PENN STATE LAW REVIEW

Symposium

The Deal Lawyers' Guide to Public and Private Company Acquisitions

Introduction to the Transcripts and Articles in this M&A Symposium Issue of the *Penn State Law Review*

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I. THE THREE TRANSCRIPTS AND FIVE ARTICLES

A. Introduction

We are the Co-Chairs of the *Eighth Annual Institute on Corporate, Securities, and Related Aspects of Mergers and Acquisitions* (the "M&A Institute"), which was jointly sponsored by the Penn State Center for the Study of Mergers and Acquisitions and the Center for CLE of the New York City Bar. The Institute was held at the New York City Bar on October 13 and 14, 2011.

This Symposium Issue of the *Penn State Law Review* contains (1) annotated transcripts of three of the panels at the M&A Institute, and (2) five articles based on, and extensions of, several of the many presentations made at the Institute. It gives us great pleasure to introduce the transcripts and articles contained in this Symposium Issue.

We start by thanking the many authors who have taken the time to edit and annotate the transcripts and write the articles contained in this Symposium Issue. All these editors and authors are outstanding M&A professionals who have put forth a superb effort in bringing this Symposium Issue to fruition. We also would like to congratulate the *Penn State Law Review* for undertaking this very valuable project, and we would like to note the excellent leadership provided on this project by Jacob M. Mattinson, the Editor-in-Chief, and Alan C. Green, the Executive Articles Editor. We would also like to thank the tireless efforts of Cathy Dittman, a former administrative assistant at the Penn State Law School, who helped to make this all possible.

We anticipate that for many years the transcripts and articles in this Symposium Issue will be valuable to both M&A practitioners and courts faced with M&A issues.

Before providing an introduction to the major points covered in the transcripts and articles, we would first like to introduce them and explain the rationale for their inclusion in this Symposium Issue. These transcripts and articles deal with many, if not most, of the major issues faced by deal lawyers in M&A transactions.

B. The Three Transcripts

The three annotated transcripts included in the issue are based on two mock negotiations and a mock argument held at the M&A Institute:

(1) *Negotiating Acquisitions of Public Companies Structured as Friendly Tender Offers (Public Company Negotiations)*;

(2) *Private Company Acquisitions: A Mock Negotiation (Private Company Acquisitions)*; and

(3) *Mock Argument before the Delaware Supreme Court on the Airgas Poison Pill Decision (Airgas Poison Pill Mock Argument)*.

All these transcripts contain footnote references that expand on the points discussed in the Mock Negotiations and Mock Argument. Thus, these transcripts provide valuable references to, and examination of, the legal principles and authorities discussed. Also, the *Public Company* and *Private Company* transcripts contain in the appendices or footnotes provisions of deal documents illustrating the issues discussed.

In the discussions below of the Mock Negotiations, as a general rule, only the discussion leader is mentioned in this introduction by name; the names and positions of all the other participants are set out at the front of the transcript.

C. The Five Articles

There are five articles in this Symposium Issue covering major issues arising in M&A transactions:

(1) *A Brief Introduction to the Fiduciary Duties of Directors Under Delaware Law* (*Fiduciary Duties Under Delaware Law*);

(2) *Basic Tax Issues in Acquisition Transactions* (*Tax Issues in Acquisition Transactions*);

(3) *Asset Acquisitions: Assuming and Avoiding Liabilities* (*Asset Acquisitions*);

(4) *Judge and Banker—Valuation Analyses in the Delaware Courts* (*Valuation Analyses in Delaware*); and

(5) *Exchange Consolidations: Help or Hospice?* (*Exchange Consolidations*).

Except for the *Exchange Consolidations* article, these articles elaborate on many of the issues raised in the two Mock Negotiation transcripts.

II. PUBLIC COMPANY NEGOTIATIONS, TRANSCRIPT

The discussion leader for the *Public Company Negotiations* panel was Richard E. (Rick) Climan of Dewey & LeBoeuf LLP. Rick, who has extensive experience representing public companies in M&A transactions, is the former chair of the Mergers & Acquisitions Committee of the American Bar Association's Business Law Section.

This *Public Company Negotiations* transcript focuses on the acquisition of a publicly held target by a publicly held acquiror in a two-step transaction. The first-step is a negotiated, friendly tender offer, and the second-step is a follow-up merger, either long-form or short-form. The consideration in both steps is cash at the same per-share amount. As pointed out in the transcript, the major advantage of this structure, as distinguished from a single step merger, is speed; the two-steps can generally be completed within "five to six weeks," whereas a one-step deal can be a "three- to four-month process." As discussed in the transcript, if there are regulatory or financing issues, the parties may be effectively foreclosed from structuring a two-step deal.

