acquisition agreement
- R&W insurance generally covers all reps in the agreement (subject to certain exceptions) and can separately cover a pre-closing tax indemnity
- Buy-side and sell-side policies are available
  - Buy-side policies can either serve as the buyer's primary source of indemnification recovery or can extend an indemnification package (e.g., excess coverage)
  - Sell-side policies insure the seller against its indemnification obligations to the buyer under the acquisition agreement
- Primary policies are typically subject to a retention amount (e.g., a deductible) of between 1-2% of deal value
- When a buy-side policy is used, sellers often (although not always) retain exposure for losses for breaches of reps and warranties up to the retention amount, subject to a market basket/deductible

Representation and Warranty Insurance: Trends

- Surge in global demand
  - Largest broker reports 32% increase in policies for 2015 compared to 2014, and 45% increase in policy limits
  - Another record year expected for 2016
- Buyer-side policies dominate
- Requirement that buyer utilize R&W insurance has become standard in competitive auctions
- Record demand attracting new underwriters

Representation and Warranty Insurance: Trends

- Competitive dynamic in marketplace driving changes to coverage
  - Insurers willing to provide coverage even if no seller "skin in the game" (i.e., no seller post-closing indemnity obligation)
  - Longer Standard Coverage Periods
    - Most policies provide for a standard three-year survival period, regardless of survival period specified in acquisition agreement
    - Customary fundamental and certain other negotiated extended survival reps (e.g., tax and environmental) survive for the shorter of six years or applicable statute of limitations period
  - Modestly Higher Average Insurance Premiums
    - Greater overall demand causing prices to rise, even as supply to market has increased
    - Current market average premium range has tightened to 3.5% to 4.0%, from former 1.5% to 4.0% range
  - More Coverage Exclusions
    - Underwriters' due diligence and claims experience driving more coverage limitations and exclusions
    - Matters more likely to be excluded: health care compliance, cybersecurity and data privacy matters, product liability, environmental matters, and certain labor and employment matters, such as Fair Labor Standards Act and wage/hour matters

Representation and Warranty Insurance: Trends

- Expansion of Universe of Covered Losses
  - **Unless** specifically excluded from indemnity under acquisition agreement, now fairly typical for policies to cover:
    - Consequential damages
    - Damages based on multiplier
    - Diminution in value
    - Punitive damages paid to third party
  - Changes to Retention Concept
    - Retention amounts typically automatically "step down" at a specified period of time following closing
    - Retention amounts generally trending downward
  - Standard Inclusion of Full "Materiality Scrapes"
  - Increased Streamlining of Underwriting Process
    - Shorter, more concentrated underwriting due diligence
    - Carriers know they have to move fast to make product appealing in marketplace
    - Insurance is seen as much less of a delay factor in transactions

Exclusive Remedy Provisions in Acquisition Agreements

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Exclusive Remedy Provisions

- Acquisition agreements typically include language stating that following closing, the indemnification provisions in the agreement constitute the sole and exclusive remedy with respect to claims arising under the agreement
- Purpose of this provision is to foreclose claims for breach outside of the carefully negotiated indemnification limitations in the agreement (e.g., survival, caps and baskets)
- Acquisition agreements commonly include exceptions to the exclusive remedies provisions, which may include:
  - Fraud
  - Intentional breach
  - Willful misconduct
  - Willful misrepresentation
  - Gross negligence
  - Equitable relief

Ramifications of Exclusions to Exclusive Remedies Provisions

- Exceptions to the exclusive remedies provision open the door to uncapped liability, limited only by the applicable statute of limitations
- Fraud determination may involve subjective interpretations of mind-set and unpredictable results
- Fraud can be used as bargaining chip for settlement outside of indemnification provisions
- Be wary of the introduction of tort concepts
- A general fraud carve-out may extend beyond intentionally misrepresenting the facts to encompass reckless misconduct
- Sellers may negotiate for fraud to be clearly defined in the agreement and limited to knowing misrepresentations made with an intent to deceive

Non-Reliance Provisions in Acquisition Agreements

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Non-Reliance Provisions: Overview

