Financing Provisions in Acquisition Agreements

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INTRODUCTION

Corporate acquisition transactions can take many forms, including mergers, equity purchases, asset purchases, and recapitalizations. Regardless of form, many acquisitions are funded with a combination of equity financing from the buyer and debt financing from a lender or group of lenders identified by the buyer. Especially in public company acquisition transactions, there can be a long time-lag between execution of the acquisition agreement and consummation of the transaction, due to the need to satisfy closing conditions such as antitrust clearance and shareholder approval. Although lenders often provide financing commitments at the time of signing of the acquisition agreement, the commitments typically have some conditions to their obligation to consummate the financing. These conditions may include contingencies not reflected in the acquisition agreement, such as financial conditions applicable to the business of the target company at closing. In the wake of the 2008 financial crisis, one of the most hotly negotiated issues in leveraged acquisition transactions is the allocation between the buyer and the seller of the risk that the contemplated debt financing for the acquisition fails to materialize between signing and closing.

NOTE: The buyer in a corporate acquisition may be a financial sponsor or strategic purchaser, or a combination of one or more sponsors and strategic purchasers. The buyer may include one or more shell acquisition subsidiaries. The term "seller" as used in this article includes not only the target company but also, to the extent applicable, the target's equity holders receiving consideration in the transaction.

The allocation between buyer and seller of the risk that an acquisition financing may not be obtained is accomplished in part by provisions in the acquisition agreement. These provisions may include (1) the presence, or absence, of a financing condition to the buyer's obligation to close (and alternative provisions, such as a reverse breakup fee), (2) the buyer's representation to the seller concerning the terms of its committed debt financing, (3) the covenant of the buyer to obtain financing, and (4) the covenant of the seller to cooperate with the buyer in obtaining financing. The acquisition agreement also may include financing-related provisions specific to the business of the buyer or seller or to the transaction itself. In addition, in the wake of the litigation among buyers, sellers, and lenders that occurred when acquisition financing collapsed during the financial crisis, it has become customary for lenders to seek in acquisition agreements so-called "Xerox" provisions, intended to mitigate the lenders' risk of liability to the buyer for failure to fund.

FINANCING CONDITIONS AND REVERSE BREAKUP FEES

A financing condition is a condition to the buyer's obligation to close the acquisition that the buyer has obtained the debt financing contemplated at the date of signing the acquisition agreement, or alternative debt financing on comparable terms. A "pure"

financing condition squarely allocates the risk of a failure of the debt financing to the seller. If the debt financing fails to materialize, the buyer's obligation to consummate the acquisition is excused and the buyer has an option to walk away from the deal without penalty. The consequences to the seller of a failure of the debt financing may include material economic loss. The seller may not be able to obtain a price comparable to the original price, and there is a risk of reputational loss for a failed deal. Out-of-pocket expenses for the seller may also be significant. For this reason, sellers often resist a "pure" financing condition strongly, particularly in auction situations where sellers have many alternative suitors.

Financing conditions that allocate the financing risk completely to the seller as described above are rare in the current public market. Indeed, a number of recent public merger agreements have included language specifically disclaiming any financing condition. A compromise approach that has become common in order to allocate the risk of a failure of the debt financing between seller and buyer is the so-called "reverse breakup fee." A reverse breakup fee is an amount payable to a prospective *seller* if the buyer fails to consummate the acquisition due to conditions specified in the acquisition agreement, which may include the failure of the buyer's proposed debt financing. (In contrast, a traditional breakup fee is an amount payable to a prospective *buyer* if the seller fails to consummate the acquisition as a result of specified conditions, such as the acceptance of an alternative bid by the seller.)

In some deals, the reverse breakup fee is the sole remedy for a financing failure, but the buyer retains a potential remedy of specific performance or damages for a willful or other type of breach. In other deals, the reverse breakup fee is the sole remedy for any type of breach by the buyer. The latter type of structure is called a "pure option" reverse breakup fee, because, in essence, it gives the seller an option to walk away from the transaction for an agreed price.

The reverse breakup fee provisions need to be considered in the overall context of the other remedial provisions of the acquisition agreement. Some deals establish one level of reverse breakup fee for financing failures and another level for other types of breaches, often including a higher amount for "willful" breaches. It is important that the specific performance, damages, and reverse breakup fee provisions be drafted clearly and that their interaction consistently reflects the parties' intent. The Delaware Chancery Court has held that a specific performance remedy may be unavailable in light of conflicted contractual provisions. See *United Rentals, Inc. v RAM Holdings, Inc. & RAM Acquisition Corp.* (Del Ch 2007) 937 A2d 810.

