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# THE FOUR-RING CIRCUS - ROUND TWENTY; A FURTHER UPDATED VIEW OF THE MATING DANCE AMONG ANNOUNCED MERGER PARTNERS AND AN UNSOLICITED SECOND OR THIRD BIDDER

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# The Four-Ring Circus - Round Twenty; A Further Updated View Of The Mating Dance Among Announced Merger Partners And An Unsolicited Second Or Third Bidder

Congratulatory handshakes and champagne toasts often accompany the execution and announcement of a merger agreement between a public company and its chosen merger partner. All too often, though, the celebration is premature. In the U.S., the incidence of unsolicited second and even third bidders surfacing after two companies have announced a definitive friendly merger agreement (or in the case of some foreign jurisdictions, a target-endorsed friendly offer) has become a standard execution risk of getting a deal done, and tends to reflect the ebb and flow of hostile acquisition activity. Such disruptive activity has been branded with its own jargon—“deal-jumping.”[1] This article endeavors to provide a retrospective of deal-jump transactions, and certain deal mechanics and structures, which have helped to shape the current state of play in the market for corporate control.

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A list of some of the notable U.S. transactions (with increasingly important foreign deal-jumps listed beginning on page 5) from 2011 through the beginning of 2016 (listed from later years to earlier years by the year of the announcement of the original signed deal) in which a signed merger agreement (or in the case of certain foreign deals where there are no merger agreements, an endorsed or recommended bid) was disrupted (or attempted to be disrupted) by a second bidder includes:[2]

## 2016

- Origin Technologies Corp.’s pending attempt to disrupt Thermo Fisher Scientific Inc.’s announced purchase of Affymetrix Inc.;
- an Anbang Insurance Group Co., Ltd.-led consortium’s pending attempted deal-jump of Marriott International Inc.’s acquisition of Starwood Hotels & Resorts Worldwide Inc. (as of the date this article is going to press, Marriott has, for now, successfully countered Anbang’s unsolicited bid with a higher deal—details on further developments, if any, to come in “Round Twenty-one”);
- Microchip Technology’s successful deal-jump of Dialog Semiconductor PLC’s announced acquisition of Atmel Corporation;

[1] Note that for purposes of this article “deal-jumping” does not include the continuation or raising by a hostile bidder of its bid in the face of a target attempting to escape by entering into a “white-knight” merger agreement with a third party. As further described in this article, while CF Industries had its hostile bid for Terra outstanding for a year, it had withdrawn its offer a month before Terra and Yara entered into their merger agreement, making CF Industries’s subsequent overbid qualify in our view as a “deal-jump.” In what we would categorize as a couple of notable instances of 2013 “not quite deal-jumps,” mention goes to (1) a Finnish entity named “Nokita” (meaning “to increase a bid” in Finnish), which was created and led by a former Nokia employee to publicly see if it could compete with Microsoft in its $7 billion acquisition of Nokia’s devices and services business—with no resulting bid; and (2) activist Starboard Value Fund, which until days before the shareholder meeting for Smithfield Foods’ $7 billion sale to China’s Shuanghui International, insisted that it was trying to put together a consortium to split up Smithfield at substantially higher value than the deal (notwithstanding the fact that Smithfield had investigated that route at the public instigation of its largest shareholder prior to the sale), only to call off its opposition the Friday before the meeting. What may earn the same label for 2016 is the rumored interest of BASF SE in jumping the giant Dow/Dupont “merger of equals” transaction announced in late 2015 on the Dupont side. Mere media reports of the rumor caused Dupont stock to shoot up roughly 5 percent, while sending BASF stock down over 2 percent. Only time will tell whether this becomes an actual deal-jump, notwithstanding a great deal of skepticism by media commentators.

[2] A similar list of notable U.S. deal-jump transactions from 1994 through 2010 is included on Annex A.

## 2015

- Icahn Enterprises L.P. successful deal-jump, and acquisition, of The Pep Boys – Manny, Moe & Jack as it was being acquired by Bridgestone Corporation;
- ON Semiconductor Corporation's pending acquisition of Fairchild Semiconductor International, Inc., after Fairchild Semiconductor's rejection of a competing acquisition offer from Hua Capital Management and China Resources Microelectronics Ltd.;
- Microsemi Corporation's successful break-up of Skywork Solutions, Inc.'s proposed acquisition of PMC-Sierra, Inc.;
- Montage Technology Group Limited's ultimate failure to break up Diodes Incorporated's acquisition of Pericom Semiconductor Corporation, notwithstanding offering a higher purchase price;
- Zoomlion Heavy Industry Science and Technology Co.'s pending attempt at jumping Konecranes Plc's proposed combination with Terex Corporation;
- GameStop Corp.'s successful acquisition of Geeknet, Inc., breaking up a signed deal between Geeknet and Hot Topic, Inc.;
- HC2 Holdings, Inc.'s unsuccessful disruption of PennantPark Floating Rate Capital's announced acquisition of MCG Capital Corp.;
- Uphill Investment Co.'s successful acquisition of Integrated Silicon Solution, Inc., in spite of efforts by Cypress Semiconductor Corporation to top Uphill's offer;
- Valeant Pharmaceuticals International, Inc.'s successful merger with Salix Pharmaceuticals, Ltd. following Endo International plc's attempt to wrest the deal away;
- R.R. Donnelley & Sons Company's successful deal-jump of Quad/Graphics, Inc.'s attempted acquisition of Courier Corporation;

## 2014

- the successful deal-jump, and acquisition, of GFI Group, Inc. by BGC Partners LP after GFI's stockholders failed to adopt a merger agreement between GFI and CME Group, Inc. in light of BGC's unsolicited acquisition proposal;
- Dollar Tree, Inc.'s acquisition of Family Dollar Stores, Inc. after a hard-fought attempted deal-jump by Dollar General Corporation;
- Endo International plc's successful acquisition of Auxilium Pharmaceuticals, Inc. after breaking up QLT, Inc.'s attempted acquisition of Auxilium;
- Tyson Foods, Inc.'s successful deal-jump, and acquisition, of The Hillshire Brands Company as Hillshire was in the midst of acquiring Pinnacle Foods, Inc.;
- The Cutrale-Safra Group's successful deal-jump of Chiquita International, Inc.'s and Fyffes PLC's announced "merger of equals";

## 2013

- Silver Lake's successful acquisition of Dell Inc. at an increased price in spite of competing proposals submitted by Blackstone and Icahn Enterprises consortiums during the "go-shop" process;
- Dish Network Corporation's unsuccessful attempt to deal-jump the SoftBank acquisition of Sprint Nextel Corporation, potentially to gain leverage in Dish's quest for Clearwire, but failing after

SoftBank increased its price to be paid for Sprint, upping the cash payable to shareholders by $4.5 billion;

- Dish Network's ultimate failure to break up Sprint Nextel's acquisition of the remainder of Clearwire, notwithstanding pushing Sprint Nextel to a significantly higher price and having been Clearwire's recommended deal for a brief shining moment;
- Minerals Technologies Inc.'s successful break-up of Imerys SA's acquisition of AMCOL International Corporation, after an intense bidding war;
- Teva Pharmaceutical Industries Limited's successful acquisition of NuPathe, Inc., after breaking up NuPath's deal with Endo Health Solutions Inc.;
- Cascade Bancorp's successful acquisition of Home Federal Bancorp, after luring Home Federal away from Banner Corporation with a superior proposal made during a 30-day "go-shop" period;
- Jacobs Investments, Inc.'s failed break-up of Eldorado Holdco, LLC's acquisition of MTR Gaming Group, Inc. after Eldorado increased the merger consideration to rebuff Jacobs's jump;
- Paulson & Co. Inc.'s acquisition of Steinway Musical Instruments, Inc., after successfully jumping Steinway's definitive agreement with Kohlberg & Company, L.L.C. during the "go-shop" period and beating out a second interloper;
- Kroenke Sports & Entertainment's successful deal-jump acquisition of Outdoor Channel Holdings, Inc., after luring Outdoor away from InterMedia Partners LP with cash, as opposed to InterMedia's mixed cash-and-stock consideration;
- Valeant Pharmaceutical International, Inc.'s valiant (and successful) effort to stave off Merz GmbH & Co. KGaA's attempted break-up of Valeant's acquisition of Obagi Medical Products, Inc. by increasing its initial purchase price;

## 2012

- Reckitt Benckiser Group plc's successful acquisition of Schiff Nutrition International, Inc., after luring Schiff away from Bayer HealthCare LLC;
- Illumina, Inc.'s failed attempt to break up BGI-Shenzhen's acquisition of Complete Genomics, Inc.;
- Innospec Inc.'s failed attempt to thwart the joint acquisition of TPC Group Inc. by First Reserve and SK Capital Partners;
- Apollo Management, L.P.'s acquisition of Great Wolf Resorts despite a series of interloping proposals by KSL Capital Partners;
- Dell Inc.'s successful acquisition of Quest Software, Inc. after breaking up a signed deal between Quest and Insight Venture Partners;
- Actian Corporation's successful acquisition of Versant Corporation after breaking up Versant's agreement with UNICOM Systems, Inc., when UNICOM declined to match the superior proposal Actian made during the "go-shop" period;
- Markwins International Corporation's successful break-up of Swander Pace Capital's proposed acquisition of Physicians Formula Holdings, Inc., after Swander Pace declined to match Markwins' superior proposal;
- MIPS Technologies, Inc.'s acquisition by its original merger partner, Imagination Technologies Group plc, after an unsolicited proposal from CEVA, Inc. instigated a bidding war that caused Imagination Technologies to twice increase its offered purchase price to secure the deal;

- PacWest Bancorp's successful disruption of Umpqua Holdings Corporation's announced acquisition of American Perspective Bank;

## 2011

- Thoma Bravo, LLC-backed Plato Learning Inc.'s failed attempt to break up a deal between Renaissance Learning and a Permira affiliate, in a bidding war that involved an innovative approach to purchase price allocation among controlling and minority shareholders and underscored the often outcome-determinative effect of a controlling shareholder;
- GTCR and ACI Worldwide, Inc.'s respective acquisitions of Fundtech Ltd. and S1 Corporation, separately breaking up and snatching away both companies, which had been parties with each other to a signed deal;
- The Williams Companies, Inc.'s unsuccessful attempt to lure Southern Union Company away from Energy Transfer Equity, L.P.;
- Kinetic Concepts, Inc.'s acquisition by its original merger partner—a consortium led by Apax Partners—notwithstanding the arrival of two unnamed parties with a joint offer during the "go-shop" period;
- Gaz Métro Limited Partnership's successful break-up of FortisUS Inc.'s acquisition of Central Vermont Public Service Corporation;
- Charlesbank Capital Partners's acquisition of DEI Holdings, Inc., after having increased the merger consideration in its previously signed merger agreement due to an attempted jump by Gibson Guitar Corp. during the "go-shop" period;
- Alleghany Corporation's successful acquisition of Transatlantic Holdings, Inc., after a true four (or more) ring circus involving a previously broken-up agreement for a "merger of equals" with Allied World Assurance Company Holdings, abandoned bids by a Berkshire Hathaway affiliate, and a bidding war between Alleghany, Validus Holdings and an investor consortium;
- Reynolds Group Holdings Limited's successful acquisition of Graham Packaging Company Inc., breaking up a signed deal between Graham Packaging and Silgan Holdings Inc.; and
- NASDAQ OMX and IntercontinentalExchange's unsuccessful joint attempt to jump NYSE Euronext's merger with Deutsche Börse, the latter deal eventually being stopped by the European Commission.[3]

Over the years, deal-jumping activity has increasingly spread to foreign markets with notable deals from 2011 to 2015[4] including Computer Sciences Corporation's successful topping bid for Xchanging PLC following an agreed final cash offer from Capita PLC; GVC Holdings PLC's successful deal-jump acquisition of bwin.party digital entertainment plc, which had agreed to be acquired by 888 Acquisitions Ltd.; EXOR S.p.A's offer to acquire PartnerRe Ltd., breaking up a planned "merger of equals" between PartnerRe and AXIS Capital Holdings Limited; Cargill Inc.'s failed attempt to break-up Nutreco NV's acquisition by SHV Holdings NV's; Arcadis NV's successful defense of its acquisition of Hyder Consulting PLC after Nippon Koei Co. Ltd. made an unsolicited proposal to acquire Hyder; Lexmark International Technology S.A.'s successful acquisition of ReadSoft AB after fending off Hyland Software UK's unsolicited proposal to acquire ReadSoft; Kier Group PLC's successful acquisition of May Gurney Integrated Services PLC, after luring it away from Constain Group PLC with a "knock-out" bid that was 24% over Constain's bid; FLSmidth & Co A/S's successful acquisition of

[3] IntercontinentalExchange announced the completion of its acquisition of NYSE Euronext on November 13, 2013; no deal-jumping occurred this time around.

[4] A similar list of notable foreign deal-jump transactions prior to 2011 is included on Annex A.

Ludowici Limited, after thwarting The Weir Group PLC's attempt to launch a competing offer by upping its offer price twice[5]; the failed sale of Goals Soccer Centres plc where, in light of the board recommendation that shareholders vote in favor of Ontario Teachers' Pension Plans' offer, competitor Patron Capital exited the process despite encouraging Goals shareholders to reserve their votes (Goals shareholders ultimately voted down the Canadian pension plan's offer); U.S. corporation Rockwood Holdings, Inc.'s thwarted scheme of arrangement with Talison Lithium Limited, an Australian company whose shares trade on the Toronto Stock Exchange, when Talison's largest customer, Chengdu Tianqi Industry (Group) Co., Ltd. (a Chinese corporation), started buying up Talison's stock and subsequently completed its acquisition of Talison (though Rockwood and Tianqi subsequently formed a joint venture whereby Rockwood acquired 49% ownership of Talison from Tianqi); Bonterra Energy Corp.'s unsolicited offer to acquire Spartan Oil Corp., which successfully broke up Spartan Oil Corp.'s arrangement agreement with Pinecrest Energy Inc.; Canadian investment consortium Maple Group's acquisition of TMX Group Inc. (the Toronto Stock Exchange) after interloping on TMX's deal with the London Stock Exchange Group plc; Equinox Minerals Ltd.'s offering to acquire Lundin Mining Corporation, despite a planned "merger of equals" between Lundin and Inmet Mining Corporation (although Equinox later found itself the subject of a hostile bid by Minmetal Resources Limited and Equinox was eventually sold to white knight Barrick Gold Corporation after dropping its Lundin offer); Primero Mining Corp.'s loss of Northgate Minerals Corporation to AuRico Gold Inc.; Fairfax Financial Holdings' acquisition of Canadian Prime Restaurants, after Prime had signed a friendly takeover agreement with Cara Operations; 811332 Alberta's unsuccessful attempt to win Raydan Manufacturing from Link Suspensions of Canada LP; Kubota fending off two interlopers in its acquisition of Norwegian Kverneland ASA; Chinese government-owned Jinchuan Group stealing away Metorex Ltd. from Brazilian Vale SA; Euronet Worldwide snatching away Australian e-Pay Asia Holdings from Malaysian Tobikiri Capital in a deal that eventually fell through; Koninklijke Bunge BV's acquisition of Polish Elstar Oils SA despite its signed agreement with Archer Daniels Midland.

Foreign deal-jump activity may continue to rise but be somewhat more complicated, at least in the U.K., where changes to the rules governing takeovers may encourage, and in other ways discourage, deal-jumping activity. Stirred by widespread criticism in the U.K. as a result of U.S.-based Kraft Food Inc.'s initially hostile (but ultimately accepted) takeover of British confectionary company Cadbury plc in February of 2010, the U.K. sought to address concerns that hostile bidders too easily could gain tactical advantages over targets and that the outcome of hostile bids were often unduly influenced by arbitrageurs. The Panel on Takeovers and Mergers implemented a number of changes to the City Code on Takeovers and Mergers designed to rebalance the rules in the target's favor, which took effect in September 2011. Given the extensive changes, the Panel announced that they would undertake a review of the new rules after a year, which they did in November 2012. The review concluded that no changes were needed to the Takeover Code as modified in 2012.

The changes to the Takeover Code in 2011 included a virtual ban on deal protections, such as "no-shops," matching rights, restrictions on changing recommendations and break-up fees, with limited exceptions. When a target is obligated to announce a possible offer (which, as previously, can be triggered, for example, by rumors in the market or an untoward movement in the target's share price) the announcement must publicly identify all potential bidders it is in talks with (unless unequivocally rejected), except in the context of a formal auction. Absent leaks, interlopers jumping in subsequent to an initial announcement do not have to be named. In a similarly substantive change, an announcement which publicly identifies a bidder triggers the

[5] Interestingly, Weir appealed to the Australian Takeovers Panel seeking an order that FLSmidth be restricted from increasing its original offer on the basis that FLSmidth had represented that it made a best and final offer in its original bid. The evidence for Weir's petition was a Reuters report in which FLSmidth's chief executive stated that their offer at that time was final and would not be raised. FLSmidth corrected this statement eight days later clarifying that it did not intend to increase its offer, but reserved the right to do so. While the panel did not prohibit FLSmidth from proceeding on its higher offers, it did require FLSmidth to institute a process to compensate shareholders in the event they suffered a loss by selling Ludowiki shares from the time of the original Reuters article through the time the article was corrected in reliance on the best and final statement.

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start of a 28-day period within which the named bidder must “put up or shut up,” by announcing either a firm intention to bid or an intention to walk away (in the latter case, with consequent restrictions on making an offer for six months).

One example of a Takeover Code governed deal-jump which may, in part, have been encouraged by the 2011 modifications to the City Code on Takeovers and Mergers is the Carlyle Group’s SS&C Technologies Holdings Inc.’s successful interruption of TPG Capital’s recommended offer to acquire GlobeOp Financial Services SA. In March 2012, TPG Capital agreed to pay 435 pence per share in cash for GlobeOp in an agreement that did not contain a break-up fee (though we note that break-up fees had been previously limited to 1% of offer value so this would have meant TPG Capital could have received only up to 4.35 pence per share on its trumped bid had a break-up fee been included in the agreement). When SS&C presented an offer of 485 pence per share in cash, GlobeOp Chairman ED Nicoll publicly stated that SS&C’s bid “represents a material premium to the TPG offer” and that independent directors intended to recommend unanimously that GlobeOp shareholders accept the SS&C offer. It follows that, even if a break-fee had been included in the TPG agreement, the GlobeOp board would likely have recommended the SS&C offer anyway. The SS&C offer closed in late June 2012 with 99.95% acceptance, with the remaining shares squeezed out under Luxembourg law in early July 2012.

More recently, changes to the Takeover Code have been made as a result of Pfizer’s aborted potential takeover of AstraZeneca plc in 2014. During the course of the bid Pfizer made a number of significant and long-term voluntary undertakings regarding the way in which the combined business would be run should the bid be successful. The AstraZeneca bid reopened the debate surrounding commitments given by bidders in the course of takeovers which was first highlighted following Kraft’s takeover of Cadbury in 2010. As a result of the discussions surrounding such statements and the ability of the Takeover Panel to police and enforce them, changes to the Takeover Code came into effect in January 2015. The changes aim to provide clarity for stakeholders as to the status of statements made by bidders and target companies concerning actions they will (or will not) take following an offer. The Takeover Code now distinguishes between, and applies separate requirements to, statements which are “post-offer undertakings” and those which are considered “post-offer statements of intentions.” Broadly, where a party to a bid makes a statement relating to a course of action they commit to take (or not take) following the end of an offer period, this will be considered a post-offer undertaking, and the Takeover Panel will require, enforce and monitor compliance with these undertakings. Post-offer intention statements are required to be accurate statements of the party’s intentions at the time they are made and based on reasonable grounds, and the Panel will expect compliance for a period of 12 months from the date on which the offer period ends or such other period of time as was specified in the statement. The Panel may permit deviation from a post-offer intention statement (with its consent), taking into account factors such as whether the party is able to demonstrate it has a good reason for taking a different course of action and whether there has been a material change in circumstances. Where a party departs from its post-offer intention statement, certain requirements will need to be met, including notification to the market regarding the change in action.

Various other amendments to the City Code on Takeovers were proposed in 2014 and implemented in January 2015. The changes made to the time by which potential competing bidders must clarify their position are likely to be significant in deal-jumping situations. Under the changes to the Takeover Code in 2011, the 28-day period after the triggering of a “put up or shut up” period could only be extended by the Takeover Panel at the request of the target. The 2014 amendments, however, changed the rules surrounding extensions, which now state that where there are competing bidders, the latest time by which a potential bidder must clarify its position is the 53rd day following the publication of the first bidder’s initial offer. Accordingly, once an offer is formally announced, interlopers that have not announced an intention to walk away have until this point in the offer timetable to intervene. Other changes include a new appendix to the Takeover Code setting out the procedure for resolving competitive situations that continue to exist on day 46 of a second bidder’s timetable and additional disclosure requirements in relation to irrevocable undertakings and share dealings. So while the restrictions on “no-shops” and matching rights created in 2011 would seem to encourage deal-jumpers to enter the ring, they may also be discouraged from doing so by the shortened timeframe, introduced in 2011 and amended in 2014, in which they need to complete their diligence, decide to make an offer and arrange financing. Additionally, given the lack of deal protections, more potential initial bidders may wait in the wings, preferring to have another bidder set the market, and swoop in later as the deal-jumper.[6] Although mergers and acquisitions deal activity in the U.K., particularly from financial sponsors, decreased over the last seven years (except for a small increase in 2011), deal activity in fiscal 2015 increased significantly, with 64 takeover offers announced, including 11 transactions exceeding £1 billion in value, suggesting that the new amendments alone have not served to hamper deal activity.

## Landmark International "Deal-Jumps"

The failed attempt in 2003 to replace Britain's William Morrison Supermarkets in its efforts to buy Safeway is one interesting example of the importance of "deal-jumping" in the international arena as well as the feeding frenzy that may occur when an attractive target becomes available. Subsequent to Safeway's initial agreement to a £2.5 billion all-share takeover by William Morrison in January 2003, and notwithstanding the £29.2 million break-up fee provided for in such agreement, alternative bidders quickly came to the table in what transformed into a six-way takeover battle. The days following the announcement of the Safeway/William Morrison merger agreement led to multiple companies publicly stating that they were considering making bids. Prospective bidders that publicly indicated interest included such heavyweights as Wal-Mart (through its United Kingdom subsidiary Asda), J Sainsbury, KKR, Phillip Green, and Tesco, and the bids encompassed both all-cash and combination cash and share offers. In the end, given the fact that several of the bidders had significant interests in the United Kingdom supermarket industry, Britain's antitrust authorities had perhaps the most important influence on the success of the suitors. After an extended probe, which was completed in September 2003, the Secretary of the Department of Trade and Industry agreed with the regulators' recommendation permitting only William Morrison to proceed, conditioned on its disposal of 53 stores under the supervision of the Office of Fair Trading. This effectively ended the bids of the other competing parties. On December 10, 2003, Asda, in an apparent attempt to force William Morrison to raise its bid, offered Safeway £2 billion for 70 of its stores. Six days later, William Morrison sweetened its January 2003 offer with an extra £636 million and finally clinched the deal.

To date, the most "valuable" (in terms of consideration paid) foray into the multi-ring circus is the 2007 acquisition of Dutch ABN Amro Bank by a consortium of banks that included Scottish Royal Bank of Scotland (RBS), Dutch Fortis Bank and Spanish Banco Santander Central Hispano. On March 20, 2007, ABN Amro and Barclays of Britain announced a proposed merger between the two financial entities for €67 billion. ABN Amro had also agreed to a deal to sell its "crown jewel," the LaSalle Bank to Bank of America, which deal was suspected to have been crafted in order to thwart an offer from RBS for ABN Amro, which had previously disclosed its interest in acquiring LaSalle, or perhaps swallow the whole conglomerate in order to achieve its goal of acquiring LaSalle.

[6] Another change of interest relates to the way in which takeovers have been structured in UK starting in 2015. In the UK, many takeovers are implemented by way of a scheme of arrangement under the UK Companies Act. Bidders have historically been able to choose between using transfer schemes, where shares in the target are transferred to new owners, or cancellation schemes, involving the reduction of target share capital and issue of new shares to new owners. An advantage of cancellation schemes was that, given they involved the issue of new shares, transactions structured in this way were not subject to stamp duty which is otherwise chargeable at the rate of 0.5%. In late 2014, the UK Government announced that in order to close this tax loophole, the use of cancellation schemes would be prohibited. This change came into effect in March 2015 and, subject to certain exceptions, cancellation schemes are no longer available for takeovers in the UK (unless a firm intention to make the offer was announced prior to the regulations taking effect). While cancellation schemes were a popular takeover mechanism and featured in many UK transactions in 2014, transfer schemes continue to be attractive, depending on the nature of the deal, given the advantages offered by a scheme of arrangement generally, including certainty of the acquisition and a shorter timeframe in which to acquire 100% of the target.

As had been speculated, two days after the announced deal between ABN Amro and Barclays, the RBS-led consortium made an official proposal to acquire ABN Amro for €72.2 billion, which proposal was conditioned on LaSalle remaining with ABN Amro. Despite this higher offer, ABN Amro's board continued to support the Barclays proposal. However, submitting to shareholder pressure, ABN Amro agreed to open its books to the RBS-led consortium and cooperate in the due diligence process. In return for due diligence access, ABN Amro required the consortium to agree to a "standstill" provision that would block the consortium from making an unsolicited offer for ABN Amro in the next 12 months. The RBS-led consortium publicly denounced such a condition and announced that unless ABN Amro removed it, the consortium would launch a tender offer for 100% of the bank's shares. As a result, ABN Amro dropped the condition; nonetheless, it reaffirmed that without a "compelling and concrete proposal" from the consortium, it recommended Barclays's offer as being in the best interest of its shareholders. To complicate matters, the VEB Dutch shareholders' association filed a claim against ABN Amro to prevent the sale of LaSalle to Bank of America. The allegation stated that the sale of LaSalle was illegal and only served as a "poison pill" to frustrate the higher proposal made by the RBS-led consortium. VEB also claimed that the sale required a shareholder vote.

On May 3, 2007, the Dutch court ordered a delay of the sale of LaSalle until ABN Amro's shareholders had a chance to vote. The next day, Bank of America filed an action in the U.S. forcing ABN Amro to sell LaSalle pursuant to the existing agreement between the two banks.[7] On May 29, 2007, the RBS-led consortium formally made a public bid of €71.1 billion for ABN Amro. This cash and stock offer was substantially higher than the all-stock offer previously agreed with Barclays.

On July 13, 2007, the Supreme Court of the Netherlands broke the impasse by overruling the prior decision of the lower court. The Court stated that the board of ABN Amro had lawfully entered into the agreement to sell LaSalle and that the sale should be carried out as agreed. This turn of events forced the RBS-led consortium to evaluate going forward with its proposal. On July 16, 2007, the consortium responded by "increasing" its bid's cash component and removing any condition that ABN Amro must retain LaSalle. As a result, Barclays increased its bid on July 23, 2007, by adding a cash component to its previous all-stock proposal, which increased the value of its bid to €67.5 billion. The RBS-led consortium publicly protested that the new Barclays proposal was inferior to its own proposal. Consequently, on July 30, 2007, and after a small drop in the value of Barclays's shares, the ABN Amro board withdrew its support of Barclays's offer; however, it refused to back the consortium's offer. After receiving the approval of the European Commission to the potential takeover of ABN Amro, Barclays launched a tender offer.

The credit crunch that was hurting the global economy impacted this transaction starting in August 2007. As European markets were distressed by the impact of credit woes, the share value of financial institutions, including ABN Amro, Barclays and RBS became volatile. During this time, analysts feared that Barclays's proposal would be harmed more significantly due to the higher stock consideration component than the offer proposed by RBS. At the end of August, this fear was realized when Barclays's stock lost 11% of its value and, as such, the value of its offer dropped to 10% below the consortium's offer. ABN Amro's board continued to refrain from endorsing either Barclays's or the consortium's offer, but stated that while the consortium's offer was "highly attractive from a financial point of view," the agreed offer from Barclays would keep ABN Amro intact and enhance its growth potential. Nonetheless, with the continuing drop in the value of Barclays's shares, ABN Amro's management later announced that Barclays's proposal was "too low" and it would defer to the decision of its shareholders. On October 5, 2007, Barclays officially withdrew its offer to acquire ABN

[7] Bank of America argued that its agreement with ABN Amro was separate from any agreement ABN Amro had with Barclays and that the only deal that could break up its offer was one that arose during the 14-day "go-shop" period. The "go-shop" permitted deals for LaSalle Bank or deals for ABN Amro as a whole, so long as the latter was not conditioned on termination of the deal with Bank of America and offered Bank of America a matching right. As to the requirement that the sale be approved by shareholders, Bank of America claimed that ABN Amro had misrepresented its authority to complete the sale without shareholder approval. The day after Bank of America filed suit, RBS moved to offer ABN Amro $24.5 billion for LaSalle, which ABN Amro rejected based on uncertainties over financing, regulatory approval, tax clearances and other intangibles.

Amro, when only 0.2% of ABN Amro's total holders tendered shares. The decline in value of Barclays's shares and the inability of the bank to increase the cash component of its proposal doomed its acquisition of ABN Amro. The sale of ABN Amro to the RBS-led consortium was completed in mid-October of 2007.

## The True Four (And Sometimes More) Ring Circus

Taking the three-party deal-jump scenario to an even higher level of "four-ring circus" complexity is the 1997 contest (not the 2005 one!) for the acquisition of MCI Communications Corporation, which resulted in the $41.5 billion acquisition of MCI by WorldCom, Inc., notwithstanding a prior merger agreement between MCI and British Telecommunications plc and another bid by GTE Corporation; the year-end 2000 battle for IBP, Inc. between Smithfield Foods and Tyson Foods, which led to the termination by IBP of a pre-existing LBO merger agreement with affiliates of DLJ and the entering into of a merger agreement between IBP and Tyson; and the 2003 fight between Cephalon, Inc. and an unnamed third party (believed to be Endo Pharmaceuticals Holdings Inc.) to wrest Cima Labs, Inc. from its merger agreement with aaiPharma Inc., a battle won by Cephalon. A different variation of the "four-ring circus" was the battle for both U.S. West, Inc. and Frontier Corporation between Global Crossing Ltd. and Qwest Communications International Inc., which resulted in Qwest's acquisition of U.S. West and Global Crossing's successful acquisition of Frontier, notwithstanding prior separate merger agreements between Global Crossing and each of Frontier and U.S. West.