- Non-reliance provisions in acquisition agreements generally are intended to limit the buyer's ability to make a fraud claim for statements made outside of the four corners of the agreement
- Because justifiable reliance is an element of fraud in most jurisdictions, a statement by the buyer disclaiming reliance on statements made outside of the agreement may serve to defeat a fraud claim based on statements made outside the agreement in certain jurisdictions, including Delaware
- In most acquisition agreements, claims for fraud are not subject to the negotiated indemnification limitations, meaning the ability to bring a fraud claim for extra-contractual fraud claims has significant consequences
- From a buyer's perspective, standard non-reliance provisions do not reflect reality, as the business decision makers typically rely on numerous statements made outside of the four corners of the agreement (e.g., financial projections) when deciding whether to enter into a transaction

Non-Reliance Provisions: Delaware Case Law Developments

- ABRY Partners V, L.P. v. F & W Acquisition LLC (2006). A sophisticated party to a contract may disclaim reliance on extra-contractual statements, which disclaimer will preclude a fraud claim by such party based on anything other than the statements within the contract. Such provisions will not, however, preclude a fraud claim based on statements made in the contract (because the party is relying on such statements).
- Anvil Hldg. Corp. v. Iron Acquisition Co., Inc. (2013). The seller's disclaimer of any representations other than those in the agreement and "entire agreement" clause together were not sufficient to "reflect a clear promise by the Buyer that it was not relying on statements made to it outside of the Agreement to make its decision to enter the Agreement." Accordingly, the buyer was permitted to bring a fraud claim based on extra-contractual representations.
- TransDigm Inc. v. Alcoa Global Fasteners, Inc. (2013). The buyer's disclaimer of reliance on extra-contractual representations was insufficient to defeat a fraud claim based on pre-signing active omission by the sellers.

Non-Reliance Provisions: Delaware Case Law Developments

- Prairie Capital III, L.P. v. Double E Holding Corp (2015). While there are no magic words required for an anti-reliance provision to be effective, the language must "add up to a clear anti-reliance clause." "Positive" statements that the buyer is solely relying on the representations within the agreement are not sufficient to preclude the buyer's extra-contractual fraud claim; rather, "negative" statements that the buyer is not relying on extra-contractual matters are required.
- FdG Logistics v. A&R Logistics (2016). An anti-reliance provision is not effective to preclude an extra-contractual fraud claim by the buyer if drafted solely from the point of view of the seller (i.e., a limitation by the seller of the seller's representations will not preclude an extra-contractual fraud claim by the buyer).
- IAC Search, LLC v. Conversant LLC (2016). Buyer's acknowledgement that the seller was not making any representation or warranty regarding any information buyer received in due diligence unless expressly included in a representation and warranty in the agreement, together with a standard contractual integration clause, added up to a clear non-reliance clause and precluded buyer's extra-contractual fraud claim.

Non-Reliance Provisions: New York and California

- New York
  - New York courts generally follow the Delaware approach in enforcing specific non-reliance provisions
  - New York recognizes a "peculiar knowledge" exception to non-reliance provisions—if a seller has unique knowledge of a misrepresented fact, the contractual non-reliance provision may not defeat a fraud claim
  - Relevant factors in determining whether a seller has peculiar knowledge include (i) the buyer's level of sophistication, (ii) the buyer's access to information underlying the alleged misrepresentation, and (iii) whether the buyer took reasonable steps in order to protect itself against fraud
- California
  - California courts generally hold that it is against public policy to allow a party to contractually absolve itself of liability for its own willful or negligent fraud
  - Some California courts hold that parties simply cannot contractually waive a fraud claim, although integration and non-reliance provisions may still be relevant in determining whether a buyer justifiably relied on the seller's extra-contractual fraudulent statement
  - Further, some federal courts in California have found that specific written statements in a contract that directly contradict an extra-contractual statement can defeat a fraud claim

Non-Reliance Provisions: Key Takeaways

- While there is no magic language for an effective non-reliance provision, the statement should:
  - be unambiguous regarding the parties' intent—i.e., the language should include an explicit disclaimer of reliance on any statements made outside of the four corners of the agreement; and
  - be made by the party against whom the non-reliance provision will be enforced—i.e., a buyer's disclaimer should be included in the buyer's representations or an acknowledgement given by the buyer, not within the seller's representations and warranties
- The non-reliance provisions should also disclaim reliance on the accuracy and completeness of information provided by the seller and include an acknowledgement that the seller may have non-public information regarding the target that is not being provided to the buyer
- To the extent possible, the parties should specify particular categories of information provided outside of the four corners of the agreement for which reliance is being disclaimed (e.g., financial projections)