The transcript focuses on, *inter alia*, the following issues that arise in a two-step, but not a one-step, transaction:

(1) the SEC's "all holder, best price rule," which was recently liberalized, thereby eliminating a barrier to friendly tender offers;

(2) "top-up" options, which are used principally to allow an acquiror that receives less than 90% in a tender offer to acquire newly issued shares directly from the target that will take the acquiror's ownership above 90%, thereby permitting the acquiror to complete the second step as a short-form merger;

(3) conditions unique to two-step transactions, and

(4) special issues in soliciting tenders of the target's shares.

The transcript also discusses the following issues that can arise in both one-step and two-step transactions:

(1) the use of standstills and exclusivity provisions in the pre-agreement documents;

(2) a non-reliance provision in the definitive agreement, which provides that the acquiror can only rely on the express representations and warranties in the agreement;

(3) deal protection devices, including a discussion of the reason for the fiduciary limitation on the amount of termination fees payable by the target to the acquiror (*i.e.*, direct termination fees); and

(4) antitrust provisions of a definitive agreement, including reverse termination fee provisions, which require the acquiror to pay a termination fee to the target if the transaction does not receive antitrust clearance, which was the case in the recently abandoned proposed acquisition by AT&T of T-Mobile.

III. PRIVATE COMPANY ACQUISITIONS, TRANSCRIPT

The discussion leader for the *Private Company Acquisitions* panel was Byron F. Egan of Jackson Walker L.L.P. Byron was the co-chair of the Asset Acquisition Agreement Taskforce of the Mergers & Acquisitions Committee of the American Bar Association's Business Law Section. The Taskforce published the widely acclaimed *Model Asset Purchase Agreement with Commentary* (2001).

The *Private Company Acquisitions* transcript focuses on the acquisition by a private equity firm of a target corporation that is held by 30 shareholders who are members of a "disjointed family." The transaction starts out as a stock acquisition but for a variety of reasons morphs into an asset acquisition. The transcript examines several issues that can arise in stock and asset acquisitions of closely held targets, including issues related to corporate law, contract law, and Federal income tax law. The discussion focuses extensively on the treatment of assumed and non-assumed liabilities and the impact of fraudulent conveyance laws in addressing a potential environmental liability.

The discussion of the Federal income tax considerations addresses the difference between a taxable stock acquisition and a taxable asset acquisition of a C corporation and why, in general, an acquiror should pay less in a taxable stock acquisition. Many of the tax concepts discussed in the transcript are elaborated upon in the article *Tax Issues in Acquisition Transactions*.

The corporate law discussion focuses, *inter alia*, on the following issues:

(1) the absence of appraisal rights in Delaware in a sale of assets transaction;

(2) the meaning of the term "substantially all the assets" under Section 271 of the Delaware General Corporation Law, which provides for a shareholder vote where there is a sale of such assets; and

(3) whether the "dropping of a consent" by a controlling shareholder immediately upon the signing the acquisition agreement is a permissible way of foreclosing the potential of an interloper.

The discussion of contractual issues in private company acquisitions includes an examination of (1) indemnification, (2) survival of representations and warranties, (3) confidentiality agreements, (4) exclusivity agreements, and (5) letters of intent.

Frances Murphy, of Slaughter and May in London, provides, from a comparative standpoint, European perspectives on many of the issues discussed.

IV. AIRGAS POISON PILL MOCK ARGUMENT, TRANSCRIPT

The third transcript, *Airgas Poison Pill Mock Argument*, is based on a mock appeal to the Delaware Supreme Court of the 2011 *Airgas* decision of the Delaware Court of Chancery.[1] In that decision, former Chancellor Chandler, in a long and comprehensive opinion, refused to order the redemption of Airgas's poison pill. This decision is one of the most important Delaware decisions addressing poison pills and was not appealed to the Delaware Supreme Court because the acquiror, Air Products, abandoned the transaction as a result of Chancellor Chandler's decision.

Acting in the role as the Chief Justice of the Delaware Supreme Court for the mock argument was former Vice Chancellor of the Delaware Court of Chancery, Stephen P. Lamb, now of Paul, Weiss, Rifkind, Wharton & Garrison LLP. The two attorneys representing the companies in the mock argument were on opposite sides of the actual case in the Delaware Chancery Court. William M. Lafferty, of Morris, Nichols, Arsht & Tunnell LLP, was counsel for the acquiror, Air

1. Air Products & Chemicals, Inc. v. Airgas, Inc., 16 A.3d 48 (Del. Ch. 2011).

Products, and Kevin R. Shannon, of Potter Anderson & Corroon LLP, was counsel for the target, Airgas.

V. FIDUCIARY DUTIES UNDER DELAWARE LAW, ARTICLE

The first article, *Fiduciary Duties Under Delaware Law*, was written by three leading lawyers from three of Delaware's leading corporate law firms: Lisa A. Schmidt of Richards, Layton & Finger, P.A.; Donald J. Wolfe, Jr. of Potter Anderson & Corroon LLP., and the previously mentioned William M. Lafferty of Morris Nichols. Penn State is proud to say that both Bill Lafferty and Lisa Schmidt are graduates of the Dickinson School of Law, which has become the Penn State Dickinson School of Law.