In addition, in reviewing its remedies for a potential buyer breach or financing failure, the seller will want to take into account the creditworthiness of the buyer entity. In many leveraged transactions, the buyer's merger subsidiary and its direct owner (the parties to the acquisition agreement) may be mere shell entities with no assets at the time of execution of the agreement. As a result, the seller will want to seek a guaranty or other type of recourse to a creditworthy entity.

A reverse breakup fee is an amount payable to a prospective *seller* if the buyer fails to consummate the acquisition due to conditions specified in the acquisition agreement, which may include the failure of the buyer's proposed debt financing.

BUYER'S FINANCING REPRESENTATIONS

Representations Concerning Financing Commitments

The buyer will be asked to make certain representations to the seller regarding its financing commitment letters. As used in this article, the phrase "financing commitment letters" includes one or more of the equity and debt commitment letters, the fee letter relating to the debt commitment, and (if applicable) any engagement letter with respect to potential debt securities to be included in the debt financing. One of these representations will be that the buyer has provided to the seller true, correct, and complete copies of the applicable financing commitment letters. (See Example 1, p 86.)

From the buyer's perspective, the seller's representation that it has provided to the buyer current copies of its financing commitment letters is essential. Whether there is a financing condition in the agreement or not, the seller needs to be able to understand how the conditions to the financing relate to the conditions to the acquisition. The conditions to the debt financing are usually the focus of most of the discussion. Both buyer and seller will be incentivized to make the conditions to the debt financing track as closely as possible the conditions to closing in the acquisition agreement. It is common, for example, for the material adverse change condition in the debt financing commitment to be conformed virtually

word for word to the material adverse change condition in

> **Example 1:**
> **Sample Buyer Financing Representation (Availability of Commitment Letters)**
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> **Parent has delivered to the Company true, correct and complete copies of the executed commitment letters from Bank of America, N.A., Merrill Lynch, Pierce, Fenner & Smith Incorporated and Royal Bank of Canada, dated as of the date hereof (the "Debt Commitment Letter"), pursuant to which, and subject to the terms and conditions thereof, the lender parties thereto have committed to lend the amounts set forth therein to Parent for the purpose of funding the transactions contemplated by this Agreement (the "Debt Financing"), and (ii) the executed equity commitment letter, dated as of the date hereof (the "Equity Commitment Letter" and, together with the Debt Commitment Letter, the "Financing Commitments") from certain funds affiliated with Apax Partners, L.P. ("Sponsor") pursuant to which Sponsor has caused such funds to commit to invest the amounts set forth therein (the "Equity Financing" and, together with the Debt Financing, the "Financing"). The Equity Commitment Letter provides, and will continue to provide, that the Company is a third party beneficiary thereof.**
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> See Epicor Software Corporation, Current Report on Form 8-K, Exhibit 2.1 (Agreement and Plan of Merger dated as of April 4, 2011 between Eagle Parent, Inc., Element Merger Sub, Inc., and Epicor Software Corporation) (Epicor Merger Agreement), Section 5.8(a), filed April 6, 2011, available at http://www.sec.gov/Archives/edgar/data/891178/000119312511090368/dex21.htm.

the acquisition agreement. Both buyer and seller will focus on, and attempt to eliminate, conditions to the debt financing that are not conditions to the acquisition (*e.g.,* minimum EBITDA or other financial conditions). So called "SunGard" provisions (limiting conditionality in debt financing commitments with respect to representations and warranties required for closing, and with respect to certain collateral matters) are common in the current market.

One particular point of contention in the financing representation can be whether a redacted version of the fee letter between the buyer and its lenders will be disclosed to the seller, and what information will be redacted. It has become customary in preparing acquisition financing commitments to include in the fee letters not only the amount of any fees payable to the lenders, but also other potentially confidential provisions. A key set of provisions often included in fee letters are the so-called "market flex" provisions, which give the lenders some flexibility to change provisions of the financing commitment in connection with the syndication of the debt. Because fee letters are subject to confidentiality requirements, a buyer will need to obtain its lenders' consent for any disclosure, which the lenders may be unwilling to provide. At a minimum, they will insist on redaction of the fee amounts. They may also redact certain of the market flex provisions and other amounts. If the buyer has entered into an engagement letter with an investment bank to place a portion of the financing, the treatment of confidential economic information may be similar to that of the fee letter. (See Example 2, p 87.)