Another example of the "four-ring circus," and one which evidences the prominence which sovereign entities and wealth funds have from time to time played in the M&A arena,[8] was the 2007 battle to acquire Nordic and Baltic stock exchange operator OMX. In this battle, NASDAQ, seeking to gain a foothold in Europe after its rival, the NYSE Group, had created the first transatlantic exchange through its acquisition of Euronext, initially struck a deal to purchase OMX in a combined cash and stock bid valued at approximately SKr 200 per share. Following NASDAQ's agreement to purchase OMX, state-owned Borse Dubai announced its intention to make an all-cash offer at SKr 230, and immediately began a bookbuilding process with selected investors. As NASDAQ contemplated raising its bid for OMX, it simultaneously commenced an auction to sell the 28% stake it then held in the London Stock Exchange after its failed attempts to acquire the exchange. On September 20, 2007, presumably in lieu of NASDAQ commencing a bidding war with the deep-pocketed Borse Dubai, NASDAQ and Borse Dubai announced an agreement to strike a complex deal pursuant to which NASDAQ would sell a 20% stake in NASDAQ and its existing stake in the London Stock Exchange to Borse Dubai, and in exchange Borse Dubai would make an offer to purchase OMX for SKr 230 in cash and following its purchase would sell all of the OMX shares to NASDAQ.[9] However, on the heels of this announcement another player quickly appeared, when the Qatar Investment Authority announced it had amassed an approximately 10% stake in OMX and was prepared to offer SKr 260 for the remaining shares. The Qatar Investment Authority also announced it had purchased a significant stake in the London Stock Exchange, making Borse Dubai and Qatar the two largest shareholders; this resulted in public speculation that the two

[8] Notwithstanding the negative positions in early 2009 of many sovereign investments in overseas entities caused by the economic and stock market upheaval, the Chinese government sought its largest ever overseas investment at the time through a purchase by Aluminum Corporation of China (Chinalco) of a $19.5 billion stake in Rio Tinto (seeking to add to the $14 billion stake in Rio Tinto that it had acquired in 2008) consisting of up to a 50% interest in nine of Rio Tinto's mining assets, and $7.2 billion of bonds convertible into shares. While the full transaction they contemplated was not to be (with Rio Tinto instead pursuing its own stock offering and entering into a joint venture with BHP Billiton Ltd. that was subsequently terminated), Chinalco maintained its stake-out 9% position in Rio Tinto and the overall situation perhaps opened the door to the announcement in 2010 of a $1.35 billion investment by Chinalco alongside Rio Tinto to jointly develop an iron ore project in Guinea.

[9] Under the deal, NASDAQ was to pay Borse Dubai $1.72 billion in cash for the OMX shares and Borse Dubai would receive a 19.99% stake in NASDAQ, along with two of 16 board seats in a combined NASDAQ-OMX; however, in order to circumvent concerns that a Middle Eastern government-controlled entity would be a significant owner in a United States Exchange, Borse Dubai agreed to limit its voting rights to 5% of the outstanding shares. As part of the deal, NASDAQ also agreed to take a 33% stake in the Dubai International Financial Exchange, which was to be rebranded NASDAQ DIFX.

parties would also enter a bidding war for control of the London Stock Exchange as well. In order to prevent a drawn out bidding war with Qatar, NASDAQ and Borse Dubai immediately increased their per share offer 15% to SKr265 and reduced their minimum offer condition to 50% of the shares, and the OMX board continued to support their deal (they also indicated they had concerns that Qatar may have violated Swedish Financial Authority rules with respect to offers and purchases in connection with a potential acquisition by not previously registering its intent). Eventually, Qatar dropped its bid for OMX, to reportedly focus on becoming the biggest shareholder in the London Stock Exchange.[10] Press reports at the time indicated that this was due to negotiations between Borse Dubai and Qatar in which the parties agreed that Qatar would sell its 10% stake in OMX in exchange for a portion of Borse Dubai's stake in the London exchange; neither party publicly confirmed such speculation.

A further variation on the "four-ring circus" scenario is the double deal-jump that occurred in the battles for Asarco Inc. and Conestoga Enterprises. In the Asarco situation, Phelps Dodge succeeded in breaking up a friendly pact between Cyprus Amax and Asarco when, after making bids for both Cyprus Amax and Asarco, it signed a merger agreement with Cyprus Amax. Phelps Dodge's efforts to buy Asarco were complicated when Grupo Mexico, S.A. de C.V., already a 10% stockholder in Asarco, emerged as a bidder for Asarco. In the wake of the Grupo Mexico bid, Phelps Dodge sweetened its offer and apparently ended the bidding war by signing an agreement to buy Asarco. However, Grupo Mexico raised its bid, and Asarco completed the double deal-jump by executing a merger agreement with Grupo Mexico. The battle for Conestoga began with a mixed consideration merger agreement signed between Ntelos and Conestoga. Following a significant decline in the share price of Ntelos that began post-announcement and bottomed out after the terrorist attacks of September 11th, Conestoga accepted an unsolicited bid by D&E that Conestoga considered to be superior. A month later, Lynch Interactive Corporation attempted to jump this new deal with an all-cash bid but ultimately backed down when Conestoga rejected the solicitation.

The acquisition of Steinway Musical Instruments, Inc. by Paulson & Co. Inc. in September 2013 was also somewhat of a "four-ring circus." The Steinway saga began in March 2013 when Kohlberg & Co. L.L.C. was referred to Dana Messina, a director and former CEO of Steinway. Kohlberg subsequently reached out to Mr. Messina, and between early April and June 30, 2013, Kohlberg and Steinway negotiated and executed a merger agreement providing for the payment of $35 per share in cash to Steinway's stockholders.

The merger agreement contained a "go-shop" provision, beginning on June 30 and lasting for 45 days thereafter, which allowed Steinway and its representatives to, among other things, solicit a competing proposal. In the event Steinway received a superior competing proposal, Kohlberg had a three business day match right.

On July 12th, in connection with the "go-shop" process, Steinway and Paulson & Co. Inc. entered into a confidentiality agreement so that Paulson could evaluate a potential transaction with Steinway. On July 18th, Paulson delivered a preliminary non-binding indication of interest to acquire all of the outstanding shares of Steinway's common stock for $38.00 per share in cash, representing a $3 premium per share over the Kohlberg deal, and reconfirmed this price in a binding offer delivered on August 9. The August 9 proposal also included an initial draft merger agreement and firm equity and debt commitment letters.

On August 12th, Steinway issued a press release stating that Paulson's August 9 proposal constituted a superior proposal and that it was willing to negotiate in good faith with Kohlberg pursuant to Kohlberg's three business day match right. On August 13th, Kohlberg publicly disclosed that it waived its match right under the merger agreement and would not alter its initial proposal.

[10] Nearly a decade later, the London Stock Exchange is again in play, as the board of Intercontinental Exchange Inc. has been considering jumping a Deutsche Boerse AG–London Stock Exchange "merger of equals" announced on March 16, 2016.

Keeping the first interloper on its toes, later that same day, the Steinway special committee's financial advisors notified Paulson that Samick Musical Instruments Co. Ltd., a 32% shareholder of Steinway, would likely submit a proposal to acquire Steinway and that Samick was willing to pay up to $40.00 per share. Samick subsequently submitted a definitive proposal to acquire all of the outstanding shares of Steinway's common stock not owned by Samick for $39.00 per share in cash. Paulson notified Steinway's financial advisor that it would be willing to increase its offer to $40.00 per share conditioned upon (i) receipt of tender and voting agreements from each of Samick and another large Steinway shareholder and (ii) an increase in the termination fee in its draft merger agreement from $6.675 million to $13.35 million. Steinway's board reacted by asking Paulson and Samick for best and final offers by 8:00 pm that day, without conditions relating to voting agreements.

Complying with the Steinway board's directions, Paulson submitted its best and final offer to acquire all of the outstanding Steinway stock—this time for $40.00 per share. The offer was not conditioned upon entry into tender and voting agreements by Samick or any other shareholder but did include the $13.35 million termination fee. That day, the board approved Paulson's revised offer (a superior competing proposal under the Kohlberg merger agreement) and Samick subsequently withdrew from the process. On August 14, 2013, before the market opened, Steinway terminated its merger agreement with Kohlberg, paying it a $6.675 million termination fee, and entered into a merger agreement with Paulson. Paulson completed its acquisition without further deal-jumping.

The events leading up to CF Industries's successful break-up of Yara's acquisition of Terra included two traditional hostile situations before ultimately leading to a successful jump. While CF Industries made the first of its multiple unsolicited proposals for Terra beginning in January 2009, Agrium Inc. made the first of its several unsolicited bids for CF Industries in February 2009, conditioned on CF Industries dropping its bid for Terra. Throughout 2009, CF Industries continued to adjust its offer upward, ultimately offering $38.41 per Terra share in cash and stock in December 2009 and stating this was its "all-in" value. While the Terra board reviewed each offer from CF Industries, the board rejected each of them for failing to appropriately value Terra, and CF Industries withdrew its bid for Terra in January 2010. Throughout 2009, however, Yara had engaged in discussions with Terra regarding a potential business combination, and in February 2010 entered into a merger agreement providing for $41.10 per share in cash to Terra shareholders and a 3% break-up fee. Three weeks later, CF Industries came in from the sidelines and made a binding offer of $47.40 per Terra share in cash and stock, and one week after that Terra's board notified Yara that CF Industries's bid was a "superior proposal." Shortly thereafter, Yara informed Terra's board it would not make another offer and the Terra board terminated its merger agreement with Yara. CF Industries then paid the break-up fee to Yara (on behalf of Terra), and entered into a merger agreement with Terra, completing a short deal-jump situation that was a long time in the making.[11]

While CF Industries's hostile overtures for Terra hovered in the background and crystallized into a short deal-jump after Terra agreed to merge with Yara, the Dynegy saga similarly involved a potential suitor disruptively stirring the waters without putting forward a concrete competing bid that would create a classic deal-jump situation. Rather, in what can be viewed as a "delayed" deal-jump, the large ownership stakes of Carl Icahn and other individual holders and their opposition to the Blackstone deal, and heavy implication that Icahn would enter the fray if the shareholders voted down the Blackstone deal, essentially scuttled Dynegy's acquisition by Blackstone without Icahn having to formally put forth a competing bid. In August 2010, Dynegy announced that it had agreed to merge with Blackstone for $4.50 cash per share. Despite Dynegy's banker having contacted 42 parties, no bidders emerged after the 40-day "go-shop" period. In October 2010, affiliated entities of the activist Icahn announced they held 9.9% of Dynegy shares, intended to vote against the merger (and would demand appraisal rights) and encouraged Dynegy shareholders to do the same. While

[11] Promptly after CF Industries entered into the merger agreement with Terra, Agrium withdrew its unsolicited bid for CF Industries.

Icahn did not make an offer for Dynegy, he made it clear at the time that the Icahn entities "reserve the right to be a bidder in this process." At the same time, Seneca Capital Investments L.P., which had acquired 9.3% of Dynegy shares, also indicated it would vote against the merger.

On November 23, 2010, despite Blackstone having raised its bid to $5.00 a week earlier, the Dynegy stockholders failed to approve the merger with Blackstone, and the merger agreement was terminated. Under the typical formulation in the original merger agreement, Blackstone would not have received a break-up fee for such termination after the "naked" vote-down (though with Icahn's thinly-veiled overtures it was not an entirely "naked" vote-down), because prior to the shareholder vote an "Acquisition Proposal" had not been made. However, in connection with Blackstone's increased bid, Dynegy agreed to pay a reduced $16.3 million termination fee if the deal were voted down (even without an Acquisition Proposal) and it consummated an alternative transaction within 18 months (at greater than $4.50 per share), which matched the reduced $16.3 million "go-shop" termination fee in the original agreement. Less than a month after Dynegy shareholders failed to vote for the merger with Blackstone (in no small part due to Icahn's presence), the Icahn entities submitted their delayed bid and entered into a merger agreement to acquire Dynegy in a $5.50 cash per share tender offer and subsequent merger. However, just as Icahn's presence had contributed to Blackstone's failed bid, Seneca's constant urging of shareholders to reject Icahn's bid resulted in low participation by shareholders and several extensions to Icahn's tender offer, which ultimately led to the expiration of the tender offer and termination of the merger agreement in late February 2011, without acquisition of shares.

In a truly rare development, in the wake of Icahn's failed bid, the chief executive officer, chief financial officer and chairman resigned, Dynegy announced the remaining board members declined to stand for re-election at the next annual meeting, and the Dynegy board appointed two Icahn nominees and one Seneca nominee to the board. Additionally, Icahn suggested he might be willing to provide the company with debt or equity financing and Dynegy agreed to a waiver of DGCL § 203 to allow Icahn to acquire up to 19.9% of the company. However, despite Icahn's ongoing interest in maintaining and possibly increasing his stake in the company, Dynegy cautioned that it might be forced into bankruptcy if it could not amend its existing credit agreements or obtain additional liquidity. As it turned out, in November 2011, Dynegy made a unique bankruptcy filing that did not include the publicly traded company, after a restructuring that some creditors have alleged was meant to protect Dynegy shareholders at the expense of bondholders. The publicly traded Dynegy, Inc. could not successfully avoid its own bankruptcy and filed in March 2012. After having agreed to auction off certain energy plants in connection with the process, Dynegy finally emerged from bankruptcy, and its shares began to publicly trade again in early October of 2012. In an uncommon result for shareholders, the pre-bankruptcy shareholders were able to maintain a 1% equity interest and 5-year warrants to buy up to 13.5% of Dynegy's common stock. The result highlights the potential risk to stockholders in holding out for higher bids following a bidding war.

Icahn also attempted to thwart the management-led buyout of Dell Inc. by its founder, Michael Dell, and Silver Lake Partners; although this time, Icahn actually submitted alternative transaction proposals to the company's special committee. In August 2012, after discussions with Mr. Dell, Dell's board of directors determined that considering a going-private transaction or other strategic alternative would be appropriate given the company's struggles. A special committee was formed on August 20, 2012 and the committee began negotiations with Silver Lake and various financial and strategic buyers from October 2012 until February 4, 2013, when Silver Lake/Mr. Dell and the company entered into a definitive merger agreement pursuant to which the acquirer would acquire all outstanding shares of Dell common stock for $13.65 in cash.

The merger agreement contained a "go-shop" provision which provided that, until March 23, 2013, the company and its subsidiaries could initiate and solicit acquisition proposals and engage in discussions or negotiations with any person or group or persons with respect to any acquisition proposal. Another key component of the merger agreement was the "unaffiliated vote condition," which required the affirmative vote (in person or by proxy) of the holders of a majority of the outstanding shares held by stockholders unaffiliated with the company, Mr. Dell or Silver Lake to adopt the merger agreement. Unaffiliated shares that were not voted effectively were counted as votes against the merger. The eventual amendment of this provision to provide for a less stringent threshold for adoption of the merger agreement proved key to the deal's ultimate approval by the company's stockholders.

Blackstone took full advantage of the "go-shop" provision on February 6 when it contacted Evercore, a financial advisor to the special committee, to obtain confidential information regarding the company for purposes of potentially submitting a competing acquisition proposal. On March 22nd, the special committee received a non-binding proposal from Blackstone and its consortium, which included Francisco Partners III, Insight Venture Management LLC and another anonymous sponsor. Blackstone proposed a transaction in which the holders of Dell common stock would be entitled to either (i) receive cash in an unspecified amount, which was expected to be in excess of $14.25 per share, or (ii) roll their shares into the surviving company, subject to an unspecified cap. The transaction would be funded through a combination of unspecified amounts of cash equity investments by the consortium, the company's cash and cash equivalents and debt financing.

Icahn threw his hat in the ring on March 22 as well and submitted a non-binding proposal for a transaction in which holders of the company's common stock would be entitled to either (i) elect to roll their shares into the surviving entity on a one-to-one basis or (ii) sell their shares for $15.00 per share in cash, with a cap of $15.6 billion on the total amount of cash to be paid out (subject to pro-rata cutbacks if the cash election was oversubscribed). Icahn's proposal would be funded through a combination of (i) a cash equity investment by Icahn Enterprises, Icahn himself and affiliated parties, (ii) the company's cash and (iii) debt financing. Icahn's proposal also contemplated that Southeastern Asset Management and T. Rowe Price (large shareholders of the company who, after announcement of the merger agreement with Mr. Dell and Silver Lake, publicly announced their opposition to the transaction) would roll their shares into the new company (although Icahn's proposal did not contemplate an investment by him of additional cash if Southeastern or T. Rowe Price subsequently balked on their commitment to roll). Other than Blackstone's proposal, Icahn's proposal and one other strategic party's proposal to acquire a portion of the company (the Dell Financial Services Business), no other proposals were submitted during the "go-shop" period. On March 24th, the special committee determined that both Icahn's and Blackstone's proposals could reasonably be expected to result in superior proposals and negotiations continued past the conclusion of the "go-shop" period.

Representatives of Blackstone and Icahn Enterprises continued to conduct due diligence and negotiate with the special committee until April 18th, when Blackstone withdrew from the process. It cited concerns regarding the PC industry's economic outlook and the downward trend in the company's projected operating income for 2013.

On May 9th, Icahn Enterprises and Southeastern delivered a letter to the special committee stating their continued opposition to the transactions contemplated by the merger agreement. The letter outlined an alternative transaction in which the company's stockholders could elect to receive either (i) $12.00 per share in cash or (ii) $12.00 in additional shares (at an assumed price of $1.65 per share) for each share currently held. This latest proposal provided no details as to how the transaction would be implemented and was not accompanied by debt financing commitments. On May 13th, the special committee sent a letter to Icahn Enterprises and Southeastern requesting additional information regarding the proposed transaction. That same day, Icahn Enterprises and Southeastern sent notices to the company of nominations of persons for election to the company's board at its 2013 annual meeting of stockholders. Following up on their proposal, Icahn Enterprises and Southeastern requested information regarding the company and data room access for purposes of evaluating their proposed transaction. The special committee, however, refused to accommodate their requests until it received information sufficient to determine whether their proposal could reasonably be expected to lead to a superior proposal under the merger agreement.

On May 31st, the company mailed its definitive proxy statement to its stockholders and began soliciting proxies for purposes of adopting the merger agreement. Icahn Enterprises and Southeastern, however, quickly fired back and filed a preliminary proxy statement that enabled them to solicit proxies in opposition of the merger. They also indicated that they might file a proxy statement for purposes of electing their director nominees at the 2013 annual meeting.

Interestingly, on June 18th, Icahn Enterprises and its affiliates purchased approximately 72 million shares of the company's common stock from Southeastern at $13.52 per share (Southeastern previously had publicly stated that it believed the company was worth approximately $24.00 per share) and sent a revised proposal to the special committee. The new proposal contemplated the company commencing a tender offer for 1.1 billion of the company's shares (approximately 63% of the outstanding shares of the company) at $14.00 per share. The letter indicated that the tender would be funded with $5.2 billion of debt financing together with $7.5 billion in company cash and $2.9 billion in company receivables. The letter was not accompanied by either debt commitments or commitments to purchase the company's receivables. Icahn Enterprises subsequently informed the special committee on July 1 that it received debt commitments (mostly from Icahn-affiliated entities) for the $5.2 billion in debt financing, which were highly conditional. Conditions included, but were not limited to, the company's stockholders electing 12 Icahn Enterprises/Southeastern nominees to the company's board of directors who were willing to pursue Icahn's leveraged recapitalization, and the company obtaining $2.9 billion of proceeds from a sale of its receivables.

Importantly, on July 8th, given Icahn's media campaign against the Silver Lake transaction, ISS and Glass Lewis recommended that the company's stockholders vote to adopt the Silver Lake merger agreement. These recommendations contributed to the ultimate success of the Silver Lake buyout. Subsequently, on July 12th, in what seemed to be an attempt to sweeten their proposal, Icahn Enterprises and Southeastern announced that, pursuant to the contemplated tender offer, stockholders would also receive one warrant for every four shares tendered, which would entitle the holder thereof, for a period of seven years, to purchase one share of common stock underlying the warrant for $20 per share. On July 16th, after discussing the revised tender offer proposal with Icahn Enterprises and Southeastern, the special committee announced that it did not believe the revised proposal was superior to the transactions contemplated by the Silver Lake merger agreement.

On July 17th, one day before the special meeting of stockholders to vote on the merger agreement, the special committee and its advisors determined that, given the large number of stockholders that had not submitted proxies to vote at the special meeting (resulting in part from the retail holdings in the company's stock) and the significant number of large stockholders that were opposing the transaction, it was unlikely that the unaffiliated vote condition would be satisfied. The special meeting was subsequently adjourned twice—once until July 24th and again until August 2nd—due to the uncertainties surrounding the ability to solicit enough proxies to satisfy the unaffiliated vote condition. Between July 17th and August 2nd, the special committee negotiated with Mr. Dell and Silver Lake regarding both an amendment to the unaffiliated vote condition and an increase in the merger consideration. Ultimately, the special committee, Silver Lake and Mr. Dell agreed upon and executed an amendment to the merger agreement on August 2nd which (i) increased the merger consideration to $13.75 per share, (ii) provided for a special cash dividend in connection with the merger of $0.13 per share, which effectively was borne by Mr. Dell (bringing the merger consideration to $13.88), (iii) allowed the company to pay its third quarter dividend of $0.08 per share to stockholders regardless of the closing date, (iv) reduced the termination fee payable by the company from $450 million to $180 million if an alternative transaction was entered into and (v) amended the unaffiliated vote condition to provide that non-voting shares held by unaffiliated stockholders would not be counted as a vote against the adoption of the merger.

In connection with the execution of the amendment, the special meeting of stockholders was again adjourned until September 12 to provide time to solicit proxies for adoption of the amended merger agreement. The company's stockholders adopted the amended merger agreement on September 12th, and the transaction closed on October 28, 2013.[12] The story concerning Dell did not end with the closing, however. Currently, there is an ongoing appraisal action involving shares of Dell that would have been entitled to over $500 million in merger consideration based on the deal price had they been cashed out in the merger—it remains yet to be seen how these shares will be valued in the appraisal action.

There are not enough rings in the circus for participants in the string of deal-jumping activity that arose following the announcement of the friendly merger between Canadian gold companies IAMGold and Wheaton River in the spring of 2004. On May 27, 2004, nearly two months after the announcement of the original transaction, U.S.-based Coeur and Golden Star, in a coordinated effort, each announced their respective bids: Golden Star announced its all stock bid to acquire IAMGold Corp. and Coeur announced its cash and stock bid to acquire Wheaton River.[13] When the IAMGold shareholders voted against the IAMGold/Wheaton River transaction on July 6, 2004, rather than endorsing the Golden Star offer, the IAMGold board expanded the mandate of the special committee that was formed for the purpose of evaluating the Golden Star offer to "include actively pursuing alternatives to maximize value." Following the no vote from the IAMGold shareholders, Wheaton River adjourned its shareholders' meeting and provided notice of termination of the transaction to IAMGold pursuant to the merger agreement. Coeur and Golden Star had successfully broken up the IAMGold/Wheaton River transaction, but each would ultimately be unsuccessful in courting its intended partners.

IAMGold adopted a short-term (just over one month) poison pill in order to give the special committee time to pursue alternatives. On August 11, 2004, IAMGold announced that it had found its white knight, South Africa's Gold Fields Ltd. Following the announcement of the friendly acquisition by Gold Fields, Golden Star allowed its offer for IAMGold to expire. Wheaton River was simultaneously fighting off Coeur's overtures when it agreed to sell off its Mexican silver production in a move that Coeur felt created "an obvious question

[12] The challenge faced by Dell in achieving its majority-of-the-minority vote due to the high level of "non-votes" is a concern that may be faced by many companies with significant retail holdings, as a result of significant post-record date turnover in their shares or which otherwise have characteristics that lead to high levels of "dead vote." This situation, many would argue, does not necessarily lead to a proper referendum on whether the "minority" supports the transaction for purposes of supplementing the statutorily required vote, versus a majority of those who choose to express their view on the deal. The debate over which standard makes more sense for practitioners, bidders and board members to utilize in deciding upon a voting paradigm for a deal needs to be considered in light of at least two other recent developments in the area, and in light of a careful analysis of the particular facts and circumstances of the deal and the likely vote, including: How small (or large) is the minority percentage? What is the potential "dead vote" composition going to be at the time of the vote? Are the required votes majority or super-majority under applicable state law? What is the activist profile of the company currently and pro-forma for the deal announcement? There were two key developments in 2013: (1) the significant increase of activists' attacks (and their success) on announced M&A transactions and the fact that a majority-of-the-minority vote (particularly of outstanding versus voting stockholders) increases activists' leverage considerably (please refer to the publication entitled "Shareholder Activism in M&A Transactions," available on the Simpson Thacher & Bartlett LLP website (www.simpsonthacher.com) for more information on the rise of shareholder activism in 2013); and (2) the MFW case in Delaware (please refer to the publication entitled "Delaware Chancery Court Applies Business Judgment Rule to Controlling Stockholder Merger Transaction," available on the Simpson Thacher & Bartlett LLP website (www.simpsonthacher.com) for more information on the MFW case) affirmed by the Delaware Supreme Court. This case supports the proposition that the vote, under proper circumstances, of both a fully functioning special committee and a fully informed majority-of-the-minority vote can lead to business judgment treatment (versus entire fairness) for a controlled party transaction. The Supreme Court in MFW, however, noted that it still may be quite difficult for courts to dismiss these types of cases before trial—potentially obviating some of the benefit of striving to be "MFW-compliant" versus obtaining the more traditional entire-fairness "burden shift," which would be obtained by following only one (and not both) of the special committee and majority-of-the-minority vote procedural steps. Practitioners will need to weigh all of these considerations and developments in deciding whether to utilize a majority-of-the-minority vote provision or potentially refrain from doing so to attempt to extract greater value from a bidder and eliminate voting uncertainty. If a majority-of-the-minority provision is utilized, the next likely question is whether to use a "majority of the outstanding" or a "majority of those voting" standard.

[13] In connection with their respective offers, Coeur and Golden Star agreed to, and publicly disclosed an agreement regarding, the payment of break-up fees in the event they were each successful in their respective bids.

of whether the Silver Wheaton transaction has any true purpose other than as a takeover defense." Ian Telfer, the chief executive officer of Wheaton River, denied the allegation and stated that the silver deal "has in no way been created as a response to the Coeur offer." Telfer also highlighted the ability to cancel the transaction if the Coeur offer succeeded. After months of back and forth, Coeur let its tender offer expire on September 30, 2004 after failing to gather the necessary support of the Wheaton River shareholders.

After two months of peace for IAMGold, on October 18, 2004, South Africa's Harmony Gold Mining Company Limited announced its intention to acquire IAMGold's white knight in a transaction conditioned on Gold Fields rejecting its purchase of IAMGold. The Harmony Gold Mining offer had the backing of the Russian mining company, MMC Norilsk Nickel, a 20% shareholder of Gold Fields. Gold Fields was unable to overcome MMC's votes against the IAMGold/Gold Fields transaction. A total of 51.4% of its shareholders voted against the IAMGold/Gold Fields transaction, and IAMGold was once again left without a partner. Although Harmony Gold Mining successfully broke up the IAMGold/Gold Fields transaction and acquired a minority stake in Gold Fields in a first-step tender offer, Harmony's attempt to fully take over Gold Fields failed after facing stiff resistance from Gold Fields and some adverse competition rulings.

In December 2004, Wheaton River agreed to sell to Canadian rival Goldcorp Inc. in a friendly transaction despite the fact that the Goldcorp deal offered shareholders significantly less than the IAMGold transaction or Coeur's offer. Less than two weeks later, Reno, Nevada based Glamis Gold Ltd. jumped into the mix with a $3.4 billion hostile all stock offer for Goldcorp. The offer was conditioned on Wheaton River once again being left out of the mix. Following receipt of the approval of the Goldcorp shareholders for the Goldcorp/Wheaton River transaction on February 10, 2005, Glamis announced its intention to let its hostile offer expire. On Valentine's Day, Goldcorp and Wheaton River announced that their transaction had received the necessary support from the Wheaton River shareholders.

In July 2011, Fundtech Ltd. and S1 Corporation found themselves in a situation similar to that of IAMGold and Wheaton River. On June 26, 2011, the parties signed a merger agreement for a stock-for-stock deal giving Fundtech shareholders $20.51 in S1 shares and 45% of the combined entity. But on July 7, 2011, GTCR Fund X/A LP, which had shown interest in Fundtech earlier in the year, sent a letter to Fundtech making a $25 per share cash offer. The Fundtech board determined that the GTCR offer was reasonably likely to lead to a superior proposal and commenced negotiations.

In late July 2011, S1 was also approached by a previous suitor, ACI Worldwide, Inc. In 2010, ACI had been in serious discussions with S1 regarding a potential transaction, but S1 had decided to go it alone. This time, following the S1 board's rejection of ACI's mixed consideration bid of $9.50 (cash or stock at the shareholder's election, subject to proration such that in the aggregate 40% was to be paid in stock), ACI started soliciting proxies against S1's deal with Fundtech and launched an exchange offer for S1 in late August 2011 after raising its bid. While ACI targeted S1, S1's merger partner, Fundtech, received a letter from GTCR stating that it was reducing its $25 offer to $23.40 to reflect payment of S1's termination fee with Fundtech (and lower closing cash projections). The Fundtech board concluded that the GTCR proposal was a superior proposal and ultimately entered into a deal at $23.33 per share in cash, with the S1 merger agreement being terminated and GTCR picking up the tab for the termination fee. Despite having lost Fundtech to GTCR, the S1 board continued to recommend against the ACI exchange offer but held further discussions through September 2011 and, after ACI increased its offer for S1 in early October 2011, the parties entered into a merger agreement. GTCR and Fundtech closed their deal in late November 2011, and ACI closed its tender offer (with the remaining shares acquired through a merger) for S1 on February 13, 2012.

In another wild deal-jump situation, after Lundin and Inmet sought to combine in a "merger of equals," Equinox Minerals intervened in an attempt to acquire Lundin, but the hunter eventually became the hunted when Minmetal Resources made an unsolicited bid for Equinox, which later was purchased by white knight Barrick Gold. On January 12, 2011, Canadian mining companies Lundin and Inmet announced they were entering into a "merger of equals" that would create Symterra Corporation, which they hoped to be a leading international copper producer. Lundin and Inmet shareholders would each receive shares of the new Symterra, and the exchange ratios represented no premium to either party. In the arrangement agreement, each party had a matching right and agreed to a non-solicit and termination fee of Cdn$120 million (approximately 2.9%). The largest shareholder of each of Inmet (Leucadia, representing 17.94% of Inmet) and Lundin (Lukas Lundin and Lundin family trusts, representing 12.32% of Lundin) executed voting agreements to vote their shares in favor of the proposed merger. However, as it more frequently seems to be the case, the announcement of this "merger of equals" with no premium was just the beginning. On February 28, 2011, Equinox issued a news release announcing it would make an offer to acquire Lundin for approximately Cdn$4.8 billion in cash and stock. Equinox's bid provided Lundin shareholders, who were not receiving any premium in the Inmet merger, with a 17% premium for their shares. On March 6, 2011, Lundin and Inmet announced that they had postponed their respective shareholders meetings from March 14 to March 28, 2011. On March 7, 2011, Equinox commenced its offer for Lundin. Subsequently, Equinox was happy to publicize the fact that ISS recommended that Lundin shareholders favor Equinox's bid. With Equinox's premium bid hovering, Lundin and Inmet announced the termination of their "merger of equals," stating they could not reach a position they thought would be supported by both companies' shareholders. Interestingly, from a Lundin perspective, this was another example of a target dropping its "merger of equals" transaction and potentially returning to the status quo, though Lundin stated it would actively look for the "best value" transaction.