Post-Closing Purchase Price Adjustments

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Post-Closing Purchase Price Adjustments: Overview

- Most acquisition agreements involving private targets include provisions for post-closing purchase price adjustments
- These adjustment provisions are intended to reconcile changes in the target's financial condition that occur prior to closing or to ensure that the target is delivered with the "normalized" financial metrics upon which the purchase price valuation is based
- The most common purchase price adjustment mechanic is tied to changes in the target's working capital
- Other common purchase price components that are subject to adjustment include:
  - Cash;
  - Indebtedness; and
  - Transaction Expenses
- While purchase price adjustment provisions are designed to ensure that neither the buyer nor the seller receives a windfall based on changes to the target's balance sheet, they commonly give rise to post-closing disputes

Post-Closing Purchase Price Adjustments: Working Capital Common Pitfalls

- A working capital adjustment tests closing date working capital against a negotiated target benchmark
- A properly functioning working capital mechanic requires an understanding of the target's business and accounting practices
  - It is important that both the lawyers and accountants are coordinated in drafting the working capital language
  - Poorly understood working capital adjustment mechanics can result in unintended significant value transfer to the buyer or the seller
- Parties should define working capital as specifically as possible
  - At minimum parties should work to identify the specific accounts that will be included and excluded as current assets and current liabilities in the working capital calculation
  - Reference to detailed working capital exhibit is advisable
- The details of the calculation methodology are important

Post-Closing Purchase Price Adjustments: Working Capital Calculation Methodology

- The general baseline standard is that working capital will be calculated in accordance with GAAP, consistently applied
- Because GAAP is not a fixed set of rules, simply relying on GAAP may yield little predictability for the parties
- Alternative standards include:
  - In accordance with GAAP applied in a manner consistent with the preparation of the latest balance sheet or latest audited balance sheet
  - In accordance with GAAP applied in a manner consistent with the target's historical practices
  - In accordance with the target's historical practices
  - In accordance with the methodologies set forth on the working capital exhibit
  - A combination of the foregoing
- Some companies follow GAAP for purposes of closing out books at period-end, but may not follow GAAP on an interim basis
- Including an example calculation in the purchase agreement can help eliminate ambiguity
- If buyer, consider inclusion of language making clear that GAAP trumps prior practice in the event of a conflict
- If seller, consider inclusion of language in the agreement stating that accounting methods, policies, practices and procedures, including reserve calculation methodologies, that are consistent with historical practice should be used in determining any purchase price adjustment

Post-Closing Purchase Price Adjustments: Resolving Disputes

- If the parties disagree regarding the post-closing working capital calculation and are unable to resolve the dispute, most purchase agreements provide that the dispute will be submitted to an independent accountant for resolution
- Reaching agreement on the terms of the independent accountant's engagement can be difficult
  - Agreement should include a covenant by the parties to enter into the independent accountant's standard engagement letter
- Agreement should clearly specify the procedure governing the independent accountant's determination
  - Requirement that the independent account follow the methodologies set forth in the agreement
  - Specify what materials the independent accountant is entitled to request from the parties (e.g., work papers)
  - Determine whether independent accountant must rule within the range specified by the parties

Trends in Public M&A: Developments in Delaware Appraisal Rights Claims

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Delaware Appraisal Rights: Overview

- Appraisal rights allow dissenting stockholders in a merger transaction to petition the Delaware Chancery Court to independently determine the "fair value" of their shares at the time immediately prior to the merger (does not include any value arising from or after the merger).
- Appraisal rights apply to public and private transactions, but only to all-cash and certain stock/cash transactions.*
  - The appraisal price, as determined by the Chancery Court, can be greater than, equal to or less than the per share price paid in the transaction.
  - Stockholders seeking appraisal also receive interest on the eventual fair value of the target's stock from the effective date of the merger through the date of payment on the determined fair value of the stock at the statutory rate of 5% over the Federal Reserve discount rate (unless the Chancery Court determines otherwise).