The seller, however, may request limited information relating to market flex and the maximum amount of fees payable under the commitment letter(s). The market flex provisions of the fee letter give the lenders flexibility on pricing and potentially other terms in connection with syndication of the loans, but in reviewing these provisions, the seller will want to make sure that they do not give the lenders the ability to impose new conditions to the availability of the financing at closing.

The buyer's financing representation also normally includes the following matters relating to the financing commitments:

- A representation with respect to the enforceability of the financing commitment letters;
- A representation that, as of the date of the acquisition agreement, there has been no event that would constitute a default under the financing commitment letters;
- A statement that there are no contingencies to funding the full amount of the financing, other than as set forth in the financing commitment letters;
- A representation that, assuming the full amount of the financing is funded at closing, the buyer will have sufficient funds to pay the acquisition consideration, as well as any fees and expenses required to be paid in connection with the acquisition and the financing, and to pay amounts related to refinancing of any outstanding indebtedness of the seller contemplated by the acquisition agreement and financing commitment letters.

Buyer's Solvency Representation

Separate from the representation concerning the financing commitments, it has become common in public leveraged buyouts for the buyer to represent to the seller that the purchased enterprise will be "solvent" after giving effect to the sale transaction and related debt financing. Solvency is usually defined in a way consistent with applicable state and federal fraudulent transfer laws and in light of case holdings that certain aspects of leveraged buyout transactions may be challenged as fraudulent transfers. The solvency definition will therefore usually include not only a balance sheet test but also tests to the effect that the entity will be able to pay debts as they become due and that the entity will not be left with unreasonably small capital. Solvency—either of the seller's enterprise as a whole on a consolidated basis or with respect to specific borrower and guarantor entities—may be a condition to the debt financing. The buyer may have more detailed information available to it concerning the economics of the financing than will the seller. In making the solvency representation, the buyer will usually be able to assume that the seller is in compliance with all of its representations and warranties in the acquisition agreement or at least the provisions relating to its financial condition.

Example 2:
Sample Buyer Financing Representations
(Fee Letter and Engagement Letter)

Except for a fee letter and an engagement letter (complete copies of which have been provided to the Company with only the fee amounts and certain economic terms of the market flex (none of which would adversely affect the amount or availability of the Debt Financing if so required by the lenders party to such letters) redacted), there are no side letters or other agreements, contracts or arrangements relating to the Financing Commitments.

See Epicor Merger Agreement, Section 5.8(b), third sentence.

Parent has delivered to the Company true, correct and complete fully executed copies of the commitment letter, dated as of the date hereof, among Parent, Bank of America, N.A. and Merrill Lynch, Pierce, Fenner & Smith Incorporated, including all exhibits, schedules, annexes and amendments to such agreement in effect as of the date of this Agreement, and excerpts of those portions of each fee letter and engagement letter associated therewith that contain any conditions to funding or "flex" provisions (excluding provisions related solely to fees) regarding the terms and conditions of the financing to be provided thereby . . .

See Silgan Holdings Inc., Current Report on Form 8-K, Exhibit 2.1 (Agreement and Plan of Merger dated as of April 12, 2011 between Silgan Holdings Inc. and Graham Packaging Company Inc.) (Silgan Merger Agreement), Section 3.02(s), filed April 18, 2011, available at http://www.sec.gov/Archives/edgar/data/849869/000119312511101026/dex21.htm.

A key set of provisions often included in fee letters are the so-called "market flex" provisions, which give the lenders some flexibility to change provisions of the financing commitment in connection with the syndication of the debt.

BUYER'S COVENANT TO OBTAIN FINANCING

The buyer's financing covenant contains the buyer's undertaking to use "reasonable best" efforts (or "commercially reasonable" efforts, or a similar formulation) to obtain the financing described in the financing commitment letters. The additional provisions of the covenant supplement and add detail to this general undertaking. They often include the buyer's agreement not to permit any modification of the terms of the financing commitments without the seller's consent, subject to certain exceptions (which often include adding or replacing lenders, but not adding any new conditions to funding or expanding the existing conditions). Further, in the additional provisions of the covenant, the buyer usually agrees to:

- Maintain the financing commitment letters in effect and comply with all obligations thereunder;
- Enter into definitive agreements for the debt financing (sometimes within a specified number of days of signing the acquisition agreement);
- Give notice to the seller if certain events (such as default) occur under the financing commitment letters; and
- Obtain alternative financing (generally, on terms not materially less favorable to the buyer) if the

original financing contemplated by the financing commitment letters becomes unavailable.