On April 3, 2011, the plot thickened as the hunter became the hunted, with Minmetals Resources announcing that it intended to make an unsolicited takeover bid for deal-jumper Equinox at $7 per share, conditioned on Equinox dropping its bid for Lundin. While Equinox extended its Lundin offer shortly thereafter, on April 25, 2011, Equinox announced that it had withdrawn its offer for Lundin. However, Equinox was not opening the door to a merger with Minmetals Resources but had instead just entered into an agreement with a white knight, Barrick Gold, whereby Barrick Gold would purchase Equinox for Cdn$8.15 cash per share. With the rings of this circus having been sufficiently shuffled and sorted out, Barrick Gold completed its takeover of Equinox in the summer of 2011.

In a similarly transnational and ring-filled deal-jump situation, the friendly stock and cash bid by Inco Ltd. to take over Falconbridge Ltd. led to multiple jumps in a global circus with seemingly six rings. In October 2005, Inco emerged as a white knight with a friendly $15 billion stock and cash takeover bid for all outstanding common shares of fellow Canadian nickel producer Falconbridge. Inco and Falconbridge entered into a support agreement following speculation that Falconbridge was a takeover target by Swiss mining company Xstrata plc, a 19.9% Falconbridge shareholder. The speculation was confirmed in May 2006 when Xstrata bid $18 billion for Falconbridge despite Inco's and Falconbridge's support agreement.

Inco's role was soon reversed as it found itself not the suitor, but the suited, as the target of an unsolicited takeover attempt by zinc producer Teck Cominco Ltd. in a May 2006 stock and cash offer worth $17.8 billion. Teck, who had approached and had been rebuffed by Inco the previous fall, made its 2006 offer contingent on Inco dropping the bid for Falconbridge. Inco's board rejected Teck's offer, and on June 25, 2006, Inco entered into an agreement to be bought by U.S. copper producer Phelps Dodge Corp. This combination contemplated, but was not conditioned on, Inco acquiring Falconbridge. At this stage, commentators indicated that Phelps Dodge was best positioned to acquire both Inco and Falconbridge through the Inco combination.

On July 20, 2006, Inco and Teck consented to a cease trade order by the Ontario Securities Commission whereby Inco's shareholder rights plan would cease to apply. Under Canadian law (unlike under U.S. state laws), defensive shareholder rights plans are only permitted to exist for a limited period of months to allow a target to conduct a search for a white knight. On July 27, 2006, Inco announced that its minimum tender condition of 50.01% of all common shares of Falconbridge was not satisfied, and Inco terminated its support agreement with Falconbridge, resulting in its receipt of a $150 million break-up fee from Falconbridge.

On August 11, 2006, Brazilian mining company Cia. Vale do Rio Doce, the world's largest iron ore company, made an unsolicited Cdn$19.35 billion offer to purchase Inco. Shortly thereafter, Teck announced that its minimum tender condition for Inco was not satisfied and let its offer expire. Fifteen days after CVRD's bid, Inco's board announced that it favored Phelps Dodge's offer and that CVRD had refused to increase its bid. After Inco's shareholders indicated by proxy that they preferred CVRD's higher all cash bid, however, Inco and Phelps Dodge mutually agreed to terminate their combination agreement, which resulted in the payment of a $125 million break-up fee from Inco to Phelps Dodge.[14] Thus, the latest entrant, CVRD, closed its acquisition of Inco. Xstrata went on to acquire Falconbridge, which triggered a further $300 million payment to Inco by Falconbridge under their support agreement.

The battle for Endesa, Spain's largest electric utility, although not a classic deal-jump, is another complex battle that falls within the category of a global multi-ring circus. This transaction started when Spain's Gas Natural made an unsolicited approach to acquire Endesa in September 2005, which proposal was approved by, and continued to have the backing of, Spanish regulators. Despite the appearance of E.ON of Germany with a higher, competing bid of $36.4 billion for Endesa in February 2006, the Spanish government openly backed Gas Natural's lower $27 billion bid that would have resulted in a domestic champion, citing national security concerns as the basis of its support (a combination with E.ON could result in an unstable power supply). In the face of condemnation by the EU, the Spanish government then further stymied E.ON by passing legislation that strengthened its regulators' power to block foreign buyers. By July, Spain had imposed 19 conditions on E.ON's bid, though technically allowing it to proceed.

In September 2006, a new player entered the field as Spanish infrastructure group Acciona acquired an additional 10% of Endesa, bringing its stake to 18%. In response, E.ON raised its bid to $47 billion. The Spanish government partially bowed to pressure from the EU and lightened its conditions on E.ON's bid in November. Acciona continued increasing its ownership stake in Endesa to 21% by January 2007, with orders to its brokers to buy up to 24.9% of the company, above which Acciona would be required by Spanish law to make an offer for all the shares. Meanwhile, on February 1, 2007, Gas Natural dropped out of the bidding and on February 5th, E.ON made a "final" bid of $53 billion. Endesa's board moved quickly to publicly recommend the offer and that shareholders vote to drop the company's poison pill in favor of a combination with E.ON.

In early March, a fourth suitor appeared: Enel, which was one-third owned by the Italian government, announced that it had acquired 21% of Endesa's shares and that it too was working towards acquiring a 24.99% blocking stake. Soon Enel and Acciona announced that they were in joint talks to prepare a rival bid, which prompted Spanish regulators to allow E.ON, on March 26th, to raise its bid again, to $56.3 billion. Endesa's board again endorsed E.ON's offer. On April 2nd, however, E.ON conceded that Acciona's and Enel's block had succeeded and that it would fail to gain support from the requisite 50% of Endesa shares. Acciona and Enel launched an official bid the following day and went on to acquire Endesa for $60.4 billion.

## The Impact of Deal Protections

The degree of enthusiasm or disdain with which an "engaged" target's board of directors will approach its analysis of an unsolicited bid and the formulation of its response will reflect many factors, including the degree of flexibility afforded the board in considering the unsolicited bid(s) by the previously executed merger agreement, any lock-ups or economic penalties built into the original merger agreement, the extent of the commitment by the management and board to the initial deal, the relative pricing and form of consideration

[14] Some speculate that Phelps Dodge's failure to achieve its acquisition goal resulted in a chain of events ending in the sale of Phelps Dodge to Freeport-McMoRan Copper & Gold Inc.

of the respective deals, the market reaction reflected in the stock prices of the target and the potential acquirers to both the first deal and the unsolicited bid(s), whether the relationship and progress of the first deal has been positive or not and whether any price concessions from the original deal price have been required of the target in mid-deal (see the discussions of the 1997 MCI deal and the 2005 Guidant deal), any uncertainties and contingencies raised by the second bid that may not be present in the agreed-upon deal (such as financing or regulatory problems), or vice-versa, and other non-price factors such as the identity and nature of the second bidder and such bidder's plans for the company and its various constituencies.

The target board's response will also necessarily be affected by the defensive profile of the target and by how the interloping company chooses to make its unsolicited bid. Does the interloper limit itself to submitting a letter to the target's board with the intention of exchanging information and engaging in discussions about the bid? Or is it willing to step up the pressure by launching a hostile tender offer (or if stock is being offered, an exchange offer) for the target's shares?[15] Is the original deal structured as a one-step merger or a "quicker to closing" two-step tender offer?[16] Is the target able to rely on a poison pill to defend against an interloper?[17] Or

[15] To the extent that tender or exchange offers are often used in deal-jump situations, it is important to note, there were, historically, open issues surrounding the impact of SEC Rule 14d-10 on "golden parachute" or change in control related executive compensation payments. According to this "all-holder best price" rule, all-shareholders tendering shares pursuant to a tender offer must receive the same consideration. Several courts held that changes to a target's employee benefit plans or golden parachute agreements made in conjunction with or shortly before a tender offer may violate 14d-10 and be re-characterized as tender offer consideration that needs to be given to all holders, although a number of other cases have gone the other way. Since 2001, the cases continued to come down differently in different circuits, with some being more plaintiff friendly, including In re: Luxottica Group S.p.A. Securities Litigation, 293 F.Supp.2d 224 (E.D.N.Y. 2003), and others being more defendant friendly, including KATT v. Titan Acquisitions, Inc., 244 F.Supp.2d 841 (M.D. Tenn. 2003) and In re: Digital Island Securities Litigation, 2004 WL 224998 (3rd Cir. 2004). In the case of a deal-jump, since the plan changes are presumably made in conjunction with the original merger agreement, there should be an even better than typical argument that the executive payment should not be viewed as part of the deal-jump tender. However, in 2006 the SEC adopted (SEC Release No. 54684, November 1, 2006, effective December 8, 2006) amendments to Rule 14d-10 that made it clear that the rule applies only with respect to the consideration offered and paid for securities tendered in a tender offer and should not apply to consideration offered and paid pursuant to executive compensation, severance or other employee benefit arrangements entered into with security holders of the target company so long as the consideration being paid pursuant to such arrangements is not to acquire their securities. The amended rule also provides a safe harbor in the context of third-party tender offers that allows the compensation committee or a similar committee or a special committee of the board of directors comprised solely of independent directors of the bidder (if a party to the arrangement) or target company (with a determination of the committee's independence by the board being conclusive!) to approve an executive compensation arrangement and thereby deem it to be such an arrangement for the purposes of the proposed exemption. The approval must occur prior to the payment of shares in the tender, and the language in the release that the committee should have knowledge of the tender suggests the approval must be contemporaneous.

[16] In this regard, the 2013 Delaware statutory amendments to Section 251(h) of the DGCL (as further amended in 2014 to clarify selected issues arising from the original adoption, including elimination of the "no 15% holder" restriction) make easier, and some would say encourage, the use of two-step friendly transactions that allow quasi-short form mergers if a majority of shares are acquired in the first step tender offer under specified circumstances. Valeant Pharmaceuticals' 2015 acquisition of Salix Pharmaceuticals, for example, was structured as a Section 251(h) transaction. For further information on these amendments, please refer to the publication entitled, "Proposed Amendment to Delaware Merger Law May Result in Increased Pressure for Private Equity-Sponsors to Use Two-Step Merger Structures in Going Private Transactions," available on the Simpson Thacher & Bartlett LLP website (www.simpsonthacher.com).

[17] In a deal-jump situation (and obviously in a straight hostile bid) for the company, the target board may be able to use an existing or new poison pill to ensure it is part of the process. Poison pills generally had a pretty good year in the Delaware courts in 2010, with courts upholding their use in the context of so-called "NOL" pills (see Selectica, Inc. v. Versata Enterprises, Inc., C.A. No. 4241-VCN (Del. Ch. Feb. 26, 2010)) and in the context of creeping market acquisitions (see Yucaipa American Alliance Fund II, L.P. v. Riggio, C.A. No. 5465-BCS (Del. Ch. Aug. 11, 2010)). This role by the board and the protection to be provided by a poison pill were particularly buoyed by the Delaware Chancery Court in Air Products and Chemicals, Inc. v. Airgas, Inc., C.A. No. 5249 (Del. Ch. Feb. 15, 2011), which upheld the use of a poison pill by Airgas in preventing an attempted $5.8 billion hostile takeover by Air Products through an all-cash, non-coercive and fully financed tender offer. Having acted "in good faith with a reasonable factual basis for its decision" that the Air Products offer was inadequate, Chancellor William B. Chandler concluded that the Airgas board met its

is the target exposed to a consent solicitation to remove the board (and therefore the shield of the poison pill) as part of the higher interloping bid? (See Warner-Lambert below).

In most circumstances, the "engaged" parties respond to the possibility of an unsolicited deal-jumping bid by including so-called "deal protection" provisions in the merger agreement. While a thorough coverage of this critical area of M&A practice is beyond the scope of this article, such deal protections typically include (i) some variation of "no-shop" provisions as discussed below (these provisions often include matching rights that give an incumbent bidder the right to be notified of superior proposals and the right to make a matching offer), (ii) break-up fee provisions providing for a payment (generally in the 2-4% range) to the rejected original merger partner upon a termination of the transaction under certain circumstances (the cost of which must ultimately be factored into the price of an interloper's bid), (iii) in stock deals far more than in cash deals, "force the vote" provisions, which require the board to submit the deal to a stockholder vote even if the board no longer supports the offer, and thus does not include a fiduciary termination right for a higher bid, (iv) support agreements or options covering the stock of significant target shareholders, if any, or (v) stock or asset options or commercial arrangements from one merger partner to the other (and sometimes reciprocal).[18] Given the potentially hostile atmosphere in the market for corporate control and the creativity of parties and their advisors, we should expect to see other innovative deal protection mechanisms used in the

Unocal burden by articulating that such an offer posed a threat to the corporate enterprise and took a reasonable and proportionate response to that threat by keeping the pill in place to block the hostile tender offer. While Chancellor Chandler was personally skeptical of the presence of such a "threat" in the defense of an offer that had been ongoing for over a year where he found the shareholders knew all the material information, and he was clear not to endorse a board's ability to "just say never," his opinion affirmed that under current Delaware law he had no choice but to hold that the board of directors retained its ability to shield its shareholders from an inadequately priced offer threatening the long-term value of the corporate enterprise by preventing the shareholders from accepting it. For further information on this case, please refer to the publication entitled, "Delaware Chancery Court Reaffirms Poison Pill and "Just Say No" Defense in Airgas Takeover Battle" available on the Simpson Thacher & Bartlett LLP website (www.simpsonthacher.com).

In the context of a deal-jump situation, it can be tactically useful to the existing deal if the original merger agreement requires the subject company to maintain its existing poison pill in place (or in some circumstances where there is no poison pill, even to put one in place), and not to amend, waive or redeem it in favor of an interloping deal-jump, unless the subject company has determined to terminate the first deal in accordance with its terms. This at least will mean that in the context of an initial deal being done by long-form merger, for example, an interloper could not obtain a timing advantage and actually acquire shares against the wishes of the board by launching a tender offer as part of a deal-jump and take down the shares before the board had completed its process of evaluating and comparing the two bids. This type of "adopt a pill as a deal protection" provision was the subject of scrutiny along with a package of other deal protection provisions determined to be extremely buyer friendly by Vice-Chancellor Laster in the Compellent Technologies, Inc. shareholder litigation, which is described further at footnote 57. The Vice-Chancellor labeled the pill-adoption provision bidder-friendly, but not "improper." As part of an overall settlement, however, the poison pill was rescinded, although the court labeled this "exceptional relief." 2014 saw more than one example of a target implementing a pill in response to an unsolicited proposal, including by Auxilium in the face of Endo's unsolicited offer after Auxilium signed a deal with QLT and by Family Dollar after Carl Icahn filed a 13D indicating he wanted Family Dollar to engage in certain strategic transactions. In 2015, on the other hand, there were no examples of a target implementing a pill in response to an unsolicited deal-jump proposal.

[18] Since the demise of "pooling" accounting, the benefits of reciprocal company stock options that had had the effect of denying an interloper pooling accounting treatment are substantially eliminated, and they are rarely used outside of financial institution transactions. As examples, the Bank of America/FleetBoston and J.P. Morgan Chase/Bank One mergers in 2003 and the Mellon Financial/Bank of New York merger in 2006 included reciprocal cross-options. Financial Institution deals often still include such options because of capital requirements that preclude the use of break-up fees. As such, whereas the contract providing for the acquisition of Bear Stearns by JPMorgan contained no break-up fee, it instead included an "asset option" giving JPMorgan a call on Bear Stearns's headquarters building for $1.1 billion under deal-jump and select other circumstances, and also granted JPMorgan a lock-up stock option on 19.9% of Bear Stearns stock at the $2.00 per share deal price. Interestingly, in 2012, a potential 19.9% stock option payable with a promissory note due upon closing of the purchase of the shares subject to such option would play a significant role in the Dell/Quest Software/Insight deal-jump.

coming years (subject to the boundaries ultimately permitted by courts assessing the propriety of those mechanisms under applicable state law).[19]

The extent of deal protection will also be heavily influenced by the exigencies and circumstances in which the target's board finds itself at the time. In the worst of the financial crisis, in the case of Bear Stearns and Wachovia, they were facing a significant implosion of their stock price and imminent risk of government intervention, and in this regard took actions which some argue might not pass muster under other circumstances. Bear Stearns's investors heavily criticized the initial JPMorgan purchase price, which raised significant concerns regarding the stockholder approval process, and fears of the operational harm any vote-down would have on Bear Stearns were already having an impact on its viability. Accordingly, the deal was amended to raise the price to $10 per share, and the stock option was eliminated and replaced with a share exchange of 95 million shares of Bear Stearns's common stock for shares of JPMorgan's common stock (approximately 39.5% of the voting stock) at an exchange ratio of approximately $10.40 in value for each share of Bear Stearns's common stock. In addition, the amended merger agreement also did not prohibit JPMorgan from buying additional shares in the open market (JPMorgan used this loophole to acquire approximately 10% more of the shares prior to the record date for the vote on the deal). The merger was eventually approved by approximately 84% of Bear Stearns's stockholders in May 2008. Litigation ensued first in New York, and then in Delaware, over the question of whether JPMorgan's ability to amass such a large voting stake effectively divested the Bear Stearns holders of a true vote opportunity. Vice-Chancellor Parsons in Delaware chose to not rule and to allow the New York court to decide the issue (an action considered quite wise for Delaware by most observers since the outcome of the merger was being touted as necessary for the survival of the U.S. economic system). Judge Cahn in New York ultimately ruled that the deal protection mechanisms in the JPMorgan/Bear Stearns merger agreement had not violated applicable legal standards applying Delaware law, in light of the exigencies of the circumstances.[20] A similar decision supporting another (albeit somewhat smaller) vote-enhancing stock grant mechanism in the Wells-Fargo/Wachovia merger was reached by Judge Diaz of the North Carolina court. In his decision, Judge Diaz was in no small part influenced by the fact that the transaction was negotiated in the face of an "unprecedented financial tsunami."[21] All of this has made many observers suggest that there may be an emergence of a "distressed company" standard for deal protection.

One example of a clever deal protection mechanism is the one used in the P&O Princess/Royal Caribbean/Carnival situation. Here, prior to its agreement with Royal Caribbean, Princess repeatedly rebuffed overtures to be acquired by Carnival, including an offer made less than two months before signing the agreement with Royal Caribbean. Perhaps in anticipation of an unsolicited bid from Carnival, Princess and Royal Caribbean, in conjunction with their merger agreement, also entered into a joint venture with an estimated cost of nearly $500 million for either party if it underwent a change in control before January 1, 2003. Notwithstanding this innovative "poison pill," Carnival continued its hostile pursuit, eventually increasing its bid and modifying its original share-exchange offer to reflect the dual-listed company structure favored by Princess and proposed by Royal Caribbean. Despite the fact that Carnival's bid was gaining momentum as a "financially superior" bid by the end of 2002, due to the aforementioned restrictions contained in the joint venture agreement, Princess was precluded from endorsing the Carnival deal until the

[19] Unfriendly (unsolicited and/or hostile) transactions continue to impact the market for corporate control, accounting for 23.9%, 18.1%, 14.4%, 18.3%, 14.8%, 13.9%, 12.8% and 12.0% of all announced deals involving full acquisitions of U.S. companies, in 2008, 2009, 2010, 2011, 2012, 2013, 2014 and 2015, respectively. (For 2008-2011, See "Unfriendly M&A Deal Activity Through 2011". Retrieved February 15, 2012. From www.factsetmergers.com. For 2012, 2013, 2014 and 2015, the percentage was calculated using searches from MergerMetrics / FactSet Mergers databases conducted on March 1, 2013, March 18, 2014, March 4, 2015 and March 16, 2016, respectively.)

[20] See In re: Bear Stearns Litigation, 870 N.Y.S.2d 709. (N.Y.Sup., Dec. 4, 2008).

[21] See Ehrenhaus v. Baker et al., No. 2008 NCBC 19 (N.C. Super. Ct. Dec. 5, 2008).

termination of such agreement in order to avoid possible change in control penalties. As anticipated, on January 8, 2003, Princess formally withdrew its support for the merger with Royal Caribbean and endorsed Carnival's $5.3 billion dual-listed merger proposal, an action that resulted in the required payment of a $62.5 million break-up fee to Royal Caribbean. The last hurdle to Carnival's acquisition of Princess was crossed when, on February 10, 2003, European antitrust regulators approved the deal.

Like all good deal protections, the mechanism used in the Carnival transaction provided the initial bidder with a reasonable amount of deal certainty while not absolutely tying the hands of the target's board to fulfill their fiduciary duties with respect to alternative transactions that better serve the interests of the target's shareholders. In most deals the target's board will have an obligation and/or an interest to consider the new alternative and will have negotiated a so-called "fiduciary out" that enables it to terminate the merger agreement if its fiduciary duty requires it to accept a higher bid (although many recent transactions impose a requirement to provide pre-termination notice for a negotiated period and/or to reveal to the initial bidder the terms of the second bid). Such a "fiduciary out" concept applies particularly in deals that constitute a change of control under applicable state law, often resulting in an obligation on the part of the board to get the best available economic alternative once the decision to sell has been made — the oft-called "Revlon" duty. A potential exception to this duty is the type of strategic "merger of equals" or stock-for-stock merger given deference by the Delaware Supreme Court in the 1989 combination of Time Incorporated and Warner Communications, Inc.[22] Without the Revlon duty applying, the target board will not legally be required to, and may not choose to, pick the alternative with the best price.

In the Coltec/B.F. Goodrich/Crane situation, Coltec's board successfully reaffirmed its acceptance of the B.F. Goodrich stock bid in the wake of Crane's unsolicited, facially higher stock bid. Similarly, Molecular Biosystems rejected two nominally higher stock-for-stock proposals from the same interloper after entering into a stock-for-stock transaction with Alliance Pharmaceutical. In the proxy statement, Molecular justified those actions because of its views that the commercial prospects of the initial combination were stronger and that the Alliance stock was more liquid. Western Multiplex Corp. defended and ultimately completed its "merger of equals" with Proxim Inc. in the face of a hostile, all-stock offer launched by DMC Stratex Networks Inc., which was thought by many analysts to be superior. In announcing its rejection of the DMC bid, Western Multiplex emphasized that it considered a "merger of equals" to be in the best interests of the company, a significant factor considering that its shareholders' interests in the combined company would have been only 28% had it elected to accept the hostile bid. Moreover, the Western Multiplex/Proxim merger was consummated despite the filing of two lawsuits, one which alleged a breach by the Western Multiplex board of directors of its fiduciary duties to shareholders and another which challenged the termination fee included in the Western Multiplex/Proxim merger agreement. Similarly, August Technology rebuffed offers from competitors, including an offer by industry leader KLA-Tencor valuing the company more than 20% higher than the merger agreement with Nanometrics, citing the "merger of equals" as presenting a greater opportunity for growth in value to August Technology shareholders.[23]

[22] Nevertheless, the lack of a significant premium in a "merger of equals," as well as the complex social issues that may be involved with such transactions, may increase the level of difficulty in successfully completing these "merger of equals" transactions. A recent example is AXIS Capital Holdings Limited's unsuccessful 2015 all-stock bid to effect a "merger of equals" with PartnerRe Ltd., which was trumped by a significantly higher cash-and-dividend offer by EXOR S.p.A. For further information on potential social issues involved in "mergers of equals" and other stock-for-stock transactions, please refer to the annually updated publication entitled, "Social Issues in Selected Recent Mergers and Acquisitions Transactions" (most recently dated March 1, 2016) available on the Simpson Thacher & Bartlett LLP website (www.simpsonthacher.com).

[23] In turning down separate all-cash proposals from Certara Corporation and an unnamed private equity fund providing for premiums to its all-stock "merger of equals" with Accelrys, Symyx in 2010 focused on the potential long-term value to its stockholders of its existing merger and the fact that the financing for the competing offers was not fully committed. Though Symyx entered discussions with Certara after it provided an equity commitment and draft merger

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In 2008, Republic Services Inc. successfully resisted the hostile attempt by Waste Management, Inc. to unravel its strategic stock-for-stock merger with Allied Waste Industries Inc., in part by refusing to negotiate with Waste Management in accordance with the non-solicitation provisions of the Allied/Republic merger agreement following the determination by Republic's board that Waste Management's all-cash proposal, despite a higher nominal value (approximating a 9.8% premium), "did not constitute, and could not reasonably be expected to lead to, a proposal for a transaction that is or would be more favorable to Republic stockholders" than the merger then contemplated between Republic and Allied. In its public announcement of the board's decision to decline to negotiate further with Waste Management, Republic's CEO was mindful to position the board's decision outside of Revlon by stating "Republic is not for sale....Although we are always mindful of our fiduciary duties, Republic has not put itself up for sale as a result of entering into a strategic merger with [Allied]." Interestingly, Republic's position was aided somewhat by vocal opposition of the Waste Management bid by some Waste Management shareholders, including Bill Gates's investment vehicle (see also the description below of the 2006/2007 battle by Express Scripts to break up the CVS/Caremark "merger of equals").

Even in a clear or possible "Revlon mode," boards and their advisors will occasionally apply their own discounting methods to conclude that the nominally higher priced deal provides less value and certainty than a competing deal. See, for example, the description of the Pericom/Diodes/Montage deal below, in which the target board discounted the value of a higher bid due to uncertainty over financing, even though the bidder was making great efforts to assuage looming regulatory concerns; the description of the IBP/DLJ/Smithfield/Tyson battle later in this article; the description of the MCI/Verizon/Qwest situation below, where MCI cited numerous reasons for its selection of the facially lower Verizon bid relating to concerns over the financial position of Qwest, competitive concerns and MCI's customers' stated preference for a combination with Verizon;[24] the description of the Vornado/Blackstone/EOP mega-deal, where the timing and value issues raised by the significant stock portion of the composition of Vornado's overbid was a highly relevant factor in EOP's continued support for the Blackstone transaction; and the description of the battle for the Chicago Board of Trade between the Chicago Mercantile Exchange and IntercontinentalExchange below, where the ability to integrate the two exchanges and create synergies driving long-term value for the combined shareholder base were factors stressed in supporting what appeared to be a lower-priced deal.[25]

agreement offering an approximately 23% premium to the initial value of the Accelrys merger, Certara thereafter significantly decreased its offer and the Symyx board determined the proposal to be inadequate based on its existing merger with Accelrys that provided better terms and greater potential for long-term value to Symyx stockholders.

[24] While investment banks provide fairness opinions with regard to a particular proposal, such opinions do not typically compare competing offers and often specifically exclude their opining as to the "relative value" of the two.

[25] While not meriting a full description, in a relatively small transaction Docucorp International Inc.'s board stayed with a seemingly-lower agreed-to all cash deal with Skywire Software rather than accepting a higher cash and stock offer by Ebix Inc. because Docucorp substantially discounted the stock component of the deal given that Ebix's market capitalization was substantially smaller than Docucorp's. Similarly, in the face of an offer from Prospect that was 20% higher than its already agreed-to offer from Ares, Allied concluded the higher offer was not superior due to Prospect's record of "highly dilutive" equity capital raises in 2009 and Prospect's at-risk dividend. However, having focused on Prospect's dividend and perhaps doubting the superiority of its own transaction, Allied declared its shareholders would receive a special $.20 cash dividend if they approved the merger with Ares (though Allied proclaimed this had "absolutely nothing to do" with Prospect's bid). While Ares's offer, taking into account the special dividend, was still less than Prospect's, with the gap somewhat narrowed Allied shareholders approved the merger with Ares. In the Bausch & Lomb/Warburg Pincus/Advanced Medical Optics situation, AMO initially bid $10 per share higher for Bausch & Lomb than the consideration proposed in the Warburg Pincus deal. However, AMO eventually pulled its higher bid after several of its largest shareholders stated publicly or in interviews with Bausch & Lomb that they would not support the proposed deal (AMO indicated the lack of support would be overcome if Bausch & Lomb would release AMO from the restrictions in the confidentiality agreement that prohibited it from fully disclosing the benefits of the merger). In a similar situation that ended well for the deal-jumper, Merge Healthcare's 13% higher cash offer was initially rebuffed by

Similarly, a board determination of certainty of value played a key role in the battle for Outdoor Channel Holdings, Inc. between InterMedia Partners LP and Kroenke Sports & Entertainment. After Kroenke's offers were determined to be superior, InterMedia submitted two offers to amend its signed deal with Outdoor Channel but to no avail—the board ultimately determined that Kroenke's offer represented more certain value for stockholders since it was an all-cash offer (as opposed to InterMedia's mix of stock and cash, with the stock having limited liquidity). Outdoor Channel terminated its agreement with InterMedia, paying it a $6.5 million termination fee, and executed a new merger agreement with Kroenke for $8.75 per share in cash. Interestingly, after Outdoor Channel signed up the new deal with Kroenke, InterMedia tossed its hat in the ring again, submitting an unsolicited all-cash offer. The Kroenke contract contained a four-day match right, which Kroenke exercised, defeating InterMedia's bid yet again. In connection with the increased valuation, Kroenke and Outdoor Channel amended the merger agreement, inserting a "force the vote" provision and raising the termination fee from $1 million to $7.5 million. In the face of these amendments, and the increased valuation to $10.25 per share in cash, InterMedia withdrew from discussions and Outdoor Channel closed its deal with Kroenke on May 17, 2013.

In a 2014 deal, a "force the vote" provision was a deal protection feature that played a role in the ultimate acquisition of Hillshire Brands Company, which initially signed a deal to acquire Pinnacle Foods Inc. but withdrew its recommendation to it stockholders in light of a then-pending offer by an interloper to purchase Hillshire. On May 12, 2014, Hillshire entered into a merger agreement to acquire Pinnacle. At closing, Pinnacle shareholders were to receive $36.02 a share consisting of $18.00 in cash and 0.5 of a share of Hillshire common stock (in a deal valued at approximately $6.6 billion).

The Pinnacle merger agreement contained a "force the vote" provision, which required each of Pinnacle and Hillshire to submit the Pinnacle merger agreement, and the issuance of Hillshire stock, as applicable, to their respective stockholders for a vote regardless of whether either board changed its recommendation and did not allow either party a termination right to accept a "superior proposal."