* Appraisal rights do not apply in mixed stock and cash transaction when (i) the cash portion is only provided in lieu of fractional shares or fractional depository receipts or (ii) the stockholder can elect stock or cash without proration or cap.

Delaware Appraisal Rights: Overview

- Chancery Court has Wide Discretion:
  - Unlike traditional transaction litigation, appraisal actions proceed directly from discovery to a trial where a judge determines the "fair value" of the shares
  - The Chancery Court has wide discretion to determine the fair value of shares based on a variety of valuation methodologies or metrics
- Interest Component Minimizes Risk:
  - In a low interest rate environment, the guaranteed statutory interest (currently 6.00%, calculated as the statutory 5% plus the current Federal Reserve discount rate of 1.00%) can provide a solid return on investment. Even if the Chancery Court decides the fair value is less than the offered price, the interest component minimizes this risk for those seeking appraisal.

Delaware Appraisal Rights: Overview

- Historically, the Chancery Court has generally used the deal price in disinterested transactions where there are effective market checks AND the third party and other expert valuation analyses presented to the Chancery Court are unreliable
- However, as a practical matter, even where the valuation analyses presented to the Chancery Court are reliable, a disinterested transaction with effective market checks have generally been appraised at or close to the transaction price
- Therefore, arbitrageurs have tended to seek out transactions involving interested parties or lacking in effective market checks

Delaware Appraisal Rights: 2016 Statutory Developments

- Recent amendments to Delaware's appraisal rights statute apply to transactions that are signed on or after August 1, 2016
- A new *de minimis* exception provides that the Chancery Court must dismiss an appraisal proceeding unless (i) the total number of shares entitled to appraisal exceeds 1% of the outstanding shares of the class or series eligible for appraisal; (ii) the value of the consideration provided in the transaction for the shares eligible for appraisal exceeds $1 million; OR (iii) the merger was approved pursuant to DGCL § 253 or 267 (short-form mergers)
- Surviving corporations will have the option to make cash payments (e.g., the deal price) prior to an entry of judgment to stockholders seeking appraisal
- Interest will accrue only on the difference between the amount paid and the amount finally determined to be payable
- It remains unclear as to whether payment is returned to corporations if the final determination is less than the amount paid in advance

Delaware Appraisal Rights: Case Law Developments

- In re: Appraisal of Dell Inc. (2016). The Delaware Chancery Court held that the merger price in a transaction that was negotiated in a lengthy, well-run, arm's-length sale process and approved by a majority of the target's unaffiliated stockholders did not represent fair market value. The court focused on several factors that it believed undercut the legitimacy of the merger price, and used its own in-house DCF analysis in determining that fair market value was 28% higher than the merger price.
- In re Appraisal of DFC Global Corp. (2016). The Delaware Chancery Court held that the deal price determined in an arm's-length transaction that was subject to a robust market check did not represent fair market value, finding that the transaction price and management's projections were unreliable because of tremendous regulatory uncertainty surrounding the target's business. The court found that the discounted cash flow analysis, multiple based comparative company analysis, and the transaction price were each imperfect, and determined fair market value by weighing all three methodologies equally.
- Dunmire et al. v. Farmers & Merchants Bancorp of Western Pennsylvania, Inc. (Nov. 2016). The Delaware Chancery Court found that the actual merger price did not represent the fair market value of the company at the time of the transaction because of what the court viewed as flaws in the sale process. The court placed no weight on the merger price as an indicator of fair value and disregarded the valuation models proposed by the parties' respective experts, instead applying the court's independent valuation analysis.

In re Appraisal of DFC Global Corp.