One component of the covenant to obtain the financing under the financing commitment letters is that the buyer generally agrees to use reasonable efforts (or a similar standard) to enforce its rights under the commitment letters. (See Example 3, p 88.)

Example 3:
Sample Buyer Covenant to Enforce Financing Commitments (General Undertaking and Enforcement of Commitment Language)

Parent shall use its reasonable best efforts to take, or cause to be taken, all actions and to do, or cause to be done, all things necessary, proper or advisable to consummate and obtain the Financing on the terms and conditions described in the Commitment Letter, including using best efforts to (i) maintain in effect the Commitment Letter and, if entered into prior to the Closing, the definitive documentation with respect to the Financing contemplated by the Commitment Letter (the "Definitive Agreements"), . . . and (v) enforce its rights under the Commitment Letter and Definitive Agreements in the event of a breach by the Financing Sources that impedes or delays the Closing, including by seeking specific performance of the parties thereunder if necessary, unless Parent reasonably concludes that seeking specific performance is impracticable or not reasonably likely to succeed under such circumstances. In the event that all conditions to the Financing have been satisfied, Parent shall use its reasonable best efforts to cause the lenders and the other persons providing such Financing to fund such Financing on the Closing Date.

See Silgan Merger Agreement, Section 5.12(a) (excerpted from first sentence).

The wording of the provision concerning the buyer's obligation to enforce its rights under the financing commitment letters can be controversial. The buyer will want the maximum flexibility in its relationship with its lenders. Accordingly, the buyer may be hesitant to be overly specific in the acquisition agreement about the actions it will take to enforce its rights under the commitment letters.

SELLER'S FINANCING COOPERATION COVENANT

In a leveraged buyout, the target's assets and revenue are used to support the acquisition financing. Indeed, in a financial sponsor acquisition, the target's business may be the sole or primary source of recourse for the acquisition lenders. Even if the buyer is a strategic buyer, the target's business likely will provide part of the credit support for any acquisition financing. Accordingly, the buyer will seek a covenant from the seller that it will cooperate with the buyer in obtaining the buyer's financing contemplated by the financing commitment letters.

In the wake of the financial crisis, buyers have been serving up significantly more detailed and extensive requirements for the seller's assistance with the financing. This development is being driven in part by lenders' insistence on increasingly detailed syndication conditions in the financing commitment letters. It also benefits the buyer by creating more "optionality" in the acquisition agreement: If the buyer does not want to close, it will look for covenant breaches by the seller, which will allow it to terminate the acquisition agreement without paying the reverse breakup fee. On the other hand, sellers seek to streamline their cooperation covenant and define their obligations as clearly as possible. As a result, these provisions are heavily negotiated.

As in the case of the buyer's covenant to obtain the financing, the seller's cooperation covenant begins with a general statement of the seller's obligation, followed by specific agreements that supplement the general undertaking. (See Example 4, below.)

Example 4:
Sample Seller Covenant to Cooperate With Buyer in Obtaining Financing (General Undertaking)

The Company shall, and shall cause its Subsidiaries to, at the sole expense of the Parent use its and their reasonable best efforts to provide such cooperation as may be reasonably requested by Parent in connection with the financing of the Transactions, if any, including . . . .

DPL Inc., Current Report on Form 8-K, Exhibit 2.1 (Agreement and Plan of Merger dated as of April 19, 2011 between DPL Inc., The AES Corporation, and Dolphin Sub, Inc.) (AES Merger Agreement), Section 5.13(a) (initial sentence/lead in), available at http://www.sec.gov/Archives/edgar/data/874761/000114420411023092/v219172_ex2-1.htm.

The list of specific seller undertakings often includes the seller's agreement to, or in certain cases to use "reasonable best" efforts (or "commercially reasonable" efforts, or a similar formulation) to:

- Participate in lender meetings, rating agency presentations, and bond offering road shows, and prepare related documents (bank book, rating agency presentation, and bond offering documents);
- Execute definitive loan documents and certificates (including a solvency certificate) for closing of the financing; and
- Obtain auditor comfort letters and legal opinions.

The seller typically requires the buyer to indemnify the seller for any actions taken in connection with buyer's financing and to reimburse the target for any fees and expenses that it incurs by its compliance with the cooperation covenant. The covenant also customarily makes clear that the seller will not be liable for any fees or expenses related to the financing unless and until the acquisition closes.