On May 27, 2014, Hillshire received an unsolicited proposal by Pilgrim's Pride Corporation to acquire Hillshire for $45.00 per share of Hillshire common stock in cash. On May 29th, Hillshire received another unsolicited proposal by Tyson Foods, Inc. to acquire Hillshire for $50.00 per share of Hillshire common stock in cash. On June 1st, Pilgrim's Pride increased its offer to $55.00 per share in cash. On June 3rd, Hillshire announced that it intended to enter into discussions with Tyson and Pilgrim's Pride and that its board had made the "requisite determinations" under the Pinnacle merger agreement, but that it was not withdrawing, modifying or qualifying its recommendation with respect to the Pinnacle merger at that time.

On June 9, 2014 Tyson submitted a unilaterally binding offer to acquire all outstanding shares of Hillshire common stock for $63.00 per share in cash. The offer was subject to Hillshire being released from the Pinnacle merger agreement in accordance with its terms. As such, Pinnacle could either terminate the Pinnacle merger agreement and collect a $163 million termination fee (this was larger than the $141 million fee that would have been payable by Pinnacle had the roles been flipped) or force Hillshire to submit the transaction to a vote of its stockholders. On that same day, Pilgrim's Pride announced that it would not increase its offer price for Hillshire.

AMICAS for being "highly conditional" and "illusory and risky," but after Merge Healthcare included in its offer an executed commitment letter securing additional financing for the transaction, AMICAS ultimately chose to be acquired by Merge Healthcare. In 2011, Plato found itself in a similar situation when its higher bid was ultimately turned down by Renaissance, with the controlling shareholder primarily citing deal uncertainty and community concerns. Microsemi's 2015 deal-jump of Skywork's bid to acquire PMC-Sierra was stalled on a few occasions when volatility in its share price caused PMC-Sierra's board to conclude that the value represented by Microsemi's mixed cash-and-stock offer had fluctuated below the value of Skywork's competing all-cash offer.

On June 16, 2014 Hillshire announced that its board unanimously determined to withdraw its recommendation of the then-pending acquisition of Pinnacle in light of Tyson's offer. On June 30th, Hillshire announced that Pinnacle exercised its right to terminate the Pinnacle merger agreement based on Hillshire's change in recommendation, and Tyson paid the $163 million termination fee to Pinnacle on Hillshire's behalf. On July 1st, Hillshire and Tyson signed a definitive merger agreement providing for the acquisition of Hillshire by Tyson for $63.00 per share in cash, which closed on August 28, 2014.

## Regulatory Concerns and the "Antitrust Factor"

Certain of the key deal-jump battles over the years have highlighted the difficulty often faced by target boards weighing price against certainty where issues of regulatory or political risk, or difficult comparative value-certainty judgments, make strict dollar for dollar comparisons impossible.

National security considerations and fears (and the resultant politics) shaped the 2005 cross-border negotiations for U.S.-based oil giant Unocal Corporation.[26] Each of CNOOC Limited, an affiliate of Chinese government controlled China National Offshore Oil Company, a second unnamed suitor and Chevron Corporation strategized to acquire Unocal.

On April 4, 2005, Chevron and Unocal announced the execution of their merger agreement. Two and a half months later, CNOOC presented a competing proposal to Unocal, providing a substantial premium over the Chevron offer. CNOOC included with its proposal a draft commitment by its controlling parent, in the form of a voting agreement, to vote in favor of the transaction with Unocal. Under the rules of the Hong Kong Stock Exchange, such shareholder approval was a condition to CNOOC's completion of the transaction. Unocal's assessment of CNOOC's proposal focused on the risk of regulatory approval, both in the United States and in Hong Kong. A CNOOC acquisition would trigger a provision commonly known as Exon-Florio, which requires a review of certain foreign investments to protect national security. In compliance with Exon-Florio, CNOOC filed a notice with the Committee on Foreign Investment in the United States requesting a review of the potential transaction. According to proxy materials, in negotiations Unocal's advisors expressed to CNOOC's advisors that Unocal was willing to accept considerably greater regulatory risk only if CNOOC provided fair compensation for the additional risk. As the negotiations continued behind closed doors, the House of Representatives was moving against the consummation of a CNOOC merger. A July 1, 2005 House Resolution prohibited the use of fiscal year 2006 U.S. Treasury funds to recommend approval of the sale of Unocal to CNOOC. A July 20 Senate amendment proposed a delay in any U.S. governmental approval of any acquisition of a U.S. company by a foreign government-owned entity until 30 days after the delivery of an assessment by the Secretary of State as to whether reciprocal laws in the acquiring government's jurisdiction would permit such an acquisition by the U.S. government. Though neither proposal was passed into law, as the House of Representatives began hearings to address national security concerns raised by the proposed transaction, the regulatory risk was mounting. Meanwhile, to keep pressure on Chevron, Unocal communicated to Chevron that the financial terms of its proposal were unlikely to be approved by the Unocal shareholders, notwithstanding their merger agreement, and the board was inclined to change its recommendation.

Though CNOOC was authorized to increase its offer from $67 per share offer to $69 per share, CNOOC refused to increase the offer in negotiations with Unocal. CNOOC indicated it could only do so if Unocal would pay the termination fees due Chevron and agree to take actions to support the CNOOC offer, including

[26] In March 2008, the same forces led Bain Capital Partners and China's Huawei Technologies to abandon their proposed acquisition of 3Com. Despite Bain's attempt to call off the merger on such grounds, 3Com continued to fulfill its obligations under the merger agreement, including obtaining the required shareholder approval of the deal, in an attempt to secure the $66 million break-up fee in a legal battle. However, late in 2008, 3Com dropped its lawsuit against Bain and Huawei. In 2011, Huawei again came under scrutiny over national security concerns, leading Huawei to agree to divest certain assets of U.S. technology firm 3Leaf Systems.

efforts to influence the U.S. Congress. Interestingly, the merger agreement contained a "force the vote" provision that would require Unocal to submit the proposed Chevron/Unocal merger to its shareholders even if its board of directors determined that the CNOOC proposal was superior and withdrew its recommendation of the Chevron transaction. The entrance of CNOOC raised interesting questions regarding various covenants in the Chevron/Unocal merger agreement requiring the parties to use their "respective best efforts to consummate" the transaction and restricting Unocal from "facilitating the making of" acquisition proposals.[27] It is unclear how a court would interpret these covenants following a change in recommendation by a board of directors that is not coupled with fiduciary termination rights. These considerations became moot when Chevron delivered to Unocal an enhanced proposal that included a $69 per share all-cash election and a 1.03 conversion ratio of Chevron common stock to Unocal common stock all-stock election. The Unocal board approved the Chevron amended agreement that evening and recommended the merger for stockholder approval.

A strategic bidder presents a target's board with the additional concern of whether a transaction with the strategic bidder can obtain antitrust clearance, avoid a lengthy review process in the U.S. or abroad or avoid having approval conditioned on significant divestitures. Several notable deal-jump transactions in recent years have prominently illustrated the deal completion risks associated with antitrust concerns and the "costs" to a strategic bidder when competing with a financial bidder free from any significant antitrust risk.

On February 15, 2011, NYSE Euronext and Deutsche Börse announced that they had entered into a business combination agreement. NYSE Euronext and Deutsche Börse were to be combined through the formation of a new Dutch holding company in a deal valued at over $10 billion. Consideration was to be all stock, and the

[27] As discussed below, Verizon would make the addition of a "force the vote" provision to its original merger agreement a condition to its increased offer to MCI in the face of competing proposals from Qwest. Also as discussed below, the Caremark/CVS merger contains a "force the vote" provision with a "twist"—the ability of Caremark on the making of a change in recommendation for a Superior Proposal to enter into a conditional Merger Agreement for that Superior Proposal that only becomes effective on the termination of the Caremark/CVS Merger Agreement (such as on a shareholder vote-down). The shareholder advisory service ISS in one of its advisory notes on that deal, issued February 12, 2007, noted its preference that target boards not agree to "force the vote" provisions, in part because of the incongruity of possibly having to propose a non-approved offer to one's shareholders. ISS (now called RiskMetrics) reiterated that position in its Edge Note email on March 18, 2008 in connection with its analysis of the initial contract for JPMorgan's acquisition of Bear Stearns, which has a "force the vote" provision and requires resubmission of the matter for repeated shareholder votes for a year (the early 2009 "merger of equals" between Ticketmaster Entertainment and Live Nation had a 30-day mandatory resubmission provision in the event of a failed stockholder vote on either side). Such "force the vote" provisions typically give a distinct timing advantage to the original merger party, but many merger agreements contain ambiguities regarding the parties' obligations during the awkward stage following a change in the board's recommendation but prior to a vote down. When faced with this kind of situation or when planning to include a "force the vote" provision, practitioners should focus on how the end-game will work in applying such a clause. Making sure that ancillary provisions like the "no-shop" clause or the best efforts clause have the appropriate exceptions to allow the "non-recommended" meeting inherent in a "force the vote" situation is key, but the target must also have a plan as to how to get the second bidder locked into his bid for that extended period without being able to sign a second merger agreement (generally prohibited by the "no-shop" clause (but note the Caremark provision described above)). The resolution of the latter problem often involves techniques such as the second bidder submitting on an irrevocable basis a merger agreement fully executed by the second bidder into an escrow arrangement or directly to the target so that if the target shareholders reject the first bid at the shareholders meeting as recommended, the target can sign and take the second offer. Perhaps the Caremark "Conditional Merger Agreement" language will become more standard. From a bidder's perspective, obtaining the time benefits of the "force the vote" provision should include making sure that the language does preclude CNOOC-type cooperation during the interim period. A comparison of the original Unocal/Chevron "no-shop" clause (may not "solicit, initiate or knowingly facilitate, encourage or induce any inquiry with respect to, or the making, submission or announcement of, an alternative proposal") to the MCI/Verizon "no-shop" clause (may not "initiate or solicit or knowingly facilitate or encourage any inquiry or the making of any proposal…or otherwise cooperate with or take any other action to facilitate any proposal") (emphasis added) might suggest different outcomes. The Caremark "no-shop" language does preclude all cooperation or facilitation, and expressly notes that even if a conditional merger agreement is entered into, until it becomes effective on termination of the first agreement, no SEC or regulatory filings for that deal may be made.

completed transaction would leave Deutsche Börse shareholders with 60% of the Dutch holding company and NYSE Euronext shareholders with the remaining 40%.

However, after much market chatter relating to possible intervening bids, on April 1, 2011, NASDAQ OMX and IntercontinentalExchange, Inc. (ICE) announced that they had made a joint proposal to acquire NYSE Euronext in a $42.50 per share mixed consideration bid ($14.24 of which was to be cash), offering a higher per share price than Deutsche Börse in a deal valued at approximately $11.3 billion. Under the NASDAQ OMX/ICE offer, ICE would purchase NYSE Euronext's derivatives businesses and NASDAQ OMX would take the remaining business, including the exchanges in New York, Paris, Brussels, Amsterdam and Lisbon, as well as the U.S. options business. However, on April 10, 2011, NYSE Euronext announced that its board had unanimously reaffirmed its agreement with Deutsche Börse and rejected its unsolicited suitors' proposal, citing the high conditionality of the competing offer and viewing its signed deal as "significantly more likely to close" and superior, despite being at a lower price. Numerous commentators observed at the time that the chances of U.S. antitrust regulators approving a NASDAQ OMX/NYSE tie-up were low. On April 19, 2011, NASDAQ OMX and ICE sent a letter to NYSE Euronext and announced that they had taken a number of steps to demonstrate their commitment to the transaction and provide more certainty to the deal. The hopeful deal-jumpers submitted a merger agreement and stated they were prepared to pay a $350 million reverse termination fee if antitrust approvals could not be obtained, noting they had already taken actions toward starting the antitrust review process. On April 21, 2011, NYSE Euronext again reaffirmed its Deutsche Börse agreement and rejected the NASDAQ OMX and ICE proposal, primarily citing execution risk. In early May 2011, NASDAQ OMX and ICE commenced an unsolicited exchange offer for NYSE Euronext. In mid-May 2011, however, the deal-jump was stopped in its tracks when the DOJ announced that it would oppose a NASDAQ OMX/ICE tie-up with NYSE Euronext, prompting NASDAQ OMX and ICE to withdraw their proposal.

With the deal-jumper hindered by regulatory obstacles, NYSE Euronext and Deutsche Börse moved ahead. In early July 2011, NYSE Euronext's shareholders approved the transaction and in mid-July 2011 it was clear that the minimum tender for the Deutsche Börse offer had been exceeded. The deal also received regulatory approvals from the Committee on Foreign Investment in the United States, the German Federal Financial Supervisory Authority and the Luxembourg Commission de Surveillance du Secteur Financier. On December 22, 2011, the DOJ approved the transaction, contingent on Deutsche Börse divesting its indirect stake in Direct Edge (a US-based stock exchange), but the deal still needed European Commission approval. However, European competition authorities indicated that a transaction between Europe's two biggest derivatives exchanges could be problematic. Taking a relatively narrow view, the European Commission defined the market as exchange-traded derivatives (excluding the OTC market). On February 1, 2012, the European Commission blocked the deal, stating it would have led to "a near-monopoly in European financial derivatives worldwide." The following day, NYSE Euronext and Deutsche Börse formally abandoned their arrangement, with neither owing the other any break-up fee.

Almost a year after the deal with Deutsche Börse was blocked, ICE (this time independently of NASDAQ OMX) and NYSE Euronext announced in December 2012 that they entered into a merger agreement whereby ICE would acquire NYSE Euronext in a stock-and-cash transaction (consisting of approximately two-thirds stock and one-third cash) with a total value of $8.2 billion or $33.12 per share. The deal closed successfully on November 13, 2013 and was less controversial from a regulatory standpoint than ICE's initial joint proposal with NASDAQ OMX. However, to ensure some form of compensation given the risk of regulatory impediments anticipated at the time of the deal, NYSE Euronext put ICE on the hook for a $750 million regulatory break-up fee in the event the transaction did not close by the "drop-dead date" (December 31, 2013, subject to possible extension to March 31, 2014) as a result of the failure to obtain regulatory approval.

In another deal-jump situation in the stock exchange industry that involved regulatory risk, Maple Group sought to acquire Canadian exchange TMX notwithstanding TMX's signed deal for a "merger of equals" with

LSE. On February 9, 2011, TMX and LSE entered into a merger with all stock consideration pursuant to which LSE and TMX shareholders would end up with 55% and 45%, respectively, of the combined entity. On February 23, 2011, the Legislative Assembly of Ontario formed a committee to evaluate the deal. A few weeks later, on the same day as the committee expressed concerns over the merger, several Canadian organizations published their (mainly nationalistic) concerns over the merger as well. The Canadian national spirit engaged, on May 13, 2011, TMX received a written proposal for a mixed consideration acquisition at approximately Cdn$48 per share (Cdn$33.52 cash plus 0.3016 shares) by a corporation formed by a number of Canadian financial institutions, including pension funds and banks, operating under the name of the Maple Group. Under the offer, TMX shareholders would end up with approximately 40% of Maple Group, 5% less than in the LSE transaction. On May 20, 2011, the TMX board determined that the Maple Group proposal did not constitute and could not reasonably be expected to result in a superior proposal, partly because of execution risk and because the proposal put all regulatory risk on TMX by failing to offer any compensation for failure to obtain regulatory approvals. In response to TMX's refusal, Maple Group took its offer directly to TMX shareholders, making a formal takeover bid for a maximum of 70% of TMX at Cdn$48 per share (to be followed by a subsequent merger) and soliciting proxies against the LSE deal. On June 22, 2011, after TMX and LSE sweetened their deal by amending their merger agreement to add a cash component in the form of a special dividend, Maple Group increased its offer to Cdn$50 per share for an increased maximum number of 80% of TMX shares. Still preferring its initial plan to merge with LSE, the TMX board also rejected this revised offer.

However, TMX shareholders had other ideas, and, on June 29, 2011, TMX and LSE announced that they had terminated their merger agreement because it was clear that the two-thirds threshold required from TMX shareholders would not be met. With the "merger of equals" transaction terminated, the TMX situation represents another example of a potential "merger of equals" potentially returning to a standalone strategy. Eventually, however, TMX and Maple Group were able to see eye-to-eye on a transaction. On October 30, 2011, TMX entered into a support agreement in relation to the Cdn$3.8 billion deal with Maple Group. However, as TMX had highlighted when it rebuffed Maple Group earlier, a TMX/Maple Group combination faced significant regulatory risk. This risk came to fruition in late November 30, 2011, when Canada's competition regulator raised "serious concerns" about the transaction. Consequently, in the first half of 2012, Maple Group was required to continually extend its offer while awaiting regulatory approvals, which were finally received in late summer. The offer was completed, and the deal closed in September 2012.

In yet another transaction where antitrust concerns played an important role, Avis Budget was ultimately able to thwart Hertz's initial signed deal with Dollar Thrifty but was unable to sign or complete an acquisition of its own (with Hertz ultimately acquiring Dollar Thrifty in 2012). On April 25, 2010, Hertz announced it had signed an agreement to acquire Dollar Thrifty for $41.00 per share in cash (including a special dividend from Dollar Thrifty immediately prior to closing) and stock, which contained matching rights and a 3.7% termination fee for Hertz and certain commitments by Hertz to obtain regulatory approval. The next week, Dollar Thrifty received a letter from the chief executive officer of Avis Budget expressing surprise at the announcement, claiming he had been scheduled to meet the chief executive officer and chief operating officer of Dollar Thrifty just days after the announcement to discuss a potential transaction (the meeting was cancelled by Dollar Thrifty) and claiming that Avis Budget would like to make a "substantially higher offer" to acquire Dollar Thrifty. The Dollar Thrifty board thereafter concluded that Avis Budget's expressed interest and suggestion of a potentially higher offer could "reasonably be expected" to result in a superior proposal and executed a confidentiality agreement with Avis Budget.

On July 28, 2010, after Avis Budget had performed due diligence, Dollar Thrifty received a letter from Avis Budget outlining a proposal to acquire Dollar Thrifty for $46.50 per share in cash and stock, with no termination fee or matching rights, but also no reverse termination fee protecting against antitrust risk (although it did include a commitment to certain divestitures to obtain regulatory approval). In evaluating Avis Budget's proposal, as per its agreement with Hertz, Dollar Thrifty reviewed whether the Avis Budget transaction was more favorable from a financial perspective, supported by financing that was fully committed or reasonably likely to be obtained, and reasonably expected to be consummated on a timely basis. In its response, Dollar Thrifty took the position that in the "superior proposal" calculus, while Avis Budget's offer did provide for a higher transaction consideration, the deal certainty prong was a separate test that had to be met regardless of price, and that in this respect, the Avis Budget offer fell short. Dollar Thrifty found the third prong to be lacking given the absence of a reverse termination fee that to Dollar Thrifty signaled an unwillingness to "share the risk of the ultimate regulatory outcome" and further signaled a "lack of confidence" by Avis Budget in its antitrust position that the divestitures would be sufficient to obtain regulatory approval.[28]

Undeterred, on September 2, 2010, Avis Budget bumped its bid by increasing the cash portion by $1.50 per share and agreeing to additional divestiture commitments to help allay antitrust concerns (but still did not offer a reverse termination fee to be paid in case of an antitrust failure). Despite the increase in the offer price, the Dollar Thrifty board still found Avis Budget's offer lacking, focusing on the fact that Avis Budget had not changed "in any respect its position with regard to the allocation of antitrust regulatory risk." On September 12, 2010, Hertz and Dollar Thrifty amended their agreement to increase the cash component by $10.80 per share, in what Hertz stated was a non-negotiable and final offer of $50 per share. Avis Budget responded by increasing its offer to $53 per share. On the eve of the September 30, 2010 vote (which had been postponed from September 10 after the amendment), Avis Budget sweetened its bid by announcing that if Dollar Thrifty shareholders rejected the Hertz deal, Avis Budget would begin a tender offer for Dollar Thrifty and include the reverse termination fee (in an amount of $20 million) against antitrust risk that it had been so reluctant to agree to previously (and that had apparently kept the Dollar Thrifty board from determining that Avis Budget's offer was a "superior proposal"). On September 30, 2010, the Dollar Thrifty shareholders failed to approve the merger with Hertz, prompting Hertz to terminate its agreement. On October 5, 2010, Dollar Thrifty and Avis Budget announced that they had agreed to cooperate to pursue antitrust clearance of the proposed acquisition of Dollar Thrifty by Avis Budget, but the parties still did not enter into a merger agreement (some suggest for tactical reasons relating to the termination fee (as described in more detail below)) and, at the request of Dollar Thrifty, Avis Budget delayed its tender offer while waiting for regulatory approval.

On May 9, 2011, Hertz entered the ring again, with a cash/stock exchange offer for all outstanding shares of Dollar Thrifty at $72 per share. Despite Hertz's refusal to waive its rights to a potential termination fee under its 2010 merger agreement as requested by Dollar Thrifty in exchange for such cooperation, Dollar Thrifty agreed to cooperate with Hertz in its efforts to obtain antitrust clearance. On May 18, 2011, Dollar Thrifty announced that its board had adopted a poison pill as a temporary measure to allow the board and shareholders to have a full and fair opportunity to consider any acquisition offers after gaining additional clarity on the antitrust process, without the undue influence that might have resulted if one or more shareholders were permitted to accumulate a significant position in the company. The Dollar Thrifty board then determined to recommend its shareholders not tender their shares pursuant to Hertz's exchange offer, chiefly because of uncertainty in relation to antitrust clearances. Hertz extended its exchange offer multiple times and on July 14, 2011 announced that it had filed an HSR notification relating thereto.

On August 21, 2011, as it continued to cooperate with both suitors with respect to the respective regulatory reviews, Dollar Thrifty sent a letter to Hertz and Avis advising them of its intention to solicit best and final

[28] In a shareholder lawsuit before the Delaware Chancery Court (In re Dollar Thrifty Shareholder Litigation, C.A. No. 5458 (Del. Ch., Sept. 8, 2010)), then-Vice Chancellor Strine reviewed the Dollar Thrifty / Hertz merger agreement, finding that the Dollar Thrifty board did not breach its fiduciary duty and ruling against an injunction blocking the shareholder vote. Then-Vice Chancellor Strine blessed the Dollar Thrifty board's actions and found that the sale process run by Dollar Thrifty was reasonable under Revlon. The Vice-Chancellor also noted that the deal protections in the form of a termination fee and matching rights clearly did not prevent another bidder, here Avis Budget, from coming in and bidding for Dollar Thrifty, observing that "deal protections actually encourage an interloper to dig deep and to put on the table a clearly better offer rather than to emerge with pennies more."

definitive proposals for submission in early October 2011. However, on September 14, 2011, Avis reported that although it believed it would obtain the necessary regulatory clearance it had decided not to pursue a transaction with Dollar Thrifty due to current market conditions. Then Hertz, despite reaffirming its commitment to the transaction, informed Dollar Thrifty that it would not submit a proposal by the final bid date. Not having received any proposal by the close of business on October 10, 2011, the Dollar Thrifty board formally concluded the solicitation process and ceased all related activities. The next day, Dollar Thrifty announced its decision to move forward on a stand-alone basis and confirmed its intent to commence a previously announced share-repurchase program. On October 27, 2011, Hertz announced that it was withdrawing its exchange offer and, though Hertz indicated it would reassess a potential transaction once antitrust clearance had been obtained, its CEO later stated that the company was looking to acquire smaller, niche companies.

The saga continued in February 2012 when Dollar Thrifty reported its 2011 fourth quarter net income—up 171% from fourth quarter net income in 2010. Dollar Thrifty's CEO also confirmed that the company had extended its poison pill for another year. Within a week, Hertz's CEO announced that, once the FTC approved its acquisition of Dollar Thrifty, it would renew discussions on purchase terms. Renewed discussions led to a merger agreement between the parties in August 2012. Hertz would acquire Dollar Thrifty for $87.50 per share—$15.50 more per share than Hertz's final offer in 2011 and more than double the agreed price per share in 2010! The merger agreement was criticized by some commentators as a product of "severe deal fatigue" due to its lack of a break-up fee in the event of a competing acquisition proposal and the December 31, 2012 "drop-dead date" that on its face looked short for a transaction of this type. However, each of these features was clearly intentional based on the circumstances at the time of signing (regulatory review of the transaction was far along at the FTC) and the history of the negotiation regarding the break-up fee (note that a prior Avis offer had already introduced the concept of no traditional break-up fee). Additionally, despite the Dollar Thrifty deal having already been heavily shopped, the agreement contained an unusual in this context "go-shop" clause entitling Dollar Thrifty to solicit alternative deals and conduct secret negotiations until September 25, 2012, at which point any competing bid was to be announced to Hertz. Hertz would have had only two days to match or top the competing bid despite the fact that the terms of the competing bid did not have to be disclosed. While this seemed like an invitation to Avis to reenter the ring, on September 26, 2012 Dollar Thrifty announced that it had not received any acquisition proposals during the "go-shop" period.

In mid-November of 2012, after almost half a decade of discussions, the FTC finally approved the deal based on Hertz divesting its Advantage business and 29 on-airport rental car locations, and the acquisition closed on November 19, 2012.

Antitrust concerns also dominated the reasons cited by Hollywood Entertainment in its continuous refusals to support Blockbuster's more generous cash and stock tender offer. The feeding frenzy over Hollywood Entertainment began when affiliates of Leonard Green, Hollywood Entertainment's original merger partner, became concerned that months of deteriorating financial results would make satisfaction of financing conditions impossible. The merger agreement was amended to reduce the merger consideration to $10.25 per share, eliminate the $26.5 million termination fee (though increase the expense reimbursement by $1 million to $4 million) and, most importantly, free up the Hollywood Entertainment special committee to continue to solicit alternative proposals prior to the shareholders meeting. In November of 2004, when attempts at amicable talks broke down over a dispute with respect to the terms of the confidentiality agreement, Blockbuster announced its offer to the public. Concurrently with the Blockbuster overtures, Hollywood Entertainment was engaging in preliminary discussions with Movie Gallery. A week after Blockbuster's announcement, Movie Gallery and Hollywood Entertainment agreed to terms on a confidentiality agreement. On January 9, 2005, they announced that they had agreed to an all-cash deal at $13.25 per share (less than the $14.00 per share provided in the first Leonard Green merger agreement, but significantly greater than the reduced $10.25 per share in the amended merger agreement), and Hollywood Entertainment terminated its merger agreement with Leonard Green. Skepticism about Blockbuster's ability to obtain antitrust approval limited, if not eliminated, pressure on Movie Gallery to improve its offer. Blockbuster's subsequent abandonment of its offer, in the face of such regulatory barriers, enabled Movie Gallery to close the transaction. The threat of FTC barriers alone appear to have led Hollywood Entertainment's special committee to be able to recommend Movie Gallery's bid, notwithstanding the approximately 10% cash premium Blockbuster's proposal would have provided Hollywood Entertainment shareholders. The antitrust issue sparked plenty of interesting debate among those who observed Blockbuster's struggle, particularly as to whether the definition of the market should include Internet sales and rental subscriptions, video-on-demand and retailers such as Wal-Mart Stores Inc.

Similarly, antitrust risk also shaped the competition to acquire Maytag. Following the May 19, 2005 announcement of Maytag's sale to Triton Acquisition Holdings, an investment vehicle formed by Ripplewood, Maytag's management and advisors took full advantage of the then relatively unusual one month active market check provided by the merger agreement (which marked the beginning of the "go-shop" craze) and contacted over thirty parties to check for interest in a competing transaction (calling into question whether this should be considered a deal-jump at all or a deal draw). A consortium including Bain, Blackstone and Haier America offered a 14% premium for Maytag over the previously announced price pursuant to the agreement with Triton. Whirlpool's subsequent proposal to acquire all outstanding shares of Maytag offered a 21% premium over the price in Maytag's prior written agreement with Triton. The consortium quickly conceded in the face of the higher bidding and highly motivated U.S. strategic buyer. After Maytag's board expressed reluctance in accepting Whirlpool's proposal so long as Whirlpool would not assume the antitrust risk, Whirlpool increased its offer three times, such that its final offer was a 50% premium over that offered by Triton and included Whirlpool's payment of the $40 million termination fee to Triton. More importantly, Whirlpool's inclusion of a $120 million dollar reverse-break-up fee linked to any failure to obtain antitrust approval helped the Maytag board resolve the value/certainty risk, although the reverse-break-up provision did not guarantee the deal would in fact occur. Together with the premium, the bidder's willingness to assume the substantial antitrust risk was enough to secure the target's agreement. Maytag accepted the Whirlpool offer in August 2005 after months of consideration.

In October 2005, Johnson & Johnson's agreement with Guidant began to unravel, as Johnson & Johnson declared a material adverse change due to the recall of the target's cardiac device products. Guidant sued to compel the transaction, and the parties settled, agreeing to consummate the merger at a 15% discount in price. Johnson & Johnson may have felt that it was purchasing Guidant at a compelling valuation. Unfortunately for Johnson & Johnson, Boston Scientific felt the same way and offered the Guidant board a facially higher proposal. Concerned about the antitrust risk of a consolidation with Boston Scientific and facing the certainty of the already board approved Johnson & Johnson acquisition, the Guidant board recommended the Johnson & Johnson combination and scheduled a shareholder vote. Importantly, the Johnson & Johnson proposal had already resolved any antitrust issues with the FTC. Guidant did elect to provide Boston Scientific with the information necessary to conduct its due diligence exercise, but setting a date for a shareholder meeting served to give Boston Scientific a deadline for submission of a formal offer. Boston Scientific did a number of things to win the day. First, it substantially increased the price to a level above that of the original Johnson & Johnson agreement. Second, it assumed the bulk of the antitrust risk in the proposed transaction by agreeing to make a number of specific dispositions to cure potential problems that might be raised by the regulators. Third, it brought in Abbott Laboratories to purchase certain of the overlapping assets and take an equity stake in Boston Scientific. While Boston Scientific's assumption of antitrust risk and the addition of Abbott Laboratories to the Boston Scientific proposal vitiated Johnson & Johnson's advantage with respect to regulatory threats, the Johnson & Johnson agreement was still in a stronger position with respect to timing. The revised Boston Scientific proposal addressed the timing issue by incorporating an interest component into its purchase price that begins to accrue a little over two months after the agreement's execution. Considering these factors together (and maybe some continuing resentment of Johnson & Johnson for the re-negotiated price and for declaring a material adverse change in the first place), the board favored the Boston

Scientific proposal. Johnson & Johnson withdrew, Boston Scientific paid the Johnson & Johnson termination fee and the transaction ultimately closed in May 2006.