- DFC Global Corporation was sold to a private equity sponsor for $9.50 per share
- Deal price was determined in an arm's-length transaction that was subject to a robust market check
- In July 2016, the Chancery Court (Bouchard) held that the fair market value of DFC's common stock was $10.21 per share
  - Despite the court having historically afforded deference to deal price in appraisal actions involving arm's-length negotiations
- The court noted that the transaction price is a reliable indication of fair market value only when the market conditions leading to the transaction are conducive to achieving a fair price
- The court found the transaction price and management's projections to be unreliable because of tremendous regulatory uncertainty surrounding DFC's business
- In determining fair market value, Chancellor Bouchard stated that each of the proposed valuation methodologies (discounted cash flow analysis, multiple based comparative company analysis, and the transaction price) were imperfect, and determined fair market value by weighing all three methodologies equally

Appraisal Rights: Key Takeaways

- It is unclear how broadly *Dell*, *DFC Global* and *F&M Bank* will be applied, although risk from appraisal proceedings is clearly not limited to just management buy outs
- Delaware statutory changes will help buyers manage the interest rate risk of appraisal claims, but deal price risk remains and may be amplified as a result of the *Dell, DFC Global* and *F&M Bank* decisions
- While relatively uncommon in recent years, buyers may begin pushing harder for the inclusion of dissenting stockholder conditions in merger agreements, which allow the buyer to elect not to close if stockholders holding in excess of a threshold percentage of the target's voting power demanded appraisal rights

Trends in Public M&A: Delaware Court Decisions

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In Re Books-A-Million Inc.

- October 2016 decision in which Delaware Chancery Court clarified obligations of controlling stockholder when authorizing a going private transaction
- Books-A-Million controlling stockholder submitted a proposal to acquire remaining Books-A-Million shares from minority stockholders for $3.25 per share
- In order to comply with the Delaware Supreme Court's 2014 decision in *Kahn v. M&F Worldwide Corp.*, the acquisition proposal was submitted conditioned upon approval by both (i) an independent special committee and (ii) a majority of the company's minority stockholders
- Even though controlling stockholder had indicated that it was not willing to sell its shares to a third party, the special committee conducted a full market check
- The committee received a proposal from a third party to acquire the company at a price of $4.21 per share
- The offer was conditioned upon the controlling stockholder selling its shares
- Stockholder plaintiff challenged the transaction on the basis that the board and controlling stockholder had breached their fiduciary duty by failing to accept the higher third-party proposal

In Re Books-A-Million Inc.

- Delaware court dismissed the plaintiff's complaint
- Case demonstrates that a special committee will generally be found to satisfy its duty of care in a controlling stockholder transaction as long as:
  - The requirements of the *MFW* framework are satisfied:
    - Transaction conditioned from the beginning on approval by (i) a properly empowered, independent special committee and (ii) an informed, uncoerced majority-of-the-minority stockholder vote;
  - The transaction does not constitute "waste"; and
  - The special committee does not act in bad faith
- Support by the special committee of a "grossly inadequate price" might constitute bad faith, but:
  - A controlling stockholder's offer is not grossly inadequate solely because it is below a third party's offer price; and
  - A controlling stockholder has no obligation to sell its shares to a third party

In re Volcano Corporation

- June 2016 Delaware Court of Chancery decision involving the sale of Volcano Corporation to Koninklijke Philips (the "Acquiror") in a two-step merger under DGCL Section 251(h)
- In Volcano, after signing a merger agreement with Volcano satisfying the requirements of Section 251(h), the Acquiror purchased 89.1% of Volcano's stock in the first-step tender offer, and acquired the remainder of the Volcano shares in the second-step merger
- Goldman Sachs served as Volcano's financial advisor in connection with the acquisition
- Two years earlier, Volcano had entered into a "call spread" hedging transaction with Goldman Sachs
- As a result of the acquisition, Goldman Sachs received $24.6 million from Volcano under the hedging transaction—had the acquisition not been completed when it was, the amount to which Goldman Sachs was entitled under the hedging transaction would have decreased over time
- Plaintiff stockholder sued alleging that the Volcano directors breached their fiduciary duties because they acted on the flawed advice of a conflicted financial advisor

In re Volcano Corporation

- The Chancery Court cited the 2015 Delaware Supreme Court holding in *Corwin v. KKR Financial Holdings LLC*
  - When a transaction not subject to the entire fairness standard is approved by a fully informed, uncoerced vote of the disinterested stockholders, the business judgment rule applies and can only be challenged on the basis that it constituted waste
- The Chancery Court extended the reasoning from *Corwin* to two-step mergers, holding that a tender of shares by a majority of stockholders in a two-step merger under DGCL § 251 has the same "cleansing effect" as a stockholder vote
- The failure of the target to provide incremental disclosure to its stockholders that would only be "somewhat more informative" is not enough to cause the stockholder vote to be uninformed
- If a fully informed, uncoerced majority of disinterested stockholders approve the transaction, the only grounds for attacking the transaction is that it constituted waste
  - The court noted that it is "logically difficult to conceptualize how a plaintiff can ultimately prove a waste or gift claim in the face of a decision by fully informed, uncoerced, independent stockholders to ratify the transaction"

The Williams Companies, Inc. v. Energy Transfer Equity, L.P.