Required Information and Marketing Period

Required Information

The financing cooperation covenant will often include an obligation of the seller to deliver "Required Information" (sometimes called "Required Financial Information") to start the "Marketing Period." The intent of this covenant is to give the buyer a sufficient period of time before the closing to syndicate its debt financing, including (but not necessarily limited to) any part of the debt financing consisting of a private placement or public offering of securities. These two definitions are often the most heavily negotiated of the financing-related provisions in the acquisition agreement.

In general, "Required Information" is the financial information needed by the buyer to prepare an offering document for its debt financing. There is an important distinction between "Required Information" (which must be provided before the closing of the acquisition) and the other information and assistance required by the cooperation covenant (which usually requires only "reasonable efforts" or a similar standard to satisfy). For this reason, the seller will want to move as many requirements as possible out of the "Required Information" definition and into the general provisions of the financing assistance covenant. At a minimum, "Required Information" will usually include financial statements and other financial data required by Regulation S-X (17 CFR pt 210) and Regulation S-K (17 CFR pt 239) of the Securities Act of 1933 (Securities Act) (15 USC §§77a–77aa) for registered offerings, of the type and form customarily included in private placements under Rule 144A of the Securities Act (17 CFR §230.144A). Often it will also include other information and data as necessary to receive customary auditor comfort letters with respect to the financial statements and other financial data described above. The buyer will often request that "Required Information" include information necessary to prepare pro forma financial statements. The seller may agree to include such information as "Required Information," but will clarify that preparation of the pro forma financial statements is the buyer's responsibility. There often are deal- and party-specific carveouts and exceptions to the definition. (See Example 5, p 90.)

Marketing Period

The "Marketing Period" ties to the buyer's obligation to close the transaction. As usually defined, it is the minimum number of days that must elapse before closing to allow for marketing the buyer's financing. The basic length of the marketing period for many transactions in the current market is 20 calendar or business days. Many acquisition agreements will provide for a delay after execution of the agreement before the marketing period can begin, to give the buyer time to prepare the bank book, rating agency presentation, and bond offering memorandum. The time period of this delay may be tied to the expiration of the go-shop period or the mailing of the proxy statement. Depending on the time of year in

which the acquisition agreement is signed, the marketing period may also have a built-in delay for the winter holiday season or other seasonal events to account for the difficulty of marketing debt during this time. For example, the acquisition agreement may provide that if the marketing period has not ended before Christmas, it will not commence until after the new year.

In addition, the Marketing Period usually can begin only after certain closing conditions in the acquisition agreement are satisfied or waived. At a minimum, these conditions include stockholder approval of the deal, a bring-down of the seller representations (including the representation that there has been no material adverse change), and the absence of any injunction or law restraining or prohibiting consummation of the acquisition. The buyer will seek to include additional conditions, such as compliance with covenants, obtaining regulatory or third party consents, and delivery of certain certificates and affidavits. The seller will often draft a notice provision in the acquisition agreement, enabling it to give notice to the buyer that it believes in good faith that it has provided the Required Information and that the Marketing Period will be deemed to have commenced unless the buyer objects in good faith within a specified time period.

Example 5:
Sample Definition of "Required Information"

. . . all consolidated financial statements and other pertinent information related solely to the Company and the Company Subsidiaries required by the Financing Commitments and all financial statements, financial data, audit reports and other information related solely to the Company and the Company Subsidiaries required by Regulation S-X (other than Sections 3-10 and 3-16) and Regulation S-K under the Securities Act and of type and form customarily included in an offering memorandum pursuant to Rule 144A under the Securities Act to consummate the offering(s) of debt securities contemplated by the Financing Commitments, but without the Company having to prepare separate financial statements for any Company Subsidiary or changing any fiscal period and (ii) during the period commencing on the twenty-third (23rd) Business Day immediately prior to July 13, 2011, and ending on the filing of the 2011 10-K, preliminary financial results of the Company and the Company Subsidiaries for the fiscal year ended May 31, 2011, including a preliminary consolidated balance sheet, preliminary income statement and preliminary cash flow statement (and, if available, any preliminary audit adjustments and notes thereto) (all such information in this clause (d), the "Required Financial Information"); provided, however, that Required Financial Information shall not include, and Parent shall be solely responsible for, the preparation of pro forma financial information including, pro forma cost savings, synergies, capitalization, ownership or other pro forma adjustments desired to be incorporated into any pro forma financial information; provided, further, however, that Required Financial Information shall not include any of the information required by Items 10-14 of Form 10-K;

See Lawson Software, Inc., Current Report on Form 8-K, Exhibit 2.1 (Agreement and Plan of Merger by and among GGC Softward Holdings, Inc., Atlantis Merger Sub, Inc. and Lawson Softward, Inc. dated as of April 26, 2011), Section 6.7(d), filed on April 26, 2011, available at http://www.sec.gov/Archives/edgar/data/1344632/000104746911004086/a2203658zex-2_1.htm.