Johnson & Johnson was unwilling to accept the $705 million break-up fee as a consolation prize and go away quietly. Instead, Johnson & Johnson sued Guidant for a breach of the non-solicitation clause in the merger agreement (alleging that Guidant was not permitted to share due diligence information with Abbott). For good measure, Johnson & Johnson also sued Boston Scientific and Abbott for tortious interference with contract. In dismissing the claims against Boston Scientific and Abbott, the Southern District of New York (applying Indiana law) found that each of them "acted to further their own economic self interest" and not "solely out of a malicious desire to harm J&J." The claim for a breach of the non-solicitation provision hinges on the interpretation of the boiler-plate exception to the limitation on post-termination liabilities in the merger agreement for "willful and material breach." The judge harshly criticized the use of the phase "willful and material" as "glaring ambiguous terms that lead to avoidable litigation" in ruling that the court would require extrinsic evidence to determine the parties' intended meaning for the provision and deciding not to dismiss the breach of contract claim. Johnson & Johnson was seeking at least $5.5 billion in damages. In February 2015, after additional evidence was presented at trial but before the court rendered its decision, Johnson & Johnson and Boston Scientific agreed to settle the long-standing lawsuit, with Boston Scientific paying Johnson & Johnson $600 million.

In another example of antitrust and regulatory issues being key factors in deal-jumping scenarios, the acquisition of Complete Genomics by BGI-Shenzhen avoided a break-up in large part due to competing bidder Illumina, Inc.'s inability to provide certainty on regulatory approvals. In 2012, Complete Genomics initiated a wide auction process (42 parties were contacted) and publicly announced it was exploring strategic transactions.

As Complete Genomics weighed the proposals of Illumina and BGI, counsel cautioned that a deal with Illumina would likely trigger a "second request" under HSR review, and Complete Genomics determined that BGI would be a preferable acquirer from an antitrust perspective. However, Complete Genomics allowed Illumina to remain in the process and continue to bid against BGI.

Illumina dropped out of the process after a best and final offer of $3.00 per share. On September 15, 2012, Complete Genomics and BGI entered into a merger agreement contemplating a cash tender offer at $3.15 per share. In addition to customary conditions, the completion of the offer (and the subsequent merger) is subject to CFIUS approval and various approvals in China.

On October 31, 2012, the FTC delivered a second request to BGI and Complete Genomics extending the HSR waiting period. Shortly thereafter, on November 5, 2012, Illumina re-entered the ring, submitting an unsolicited non-binding proposal to acquire Complete Genomics for $3.30 per share (a 5% premium over BGI's price) financed with cash on hand and no diligence requirements.

After consideration, on November 7, 2012, the Complete Genomics board determined that Illumina's proposal was "inadequate," not in the best interests of Complete Genomics's stockholders, and did not constitute a superior proposal, largely due to uncertainty around antitrust approvals. This decision was based on statements by Illumina's executives and advisors, discussions with BGI's CEO and antitrust counsel (indicating that as long as BGI was a viable option, U.S. antitrust approval of an Illumina acquisition would be unlikely), the fact that Illumina and Complete Genomics are each the other's closest competitor for customers in the U.S. for whole human genome sequencing as an outsourced service, and the pro-competitive nature of the deal with BGI (which would preserve Complete Genomics's innovative technology in the marketplace). For these reasons, on November 8, 2012, Complete Genomics informed Illumina that its proposal was not a superior proposal under the merger agreement.

On November 20, 2012, Illumina resubmitted its November 5th proposal, along with transaction agreements it was prepared to negotiate with Complete Genomics. Complete Genomics notified BGI. On November 25, 2012, BGI sent a letter to Complete Genomics outlining the flaws in Illumina's proposal—essentially an outline of the regulatory case for determining that a higher cash value alone does not make a superior proposal. BGI noted that: (i) Illumina's proposal would not be approved by the FTC and (ii) Illumina's proposal was not superior because there was a "virtual certainty" that any Illumina/Complete Genomics transaction would "fail to receive U.S. antitrust clearance" and the proposal "obviously does not satisfy" the superior proposal definition in the BGI merger agreement. Further BGI stated that the Illumina proposal was not bona fide, but instead an attempt to prevent Complete Genomics's technology from posing a competitive threat to Illumina's market dominance and 90% market share. BGI pointed out that Illumina's proposed merger documents included a one-year "drop-dead date" without any additional obligations on Illumina to secure U.S. antitrust approval (or penalties for failure to do so) and explained that these terms were "clearly calculated to achieve Illumina's desired objective—the elimination of Complete Genomics as a competitor," and further that "Complete Genomics and its business will irreversibly wither during this one year time frame, and Illumina will simply walk from the transaction without penalty when Complete Genomics is spent as a competitive force and the FTC inevitably blocks the Illumina– Complete Genomics deal."

On November 26, 2012, after further deliberation, Complete Genomics again determined that the Illumina proposal was not a superior proposal, again citing antitrust uncertainty and that the deal was "not reasonably capable of being consummated." Complete Genomics notified Illumina of this fact. Interestingly, Illumina's November 20 proposal raised issues of "national security" and regulatory concerns in relation to BGI as a potential acquirer of Complete Genomics, claiming that BGI is a state-owned enterprise owned by the government of China. Ultimately, these claims did not prove persuasive as BGI confirmed that it is a private company and demonstrated that its well-known work history in the U.S. (including Illumina's historical business relationship with BGI) showed that Illumina did not believe a transaction with BGI raised any national security issues. The Complete Genomics board weighed in favor of a transaction with BGI (despite the purported national security concerns) when comparing it to the uncertainty regarding antitrust approvals in a transaction with Illumina. Illumina would make no further proposals (but pursued antitrust approvals until January 8, 2013, at which time it formally announced its withdrawal from the process). On March 12, 2013, BGI and Complete Genomics obtained approval to consummate the transaction from the State Administration of Foreign Exchange of the People's Republic of China (PRC). The transaction closed on March 18, 2013.[29]

Potential antitrust concerns, and the Delaware courts' assessment of such concerns, also loomed over the dual pursuit by CVS Corp. and Express Scripts of the pharmaceutical concern Caremark Rx, Inc. Caremark and CVS entered into a merger agreement in November 2006, a $21.5 billion stock swap that the parties announced to be a "merger of equals." The agreement included relatively typical protection devices, including a "no-shop" provision with a "matching right," a $675 million (under 3%) reciprocal break-up fee and a "force

[29] Although it would not ultimately impact the bidding, the litigation with respect to the Complete Genomics transaction led to a notable decision with respect to the use of "don't ask, don't waive"-type "standstill" provisions in confidentiality agreements. In late November 2012, Vice-Chancellor Laster issued a bench-ruling that enjoined Complete Genomics from enforcing the "don't ask, don't waive"-type "standstill" provision in confidentiality agreements entered into with bidders in the process, finding that "the Genomics board impermissibly limited its ongoing statutory and fiduciary obligations to properly evaluate a competing offer, disclose material information, and make a meaningful merger recommendation to its stockholders." The Vice-Chancellor looked to the Phelps Dodge case which ruled that pure no-talk provisions were invalid, effectively viewing the provisions as bidder specific no-talk provisions. See In re: Complete Genomics, Inc. Shareholder Litigation, C.A. No. 7888-VCL (Del. Ch. Nov. 27, 2012) (transcript). Then-Chancellor Strine would issue his own bench ruling on the issue, published just a few weeks after the Complete Genomics ruling, stating that the "don't ask, don't waive" provisions were not per se invalid, although then-Chancellor Strine concluded that Ancestry.com's public disclosures regarding the nature of the restriction were not sufficient. The Chancellor also cautioned regarding the reliance on bench rulings as precedent noting that: "Bench rulings are limited rulings. They're time-pressured ones ... and because they're time-pressured, they shouldn't make broad law." See In re: Ancestry.com Inc. Shareholder Litigation, C.A. No. 7988-CS (Del. Ch. Dec. 17, 2012) (transcript).

the vote" provision requiring a shareholder vote even in the face of a changed board recommendation (but which permitted Caremark to enter into a conditional merger agreement with respect to a Superior Proposal).

Express Scripts made an unsolicited cash and stock bid in mid-December at a 22% premium over the CVS/Caremark deal. Before Caremark responded, the CVS/Caremark merger received antitrust approval, leaving a shareholder vote as the final hurdle to closing the transaction. Caremark's board, citing the antitrust risk particular to an Express Scripts combination (the Express Scripts bid had not received antitrust approval), its determination to pursue a vertical merger rather than a horizontal combination, clients who were reluctant to work with Express Scripts and its concern that a merger with Express Scripts would result in a highly leveraged entity, determined that Express Scripts's offer was not a "Superior Proposal."

A group of shareholders and Express Scripts sued for a preliminary injunction in Delaware Chancery Court to prevent the Caremark shareholders' meeting. Chancellor William Chandler delayed the scheduled February shareholder vote until March 9th, as Caremark had failed to provide certain disclosures in time for shareholders to consider them and return their proxies (particularly in light of an intervening holiday). Chancellor Chandler was especially critical of Caremark's antitrust justification for its refusal to consider Express Scripts's higher offer. He found relevant that Caremark had previously considered at three different times transactions with Express Scripts. In particular, Chancellor Chandler cited the need to disclose the prior Express Scripts meetings.

Caremark's shareholders' meeting was subsequently enjoined for another week because of Caremark's failure to disclose to shareholders their right to seek appraisal and the need to clarify certain disclosures about the bankers' fees. This aspect of Chancellor Chandler's opinion has been viewed by some observers as being somewhat controversial in light of Delaware's doctrine of "independent legal significance" since the Caremark/CVS merger is itself an all-stock deal (where no appraisal rights apply) and the Chancellor deemed the special dividends by Caremark discussed below to be part of the merger consideration for merger purposes because they were conditioned on the closing of the merger.

On January 13, 2007, Caremark declared a special $2 dividend to its shareholders and announced that CVS would have a post-closing accelerated share repurchase (ultimately turned into a fixed price self tender offer) whereby the post-merger company would retire 150 million shares of stock, both measures were to be effective only if shareholders approved the CVS merger. On January 16th, Express Scripts commenced an exchange offer for Caremark stock that was on the same terms as its prior bid. Caremark continued to favor CVS's offer, listing in addition to its prior rejection that Express Scripts's offer was highly conditional and illusory, that its financing commitments were questionable, its tax implications uncertain, and that it possibly did not cover the CVS/Caremark break-up fee. On February 12th, ISS recommended that Caremark shareholders vote against the merger with CVS. On February 13th, CVS and Caremark increased the dividend to $6.

In a round of bidding on March 7th, Express Scripts sought to offset the risk of any delay from an antitrust review of its bid by offering to pay a 6% "ticking fee" on the cash portion while the deal would be reviewed. In response, on March 8th CVS and Caremark boosted the Caremark special dividend to $7.50, turned its post-closing share repurchase into a self-tender and declared it to be its "best and final" bid. The next day, the FTC issued a "second request" to Express Scripts regarding its proposed transaction and thus delayed its closing for months. Express Scripts announced on March 12th that it had made its "best and only" offer because Caremark had prevented a confirmatory diligence review.

Caremark's shareholder vote was set for March 16th. In ISS's March 12 release, the advisory service changed its position and endorsed CVS's bid because it deemed the dividend to in effect have "partially 'cured' the poor board process." ISS further noted that Express Scripts's ticking fee compensated for the time value of money, but not potential event risks such as Express Scripts shareholders voting down the merger, FTC non-approval, or a “market out.” Chancellor Chandler, as well, had harsh words for Express Scripts in his latest opinion, noting that the break-up fee, while “breathtakingly” large, was not unreasonable so as to preclude Express Scripts from making an unconditional superior offer, and wondering if Express Scripts was serious about its tender offer or merely seeking to disrupt a strategic merger. On March 16th, Caremark shareholders approved the CVS merger.

Fresh from completion of its deal, CVS (now CVS Caremark Corp.) reentered the circus for a transaction where regulatory risk would yet again play a significant role in its ultimately successful bid to acquire Longs Drug Stores. On August 12, 2008, CVS and Longs entered into a merger agreement pursuant to which CVS would acquire Longs for $71.50 per share in cash for a total purchase price of $2.8 billion. As early as June 13th, Longs had been in contact with both CVS and Walgreens Co. regarding a potential transaction. However, talks with Walgreens had quickly faltered due to an early unwillingness of Walgreens to take on regulatory risk sufficient to provide Longs with certainty that a transaction would be consummated. Of particular concern were the antitrust issues inherent in the fact that approximately 63% of the Longs pharmacy counters in the continental U.S. were within two miles of a Walgreen’s location; and in several markets their geographic footprints had even more significant overlap. CVS, on the other hand, had offered a per share price valued at nearly a 28% premium to the then-current stock price, reaffirmed to Longs that CVS did not anticipate any regulatory impediments to completing a transaction quickly, required no financing condition with respect to the transaction and (due to lack of market overlap) expected to retain substantially all of the Longs field management and store level employees.

Undeterred, on September 12th, nearly one month following the execution of the CVS/Longs merger agreement, Walgreens presented Longs with a non-binding offer of $75.00 per share ($3.50 per share premium to CVS’s offer and a 35% premium over Longs’s pre-announcement stock price). In an ill-fated gesture to assuage Longs’s antitrust concerns, Walgreens proposal provided a modified “hell-or-high-water” covenant whereby Walgreens would be willing to divest Longs’s assets accounting for up to 40% of Longs’s consolidated revenue in any market measured during a predetermined 12-month period.

Perhaps informed by its antitrust related struggles in the bid for Caremark, and undoubtedly to the surprise of Longs, CVS did not respond to Walgreens’s proposal with an increased bid or softened deal terms. Instead, on September 17th, days after the CVS/Longs transaction had received FTC approval, CVS set forth in a publicly filed letter to the Longs’s board its numerous antitrust concerns associated with a Walgreens/Longs transaction and reaffirmed that CVS had secured the necessary financing and was prepared and able to proceed on the terms of the executed agreement. Shortly thereafter, having reconsidered the substantial deal completion risk associated with the antitrust concerns presented by a transaction with Walgreens, Longs declined further discussion with Walgreens; and, on October 8, 2008, Walgreens withdrew its bid.

The battle for Family Dollar Stores, Inc. is another story where antitrust concerns played a key role in determining the fate of the target. Since 2010, Family Dollar emphasized a stand-alone strategic plan, adopting on two occasions poison pills in the face of significant shareholder activity and other strategic proposals. Starting in 2013, Dollar General Corporation and Dollar Tree, Inc. separately expressed interest in a transaction with Family Dollar.

By March 7, 2014, the Family Dollar board met to review the strategic alternatives proposed by a committee established in January of 2014 to develop a new strategic plan for Family Dollar. Family Dollar’s financial advisor stated that it was unlikely that any strategic buyer, other than Dollar Tree or Dollar General, would be interested in a combination. It also assessed the possibility of an LBO by a financial buyer but noted that such a deal faced serious challenges due to the magnitude of the purchase price and required equity investment.

The Family Dollar board considered its tactics carefully given the circumstances. The board considered that if it were to invite Dollar General, at that time, into a formal process to compete with Dollar Tree for a business combination with Family Dollar, Dollar General might decide it was not interested in competing with Dollar Tree and instead pursue a combination with Dollar Tree, leaving Family Dollar without a merger partner and in a disadvantageous position. Thus, the board instructed management to obtain an indication of what Dollar Tree was willing to offer.

On May 14th, representatives of Dollar Tree telephoned representatives of Family Dollar to outline the terms of a non-binding proposal pursuant to which Dollar Tree would acquire Family Dollar for between $68 and $70 per share, with 75% of the consideration in cash and the rest in Dollar Tree common stock. On May 19th, at a meeting of the Family Dollar board, the board determined that Dollar Tree's proposal was inadequate and that Family Dollar was not for sale, but that it would consider other proposals for a higher premium.

On June 6th, Carl Icahn filed a Schedule 13D disclosing that he and his affiliates beneficially owned 9.39% of the then-outstanding common stock of Family Dollar and that they wished to discuss with Family Dollar its business and strategies to enhance stockholder value, including a business combination. To further that cause, Icahn said that he might reach out to Dollar General regarding a strategic transaction with Family Dollar.

That same day, representatives of Dollar General also contacted representatives of Family Dollar in connection with Mr. Icahn's Schedule 13D filing. Dollar General representatives stated that they were interested in negotiating a business combination with Family Dollar directly at some point. Family Dollar representatives agreed with Dollar General's concern regarding Mr. Icahn, but also stated that they and the Family Dollar board were being advised that there would be material antitrust impediments to a combination of the two companies, and that large divestitures could be necessary to obtain FTC clearance. In response to Mr. Icahn's actions, in order to control its strategic process, the Family Dollar board adopted a one-year poison pill.

On June 13th, representatives of Dollar Tree contacted representatives of Family Dollar to increase the price in its proposal to $72 per share of Family Dollar common stock, with 75% of the consideration to be paid in cash and the remainder to be paid in Dollar Tree common stock. On June 16th, the Family Dollar board of directors declared the revised Dollar Tree proposal inadequate, and representatives of Family Dollar conveyed the board's decision to Dollar Tree's representatives.

On June 18th, representatives of Family Dollar met with Mr. Icahn, who urged Family Dollar representatives to more actively explore a sale of Family Dollar to Dollar General. On June 19th, Mr. Icahn contacted representatives of Family Dollar to state that it was imperative that Family Dollar be put up for sale immediately and to request that three of his representatives be added to the Family Dollar board to oversee the sale process. Mr. Icahn subsequently disclosed a letter to Family Dollar representatives where he threatened to engage in a near-term consent solicitation to replace the entire board.

Also on June 19th, representatives of Family Dollar met with representatives of Dollar General to discuss a potential business combination. Representatives of Dollar General suggested, however, that the timing of a combination with Family Dollar was "not optimal" as a result of various factors, including the inflated stock price of Family Dollar due to Mr. Icahn's investment and the potential complications of negotiating a deal while a large stockholder was advocating for a sale.

On June 20th, representatives of Dollar Tree contacted representatives of Family Dollar to increase the per-share price specified in its proposal from $72 to $74 per share, which would be comprised of approximately 75% cash and the remainder of Dollar Tree common stock. Family Dollar representatives stated that the price remained too low, and, in response, Dollar Tree representatives increased the proposed price to $74.50 per share and stated that it was Dollar Tree's best and final offer. Dollar Tree also stated that the offer price was conditioned upon Family Dollar agreeing to a six-week exclusivity period with Dollar Tree. That day, the

Family Dollar board instructed senior management to begin negotiating a merger agreement with Dollar Tree at a price of $74.50 per share and to negotiate an exclusivity agreement with an exclusivity period ending on July 10, 2014. In light of the lack of interest shown by Dollar General, the Family Dollar board approved the final exclusivity agreement on June 24th, which contained an exclusivity period expiring on July 28th.

On June 27, 2014, Dollar General issued a press release announcing that its chief executive officer intended to retire. Observations by analysts and Mr. Icahn were that Dollar General would not be pursuing a transaction with Family Dollar.

From June 30 through July 27, 2014, representatives of Family Dollar and Dollar Tree negotiated the terms of the merger agreement and the other transaction documents and conducted due diligence. On July 27th, Family Dollar and Dollar Tree entered into a merger agreement providing for a cash and stock transaction valued at approximately $9.2 billion or $74.50 per share of Family Dollar stock.

On August 18, 2014, Dollar General decided to reengage with Family Dollar, sending a letter to its board of directors setting forth a non-binding, unsolicited proposal to acquire all of the outstanding shares of Family Dollar common stock for $78.50 in cash (vs. Dollar Trees mixed cash and stock price of $74.50), contingent on the completion of due diligence and regulatory approval. The letter also indicated that Dollar General would be prepared to divest up to 700 retail stores in order to obtain antitrust approval. On August 19th, the Family Dollar board determined that, because of significant antitrust risks, Dollar General's offer was not reasonably expected to lead to a superior proposal that "is reasonably likely to be completed on the terms proposed" as required by the Dollar Tree merger agreement. Based on the conclusion, Family Dollar was not permitted to commence negotiations with and provide due diligence access to Dollar General.

On August 20, 2014, Dollar General sent a letter to the Family Dollar board of directors criticizing the content of the Family Dollar Form S-4 and stating that it had, over the years, expressed a strong interest in a business combination with Family Dollar. Dollar General also pointed to conversations held with Family Dollar's chief executive officer, during which the chief executive made known his intention to remain as chief executive of the combined company should a deal occur. Finally, Dollar General stated its belief that antitrust was not a significant threat to a potential deal and that the divestiture commitment in its proposal would be sufficient to mitigate any antitrust risk.

On September 2, 2014, Dollar General sent a revised proposal to Family Dollar for $80.00 a share in cash. The letter also indicated that Dollar General would be prepared to commit to divest up to 1,500 retail stores to obtain antitrust approval, as well as pay a $500 million reverse termination fee if antitrust approval could not be obtained. Dollar General further reaffirmed its rationale behind its antitrust position.

That day, the Family Dollar board met to discuss Dollar General's revised proposal. The Family Dollar board also received a letter from Dollar Tree stating its belief that Dollar General's proposal was not a "superior proposal" under the Dollar Tree merger agreement and that Dollar Tree was willing to amend the Dollar Tree merger agreement to provide for a "hell-or-high-water" antitrust commitment, further highlighting and widening Dollar Tree's advantage on the antitrust front. On September 4th, the Family Dollar board approved Dollar Tree's amendment to the Dollar Tree merger agreement and Family Dollar and Dollar Tree entered into an amended Dollar Tree merger agreement providing for a "hell-or-high-water" antitrust commitment from Dollar Tree. On September 5th, Family Dollar issued a press release stating that the board unanimously rejected Dollar General's revised proposal on the basis of antitrust concerns and lack of certainty surrounding whether the deal could be completed.

On September 8, 2014, Family Dollar and Dollar Tree received a second request for additional information from the FTC in connection with Dollar Tree's then-pending acquisition of Family Dollar. On September 10th, Dollar General commenced its hostile tender offer for all of Family Dollar's outstanding shares at the previously proposed $80 per share. The Family Dollar board was steadfast in its previously communicated positions with respect to the antitrust risk and continued to reject the offer, including in its Schedule 14D-9 filing.

On October 10th, the FTC issued a second request in connection with its review of the Dollar General tender offer and, on October 21st, Family Dollar issued a press release announcing substantial compliance with the FTC's second requests both in connection with the Dollar Tree merger agreement (though Dollar Tree had not substantially complied at this time) and the tender offer and indicated its understanding for the timelines when the waiting period under the HSR Act would expire for each deal. Family Dollar indicated that it could close the transaction with Dollar Tree as early as December 2014, while it was uncertain of the length of time Dollar General would take to comply with the FTC's second request in connection with the tender offer.

On October 31, 2014, Dollar General continued to extend its tender offer until December 31, 2014. On that day, Dollar General also filed its definitive proxy materials with the SEC in order to solicit opposition to the Dollar Tree merger agreement and support for the tender offer.

On December 19, 2014, the Delaware Court of Chancery issued a memorandum opinion in the case of In re Family Dollar Stores, Inc. Stockholder Litigation, in which certain stockholders of Family Dollar sought to preliminarily enjoin the stockholder vote on the proposed merger of Dollar Tree and Family Dollar. Chancellor Bouchard ultimately denied plaintiffs' request for a preliminary injunction after finding that the Family Dollar board was motivated to maximize Family Dollar's value and acted reasonably within the constraints of the Dollar Tree merger agreement when it decided not to engage in negotiations with Dollar General.

On December 23rd, a special meeting (the meeting had been previously postponed) of Family Dollar stockholders was convened to vote on the Dollar Tree merger agreement. Because there were insufficient votes at the time of the special meeting to adopt the Dollar Tree merger agreement, a proposal was submitted to Family Dollar stockholders to adjourn the meeting before taking a vote. The Family Dollar stockholders adopted the adjournment proposal. As such, the meeting was adjourned until January 22, 2015. That same day, Dollar General announced that it was extending the tender offer until January 30, 2015.

On January 9, 2015, Dollar Tree stated that it would be unwilling to agree to any further adjournments of the special meeting of Family Dollar stockholders. In response, representatives of Family Dollar issued a letter to stockholders affirming their support for the Dollar Tree merger agreement and setting forth the alleged risks of accepting the tender offer, highlighting antitrust risks and the delay that would be involved in closing a deal with Dollar General. In fact, Family Dollar representatives predicted that Dollar General would be forced to divest 3,500 to 4,000 stores versus the 1,500 set out in Dollar General's proposal.

On January 14th, ISS issued a revised report to Family Dollar shareholders (importantly, following Family Dollar's weak earnings announcement the prior week). It changed its recommendation to a vote "FOR" the Dollar Tree transaction, citing "significant value," the "near certainty" of closure, the lack of regulatory disclosure by Dollar General after the second adjournment of the Family Dollar special meeting and the disclosures by Family Dollar stating that FTC divestitures required for the Dollar General deal would be in the range of 3,500 to 4,000 versus the 1,500 set out in Dollar General's proposal.

On January 22, 2014, investors holding approximately 74% of Family Dollar's outstanding stock voted to adopt the Dollar Tree merger agreement, and the merger was completed on July 6, 2015.

Antitrust and other regulatory concerns had a major impact on the negotiation of Uphill Investment Co.'s ultimately successful bid for Integrated Silicon Solution, Inc. Unlike most other cases, however, Integrated Silicon's board decided that its deal-jump counterparty was likely to agree to strong covenants to address the regulatory risk and parleyed the deal-jump offer into a stronger counter offer rather than saying "no" to the unsolicited proposal, which it believed to carry significant regulatory risk. On March 12, 2015, Integrated Silicon entered into a definitive merger agreement with Uphill, an investment company with Chinese backing, whereby Integrated Silicon shareholders would receive $19.25 in cash per share of common stock, or a 16.2% premium to the closing price of Integrated Silicon's common stock on the prior trading day.

The agreement with Uphill included a regulatory reverse termination fee of $9.6 million in the event of termination due to Taiwanese regulatory obstacles preventing the restructuring and divestiture of Integrated Silicon's Taiwan operations and a regulatory reverse termination fee of $19.2 million in the event of termination due to other PRC or Taiwanese regulatory obstacles. (The Taiwan-specific regulatory reverse termination fee was later eliminated in favor of a uniform $19.2 million PRC and Taiwan regulatory reverse termination fee.) To ensure availability of funds for the termination fees, the agreement provided that the parties would place the termination fees in escrow at or shortly after signing. Furthermore, the parties covenanted to use reasonable best efforts to obtain the required regulatory approvals.

On May 13, 2015, Cypress Semiconductor Corporation announced that it had made an unsolicited, non-binding proposal to acquire all of Integrated Silicon's outstanding shares for $19.75 per share in cash. On May 14, 2015, the Integrated Silicon board of directors determined that the Cypress offer was reasonably expected to lead to a superior proposal and decided to enter discussions with Cypress.

On May 28th, Uphill offered to increase the purchase price from $19.25 per share to $20 per share, subject to reversion to $19.25 per share if Integrated Silicon failed to convene a meeting of the stockholders to consider the proposal within 10 days. Thereafter, Integrated Silicon engaged in negotiations with Uphill resulting in an agreement to remove the price-reversion mechanism from the $20 per share offer and to hold the meeting of the stockholders on June 12, 2015.

On May 29, 2015, Cypress made a revised, unsolicited, non-binding proposal to acquire all of Integrated Silicon's outstanding shares for $20.25 per share in cash.

On May 30 and 31, 2015, Integrated Silicon considered the antitrust risk associated with the Cypress proposal, given that the combined company would represent a very high percentage of the static random-access memory (SRAM) market in the U.S. and would be the largest supplier of SRAM to the global automotive market, including a delayed timeline of up to nine months for regulatory approval and the possibility that regulators would require Integrated Silicon to divest some or all of its SRAM business, which represented up to approximately 25% of Integrated Silicon's revenue. Integrated Silicon noted that the revised Cypress offer recognized this risk by proposing to agree to certain measures to avoid potential impediments to regulatory approval in a "side letter," but did not believe that it would be accepted as an adequate solution by U.S. antitrust regulators. Additionally, the draft merger agreement included receipt of all necessary antitrust approvals (U.S. and German) as a closing condition. The Integrated Silicon board ultimately determined that the Cypress offer could reasonably be expected to lead to a superior proposal and decided to engage Cypress in further discussions, in spite of what it viewed to be a significantly larger regulatory risk than the Uphill proposal. In concluding that the revised, non-binding offer from Cypress could reasonably be expected to lead to a superior proposal, the Integrated Silicon board determined that it was reasonable to expect that Cypress would agree to take all actions necessary to receive government approvals, even though Cypress had not agreed to do so.

On June 9, 2015, the Integrated Silicon board determined that the current Cypress offer and the likelihood of its consummation constituted a superior proposal. Integrated Silicon notified Uphill of its intention to approve or recommend the Cypress offer and terminate the agreement with Uphill to enter into a definitive agreement with Cypress and gave Uphill four business days to offer a superior proposal. As a result, the meeting of the stockholders that was scheduled for June 12, 2015 was postponed until at least June 19, 2015.

In the agreement with Cypress, Cypress had agreed, with respect to antitrust approval matters, to use its reasonable best efforts and take all reasonable actions to obtain such approvals, including fully divesting all of Integrated Silicon's SRAM business, if required.

On June 10, 2015, Uphill offered to increase the purchase price from $20 per share to $21 per share, provided that Integrated Silicon would hold its meeting of the stockholders on June 19, 2015. Integrated Silicon determined that the most recent proposal from Cypress no longer constituted, and would not be reasonably expected to lead to, a superior proposal, terminated discussions with Cypress and adopted the amended Uphill agreement.

On June 18, 2015, Cypress increased its offer to $21.25 per share, together with an incremental ticking fee of $0.10 per share for each additional three months required to obtain regulatory approval, which would begin to accrue daily starting on October 1, 2015 up to a maximum of $0.20 per share, in an apparent effort to alleviate concerns about potential delay due to regulatory approval.

The same day, Uphill raised its offer from $21 per share to $21.75 per share, provided that Integrated Silicon would adjourn the meeting of the stockholders by no more than three business days and proposed a restriction on the ability of Integrated Silicon to further postpone or adjourn the meeting of the stockholders without the consent of Uphill. Integrated Silicon negotiated with Uphill to increase its offer from $21.75 to $22 per share, provided that the meeting of the stockholders would be adjourned to June 25, 2015 with no restriction on the ability of Integrated Silicon to further postpone or adjourn the meeting of the stockholders. Integrated Silicon determined that the current Cypress proposal was not, and would not reasonably be expected to lead to, a superior proposal and adopted the amended Uphill agreement.

On June 22, 2015, Cypress increased its offer to $22.25 per share, combined with the incremental ticking fee in its previous offer.