- Case arose from a merger agreement between ETE and Williams under which ETE (through a newly formed parent entity) would acquire Williams in exchange for cash and equity in the newly formed parent
- Closing was conditioned upon the delivery by ETE's tax counsel of a legal opinion that a portion of the transaction would be afforded tax-free treatment
- Ultimately, ETE's tax counsel said that it was unable to deliver the tax opinion, and ETE asserted that without the tax opinion it was not required to close
- Another firm was prepared to deliver the tax opinion
- In June 2016, a lower court ruled that given that ETE's tax counsel could not provide the tax opinion as provided in the merger agreement, ETE did not have to close and could terminate the agreement
- Williams filed an appeal and the case is still pending

The Williams Companies, Inc. v. Energy Transfer Equity, L.P.

- The Williams/ETE lower court decision will result in greater focus on tax opinion closing conditionality in certain future transactions
- Traditionally, one or both parties' counsel often would be required to deliver a tax opinion as a closing condition
- Since the Williams decision, some high profile transactions have dispensed with tax opinions as a closing condition
  - AT&T/Time Warner; Enbridge/Spectra Energy
- Increasingly, at signing parties are agreeing to the form of opinion and representation letter to the opining law firm
- When tax opinions are required, dispute resolution mechanisms in the event that a party's tax counsel is unable to deliver the opinion will likely become more common
  - One example is a provision stating that an independent law firm may be allowed to deliver the opinion if the buyer's counsel or seller's counsel, as applicable, is unable
- Increasingly, at signing parties are agreeing to the form of opinion and representation letter to the opining law firm
- Inclusion of (soft) covenants by the parties to discuss potential restructuring of the transaction if tax opinion can't be given or intended tax results can't be achieved

Attorney-Client Privilege Considerations in M&A

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Attorney-Client Privilege: Overview

- In the M&A context, attorney-client privilege issues generally arise in two scenarios:
  - Prior to signing/closing, parties to an M&A transaction need to share information with third parties outside of the zone of privilege, including deal counterparties, financial advisors, lenders and representation and warranty insurance carriers
  - Following closing, questions arise as to what entity controls the privilege regarding pre-closing communications, specifically as it relates to communications regarding the transaction

Issues Regarding Attorney-Client Privilege Prior to Signing/Closing

- Because the attorney-client privilege only applies to confidential communications between the attorney and client, sharing privileged communications with third parties can result in the waiver of privilege
- Courts have held that disclosures of attorney-client privileged communications to third parties do not result in waiver under two commonly recognized paradigms:
  - The Interpreter Analogy –when an agent is essential for the attorney to render legal advice, then the disclosure of communications to that agent does not result in a waiver
  - The Common Interest Doctrine – allows parties with a common interest in a legal matter to share privileged information

Common Interest Privilege

- The law in this area is unsettled.
  - New York's highest court recently held that communications between Bank of America and Countrywide and their respective counsel during the pre-merger period were not protected by attorney-client privilege under New York law, reversing a lower court opinion.
    - The lower court had held that the communications were made for the purpose of furthering a legal interest or strategy in common to the parties – to ensure the parties' compliance with law and to resolve pre-closing legal issues of common interest.
    - The court held that pre-merger communications are protected from disclosure only if shared during the post-signing, pre-closing period and only if litigation is pending or reasonably anticipated.
- Federal courts have largely rejected the requirement that covered communications pertain to pending or anticipated litigation.
- Uniform Delaware Rules of Evidence codify the common interest doctrine without requiring the pendency or anticipation of litigation.
- Recommendation: Exercise caution. If attorney-client privileged information is to be shared, ensure that a written common interest agreement is in place.