The Marketing Period may also include triggers for certain accounting-related events that will suspend the Marketing Period, such as withdrawal of the audit opinion with respect to any financial statements, announcement of a restatement of the seller's financials, a delay in SEC reporting, or the receipt of material SEC comments on a disclosure document. The seller should exercise caution, however, because these triggers can work as a proxy for financial-related conditions that would not otherwise cause a failure of a closing condition. Because these conditions are not typically included in the financing commitment letters, the seller will argue that these conditions should not delay or prevent the closing of the acquisition. If the buyer's debt financing includes a Rule 144A (or other securities) offering component, the buyer will often negotiate with its lenders for a committed bridge loan to be available in the event that the securities markets are unfavorable at the time of the closing. The seller will expect such a bridge commitment and will argue in the context of negotiating the Marketing Period definition that the bridge loan is intended to be a backstop to the securities offering.

The buyer also needs to ensure that the financial information provided does not go stale during the Marketing Period. As a result, the definition often incorporates a provision that the Marketing Period will not be deemed to have commenced if the financial statements included in the Required Information would be required to be updated under Regulation S-X during the 20-day period in order to permit a registration statement using those financial statements to be declared effective by the SEC.

DEAL-SPECIFIC FINANCING PROVISIONS

In addition to the provisions discussed above, an acquisition agreement may include specific financing-related provisions concerning the particular buyer, seller, or transaction. Examples of these provisions include provisions relating to the disposition of convertible debt securities, the seller's cooperation with respect to a preclosing tender offer for debt securities of the seller, and the prepayment of the seller's bank debt. The buyer's confidentiality obligations with respect to nonpublic information of the seller will need to be tailored to take into account the possible disclosure of such information to prospective lenders as part of the debt syndication process.

LENDER LIABILITY PROTECTION PROVISIONS

In the wake of litigation relating to financing failures during the financial crisis (see, *e.g.*, *BT Triple Crown Merger Co., Inc. v Citigroup Global Mkts., Inc.* (NY Sup Ct 2008) 866 NYS2d 90; *Hexion Specialty Chems., Inc. v Huntsman Corp.* (Del Ch 2008) 965 A2d 715), acquisition lenders are concerned that sellers may claim that any failure to fund committed acquisition financing amounts to tortious interference with the acquisition agreement and that lenders could face potential tort liability. This liability might even exceed the amount of any reverse breakup fee or damages cap negotiated by the buyer in the acquisition agreement. The lawsuits potentially could be brought in forums favorable to the seller (*e.g.*, before juries in the seller's home state).

In response, acquisition lenders have developed the so-called "Xerox" language to be included in the acquisition agreement. (The language is referred to as "Xerox" language because it first came to the market's attention when it was included in a 2009 merger agreement among Xerox Corporation, Boulder Acquisition Corp., and Affiliated Computer Services, Inc. See http://www.sec.gov/Archives/edgar/data/108772/000119312509199142/dex21.htm) The language gives the lenders the benefit of any cap on damages negotiated by the buyer. Some variant of the Xerox language is now routinely included in public acquisition agreements.

The Xerox provisions typically include the following:

- The lenders have the benefit of any cap on damages negotiated by the buyer (so that if the reverse breakup fee is the sole and exclusive remedy of the seller under the acquisition agreement as against the buyer, it is also the sole and exclusive remedy as against the lenders);

- New York is the exclusive jurisdiction for any action brought against the lenders in connection with the acquisition;
- Buyer and seller waive any right to a jury trial; and
- The lenders are express third-party beneficiaries of these provisions.

CONCLUSION

Debt financing will continue to be an important part of corporate acquisitions for the foreseeable future. As long as debt remains an important source of funding, sellers and buyers will continue to struggle with minimizing, and allocating between themselves, the risk of a debt financing failure between signing and closing. The outcome of this negotiation in any particular transaction will depend in part on the negotiating leverage of the parties and the nature of their particular businesses. The typical representations, warranties, and covenants that allocate the financing risk in the acquisition agreement are complex and will continue to evolve as creative buyers and sellers (and their counsel) continue to improve and refine them.

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