This article does an excellent job of discussing the applicability of fiduciary duties of directors in a variety of transactions involving the acquisition of Delaware target corporations. The fiduciary duties include (1) the *Revlon* requirement of getting the "best price reasonably available" in, *inter alia*, cash transactions, and (2) the *Unocal* two-pronged reasonableness standard applicable to the employment by a target's board of defensive tactics, such as a poison pill.

VI. TAX ISSUES IN ACQUISITION TRANSACTIONS, ARTICLE

The second article, *Tax Issues in Acquisition Transactions*, was written by Michael L. (Mike) Schler of Cravath, Swaine & Moore LLP. Mike is the co-chair of the annual Institute on Tax Aspects of Mergers and Acquisition, which is jointly sponsored by Penn State's Center for the Study of M&A and the New York City Bar. This article provides an excellent discussion, from a deal lawyer's perspective, of some of the major Federal income tax issues arising in an M&A transaction.

The article addresses both (1) taxable stock and asset acquisitions, and (2) tax-free stock and asset reorganizations. In connection with tax-free transactions, the article discusses the tax motivations behind the horizontal double dummy transaction that was used, for example, in Oracle's acquisition of PeopleSoft. Also, the article briefly touches on (1) acquisitions of target corporations that have net operating losses, and (2) tax-free spinoffs prior to an acquisition. The article elaborates on many of the tax issues discussed in the *Private Company Acquisitions* transcript.

VII. ASSET ACQUISITIONS, ARTICLE

The third article, *Asset Acquisitions*, which was written by the previously mentioned Byron F. Egan, of Jackson Walker L.L.P., explores, *inter alia*, the following issues:

(1) the pros and cons of structuring an acquisition as an asset acquisition, stock acquisition, or merger;

(2) the assignability of contracts, including the treatment of intellectual property rights in asset acquisitions, stock acquisitions, and mergers; and

(3) the successor liability issues that can arise in asset acquisitions.

This article, which is extensively referred to in the *Private Company Acquisitions* transcript, has an excellent discussion of potential "responses" to the risks of successor liability, including provisions of the acquisition agreement.

VIII. VALUATION ANALYSES IN DELAWARE, ARTICLE

The fourth article, *Valuation Analyses in Delaware*, was authored by two leading M&A lawyers from Cleary Gottlieb Steen & Hamilton LLP: William A. Groll and David Leinwand. The article discusses the evolving law in Delaware relating to (1) the required disclosures in the M&A proxy statement or registration statement of the valuation analyses done by the investment banker on the transaction, and (2) the close scrutiny by the Delaware courts of the substance of these analyses.

The article has an excellent discussion of the valuation analysis in Chancellor Strine's 2011 decision in *Southern Peru*,[2] one of the most important decisions of the Delaware courts in 2011. This case involved an interested party transaction in which the Chancellor found that the board of a publicly held acquiror (Southern Peru), which was controlled by Grupo Mexico, breached its fiduciary duty in paying too much for the stock of Minera Mexico that was also controlled by Grupo Mexico. Thus, Grupo Mexico was the controller of both the acquiror, Southern Peru, and the target, Minera Mexico. The deal was done at a price proposed by Grupo Mexico.

The case was brought by minority shareholders of the acquiror, Southern Peru. The Chancellor applied the entire fairness doctrine, and found that the price was not fair. He, therefore, required Grupo Mexico to pay Southern Peru $1.2 billion in damages. In reaching this decision, the Chancellor took a detailed look at the valuation methodologies employed by Southern Peru's financial advisers, and he rejected them.

2. *In re* S. Peru Copper Corp. S'holder Derivative Litig., 30 A.3d 60 (Del. Ch. 2011).

In *Valuation Analyses in Delaware*, the authors point out that valuation issues are an active area of litigation in Delaware courts, even in transactions not presenting conflicts of interests. Consequently, the authors properly assert that "[c]are and consistency in preparing valuation analyses, and in describing them adequately to shareholders, are essential to the smooth effectuation of transactions."

IX. EXCHANGE CONSOLIDATIONS, ARTICLE

The fifth and final article, *Exchange Consolidations*, deals with one of the hottest issues in M&A, the consolidation of securities and commodities exchanges. This article was written by Philip McBride Johnson, a retired partner of Skadden, Arps, Slate, Meagher & Flom LLP and a former Chairman of the Commodities Futures Trading Commission. The article addresses whether exchange mergers (for example, the proposed but abandoned merger of Deutsche Börse Group, the principal German securities exchange, and NYSE Euronext, the principal U.S. securities exchange) can "stem or reverse the gains made by . . . alternative execution methodologies." He suggests that rather than merging, exchanges should "go gung-ho into the alternative trading systems world. . . ."

X. CONCLUSION

We are confident that the excellent transcripts and articles in this Symposium Issue will make an important and lasting contribution to the practice of M&A. We again thank all the editors and authors and congratulate the members of the *Penn State Law Review*.