Attorney-Client Privilege Post-Closing

- Following closing, questions arise as to who controls the privilege for pre-closing communications between the target, the sellers, and their attorneys
- As a general rule in stock sale or merger context, attorney-client privilege remains with the target
- Attorney-client privilege regarding transaction negotiations
  - New York Rule: attorney-client privilege regarding transaction negotiations remains with the seller
  - Delaware Rule: Absent agreement between the parties, all privileged communications (including privilege relating to deal negotiations) remain with the target
- Most acquisition agreements now include language specifically addressing what party retains and controls privilege for pre-closing communications regarding the target

Presenter Profiles

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Mr. Davidson also represents venture capitalists and corporate strategic investors, as well as companies in connection with private placements of equity and debt, and he counsels start-up and emerging growth companies in all aspects of their corporate legal requirements.

Mr. Davidson represented Intel Capital in connection with its $600 million investment in Clearwire -- at the time the largest ever venture capital transaction. Later, he again represented Intel Capital for its $1 billion investment in the entity formed by the merger of Sprint's WiMAX business and Clearwire, its additional investment in Clearwire, and the acquisition of Clearwire by Sprint Nextel. Mr. Davidson served as counsel to Accuray Incorporated, developer of the CyberKnife radiosurgery system, with respect to its strategic alliance agreement with Siemens and its merger agreement with TomoTherapy. He also represented Allergan in connection with its collaboration and co-promotion agreements with, and subsequent acquisition of, MAP Pharmaceuticals. In addition, Mr. Davidson represented MTC Holdings, a port terminal operator, in connection with its acquisition by Highstar Capital private equity fund.

Mr. Davidson is named in *Chambers USA – American Leading Lawyers for Business* as a Leader for his mergers and acquisitions practice and his venture capital practice.

Mr. Davidson joined Gibson Dunn in 1988 after earning his law degree from the University of California, Berkeley, School of Law. He received his Bachelor's degree with distinction in political science and economics from Stanford University in 1985. He is the former Chairman of the Board of Directors of United Way Silicon Valley.

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Consistently recognized as one of *The Best Lawyers in America®*, Mr. Little's practice focuses on corporate transactions, including mergers and acquisitions, securities offerings, joint ventures, investments in public and private entities, and commercial transactions. He also advises business organizations regarding matters such as securities law disclosure, corporate governance, and fiduciary obligations. In addition, he represents investment funds and their sponsors along with investors in such funds. Mr. Little has represented clients in a variety of industries, including energy, retail, technology, transportation, manufacturing, and financial services.

In 2013, Mr. Little was the youngest corporate M&A lawyer in Texas to receive a ranking by *Chambers USA: America's Leading Lawyers for Business*. *Chambers* noted that Mr. Little "attracted a raft of glowing comments, with one interviewee noting: 'He is very personable and one of the best lawyers in negotiations at keeping the relationship with the other side good. He is a fantastic lawyer with great commercial and interpersonal skills.'" *Chambers* 2014 observed that he has a "remarkable grasp of legal issues" and "provides outstanding legal work." The 2015 edition noted that he "receives extensive praise from clients and peers who describe him as 'extremely thorough and very knowledgeable.'" In 2016, *Chambers* observed that clients praise him for being "strategic, super-responsive [and] a fast learner of industries" and having "an excellent approach to complex and highly contested negotiations."

Mr. Little received his law degree in 1998 with highest honors from The University of Texas School of Law, where he was named a Chancellor and a member of Order of the Coif and served as Articles Editor of the *Texas Law Review*. He also holds a B.A. from Baylor University, where he graduated *summa cum laude* in 1995. He previously served as a law clerk to The Honorable Patrick Higginbotham of the U.S. Court of Appeals for the Fifth Circuit.

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Mr. Whalen's practice focuses on a wide range of corporate and securities transactions, including mergers and acquisitions, private equity investments, and public and private capital markets transactions.

Mr. Whalen received his law degree *summa cum laude* in 2009 from the SMU Dedman School of Law, where he was a member of the Order of the Coif and served as an Articles Editor on the *SMU Law Review*. He earned his Bachelor of Science degree *summa cum laude* and his Masters of Business Administration degree from Louisiana Tech University. Prior to the practice of law, Mr. Whalen served as the vice-president of a landscape contracting firm in Dallas, Texas.

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