The same day, Uphill increased its offer from $22 per share to $23 per share, topping what Cypress was ultimately willing to pay (Cypress's best and final offer, on June 24, 2015, was $22.60 per share in cash, combined with the incremental ticking fee from its previous offers). Uphill had already delivered funding commitments to Integrated Silicon that would provide sufficient funds to consummate the transaction at the increased purchase price on June 11, 2015, and negotiations between the various parties ended June 25, 2015, when Uphill and Integrated Silicon signed an amended merger agreement. The acquisition closed on December 7, 2015.

Although antitrust concerns may take on an outsized presence in the negotiation of a deal, antitrust-related regulatory risk is just one of several execution risks that may impact the ultimate outcome. Montage Technology Group Limited's efforts to derail Diodes Incorporated's acquisition of Pericom Semiconductor Corporation were ultimately unsuccessful due to residual financing uncertainty in spite of Montage's repeated, strong efforts to address regulatory concerns.

On September 2, 2015, Pericom entered into a merger agreement with Diodes, with Diodes paying $17 in cash per Pericom share, an implied premium of 42.1% relative to Pericom's trading price on September 1, 2015. The Diodes agreement was backed by a fully funded credit agreement and was not subject to any regulatory approvals. On September 17, 2015, Montage made an unsolicited proposal to acquire Pericom for $18.50 per share and otherwise on terms substantially similar to the terms of the agreement with Diodes, an implied premium of 54.7% relative to Pericom's trading price on September 1, 2015. However, Montage had given several verbal indications of interest in a strategic acquisition of Pericom earlier in 2015 that had raised issues of regulatory and financing uncertainties that were not addressed in the proposal.

On September 19, 2015, Pericom discussed the financing uncertainty of the Montage proposal and its failure to adequately address the regulatory risks, including certain required regulatory approvals in Taiwan, the absence of a reverse termination fee for the failure to obtain regulatory approvals and potential concerns regarding the enforceability of a merger agreement with Montage, which is a Cayman Islands exempted company with significant assets in China. Nevertheless, Pericom determined that Montage's acquisition proposal could reasonably be expected to result in a superior proposal, decided to enter discussions with Montage and provided notice to Diodes that it was engaging Montage's proposal.

On September 22, 2015, after negotiation of the Montage proposal, several key issues remained open, including the lack of certainty with respect to Montage's ability to finance a transaction, regulatory risks, the absence of a reverse termination fee for the failure to obtain regulatory approvals and potential enforceability issues. The same day, Pericom received a revised acquisition proposal from Montage, which included an updated proposed merger agreement, a one-page debt commitment letter (which expired in 90 days) covering a portion of the required merger consideration and executed by China Electronics Financial Co., Ltd. (CEFC), a subsidiary of one of Montage's principal shareholders based in China, stronger regulatory covenants requiring Montage to take all actions necessary to obtain required regulatory approvals, a reverse termination fee of $21.5 million to be escrowed in the United States and payable, among other cases, in the event of a failure to obtain regulatory approvals or financing, and the arbitration of any disputes arising under the agreement.

By September 27, 2015, Pericom had received from Montage a draft of an escrow agreement providing for the deposit of the reverse termination fee in an escrow account maintained by a United States bank and a revised one-page debt commitment letter covering a portion of the required merger consideration executed by CEFC that extended the termination date of the effectiveness of the commitment to 180 days after September 22, 2015. The same day, after negotiation of the Montage acquisition proposal, Pericom noted that Montage had also agreed to "hell-or-high-water" obligations for regulatory approval in Taiwan, China and the United States and arbitration for disputes arising from the proposed transaction; however, certain key issues remained open in Montage's acquisition proposal, including the lack of certainty with respect to Montage's ability to finance a transaction, timing and other risks associated with required regulatory approvals and potential enforceability issues. Pericom notified Diodes of its intention to meet with Montage to discuss such issues and seek greater financing certainty.

On September 28, 2015, Pericom received from Montage a one-page loan commitment letter executed by the Bank of China Shanghai Pudong Branch and a revised draft of the escrow agreement for the reverse termination fee set forth in the draft merger agreement proposed by Montage. The loan commitment letter from the Bank of China covered only a portion of the required merger consideration, was governed by the laws of the PRC and conditioned the issuance of the loan contemplated thereby on the evaluation of the Bank of China's committee and the satisfaction of all conditions that the Bank of China would require.

On September 30, 2015, Pericom received a binding, limited-time offer from Montage to acquire all of the outstanding shares of common stock of Pericom for the previously-communicated $18.50 in cash. In the ensuing weeks, Pericom continued discussions with Montage, particularly regarding its concerns about financing uncertainty, and Montage extended the expiration date of its offer three times, with the Montage offer ultimately set to expire in early November 2015.

On October 19, 2015, Pericom discussed the key issues that remained unresolved in the Montage offer, including the lack of certainty with respect to Montage's ability to finance a transaction and the lack of any progress by Montage in addressing Pericom's concerns relating thereto, as well as timing and other risks associated with required regulatory approvals and potential enforceability issues. Following this discussion, Pericom determined that the additional premium represented by the $18.50 per share price of the Montage offer, as compared to the terms of the agreement with Diodes, would be insufficient to outweigh the significant timing and deal certainty risks for Pericom's shareholders that were associated with pursuing a transaction with Montage, unless Montage provided evidence of improved financing certainty prior to the expiration of the Montage offer.

On October 25, 2015, Pericom noted the lack of a response from Montage to requests for further details on financing certainty and regulatory matters. Pericom determined that, given the absence of any further assurances of certainty regarding financing or regulatory matters from Montage, the extension of the Montage offer did not impact its prior determination on October 19, 2015 that the additional premium represented by the $18.50 per share price of the Montage offer, as compared to the terms of the agreement with Diodes, was insufficient to outweigh the significant timing and deal certainty risks for Pericom's shareholders that were associated with pursuing a transaction with Montage. Pericom then decided to reject the Montage offer and reaffirm its recommendation that its shareholders vote for the agreement with Diodes.

On November 4, 2015, Pericom received an amended limited-time offer from Montage that increased the reverse termination fee from $21.5 million to $43 million to be escrowed in the United States and payable, among other cases, in the event that certain government entities issued an order blocking the deal, removing the closing conditions on obtaining certain governmental approvals and eliminating Montage's ability to delay the closing for an additional 180 days if such governmental approvals were not obtained prior to March 30, 2016.

The same day, Pericom discussed the amended Montage offer and determined that, given the absence of any further assurances of certainty regarding financing from Montage, as well as continued regulatory risk in connection with the amended Montage offer, as compared to the terms of the agreement with Diodes, it was insufficient to outweigh the significant timing and deal certainty risks for Pericom's shareholders that were associated with pursuing a transaction with Montage, and as a result, the amended Montage offer could not reasonably be expected to result in a superior proposal.

On November 5, 2015, Diodes offered to increase the purchase price from $17 per share to $17.75 per share and to increase the termination fee to $15.7 million. In spite of the lower price, on November 6, 2015, Pericom determined that Diodes's new offer was fair to, and in the best interests of, Pericom and its shareholders, approved the amended Diodes agreement and recommended that its shareholders vote in favor of the amended Diodes agreement. Within a week thereafter, ISS and Glass Lewis each recommended that shareholders vote in favor of the amended Diodes agreement, with Glass Lewis questioning "the ability of Montage to truly finance its deal and resolve the relevant regulatory risks" and criticizing "Montage['s] push [forward] with an acquisition offer that does not appear . . . to include full unconditional financing" without "address[ing Pericom's] concerns."

On November 18, 2015, Montage announced that it increased its cash offer to acquire all of the outstanding shares of Pericom to $19 per share from $18.50 per share, valuing the transaction at approximately $442 million and representing a 56% premium to Pericom's unaffected closing price on September 2, 2015. However, in spite of the higher offer from Montage, Pericom's shareholders voted in favor of the Diodes offer on November 20, 2015, and the acquisition closed on November 24, 2015.

Increasingly, concerns over transaction risk posed by CFIUS review are impacting target companies' evaluation of potential suitors. On November 18, 2015, ON Semiconductor Corporation entered into a merger agreement with Fairchild Semiconductor International, Inc. to acquire all of the outstanding shares of Fairchild Semiconductor's common stock for $20 per share in cash. ON Semiconductor agreed to commence the offer as promptly as practicable, but no later than December 4, 2015. Given that ON Semiconductor is a U.S. company, there is naturally no CFIUS closing condition in the ON Semiconductor agreement, which also contains a standard termination fee of $72 million, a non-CFIUS regulatory reverse termination fee of $180 million and a financing failure reverse termination fee of $215 million.

On December 28, 2015, China Resources Holdings Limited and Hua Capital Management Co., Ltd. made an unsolicited proposal to acquire all of the outstanding shares of common stock of Fairchild Semiconductor for $21.70 per share in a two-step tender offer, which was conditioned on receipt of CFIUS approval and other regulatory conditions being met and Fairchild Semiconductor making extensive representations and warranties with respect to national security matters. Although China Resources proposed a reasonable best efforts obligation with respect to its efforts to obtain regulatory approvals, it limited its obligation in the case of divestitures required by CFIUS only to those not reasonably likely to have a material adverse effect on the combined company. The China Resources proposal introduced two tiers of regulatory termination fees: a regulatory reverse termination fee, which did not include lack of CFIUS approval, of $200 million and a CFIUS reverse termination fee of $108 million. China Resources also proposed that it pay the break-up fee payable to ON Semiconductor in the event the ON Semiconductor agreement was terminated. The China Resources proposal also envisioned a $300 million letter of credit serve as a backstop to the payment of the various reverse termination fees.

On February 12, 2016, Fairchild Semiconductor received a revised proposal from China Resources valuing its stock at $22 per share in cash, which included a "hell-or-high-water" obligation with respect to China Resources's efforts to obtain CFIUS approval, improvements with respect to the scope of the representations and warranties that Fairchild Semiconductor would be required to make with respect to national security matters, and an increased reverse termination fee for non-CFIUS regulatory approvals ($300 million). Although the Fairchild Semiconductor board felt there to be a substantial probability that a potential transaction with the consortium would obtain CFIUS approval, because China Resources had not increased the amount of the CFIUS reverse termination fee, it concluded that there is some non-negligible risk of a failure to obtain CFIUS approval, and that the allocation of risk would fall mostly on Fairchild Semiconductor.

On February 16, 2016, Fairchild Semiconductor announced that its board of directors determined that the unsolicited proposal to acquire Fairchild Semiconductor received from China Resources and Hua Capital on December 28, 2015 and amended on February 12, 2016 did not constitute a superior proposal, primarily because the $108 million CFIUS termination fee would not adequately justify risking the stockholder premium present in the ON Semiconductor transaction in order to seek the incremental $2 per share offered by the China Resources proposal. As of the date of this article, Fairchild Semiconductor remains party to the ON Semiconductor agreement, and the Fairchild Semiconductor board has not changed its recommendation in support of that agreement.[30]

## Tough Decisions: Going Naked, Mergers of Equals and Other Value Judgments

It is also very important to note that while the shareholders in Dollar Thrifty voted down the Hertz deal (the so-called "bird in the hand") without a committed deal from Avis Budget, two such offers were essentially voted down in Dynegy (both the Blackstone merger agreement and Icahn tender offer) without another deal to fall back on, and U.K. target Goals Soccer shareholders voted against a recommended offer by Ontario Teachers' Pension Plan without a formal offer (or an indication of one) from Patron (another potential suitor

[30] Terex Corporation, which is currently the target of acquisition proposals from Konecranes Plc and Zoomlion Heavy Industry Science and Technology Co., is another company for which regulatory risk is impacting its evaluation of competing offers. In August 2015, Terex entered into a business combination agreement and plan of merger with Konecranes, pursuant to which Terex shareholders would receive 0.80 of a Konecranes share for each existing Terex share, resulting in 60% ownership by Terex shareholders and 40% ownership by Konecranes shareholders in the combined company. The deal valued each Terex share at $24.69. On January 26, 2016, Terex announced that it had received an unsolicited, non-binding acquisition proposal from Zoomlion to acquire all of the outstanding shares of Terex for $30 per share in cash, conditioned on receipt of U.S. and Chinese regulatory approvals. Terex has suspended its integration efforts with Konecranes to consider Zoomlion's offer and announced on March 23rd that Zoomlion had sweetened its offer to $31 cash per share, conditioned on receipt of Chinese and U.S. regulatory approval. Terex has said that it will pursue negotiations with Zoomlion, but the Terex board has not changed its recommendation of the Konecranes deal, which remains in place as of the date of this article.

who urged shareholders to reserve action but exited the process prior to the shareholder vote) or any other potential acquirers, such results are quite unusual given the risks to shareholders of being left without any deal at all. When one looks at the end result for the Dynegy shareholders, one can see the risks of such a "go-naked" turndown (although, on the other hand, in hindsight things turned out pretty well for the Dollar Thrifty shareholders). In another example of "going-naked," on January 30, 2015 the stockholders of GFI Group, Inc. voted down the merger agreement with CME Group, Inc. after a bidding war between CME and BGC Partners LP—but without a new deal in hand. After about a month of uncertainty, BGC completed its tender offer and acquired control of GFI on February 27, 2015. The result was less uncertain for Chiquita stockholders in 2014 after they voted down their combination with Fyffes in light of a then-pending cash buyout offer from Cutrale-Safra, which resulted in a signed merger agreement three days later. Cutrale-Safra's jump of the Chiquita-Fyffes combination is discussed below in this section.

A variation of this situation is the mutual decision by the boards (as opposed to the shareholders) in a "merger of equals" transaction to abandon the deal before a shareholder vote, in the face of a clear mandate against the deal—even without a new deal to take its place. Remember, from the perspective of the board, a "merger of equals" generally does not represent a formal legal decision to sell control of the company and better lends itself to an attempt to potentially re-establish the pre-"merger of equals" status quo (or at least suggest the possibility of that occurring). That latter situation happened at least three times in 2011, in the Lundin/Inmet and TMX/LSE situations in Canada (described above) and in the Transatlantic/Allied World announced "merger of equals," when lack of support by Transatlantic shareholders in light of bids by both Validus and a Berkshire Hathaway affiliate resulted in the termination by the respective boards of Transatlantic's merger agreement with Allied World, leaving Transatlantic, for a time, without a signed agreement.

After evaluating a number of potential partners, including Validus, Transatlantic announced on June 12, 2011 that it had entered into a "merger of equals" with Allied World for 0.88 Allied World shares (or $51.10 at the time of announcement) per share of Transatlantic with closing anticipated by the end of the year. The merger agreement essentially required that any potential suitor had to enter into a confidentiality agreement with a two-year "standstill" for Transatlantic to share information with the bidder. In the event Transatlantic shareholders failed to approve the deal at the shareholder meeting, or any adjournment or postponement thereof, Transatlantic would pay Allied World a break-up fee of $35 million, plus expense reimbursement up to $35 million. In addition, if within a year from any such termination Transatlantic entered into a definitive agreement in respect of a competing transaction, recommended or submitted a competing transaction to its stockholders, or consummated any such transaction, Transatlantic would owe an additional termination fee of $115 million (minus any termination fees previously paid).

While Validus had initially shown interest in Transatlantic, and even contacted Transatlantic about a potential transaction days prior to the announcement of the Transatlantic/Allied World deal, it was not until July 2011 that the circus started to arrive. On July 12, 2011, Validus delivered a proposal to Transatlantic offering 1.5564 shares and $8 cash (pursuant to a special dividend immediately prior to closing) per share ($55.95 per share at announcement) and delivered a presentation to the Transatlantic board a few days later highlighting the benefits of a Transatlantic/Validus transaction. Allied World announced the next day that it remained fully committed to the terms of its "merger of equals" with Transatlantic, which Allied World claimed provided superior strategic benefits and long-term value. On July 19, 2011, the Transatlantic board announced that while Validus's offer did not constitute a superior proposal, it was reasonably likely to lead to one, and Transatlantic would engage in discussions and exchange information with Validus, subject to executing a confidentiality agreement with a two-year "standstill". However, Validus refused and instead commenced an unsolicited exchange offer for Transatlantic shares.[31] Determined to move ahead with Allied World, the Transatlantic board recommended that its stockholders reject the Validus offer and adopted a

[31] The issues raised by the "standstill" in this transaction and in deal-jump situations in general are discussed further later in this article.

poison pill, also filing suit against Validus alleging violation of securities law through false and misleading statements in its proxy and exchange offer materials. As the hostility in this traditional, three-party deal-jump situation was rising, a third bidder decided to up the ante and join the circus.

On August 4, 2011, Transatlantic received a $52 cash per share proposal from National Indemnity Company, an affiliate of Berkshire Hathaway. As it had done with Validus's proposal, the Transatlantic board announced that Berkshire's proposal did not constitute a superior proposal, but was reasonably likely to lead to one, and that it would engage in discussions. However, unlike Validus, Berkshire entered into a confidentiality agreement with Transatlantic with a two-year "standstill". In late August 2011, Validus filed a proxy statement in opposition to the proposed Allied World transaction and, in mid-September 2011, in the wake of ISS recommending that Transatlantic shareholders vote against the Allied World deal, Validus filed a preliminary consent solicitation statement to, among other things, remove and replace the members of the Transatlantic board. Shortly thereafter, on September 15, 2011, with several investment advisory firms recommending against the Transatlantic/Allied World tie-up and shareholder dissent growing, Transatlantic cancelled its upcoming shareholder meeting and the parties terminated their merger agreement. Transatlantic indicated that Berkshire's offer was inadequate and that it remained willing to negotiate with Validus subject to a potentially shorter "standstill". Transatlantic then paid Allied World its break-up fee of $35 million plus expense reimbursement of $13.3 million. In addition, as described above, if within a year from the termination Transatlantic entered into a definitive agreement in respect of a competing transaction, recommended or submitted a competing transaction to its stockholders, or consummated any such transaction, Transatlantic would owe Allied World an additional $66.7 million termination fee (i.e., the unpaid portion of the $115 million termination fee).

After the termination of its merger agreement with Allied World, Transatlantic did not go it alone for long. In late September and early October 2011, Transatlantic entered into confidentiality agreements with Validus, Alleghany and two other consortium bidders that contained much shorter "standstills" (approximately 40 days) than had been required under Transatlantic's terminated merger agreement with Allied World. In early November 2011, Alleghany proposed $56.52 in cash and stock and then increased its bid to $59.57 and ultimately to $59.79, while Validus upped its bid to $60.09. Meanwhile, one of the consortiums, which had offered $58 per share in cash, increased its offer to $60 per share and ultimately to $61.50 per share in cash. However, on November 21, 2011, after the Transatlantic board had evaluated the three bids on the table, Transatlantic announced it had entered into a merger agreement with Alleghany for $59.79 per share in cash and stock. Interestingly, the Alleghany offer was the low bid of the three. However, Transatlantic noted that Validus's $0.30 overbid in its otherwise similar offer was only a "minimal difference" and part of a riskier proposal, and that the significantly higher consortium bid was subject to financing risk and uncertainty. Although Allied World missed out on its merger with Transatlantic, as a result of Transatlantic's transaction with Alleghany, Allied World was also owed an additional $66.7 million termination fee, thus receiving a total of $115 million in termination fees and expense reimbursement out of this circus-like deal-jump situation. In early February 2012, shareholders of both Transatlantic and Alleghany approved the merger, which closed in March 2012.

MCI's discussions with Qwest Communications International Inc., Verizon Communications Inc. and other industry players began almost immediately after it emerged from bankruptcy in the summer of 2004, matching the intense consolidation in the telecommunication industry. While not involving regulatory issues, this situation exemplifies value judgments boards sometimes have to make between a large and more stable acquirer and a smaller, high-risk buyer that may offer a higher facial value, comparing potential near-term perceived value against a more stable, less volatile value proposal. While Qwest had made an initial facially higher offer, Verizon secured an agreement with MCI. Qwest followed with an even higher offer, and, in spite of indications shareholders favored the Qwest offer, the MCI board continued to determine the Verizon deal was more appropriate. Though the face value of Qwest's proposal appeared to exceed the value of Verizon's, a transaction with Qwest was widely assessed to carry more risk than the Verizon transaction as, among other things, Qwest had a higher debt to EBITDA ratio, was significantly smaller than Verizon and in the view of many would represent a less powerful competitor in the industry than an MCI/Verizon combination. Qwest then offered a further sweetened proposal, which finally drove Verizon to raise its price in a revised agreement with MCI. The revised agreement included a "force the vote" provision, enabling Verizon to require a shareholder vote on its proposal, even if the MCI board changed its recommendation, and an increase in the termination fee. Verizon then surprised the market by taking a 13.3% stake in MCI, making a private purchase of MCI shares from its largest individual holder at a higher price than that provided for in the Verizon agreement on the table. An even more sweetened Qwest rebid finally brought MCI back to the table, however, and, for the first time in the process, on April 23, 2005, MCI determined a Qwest proposal to be superior to a Verizon proposal, triggering a period under the merger agreement with Verizon during which Verizon had the option of offering a competing proposal before MCI could formally withdraw its recommendation of the Verizon bid. Verizon countered with a proposal that the MCI board did find better than Qwest's. Although Verizon's bid was still facially lower than Qwest's, the MCI board considered the Verizon re-proposal to be superior, and Qwest ended its efforts to jump Verizon's deal. In addition to various relative value and operational concerns described in the proxy materials, the board clearly noted that a large number of MCI's most important business customers had expressed concerns about the possibility of a Qwest acquisition. In spite of vocal shareholder opposition, MCI shareholders approved the Verizon acquisition in October 2005.

An example of value judgments made, and the various considerations taken into account, by a target's board in evaluating competing offers involved the $11.9 billion acquisition of the Chicago Board of Trade (CBOT) by the Chicago Mercantile Exchange (CME). On October 17, 2006, CBOT and CME announced that they had entered into a merger agreement pursuant to which CBOT would be merged into CME, with each shareholder receiving either 0.3006 CME shares or the cash equivalent. It was expected that the merger would result in CBOT's shareholders owning approximately 30% of the combined entity. Executives from both exchanges were enthusiastic about the combination, stating that the merger of these two exchanges would create a "derivatives powerhouse" and a bigger "futures marketplace." CBOT's board strongly supported the merger, and, aside from the DOJ approval required to close the transaction, it appeared as if this merger would close by mid-2007. On March 15, 2007 ICE, then just an upstart energy exchange based in Atlanta, placed an all-stock offer for CBOT. ICE's all-stock offer amounted to an approximately 10% premium over the previously announced CME offer and would also give CBOT majority ownership of the combined entity. The ICE offer forced a delay of the scheduled April 4, 2007 shareholders' meeting in order to allow the CBOT board to evaluate ICE's proposal.

On May 11, 2007, CBOT announced that its board of directors had concluded that the ICE offer was not deemed a "superior proposal" based on its review and announced a revised merger agreement between CBOT and CME. The revised merger agreement included an increase of 16% from the original terms of the merger agreement and would result in CBOT's shareholders owning approximately 34% of the combined entity. In addition, the exchanges agreed to include a provision providing that once the merger was executed, the combined entity would launch a tender offer that would allow dissenting shareholders to cash in their shares. The CBOT board reaffirmed its support of the CME proposal and rejected ICE's proposal, stressing that this conclusion was based on the potential for global growth of CME and CBOT as a combined entity, the similarities of both exchanges (both exchanges were based in Chicago and shared a similar operational organization) that would ease their integration process, the similarities and knowledge of their products and platforms and the long-term value for shareholders arising from enhanced synergies created by combining the exchanges (tax savings, etc.).

ICE, nevertheless, continued bidding resulting in a series of proposals from both CME and ICE. After failing to sway CBOT's board, ICE's management directly appealed to CBOT shareholders by emphasizing that ICE's proposal provided an additional $1.3 billion in value. Even with such a price differential, the CBOT board reaffirmed its recommendation of the CME proposal emphasizing that the uniformity of CME and CBOT would lead to a smoother integration process (operational and strategic) of the two exchanges as well as creating the "most extensive" global derivatives exchange and allowing the combined entity to better compete in the "global environment." Nevertheless, CME was forced to raise its offer by an additional $1 billion after complaints shared publicly by various shareholders. This proposal by CME sealed the merger between CME and CBOT, despite the higher dollar value of the ICE proposal (by approximately $300 million).

The 2012 acquisition of TPC Group, Inc. by First Reserve and SK Capital Corporation (acting jointly) presented an interesting deal-jumping situation. TPC's sale process began when First Reserve and SK Capital sent TPC an unsolicited letter in December, 2011 indicating they were interested in acquiring TPC in an all cash transaction for $30-$35 per share. By mid-February, 2012, the First Reserve and SK Capital joint bid had risen to $40-$42.50 per share. However, TPC's stock continued to rise and on March 9, 2012 reached an all-time high closing price of $47.03. In early April 2012, First Reserve and SK Capital decided not to pursue the transaction in light of a stock price increase, as their bid would be below the then-current trading price. TPC opened up the process to other potential bidders, but after initial discussions these bidders did not submit further proposals, citing similar reasons.

After some internal discussions, TPC decided to reach out to more potential bidders to re-initiate the sale process. All parties except for First Reserve and SK Capital and one other bidder declined to submit proposals. On June 25, 2012, First Reserve and SK Capital submitted a proposal to acquire TPC for $40 per share in cash; shortly thereafter the other bidder dropped out. After some unsuccessful discussions with other potential bidders, TPC's board decided to proceed with the First Reserve-SK Capital group at $40 per share, while still courting other potential acquirers. At the same time, First Reserve and SK Capital were negotiating the merger agreement with TPC and objected in particular to TPC's inclusion of a "go-shop" provision.

With prospects of new suitors waning, the parties signed an exclusivity agreement effective July 27, 2012 through August 17, 2012 (with an option to extend one week if the First Reserve-SK Capital group confirmed they were proceeding at a price of not less than $40 per share). Additionally, if a definitive agreement was not reached with TPC despite the First Reserve-SK Capital group's willingness to proceed at $40 per share and TPC entered into a definitive agreement concerning an alternate transaction within four months of the end of the exclusivity period, TPC agreed to reimburse the group's expenses up to $3 million (or $2.5 million if the one-week extension option was exercised). Such an exclusivity arrangement including expense reimbursement is not a common occurrence but was likely justified by the fulsome market check conducted. The parties continued to negotiate definitive documents and the First Reserve-SK Capital group (through a newly formed affiliate, Sawgrass Holdings) entered into a merger agreement to acquire TPC for $40 per share on August 24, 2012.

On August 28, 2012, Sandell Asset Management, a TPC stockholder, publicly opposed the Sawgrass merger claiming that the $40 share price grossly undervalued the company. Regardless, on September 10, 2012 TPC stated in a press release that the proposed transaction was in the best interest of shareholders and was the product of negotiations with nine other potential strategic and financial bidders. On September 25, TPC announced HSR clearance for the Sawgrass merger.

On October 5, 2012, Innospec Inc. submitted a preliminary, non-binding proposal to acquire all of the outstanding shares of TPC's common stock for $44 to $46 per share ($4 to $6 per share more than the Sawgrass deal). The proposal stated that equity financing would be provided by Blackstone Capital Partners VI, L.P. In light of Innopsec's bid, Sandell reaffirmed its belief that the $40 share price was grossly inadequate. On October 6 and 7, 2012, the TPC board met with its advisors to discuss the Innospec proposal. The board determined the proposal would reasonably be expected to lead to a superior proposal and authorized discussions and negotiations with Innospec after providing the required notice to First Reserve and SK Capital.

On November 5, 2012, Sawgrass proposed an amendment to the merger agreement, increasing the consideration to $44 per share and the termination fee to $28 million (payable in expanded scenarios); its offer was also conditioned on the termination of discussions with Innospec and Blackstone. On November 6, 2012, TPC countered with, among other things, an increased merger consideration of $46 per share, a lower increase to the termination fee and no expansion of the circumstances in which the termination fee was payable. On November 7, 2012, Sawgrass replied with a modified proposal—$45 per share consideration, an increase in termination fee to $24 million and revised circumstances in which the fee is payable. TPC discussed the revised proposal and, despite the possibility of further negotiations with Innospec, decided to move forward with an amendment to the Sawgrass transaction. The board's decision was largely due in part to timing and diligence—Innospec indicated that it needed six weeks to complete its due diligence. Weighing these considerations, TPC approved a November 7, 2012 amendment to the merger agreement which increased the consideration to $45 per share in cash. On its related 8-K, TPC reported that it had terminated discussions and negotiations with Innospec and Blackstone. Shortly thereafter, on November 9, 2012, the European Commission provided antitrust clearance for the Sawgrass transaction—leaving only stockholder consent and other customary closing conditions in the way of closing.

However, on November 15, 2012, Innospec decided to get back in the ring and increased its offer to acquire TPC at an all-cash purchase price of $47.50 per share. Once again, TPC's board determined that this would reasonably be expected to lead to a superior proposal under the Sawgrass merger agreement. Negotiations and discussions were renewed with Innospec. First Reserve and SK Capital commented on November 16, 2012 that they believed the Sawgrass transaction was clearly superior, could close by year end and had already received all regulatory approvals. It is important to note that, in addition to regulatory approvals, Innospec's offer remained subject to numerous other conditions, including securing requisite debt and equity financing, completion of due diligence, receipt of internal approvals and negotiation and execution of a definitive agreement. Innospec indicated it would submit a definitive proposal prior to the December 5, 2012 TPC stockholder vote. However, on December 3, 2012, Innospec, in lieu of putting forth a definitive proposal, announced that it had withdrawn its proposal to acquire TPC. In its press release, Innospec stated that, while they had spent a great deal of time and effort studying the TPC business, "we are unable to conclude a deal structure in a manner where we are totally satisfied with the value creation for our shareholders." Immediately following this announcement, TPC urged all shareholders to vote in favor of the Sawgrass transaction at the December 5, 2012 vote, and the transaction closed in December 2012.

In the 2013 contest for NuPathe Inc., while a stronger valuation was clear, a strategic relationship and prior discussions also potentially played a role in Teva Pharmaceutical Industries Limited's successful jump of NuPathe's signed deal with Endo Health Solutions Inc. Starting in December 2012, Teva and NuPathe engaged in discussions concerning a certain product, ZECUITY, a migraine patch, that NuPathe produced. The parties entered into a confidentiality agreement, and after a period of diligence, on March 1, 2013 Teva submitted a non-binding indication of interest to acquire NuPathe for $130 million. After continued discussions, Teva increased its non-binding offer to $145 million. Citing diligence results, Teva informed NuPathe that it would not proceed with an acquisition. Subsequently, the parties reengaged in discussions concerning a potential commercial partnership arrangement, as opposed to an acquisition.

However, on December 15, 2013, NuPathe informed Teva it had entered into a merger agreement to be acquired by Endo and, pursuant to the terms of that agreement, had to cease discussions with Teva. The Endo deal was announced the next day, valuing NuPathe at $2.85 per share (or approximately $105 million). The Endo merger agreement contained a "no-shop" provision, but permitted the NuPathe board, in response to a bona fide written takeover proposal, to furnish information to a potential suitor and terminate the merger agreement in connection with a superior proposal (including the payment of a $5 million termination fee). Endo also had a match right of two days with respect to any such superior proposal.

On January 6, 2014, Teva sent NuPathe an unsolicited proposal, providing for a tender offer to purchase all outstanding shares of NuPathe for $3.65 per share and including a contractual right to receive additional contingent cash consideration of up to $3.15 per share based on the achievement of certain milestones with respect to ZECUITY. Additionally, Teva noted that it would loan NuPathe funds to cover its ongoing operations pending the closing of the transaction and pay the termination fee due Endo upon a termination of the Endo merger agreement in light of a superior proposal. After only a week of negotiations with Teva, the NuPathe board informed Endo that it intended to make a change of recommendation, preferring the Teva deal over the Endo deal. Endo did not increase its offer, and on January 17th NuPathe terminated the Endo deal, with Teva paying the $5 million fee. The transaction was consummated on February 20, 2014.

Similarly, in the intense battle for AMCOL International Corporation, Imerys SA consistently increased its bid price in the face of competing offers from Minerals Technologies Inc. despite a sizeable break-up fee payable upon termination of its agreement with AMCOL in the event of a superior proposal. AMCOL entered into a merger agreement with Imerys on February 11, 2014 which valued AMCOL at $41 per share and contained a customary "no-shop" provision, with a "fiduciary out" for a superior proposal. If AMCOL's board found that there was a superior proposal, it could change its recommendation and terminate the agreement with Imerys, subject to Imerys's termination fee of $39 million and four business day match right.

Two days after signing, AMCOL received an unsolicited letter from Minerals Technologies valuing AMCOL at $42 per share, a dollar per share over the purchase price in the Imerys agreement. This bid, however, was continent on debt financing and due diligence. Finding that this proposal could reasonably be expected to lead to a superior proposal under its agreement with Imerys, the AMCOL board engaged in discussions with Minerals Technologies. On February 24th, Minerals Technologies submitted a revised proposal increasing its offer to $42.50 per share, this time not contingent on a financing commitment or diligence. In response, Imerys increased its offer to $42.75 per share. Minerals Technologies fired back with a bid of $45 per share on March 3rd (though stipulated that a closing would be conditioned on financing). Despite the promise of a $39 million pay out if AMCOL signed up a deal with Minerals Technologies, Imerys again topped Minerals Technologies's offer, increasing its per share price to $45.25 on March 5th. Minerals Technologies responded in turn on March 6th, upping the price to $45.75 per share and dropping the financing condition from its draft agreement. However, after the March 6th offer, Imerys conceded the battle, refusing to again increase its price. On March 10th, AMCOL signed a merger agreement with Mineral Technologies, concurrently paying Imerys its $39 million termination fee. Imerys declined to jump back into the ring, and, on May 9, 2014, Minerals Technologies completed its acquisition of AMCOL.

In another example of value judgments made in the face of a signed "merger of equals", the Chiquita International, Inc. board and shareholders needed to determine whether an all cash buy-out constituted a superior proposal to a signed "merger of equals" with Fyffes PLC. On March 10, 2014, Chiquita International, Inc. and Fyffes PLC agreed, by entering into a transaction agreement, to combine under a new holding company incorporated in Ireland to be named ChiquitaFyffes. In the event of a termination by Chiquita to enter into an alternative transaction agreement, Chiquita would be required to reimburse Fyffes in an amount equal to all documented, specific and quantifiable third party costs and expenses incurred by Fyffes in connection with the combination, subject to a cap of 1% of the total value of Chiquita's share capital attributable to the combination. The low reimbursement cap was negotiated to be reciprocal due to a requirement of Irish takeover rules that prevent a target from paying more than 1% of the deal value in a break-up fee and effectively provided little deterrent or incremental cost to competing bidders.

On August 11, 2014, Cutrale-Safra Group delivered a letter to the Chiquita board expressing an interest in pursuing an all-cash acquisition of Chiquita at a price of $13.00 per share (which valued Chiquita at approximately $666 million), but on August 14th, the Chiquita board, after determining that Cutrale-Safra's proposal was inadequate and not in the best interest of Chiquita's shareholders, chose not to engage in discussions with Cutrale-Safra at that time. On August 26th, representatives of Cutrale-Safra met with representatives of ISS regarding their proposal to acquire Chiquita.

On September 4, 2014, ISS and Glass Lewis recommended that Chiquita shareholders vote against the adoption of the Fyffes transaction agreement based on the Chiquita board's failure to engage in discussions with Cutrale-Safra (despite Chiquita's determination that the proposal was inadequate). On September 8th, in response to ISS's and Glass Lewis's recommendations, Fyffes granted Chiquita a waiver under the non-solicitation provisions of the Fyffes transaction agreement to allow Chiquita to engage in discussions with Cutrale-Safra. As consideration for the waiver, Chiquita agreed that, in the event of a definitive agreement with Cutrale-Safra in which Chiquita agreed to a higher termination fee than was agreed in the Fyffes transaction agreement, Chiquita would pay such higher termination fee to Fyffes (Chiquita not being subject to the 1% cap under Irish takeover rules discussed above).

On September 10, 2014, Chiquita executed a confidentiality agreement with Cutrale-Safra, and diligence was conducted over the next several weeks.

On September 25, 2014, in an effort to preserve the combination in the face of the Cutrale-Safra negotiations, Chiquita and Fyffes agreed to revised terms, in which the holder of each outstanding Fyffes ordinary share would receive 0.1113 of a ChiquitaFyffes ordinary share instead of 0.1567 of a ChiquitaFyffes ordinary share. In effect, former Chiquita shareholders were expected to own 59.6% of ChiquitaFyffes, instead of 50.7% of ChiquitaFyffes under the original terms. Chiquita's termination fee was also amended to require Chiquita to pay Fyffes an amount equal to 3.5% of the total value of Chiquita's share capital attributable to the combination (versus the reimbursement of Fyffes' expenses capped at 1% of Chiquita's share capital attributable to the combination, as described above). Shortly thereafter, Chiquita and Fyffes announced that all requisite regulatory approvals to the combination had been received.

On October 15, 2014, in response to the revised terms, Cutrale-Safra increased its offer to purchase Chiquita from $13.00 per share to $14.00 per share in cash. That evening, representatives of Chiquita informed representatives of Cutrale-Safra that Chiquita believed the $14.00 per share price was inadequate but representatives of Cutrale-Safra stated that Cutrale-Safra was not prepared to increase its offer price. On October 16th, the Chiquita board determined that Cutrale-Safra's revised offer was inadequate and issued a press release announcing its decision.

On October 20, 2014, ISS issued a report changing its recommendation and recommending that Chiquita's shareholders vote in favor of the Fyffes/ Chiquita combination. On October 21st, however, Glass Lewis stated that it was continuing to advise Chiquita's shareholders to vote against the combination.

On October 23, 2014, Cutrale-Safra delivered to Chiquita a revised offer letter pursuant to which it proposed to purchase Chiquita for $14.50 per share in cash. That same day, ISS issued a report stating that, given the certainty of value of the revised, fully financed Cutrale-Safra offer, and the two years it would take ChiquitaFyffes to achieve projected EBITDA multiples, the revised Cutrale-Safra offer was potentially more compelling.

On the morning of October 24, 2014 at the special meeting of Chiquita shareholders, Chiquita's shareholders failed to adopt the Fyffes transaction agreement. Each of Fyffes and Chiquita tendered notices of termination of the Fyffes transaction agreement to one another after the vote, and the Chiquita board issued a press release stating its intent to engage in discussions with Cutrale-Safra regarding the $14.50 per share offer (which valued Chiquita at approximately $742 million).

On October 27, 2014, Chiquita and Cutrale-Safra executed a definitive merger agreement providing for the purchase of Chiquita for $14.50 per share in cash and issued a press release announcing the Cutrale-Safra transaction. In connection with the termination of the Fyffes combination and entry into the Cutrale-Safra merger agreement, Chiquita paid Fyffes the amended required break-up fee. The Cutrale-Safra acquisition closed on January 6, 2015.

## Fiduciary Outs, Influential Shareholders and the Role of Activists

Since the Delaware amendment to DGCL § 251(c) (now § 146) expressly permitting merger agreements to require that the agreement be submitted to a stockholder vote notwithstanding a post-signing change in the board's recommendation, a number of merger agreements, including the Warner-Lambert/American Home Products agreement (discussed below) and the Pinnacle/Hillshire agreement (discussed above), do not contain a "fiduciary" termination right but do contain "fiduciary outs" to the "no-shop" restrictions and an express right of each company to change its recommendation on enumerated "fiduciary" grounds—the so-called "force the vote" construct (see the discussion at footnote 27, above). In the Warner-Lambert deal, the inability of Warner-Lambert to prematurely terminate the agreement clearly affected all sides' strategic actions during the pendency of the fight. Whereas, in connection with its increased offer to MCI, Verizon required a "force the vote" provision in the revised merger agreement. Verizon's right to force an MCI stockholder vote if the MCI board of directors did not recommend the merger's approval did not ultimately discourage Qwest from offering subsequent proposals, but it did provide Verizon an additional card to play in negotiations.

However, in a closely followed battle between Omnicare, Inc. and Genesis Health Ventures, Inc. for control of NCS Healthcare, Inc., the Delaware Supreme Court, in an unusual split 3-2 decision, reversed the lower court by ruling that NCS's board of directors had breached its fiduciary duties by approving (after a shopping process that, at least in part, included Omnicare, the interloper) voting agreements from the holders of a majority of NCS's voting power that, when combined with a merger agreement provision that required the NCS board to present the merger agreement to stockholders, effectively locked up the merger (Omnicare v. NCS Healthcare, Inc., 818 A.2d 914 (Del. 2003)). The reversal surprised many commentators who believed the lower court opinion to be well reasoned and written, and, in the end, was outcome determinative, since, in light of the Supreme Court's ruling, and pursuant to a termination agreement under which Genesis received a $6 million termination fee from NCS and an additional $16 million fee from Omnicare, Genesis withdrew its bid and Omnicare acquired NCS. The decision clouds the picture for using voting agreements in the future to lock up deals with majority shareholders in the absence of a fiduciary termination right. However, the case has continued to be criticized, and, particularly in light of changes in the composition of the Delaware Supreme Court since the decision, its ultimate effect on future cases is somewhat uncertain.

In situations where a target's controlling shareholder (or collection of shareholders sufficient to deliver the vote) can act by written consent, advisors have generally been comfortable that a merger agreement can contemplate delivery of the consent(s) shortly after signing (effectively eliminating the opportunity for a topping bid) thereby avoiding the Omnicare situation. However, even in circumstances where such an opportunity presents itself, targets will often negotiate for the right to accept a topping bid for some period of time post-signing. This construct would prove valuable to the stockholders of Schiff Nutrition International, Inc. in Reckitt Benckiser's successful jump of Bayer HealthCare LLC's agreement to acquire Schiff for $34 per share in October 2012.

During the course of negotiations with respect to the merger agreement between Bayer and Schiff, Schiff opened with a proposal that contemplated a 30-day "go-shop" followed by a traditional "no-shop" with customary exceptions. Bayer initially demanded that Weider Health and Fitness and TPG (who together could deliver the required shareholder vote) deliver consents shortly following the signing without leaving any practical opportunity for a post-signing market check, whether pursuant to active solicitation via a "go-shop" or the ability to respond to unsolicited proposals. After much discussion on the point, Bayer dropped the demand and proposed a limited 30-day "window-shop" period during which Schiff could terminate to accept an unsolicited superior proposal subject to the payment of a termination fee. Schiff accepted this construct and agreed to the $34 per share price offered by Bayer; the parties announced the transaction on October 29, 2012.

On November 15, 2012, realizing that the 30-day "window-shop" period provided Schiff with limited flexibility and acknowledging the desire of Schiff shareholders to close by year-end, Reckitt jumped the deal aggressively by publicly announcing its offer and simultaneously announcing its intention to commence an all-cash tender offer to acquire Schiff for $42 per share on November 16, 2012. This offer represented a 23.5% premium to the Bayer transaction. On November 18, 2012, the Schiff board determined that the Reckitt proposal in fact constituted a superior proposal. Bayer did not increase its price or engage in competitive bidding and waived the four-day negotiation window relating to the Reckitt proposal (subject to the requirement that there were not any material revisions to the Reckitt proposal), and opted to receive its $22 million termination fee. Interestingly, Reckitt refused to agree to any "window-shop" provision with respect to its offer despite Schiff's desire to preserve the flexibility for another offer to emerge. Weider and TPG did deliver their written consent to the Schiff transaction shortly after the signing of the merger agreement on November 21, 2012. Reckitt announced the successful completion of its tender offer for Schiff's outstanding shares and subsequent short-form merger on December 17, 2012.

In another deal-jump situation involving voting agreements that turned out to be outcome determinative in favor of the second bidder, the initial bidder learned the importance of careful drafting the hard way. When RAE Systems entered into a merger agreement with Battery Ventures for $1.60 per share, holders of RAE Systems (including Chairman and Chief Executive Officer Robert Chen) owning an aggregate 30% of the company entered into voting agreements pursuant to which they agreed to vote in favor of the merger and against any competing proposals. The voting agreements would terminate if the merger agreement were terminated in favor of a "superior offer." Then Vector Capital entered, submitting an offer of $1.75 per share in cash (with the 30% holders being exchanged for equity in Vector Capital). In response, Battery Ventures offered, pursuant to its matching right, to amend its merger agreement to provide $1.85 per share and increase the termination fee, while also stating its position that the existing voting agreements would remain in effect and enforceable following such an amendment. However, the RAE Systems board thought there was uncertainty as to whether the voting agreements would survive such an amendment, notwithstanding the matching right, and suggested Battery Ventures submit a proposal at $1.85 that would be effective regardless of whether the voting agreements (and related rollover agreements) continued to be enforceable. Battery Ventures refused.

Mr. Chen then advised the RAE Systems special committee that he believed Vector Capital's transaction was superior due to its financial resources and strong connections with China, and indicated that he would not agree to vote in favor of the proposed amendment to the transaction with Battery Ventures. In taking this position, Mr. Chen essentially viewed the amendment, even though it amended the existing merger agreement in favor of the shareholders by increasing the merger consideration, as terminating the existing merger agreement, and thereby his voting agreement. The next day, when the Vector Capital offer was to expire, the RAE Systems special committee determined Vector Capital's $1.75 offer to be a "superior offer" to Battery Ventures's proposed $1.85 amended offer. Its reasoning was that Battery Ventures's proposal failed to assume the risk that the voting agreements would no longer be enforceable after such an amendment which, combined with Mr. Chen's lack of support for the amendment, made passing on Vector Capital's offer the riskier and inferior option. RAE Systems then terminated its existing merger agreement and paid the termination fee to Battery Ventures, entering into a merger agreement with Vector Capital. In an apparent effort to clarify the situation the second time around, voting agreements were entered into supporting the Vector Capital transaction that added a provision that such agreements would terminate if the merger agreement were amended to decrease the merger consideration. By implication, an amendment to increase the merger consideration would not trigger a termination right. While voting agreements locking up a significant portion of a target's shareholders can add greatly to deal certainty, as the RAE Systems situation shows, they should be carefully drafted and reviewed by the initial bidder, particularly to ensure that actions or amendments improving the existing deal, or enforcing an initial bidder's matching right (if any), would not trigger any termination of such voting arrangements and thereby put the deal at risk.

Though it had received its break-up fee upon termination of its agreement with RAE Systems, Battery Ventures eventually returned, joined by SFW Capital Partners, and made a proposal for RAE Systems at $1.90 per share in cash in early April 2011. Vector responded by increasing its offer to $1.87 per share with an increased break-up fee of $3.98 million correlating to the price increase. Subsequently, RAE Systems solicited higher bids from the two suitors. Vector came back with two options for RAE Systems, one offer at $1.87 per share with a $3.71 million break-up fee and another at $1.88 per share with a $4.01 million break-up fee. The board considered its options and, mainly due to uncertainty with respect to Battery's proposed structure, decided to go with the second Vector option. On April 3, 2011, RAE Systems and Vector amended their merger agreement to reflect the new terms. The bidding war continued, however, resulting in three more amendments to the merger agreement, each increasing the consideration (with proportional increases in the break-up fee). In May 2011, RAE Systems and Vector entered into their final amendment, increasing the price to $2.25 cash per share with a break-up fee of $5.75 million, a significant increase (relative to deal value) in the break-up fee likely meant to help lock up the RAE Systems/Vector transaction once and for all. RAE Systems's shareholders approved the deal with Vector at a special meeting on June 9, 2011 and closing of the deal was announced on June 16, 2011. While the early stages of the RAE Systems situation showed the importance of careful drafting with respect to a voting agreement with a large shareholder, it also highlighted the strong, and often outcome-determinative, influence a large shareholder can have in pursuing, or spurning, a potential transaction.

Similarly, controlling shareholder influence and the importance of locking up such a shareholder were evident in the Graham Packaging situation. Since its Blackstone-backed recapitalization in 1998 and its 2010 IPO, Graham Packaging had evaluated numerous transactions and was already in talks with another party at the time it was approached by Silgan in late January 2011. On February 11, 2011, Silgan sent a letter to Graham Packaging proposing a transaction at 0.402 shares and $3 per share in cash. On March 14, 2011, Silgan raised the cash portion of its bid to $4 per share and, two and a half weeks later, submitted a revised proposal with an increase of the cash portion to $4.75 per share. On April 12, 2011, Graham Packaging and Silgan entered into a merger agreement that had Silgan paying 0.402 Silgan shares and $4.75 in cash and contained a customary covenant by Graham Packaging not to solicit alternative transactions, a matching right and a termination fee of $39.5 million (approximately 3% of equity value but only approximately 1% of enterprise value). Blackstone entities owning 61.3% of Graham, along with the Silgan co-founders holding approximately 29% of Silgan, entered into voting agreements whereby they agreed to vote in favor of the merger agreement.

On June 8, 2011, shortly before the proxy statement cleared the SEC, the Reynolds Group delivered to Graham Packaging an unsolicited $25 cash offer. On June 16, 2011, pursuant to the matching right that it was afforded under the merger agreement, Silgan submitted a revised offer at $15 cash per share plus 0.30 Silgan shares, with a higher $75 million termination fee, but the Graham Packaging board concluded that the Reynolds Group proposal was superior. The next day, shortly after midnight, Graham Packaging informed Silgan it was terminating its merger agreement. In doing so, Graham Packaging did not follow the "go-naked" approach taken by Dollar Thrifty and Dynegy. Instead, Graham Packaging already had in escrow the signature pages of its merger agreement with the Reynolds Group, which were released immediately after the Silgan agreement was terminated. Under the merger agreement with the Reynolds Group, Graham Packaging would receive $25 per share in cash, and Blackstone, the controlling shareholder, agreed to deliver its written consent within three days. However, within minutes after execution of the merger agreement with the Reynolds Group, Blackstone and the Reynolds Group discussed the possibility of Blackstone's delivering its written consent by 5:00am that morning to deliver the deal, in exchange for an additional $0.50 in cash per share. After a Graham Packaging board meeting was quickly assembled in the wee hours to approve these arrangements, the Reynolds Group agreed to bump up its price in exchange for Blackstone's immediate execution of a stockholder consent approving the deal. In the middle of the night, after the merger agreement was amended to reflect the higher price, Blackstone delivered its written consent and, as the controlling shareholder, the deal to the Reynolds Group.

A controlling shareholder also had an impact in the Renaissance/Permira situation, counter-intuitively resulting in the lower offer being successful. Renaissance had assessed its "strategic alternatives" for several years before engaging in talks with affiliates of Permira. In early 2010, Renaissance's majority shareholders, trusts controlled by the Paul family, had contemplated a buy-out but the idea had been abandoned. Then, in late 2010, Permira contacted Renaissance's investment banker and expressed an interest in hearing more about the company. In April 2011, after Permira and the Pauls had discussions and signed a non-disclosure agreement, Permira submitted an initial indication of interest at between $14 and $14.50 in cash per share. After Renaissance's investment banker sought additional offers from other parties with an eye to an August 12th deadline, and the Pauls indicated that a $14.85 per share offer (they had initially desired $15) would be necessary to win the day, on August 3, 2011, Permira submitted a revised proposal at $14.85 in cash. At a board meeting two days later, both the Pauls and Renaissance's investment banker informed the Renaissance board that they had been contacted by Plato (financed by Thoma Bravo), but the board decided in view of the self-imposed August 12th deadline not to respond to Plato's inquiries. Ultimately, with the Pauls willing to accept less than $15 cash per share, on August 15, 2011, Renaissance and Permira entered into a merger agreement at $14.85 per share in cash. The agreement contained a "no-shop" and a $13 million termination fee (approximately 3%). The Pauls, as controlling shareholders owning approximately 69% of Renaissance, agreed to vote in favor of the transaction. Undeterred, on August 22, 2011, after it was rebuffed in its attempts to engage Renaissance's advisors, Plato sent a letter addressed to one of the Pauls offering $15.50 per share in cash. On August 23, 2011, the Renaissance board determined that the Plato proposal could reasonably be expected to lead to a superior proposal and entered into a confidentiality agreement with Plato. Without a bona fide offer on the table from Plato, however, Renaissance moved forward with Permira until September 22, 2011, when Renaissance announced it had received an unsolicited definitive acquisition proposal from Plato at $15.50 per share in cash.

In response, on September 27, 2011, Permira amended its merger agreement with Renaissance to bifurcate the consideration to be received by Renaissance shareholders. Under the amended agreement, in what amounted to a control discount rather than a control premium, the Pauls would receive $15 per share in cash and the non-controlling shareholders would receive $16.60 per share in cash (averaging out to $15.50 per share). Later that same day, Renaissance received a revised Plato proposal at $15.10 and $18 for the Pauls and the non-controlling shareholders, respectively (averaging out to $16.01 per share), providing both the Pauls (by $0.10) and the non-controlling shareholders (by $1.40) with more value than the revised Permira offer. However, despite the higher values offered by the revised Plato offer, the Pauls informed Renaissance's board that they would not support a sale to Plato at the revised price, leading the Renaissance board to determine that Plato's proposal could not reasonably be expected to lead to a superior proposal. In early October 2011, Plato filed motions to intervene in two federal lawsuits that had been filed in order to assert claims against Renaissance and its board for, among other things, failure to act in good faith in its dealings with Plato, seeking to preliminarily and permanently enjoin the Renaissance/Permira merger.

While attacking Renaissance in the courts, Plato also continued to pursue a deal. On October 10, 2011, Renaissance announced receipt of another unsolicited proposal from Plato offering an aggregate $469 million in cash for Renaissance (or $16.90 per share), but in a twist, leaving the allocation of the purchase price among the Pauls and the remaining holders to the board or the Pauls to decide. However, despite Plato's innovative approach and its increased per share offer (on average), the Pauls again informed the Renaissance board that they would not support Plato's acquisition of Renaissance, and the Renaissance board again determined that the revised Plato offer could not reasonably be expected to lead to a superior proposal. With the Plato path sufficiently blocked, the Renaissance shareholders voted on October 17, 2011 to approve the merger with Permira. The transaction closed on October 19, 2011, with the Pauls receiving their originally stated target of $15 per share and the remaining shareholders receiving $16.60 per share.

While one might surmise that financing risk was at work in the background of the Pauls' aversion to the higher Plato bids, such offers were not subject to a financing condition. However, the Pauls took the view that terminating a transaction with a high likelihood of closing (Permira) in favor of a transaction with a higher risk of non-consummation and a longer timeline to close (Plato) would have exposed the transaction to financing risk at a time when the financial markets were unsteady. More quizzically, the Pauls also noted they would not accept an allocation of the merger consideration from Plato that would result in the Pauls receiving less value than the remaining shareholders, even though the Permira transaction did exactly that. In addition, the Pauls put forth a broader social consciousness rationale, stating that the Permira transaction would be more favorable than Plato's to Renaissance's employees, the students, educators and schools Renaissance serves, and the communities in which Renaissance operated. While the reasoning that held the day for the Pauls in preferring the Permira transaction may be unclear, what is crystal clear is that as the controlling shareholders, the Pauls were able to choose the outcome in this intriguing deal-jump situation.

In the battle for Quest Software, Inc. between Dell Inc. and Insight Venture Management, LLC (eventually bidding together with Vector Capital), Vincent Smith, Quest's Chairman and now CEO controlling approximately 34% of Quest's common stock, played a key role in the transaction. In September 2011, the Quest board met to discuss a potential transaction with Insight—a special committee was formed as result of Mr. Smith's relationship with Insight (he held interest in certain funds affiliated with Insight) and to manage potential conflicts (the board was likely anticipating a potential rollover by Mr. Smith). By February 2012, two other sponsors and Dell had been contacted by Quest concerning a potential transaction after the board determined that Insight's than current offer of $22.25 per share price was not acceptable. At this time, Dell communicated that it was not interested in pursuing an acquisition of the entire company. In early March 2012, Insight raised its bid to $22.50, then, after discussions with Mr. Smith and the special committee, to $23. Another sponsor bidder submitted a proposal, also at $23, but because it indicated it would need an extra two weeks to conduct diligence, the Quest board saw the bid as risky and decided to proceed with Insight— a decision made easier by the sponsor confirming its willingness to participate in a "go-shop" process and Mr. Smith's agreement to engage in discussions with third-parties and participate in diligence during the "go-shop" period.

On March 8, 2012, the Insight deal was approved by both the special committee and the board. A merger agreement was entered into the same day. The deal provided $23 per share in cash (valuing the company at approximately $2 billion) for all stockholders other than the holders of rollover shares (predominately shares controlled by Mr. Smith and his affiliated trusts). Importantly, the agreement contained a 60-day "go-shop" provision allowing Quest to engage in a full post-signing market check. The deal also presented a two-tiered termination fee structure—the termination fee in case of a superior proposal and accompanying termination during the "go-shop" period was $4.2 million, and during the "no-shop" period, $6.3 million.

Also essential to the deal was the voting agreement Mr. Smith (and his affiliated trusts) entered into at signing. The voting agreement obligated Mr. Smith and his affiliated trusts (together holding approximately 34% of the Quest common stock all of which would be rolled into the new deal) to vote their shares in favor of the Insight transaction and against any other takeover proposal (other than a superior proposal as defined in the merger agreement) or other actions that would have the effect of interfering with the Insight agreement.

A press release announcing the merger went out the following day, and Morgan Stanley immediately started shopping for alternative transactions under the "go-shop"—55 parties were contacted, including 38 sponsors and 17 potential strategic buyers. 23 confidentiality agreements were circulated, 17 of which were executed. Nine parties engaged in meetings with management. One of them was Dell (who had earlier dropped out of the process). Previously, the special committee had expressed concerns over whether a strategic bidder would bid without assurances from Mr. Smith that he would support the superior proposal. The special committee requested that Mr. Smith (and his affiliated trusts) enter into a voting agreement that required the support of a superior proposal under the merger agreement, but Mr. Smith declined (Insight and Mr. Smith would later in the negotiations offer a variation on this concept subject to a minimum price threshold for the superior proposal). In order to prevent the Insight voting agreement from stifling the "go-shop," the special committee considered offering potential bidders an option to acquire newly issued shares constituting 19.9% of Quest's common stock payable with a promissory note due upon the purchase of such shares—this would be reserved for situations where Mr. Smith refused to support a superior proposal. Various bids were submitted, including a bid from Dell, leading the special committee to designate multiple offers as "qualifying bids" for purposes of the "go-shop."

The Dell proposal, coming in just under the wire the day before the "go-shop" period expired, offered an all-cash transaction providing $25 per share for all outstanding shares of common stock and came with a proposed merger agreement. Dell's proposal required a 16-day exclusivity period, for Mr. Smith to enter into a voting agreement and that, in the event Mr. Smith refused, Dell would receive the 19.9% option in combination with a higher termination fee. On May 8, 2012, Quest countered Dell's offer, highlighting that it would support an offer price of $27 but that the decision of whether to enter into a voting agreement resided with Mr. Smith—although the special committee speculated that Mr. Smith might be willing to support an offer at $27.

On May 12, 2012, Dell was granted a 5-day exclusivity period and after further discussions, Dell made a revised proposal to acquire all of the outstanding Quest common stock for $25.75 per share. The exclusivity arrangement was extended.

The negotiations continued when finally, on May 18, 2012, Mr. Smith indicated he would enter into a voting agreement supporting the Dell transaction if its bid was upped to $28. Dell declined. On May 20th, Dell revised its offer by adding an automatic termination unless the board determined it constituted a superior proposal by May 22, 2012. With the special committee unable to make a determination in light of the deal protections Dell was requesting, the offer expired by its terms. During this time, Insight had also delivered several letters with proposals to Quest—on May 19th, it offered a price in the $26 to $27 range and claimed Mr. Smith would sign a voting agreement in favor of any superior proposal of at least $28 (but with the additional requirement that such a proposal include the acceleration of all in-the-money options and assumption of all out-of-the-money options). It also requested increased termination fees. On June 1st, the special committee prompted Insight to submit an executable offer by June 5th. On June 8th, Insight, now partnering with Vector Capital, submitted an offer at $23.50, purporting that Mr. Smith would support an alternative deal at $27.50 (working with a concept earlier introduced by the special committee that it would not issue the 19.9% option if Mr. Smith agreed to support superior proposals) and requiring an increase in the termination fee and expense reimbursement, as well as the addition of a 2% termination fee in the case of a "naked" vote-down. On June 10th, Dell bid $25.50 cash, justifying the decrease with the deterioration of macro-economic conditions worldwide. The special committee was hopeful that Insight (together with Vector) would be able to deliver an improved bid. However, following further discussion, on June 14, 2012, the board deemed the Dell proposal at $25.50 a superior proposal, triggering Insight's match right. On June 17th, Insight submitted a proposed amendment to the Insight agreement adding Vector Capital as an official party, increasing the offer price to $25.75, increasing the termination fee from $6.3 million to $25 million, increasing expense reimbursement allowances and extending the "drop-dead date" by a month. Mr. Smith communicated that he was supportive of the Insight-Vector proposed amendment. Given this, the board moved to execute the proposed amendment and declared Dell's proposal as no longer a superior proposal.

In response, on June 21, 2012 Dell countered with an offer of $27.50 cash (and included two versions of a merger agreement—one of which required Mr. Smith to enter into a voting agreement; the other including the 19.9% option with the higher termination fee). On June 25th, this superior proposal was announced. Mr.

Smith, using his power as a major shareholder to its fullest, indicated he would only support a transaction with Dell at an offer price of $28 or more per share. As a result, on June 27th, Dell increased its offer to $28 in exchange for Mr. Smith and his trusts executing a voting agreement. Insight, having secured a $25 million termination fee (and increased expense reimbursement) with its amendment, agreed not to resist the termination of its amended merger agreement. Dell loaned $13.3 million to Quest, to help out with the $25 million termination fee payable to Insight. The Dell/Quest transaction closed in September 2012.

In another deal, a significant shareholder wasn't able to exert its influence to accomplish a successful deal-jump. As described above, in the 2013 contest for Steinway, 32% shareholder Samick, an interloper on Steinway's signed deal with Kohlberg, was topped by another interloper, Paulson, who ultimately won the deal. While Paulson's bid was initially conditioned on Samick entering into a voting agreement in favor of a deal with Paulson, the Steinway board was able to get Paulson to drop that condition while simultaneously increasing its bid. Paulson's best and final offer was ultimately higher than Samick's, with Samick dropping out of the process.

Similarly, in the saga to determine the fate of GFI Group, Inc., Michael Gooch, GFI's founder and executive chairman who individually and through certain controlled affiliates owned approximately 37.3% of GFI (as of April 22, 2014, the date of GFI's annual proxy statement), was unable to deter BGC Partners LP from gaining control of GFI through a tender offer, which was successfully completed on February 26, 2015. Mr. Gooch had previously brokered a deal where GFI would be sold to CME Group, Inc., with a division being immediately sold to an entity controlled by Mr. Gooch following the completion of the CME merger. GFI's stockholders ultimately voted down the CME merger agreement given BGC's steady upping of its tender price.

On the other side of the coin, the late 2012/2013, six-plus month battle for Clearwire Corporation represented a scenario where a controlling stockholder (in this case, Sprint Nextel Corporation) was trying to acquire the balance of the minority interest. Deal-jumps in these circumstances are rare, but a combination of the presence of stubborn activist shareholders, plus a deal-jumping, somewhat unpredictable strategic interloper, plus a motivated control holder, resulted in a significant increase in shareholder value—from an originally announced deal with Sprint at $2.97 per share to a final deal with Sprint at $5.00 per share! Shortly after the announcement of the Sprint/Clearwire merger agreement at $2.97 per share in mid-December 2012, Dish Network Corporation made a competing offer to acquire all or a minimum minority percentage of Clearwire's outstanding stock at $3.30 per share, but only if it also could acquire a significant block of Spectrum assets from Clearwire and obtain certain governance rights, in an attempt to break up the definitive agreement between Clearwire and Sprint. Dish had previously expressed an interest in acquiring substantially the same Spectrum assets of Clearwire prior to the announcement of the Sprint/Clearwire agreement without any equity component—but Clearwire's special committee and board ultimately determined at the time that a transaction with Sprint would be more favorable to its stockholders.

Clearwire was in fairly dire financial straits—with significant liquidity concerns and no real prospect for the second wholesale customer it desperately needed. Without a deal, bankruptcy was mentioned as a potential alternative. While their Spectrum assets were valuable, the special committee had engaged in a multi-year process of trying to monetize those assets in a way that bolstered the company's business plan, and had attempted before signing the merger agreement with Sprint to re-ignite the interest of any potential buyers—but to no avail. The background section of the proxy statement for the deal is an "alphabet soup" of contacted potential counterparties, ultimately leading to no real alternatives until the battle between Dish and Sprint heated up after the announcement of the Sprint deal at $2.97 per Clearwire share. A primary and continuing concern with the Dish proposals throughout the saga was that they were highly conditional and dependent on concessions that Sprint repeatedly asserted would violate legal and contractual rights of Sprint, which it would not permit. After months of on-and-off negotiations between Clearwire and Dish to attempt to reduce that conditionality, and between Clearwire and Sprint to get an increase in the deal, during which various activist holders of Clearwire stock asserted their opposition to the Sprint deal at $2.97 and launched a proxy fight to solicit against the Sprint deal (and during which Dish also simultaneously launched a bid to directly buy Sprint and deal-jump the then-pending, and ultimately successful, purchase of Sprint by SoftBank at an increased price), Sprint finally increased its merger agreement to $3.40 per Clearwire share on May 21st, the original date of the Clearwire stockholder meeting to vote on the deal—which was obviously adjourned (the first of a number of adjournments). In what proved to be a tactical miscalculation, Sprint did not obtain shareholder lock-ups at that time from the activist shareholders opposing the deal. On May 29th, Dish launched a tender offer for Clearwire at $4.40 per share, with complex but reduced conditionality, but which required an extremely quick response by Clearwire's special committee to lock in the terms. Sprint continued to assert that various of the predicate Spectrum and governance desires of Dish to effect the joint ownership of Clearwire that would ensue when Dish would acquire the shares of Clearwire other than Sprint's, would violate Sprint's legal and contractual rights (a position that then-Chancellor Strine appeared very sympathetic to when he later held a hearing in the case). After negotiating down the conditionality as far as possible, the Clearwire special committee determined that given the significant price difference and the low likelihood of the $3.40 per share Sprint merger agreement being approved by shareholders, the best interests of the Clearwire shareholders required it to withdraw its recommendation of the Sprint merger agreement on June 12th and recommend in favor of the Dish tender offer—thus locking in its terms. But Sprint was determined to have its prize—on June 19th through June 20th, Sprint bumped to $5.00 per share, obtained voting commitments from the key Clearwire activist shareholders that had been opposing the deal, and the parties executed a new merger agreement providing for the acquisition by Sprint of the balance of Clearwire. Dish dropped its tender offer on June 26th, and the Sprint/Clearwire merger agreement was approved by Clearwire shareholders, and closed, on July 8 through July 9, 2013.

The 2014 Family Dollar transaction described earlier in this article highlights a number of roles that activists can play in M&A situations. Looking back to early 2011, Nelson Peltz's Trian accumulated 8% of Family Dollar's stock and offered to buy the remainder at $55 to $60 per share in cash. The Family Dollar board decided to stay on its strategic path at the time, but inevitably the company was effectively in play. Just a few months later, William Ackman's Pershing Square's surfaced as holder of 6.9% (8.9% by the time it filed its 13G) of the Family Dollar stock and outlined the potential benefits of Family Dollar undertaking a leveraged recapitalization or selling itself.

Trian eventually withdrew its proposal and entered into a "standstill" in connection with an agreement by Family Dollar to add Edward Garden, a founding partner of Trian, to its board. Pershing Square exited quietly in late 2012. However, in mid-2014, Carl Icahn announced his stake and desire to serve as a catalyst for a sale by engaging directly in discussions with Dollar General. As described earlier in this article, Dollar General preferred company to company discussions and did not want to negotiate through Icahn.

While the trifecta of high profile activists that made their way into the Family Dollar stock is uncommon, activists have and will continue to play a significant role in transactions—whether in the role of the "opening bidder" as Trian initially played (transitioning to supportive shareholder with Trian signing a voting agreement to support the successful approval of the Dollar Tree transaction) or the vocal advocate for a M&A event that Pershing and Icahn played. We will also likely see activists continue to play various other roles from the noisy opposition in the Sprint/Clearwire transaction to the role of the jumper, most notably, with respect to Icahn's proposals in the Dynegy and Dell transactions.

A recent example of activist-as-deal-jumper is Icahn's bid to acquire The Pep Boys – Manny, Moe & Jack in lieu of Bridgestone Retail Operations, LLC, a suitor that had come calling with a cash tender offer of $15 per share, which demonstrates how activists occasionally move beyond their traditional role of instigating M&A events and act as principals in deal-jump transactions. On December 7, 2015, after Bridgestone had commenced a tender offer, Icahn Enterprises L.P., which took a 12.12% minority stake, proposed a negotiated transaction whereby Icahn would acquire all of the outstanding shares of common stock of Pep Boys for $15.50 per share in cash without any due diligence, financing or antitrust conditions and on the exact same terms as in the October 26, 2015 merger agreement that Pep Boys executed with Bridgestone, in addition to any reasonable further agreements that Pep Boys might require in order to provide greater certainty of closing. The proposal was followed by a proposed definitive merger agreement the following day reflecting the proposal and containing a "hell-or-high-water" antitrust covenant, pursuant to which the buyer parties would be required to agree to any divestiture or other remedy to secure any required regulatory approvals. (Pep Boys and Bridgestone had already received antitrust approval for the transaction with Bridgestone).

Over the course of the negotiations, while the Pep Boys board did not terminate the Bridgestone agreement, it went back and forth in its support for proposals on both sides. In response to the Icahn proposal, Bridgestone increased its offer price from $15 to $15.50 per share (which led to an amendment of the Bridgestone agreement), and Icahn came back with an offer to buy the Pep Boys shares at $16.50 per share and offered, in certain circumstances, to pay the $35 million termination fee payable to Bridgestone in connection with a termination of the Bridgestone agreement on behalf of Pep Boys. Bridgestone came back with a proposal that increased its offer price from $15.50 to $17 per share and the termination fee payable by Pep Boys in certain circumstances under the Bridgestone agreement from $35 million to $55 million, or from 3.7% to 5.8% of the proposed equity value. Icahn responded by agreeing to pay the greater of (a) $16.50 per share and (b) $0.10 more per share than any increased bona fide bid for Pep Boys offered by Bridgestone, up to a maximum of $18.10 per share, but not if Pep Boys agreed to any offer from Bridgestone that would result in Bridgestone being entitled to receive a termination fee that was in excess of the $35 million termination fee in the then-present Bridgestone agreement. Bridgestone withdrew its prior proposal and responded by proposing a deal for $17 in cash per share and a termination fee of $39.5 million, or 4.2% of the proposed equity value. Pep Boys accepted Bridgestone's proposal and amended their merger agreement, evidently deeming Icahn's creative $0.10 more per share offer not to be a superior proposal.

On December 28, 2015, Icahn proposed an increased offer price of $18.50 per share in cash and claimed that it could be willing to bid in excess of that price, but that it did not intend to bid any higher if Pep Boys agreed to any increase of Bridgestone's termination fee, over concerns that an increased termination fee would not be in the best interest of the shareholders and would prevent a "truly robust auction." Pep Boys board determined that the latest Icahn proposal constituted a superior proposal and delivered notice to Bridgestone. In response, Bridgestone announced that it did not intend to top Icahn's bid and provided wire transfer instructions to facilitate the payment of the $39.5 million termination fee, which Icahn paid on Pep Boys' behalf. On January 5, 2015, Icahn commenced the tender offer, and the acquisition closed on February 4, 2016.[32]

Related to the issue of obtaining shareholder approval for a transaction, the "fiduciary out" and "fiduciary" exceptions to the "no-shop" clause often fall away after the target's shareholders have approved the transaction at a shareholders' meeting. This aspect of the Qwest/U.S. West merger agreement proved to be the essential weakness in Deutsche Telecom's early 2000 attempt to woo Qwest away from U.S. West, because the Deutsche Telecom approach came after Qwest's shareholders had already approved the deal, and thus Qwest no longer had the benefit of a termination right relating to a better deal. After a flurry of dueling press releases and threatened litigation from U.S. West, Deutsche Telecom and Qwest halted their discussions, and the Qwest/U.S. West merger was consummated later in 2000. This is particularly relevant in transactions involving a highly regulated industry, such as telecommunications, where the shareholders' meetings can come well before the closing because of the need for time-consuming regulatory approvals. A few transactions, most notably the Frontier/Global Crossing merger agreement, have dealt with the issue of the time gap by providing that the shareholders' meetings would not be held until reasonably close to the time of the expected closing and receipt of regulatory approvals.

[32] Please refer to the publication entitled "Shareholder Activism in M&A Transactions," available on the Simpson Thacher & Bartlett LLP website (www.simpsonthacher.com) for more information on the rise of shareholder activism.

Moreover, in response to the flurry of hostile takeover activity of the 1980s, several states passed tight anti-takeover laws that allow boards to look beyond the highest bid and strictly shareholder interests to such concerns as what the board believes is best for all the constituencies of the company, including employees and communities. One such state was Pennsylvania, the forum for the CSX/Norfolk Southern fight for Conrail, and the target-favorable framework of Pennsylvania's statutory system clearly affected the tactics and outcome of that battle. Of course, legal duties notwithstanding, as illustrated by the Warner-Lambert /AHP deal discussed later, the target's board cannot ignore the fact that if its stockholders are voting on the original transaction or being asked to tender their shares, a firm second bid at substantially higher value is likely to trigger stockholder rejection of the first deal.

SunTrust's attempt to break up the friendly merger between Wachovia and First Union provides an interesting example of the various factors that may impact a hostile bidder's choice of tactics. Although SunTrust engaged in an aggressive proxy fight against the Wachovia/First Union deal, it refrained from launching a simultaneous exchange offer because North Carolina's control share acquisition statute would have subjected any such offer to a separate shareholder vote and, more importantly, would have given all other shareholders the right to put their shares to SunTrust even if SunTrust had prevailed in that shareholder vote. Furthermore, while SunTrust was willing to challenge Wachovia's directors in court by bringing litigation seeking to invalidate the First Union/Wachovia merger agreement and deal protection provisions, it was unwilling to bring this challenge directly to Wachovia's shareholders through a proxy fight to unseat Wachovia's board. Instead it relied upon an ultimately unsuccessful strategy whereby SunTrust would attempt to call a special meeting to elect SunTrust-friendly directors to Wachovia's board only if Wachovia's shareholders first agreed to vote against the First Union merger.

It is worth noting that 2014 saw two foreign deals with minimum "topping" requirements in order for a proposal to qualify as a "superior proposal" under the signed merger agreement, which proved to quickly drive up deal value in the event of an interloper. First, in connection with the May 2014 announced deal between Lexmark International Technology S.A. and ReadSoft AB, ReadSoft could not conduct negotiations with any third party regarding a competing offer (or otherwise support such offer) unless it constituted at least a 7% higher value for shareholders than Lexmark's offer (or Lexmark's subsequently revised offer). Hyland Software UK attempted (multiple times) to jump Lexmark's deal, driving the deal price from SEK 40.05 in cash per share of ReadSoft to SEK 57.00 in cash per share of ReadSoft, which Lexmark ultimately ending up paying to settle its tender offer on September 8, 2014. Second, in the October 20, 2014 merger agreement between SHV Holdings NV and Nutreco NV, Nutreco could only accept a competing offer from a third party if the offer exceeded SHV's deal price by at least 8%; while Cargill Inc. attempted to jump that deal, it ultimately pulled out of the process when SHV matched and then topped its offer, ending with a deal price €45.25 per share of Nutreco (as compared to an original deal price of €40.00).

## The Impact of the "Standstill" and Other Confidentiality Concerns

In many cases, a potential deal-jumper is an entity with which the target held unsuccessful discussions about a possible combination prior to announcing the original merger agreement. Previously, it was generally assumed that if such an entity had executed a customary confidentiality/"standstill" contract agreeing not to make any proposal to buy the target unless invited or approved in advance by the target's board, such entity would be blocked from deal-jumping by the provisions of the agreement. But in the Northrop/Grumman/Martin Marietta battle of early 1994, the danger of relying on such a "standstill" agreement after a deal is announced with another merger partner became clear. There, Grumman and Northrop had been talking for more than a year and seemed to be getting close to a common position when Grumman ended the discussions and announced a merger agreement with Martin Marietta at $55 in cash. Even though Northrop had signed a "standstill" agreement, Northrop launched an unsolicited competing tender at $60 in cash.

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Grumman made no serious attempt to enforce the "standstill" agreement, and when Martin Marietta demanded that Grumman do so, Grumman observed in publicly filed correspondence to Martin Marietta that in order to enforce the agreement it would need to show "how Grumman would be damaged," and somewhat sarcastically concluded: "We would welcome any thoughts you have on this subject."

Nevertheless, one must not assume this analysis will automatically be applied by targets (or courts), particularly in different factual circumstances. Both Martin Marietta's and Northrop's offers were all cash and had few contingencies. Under such circumstances, it is difficult to identify the damage caused by offering greater cash value for shareholders. On the other hand, when a target could allege and establish that the second bid was a threat (whether because the target was not for sale or the first deal did not trigger a "change of control," or because the second bid is structurally coercive or inadequate), and that bid loses, a court might recognize damages in the form of defense costs or other expenses stemming from the business disruption inherent in a takeover battle. Furthermore, if the initial merger partner is made an express third-party beneficiary of the other potential bidder's "standstill" agreement, that direct contractual right may allow the initial merger partner to enforce the agreement directly against the potential "deal-jumper," providing an end-run of the target's fiduciary duty obligations. See, for example, the Armor Holdings and Marsh Supermarkets discussions below. Of course, for that very reason the target will need to carefully consider whether it is appropriate to put the power to prevent a third-party rebid in the hands of an entity with very different incentives than the target's board, and the board could well be challenged in court as to whether such act was itself a violation of the board's fiduciary duty.

Similarly, in Metromail, American Business made a higher hostile cash offer (with substantial conditions) for Metromail, notwithstanding the confidentiality/ "standstill" agreement that it had executed earlier as a participant in the sale process of Metromail. Great Universal, the original merger partner, then made a counterclaim in the deal litigation to attempt to enforce the "standstill" provisions of the confidentiality agreement. However, the counterclaim never reached a decision. The Ontario Superior Court refused to enforce a "standstill" agreement in favor of IAMGold in connection with its efforts to fend off Golden Star. Golden Star had agreed to a "standstill" in connection with friendly discussions it had had with IAMGold a year prior to its hostile bid. The court adopted an expansive reading of an exception to the Golden Star/IAMGold "standstill" where the company had been put in play.

In 2009 the Ontario Superior Court granted an injunction prohibiting a hostile tender offer by Research in Motion for the shares of Certicom Corp. on the grounds that RIM, in using confidential information obtained from Certicom to "assess the desirability of a hostile take-over bid," had breached the non-disclosure agreements entered into by RIM and Certicom with respect to earlier negotiations for a friendly acquisition. The court's decision highlights the need to carefully consider the impact of confidentiality agreements since they can create backdoor "standstill" provisions, by prohibiting the use of confidential information in connection with an unsolicited bid.[33] The court's decision largely rested on its finding that the language of the "purposes" provision (i.e., that a recipient of information uses such information solely for specific

[33] In the same vein, in a May 4, 2012 decision of the Court of Chancery of the State of Delaware (which was later affirmed by the Delaware Supreme Court) concerning Martin Marietta Materials, Inc. v. Vulcan Materials Company, then-Chancellor Strine ruled that Martin Marietta violated its confidentiality agreement with Vulcan in connection with its hostile bid to acquire Vulcan. The crux of the case turned on whether Martin Marietta's use of information obtained from prior friendly discussions in his current hostile takeover attempt violated a prohibition in the parties' confidentiality agreement that such information could only be used for a business combination transaction between the parties. The court found that both Vulcan and Martin Marietta intended the agreement to be broad and that the language was meant to prevent a hostile transaction. Then-Chancellor Strine ordered an injunction similar to the one RIM faced. It is unclear to what extent this decision will have application in the deal-jumps context, as it was quite fact specific and this case did not include a company that had already signed a merger agreement and potentially taken on enhanced duties to consider alternatives. For further information on this case, please refer to the publication entitled "Delaware Chancery Court Delays Martin Marietta's Takeover Attempt of Vulcan Materials Due to Confidentiality Agreement Breaches" available on the Simpson Thacher & Bartlett LLP website (www.simpsonthacher.com).

purposes—often limited to a “negotiated” transaction), a customary provision to which practitioners may fail to pay close attention, restricted the use of the confidential information by RIM to negotiated transactions between RIM and Certicom; and, in the court’s view, a tender offer to the shareholders of Certicom was not a transaction between RIM and Certicom. This finding came despite the expiration of a specific “standstill” provision preventing unsolicited tender offers or bids.

However, as it turns out the court’s decision did not prove to be ultimately fatal to RIM’s attempts to acquire Certicom. Although Certicom agreed to be acquired by VeriSign Inc. four days after RIM was forced to withdraw its hostile offer, RIM returned two weeks later with an offer for Certicom that was 43% higher than the VeriSign bid. Following VeriSign’s decision not to exercise its matching right, Certicom exercised its “fiduciary out”, paid the break-up fee to VeriSign, and entered into a definitive agreement with RIM.

A slightly different twist on the impact of “standstill” provisions occurred in the Cole/Luxottica/Moulin contest. Luxottica won an auction to acquire Cole. As Cole’s largest shareholder, HAL Holding had a pre-existing “standstill” agreement that limited its ability to acquire more than 25% of Cole’s shares. According to Cole’s proxy, provisions of the “standstill” were waived to permit HAL Holding to participate in the auction (it failed to obtain financing commitments in time to satisfy the Cole special committee). When Moulin teamed up with HAL Holding after the announcement of the Cole/Luxottica deal, Moulin was forced to make its bid without a commitment from HAL Holding. Despite Cole’s statements to the contrary, HAL Holding claimed it was unable to make a binding commitment to support Moulin because it was restricted by portions of its “standstill” agreement with Cole.

In Southwest Gas/Oneok, as described in press reports, in order to have its unsolicited proposal reviewed by the Southwest Gas board, Southern Union executed an agreement with standard “standstill” provisions stipulating that Southern Union would not try to influence the Southwest Gas board’s decision through a shareholder vote or other means. When Southwest Gas rejected the higher Southern Union bid, Southern Union joined a lawsuit brought by Southwest Gas shareholders claiming that the Oneok bid was too low. Viewing this lawsuit as a violation of Southern Union’s agreement with Southwest Gas, Oneok sought and won an injunction prohibiting Southern Union from interfering with the Oneok/Southwest Gas merger. Although shareholders of Southwest Gas approved the merger with Oneok, the merger was ultimately abandoned because of regulatory delays and impediments.

In the NBC/Outlet situation, NBC had participated in an auction process prior to Outlet entering into a merger agreement with Renaissance but had not entered into any “standstill” agreement. Nevertheless, when NBC made a post-merger agreement higher bid for Outlet, Renaissance sued Outlet and NBC in Delaware state court seeking a temporary restraining order asserting, among other things, that Outlet’s failure to require NBC to sign a “standstill” agreement was improper and violated Renaissance’s understanding of the auction process, and that NBC’s bid constituted a tortious interference with contract (notwithstanding the presence of a “fiduciary out” in the Outlet/Renaissance merger agreement). Not surprisingly, the temporary restraining order was denied.

In Armor Holdings, Inc.’s successful $1.1 billion acquisition of Stewart & Stevenson Services Inc., Oshkosh Truck Corp. signed a confidentiality and “standstill” agreement with Stewart in order to bid in the auction for Stewart. After Armor submitted the winning bid, Oshkosh went to court to seek to enjoin enforcement of the “standstill” agreement by alleging that the auction process was unfair and claimed that it would make an offer topping Armor’s bid but for that agreement. It should be noted that the Armor/Stewart merger agreement provided that Stewart could not waive any material rights under any of its confidentiality agreements (such as the one with Oshkosh) without Armor’s consent. Therefore, Stewart was not in a position to allow Oshkosh to make the overbid even if Stewart were inclined to do so. Regarding Oshkosh’s claims, the Texas District Court declined to issue a preliminary injunction to delay Stewart’s special meeting of shareholders but agreed to a full hearing several weeks later (the utility of which was unclear unless shareholders voted down the merger).

Stewart's shareholders approved the merger with Armor during the special meeting, rendering the challenge to the "standstill" moot.

In a somewhat similar situation, Cardinal Paragon Inc. and private investment fund Drawbridge Special Opportunities Investors made an unsolicited higher bid for Marsh Supermarkets Inc., despite the "standstill"/confidentiality agreement that Cardinal executed in connection with its participation in the auction for Marsh. Sun Capital Partners Inc. won that auction and executed a merger agreement with Marsh that granted Sun a 21-day exclusivity period and obligated Marsh not to waive or fail to enforce any "standstill" agreements without Sun's consent. Cardinal and Drawbridge sought Marsh's consent under the "standstill" agreement to make an offer for Marsh, and Marsh requested Sun's consent. Finding Sun's terms for such a consent unacceptable, Marsh took the position that the merger agreement allowed the company to evaluate an offer from Cardinal and Drawbridge, and Marsh sought a declaratory judgment requesting clarification of the merger agreement. The Indiana Superior Court held that Marsh could not pursue the Cardinal and Drawbridge offer without Sun's consent, and the unsolicited bid was withdrawn shortly thereafter.[34]

This situation and the Armor/Stewart & Stevenson and Ventas transactions discussed above highlight the dangers of agreeing in a merger agreement through a "no waiver" or "agree to enforce" clause to contractually put the decision on enforcement of a "standstill" in the hands of the original merger partner, who does not have fiduciary duties to the target's shareholders (and has divergent interests to theirs), instead of leaving that decision in the hands of the target board. While there were complicated facts in the Ventas situation, the danger of a jury granting a large damage award against the second bidder clearly could have a chilling effect on the emergence of second bidders, unless it is clear under the original agreement (or under applicable law) that a target board would be able to rely on a "fiduciary out" to consider any second bid.

Even when the decision to enforce a "standstill" rests solely with the target's board, other considerations such as the defensive profile of the target may affect its willingness to enforce a "standstill" provision. For example, while Warner-Lambert was willing to claim that Pfizer had breached an existing "standstill" agreement entered into in connection with their "Lipitor" drug relationship and should therefore lose the huge benefits of the Lipitor agreement and be barred by the "standstill" from running a hostile consent solicitation to remove the Warner-Lambert board, Warner-Lambert was never willing to claim that Pfizer should be barred by the

[34] Similarly, in Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust, the Ontario Superior Court of Justice supported the strict performance of "standstill"/confidentiality agreements entered into as part of the auction process. On January 1, 2007, Sunrise Senior Living REIT agreed to sell itself to Ventas. As a participant in the prior auction, Health Care Property Investors (HCP) agreed to sign a "standstill"/confidentiality agreement that prohibited HCP from buying any securities or assets from Sunrise without its consent and from making or announcing any bid outside the auction process for a period of 18 months following the conclusion of the auction. As part of the Ventas acquisition agreement, Sunrise agreed to a non-solicitation clause that contained language prohibiting Sunrise from releasing any third party from a "standstill"/confidentiality agreement previously signed. As a result, when HCP announced a bid for Sunrise at a substantially higher price within the 18-month "standstill" period, Ventas "reminded" Sunrise that it was not allowed to release HCP from its "standstill"/confidentiality agreement pursuant to the non-solicitation clause. However, Sunrise considered the HCP offer claiming that the non-solicitation clause allowed Sunrise to entertain a higher bid if one appeared; nonetheless, Ventas sued the company claiming breach of their January agreement. The Court agreed with Ventas and held that the agreement required Sunrise to withhold its consent of HCP's offer and adhere to the "standstill." HCP was forced to abandon its offer. In 2009, Ventas sued HCP in federal district court in Kentucky for tortious interference with the Sunrise/Ventas agreement, claiming HCP employed "significantly wrongful means" to interfere with the existing agreement by bidding for Sunrise outside the auction process in violation of its "standstill" agreement and issuing a misleading press release offering Cdn$18 per unit, which greatly contributed to turnover in the existing unitholder base. As a result, Ventas claimed, it had to pay an additional Cdn$1.50 per unit over its previously agreed price to acquire Sunrise. The jury agreed and awarded Ventas $101 million in compensatory damages. HCP then requested that the federal district court grant HCP judgment as a matter of law or a new trial, but was denied. Subsequently, HCP appealed to the Sixth Circuit Court of Appeals, which affirmed the jury's award of compensatory damages and remanded the matter back to the district court on the single issue of punitive damages.

"standstill" from proceeding with its deal-jumping offer itself. It is generally assumed that this somewhat inconsistent position stemmed from Warner-Lambert's vulnerability to removal of their entire board by consent, which would be enhanced if the Warner-Lambert stockholders concluded that the board was flatly opposing the premium Pfizer bid.[35]

On the other hand, in the 2007 Topps decision, the Delaware Chancery Court challenged the use of a confidentiality/"standstill" agreement to thwart a higher proposal for the target. The Court recognized the need for these types of agreements in order to "protect" confidential information, promote an orderly auction and give the target certain leverage to extract tangible and intangible concessions from the bidder. However, the Court cautioned about the abuse of "standstill" agreements to "improperly favor one bidder over another." The Topps Company agreed to a take-private buyout by a group led by Michael Eisner. The merger agreement provided a 40-day "go-shop" period which resulted in the Upper Deck Company offering a "higher" proposal to acquire Topps. In order to conduct its due diligence during this "go-shop" period, Upper Deck signed a confidentiality/"standstill" agreement that prevented Upper Deck from acquiring or offering to acquire any of Topps's shares for a period of two years. The Topps board could waive the "standstill" in order to meet its fiduciary duties. The Court noted that reserving such a right was an "important thing to do" and found the agreement to be unproblematic, but questioned Topps's misuse of the agreement to block the higher offer that Upper Deck desired to make.

The Chancery Court held that the Topps board failed to negotiate in "good faith" with Upper Deck and unfairly dismissed Upper Deck's proposal. Consequently, Upper Deck asked Topps for a release from its "standstill" in order to initiate a tender offer and communicate directly with Topps's shareholders. Topps refused to release Upper Deck from the "standstill" or leverage the "standstill" to "extract" concessions from Upper Deck, and, in what appeared to inflame the Court, Topps made disparaging comments about Upper Deck's proposal in Topps's proxy materials but used the "standstill" to prevent Upper Deck from responding. The Chancery Court held that such actions by Topps's board and its prior failure to negotiate the proposal made by Upper Deck seemed "likely, after trial, to be found a breach of fiduciary duty." As a result, the Court enjoined a shareholder vote approving the merger between Topps and the private-equity group pending supplemental disclosure and the release of Upper Deck from the "standstill" in order to permit it to make a competing offer.

In the 2011 Transatlantic situation described earlier in this article, Validus's reluctance to enter into a confidentiality agreement with the two-year "standstill" being demanded by Transatlantic (albeit pursuant to its merger agreement with Allied World) allowed Validus to avoid Upper Deck's predicament of being bound to a "standstill" with a non-responsive target.[36] As a result, Validus continued its exchange offer while Transatlantic's merger with Allied World was still in effect, and then after it had been terminated. Interestingly, in entertaining bidders after the Allied World agreement was terminated, Transatlantic

[35] In 2011, in its attempt to acquire Transatlantic, Validus increased the pressure on the Transatlantic board by pursuing a consent solicitation to replace the board. Another interesting situation arose during the 2013 "merger of equals" transaction between Office Depot and Office Max. The 50/50 board was bolstered by a co-CEO structure pending the determination of a new potentially external CEO. Starboard Value Fund had been an activist in the stock of Office Depot before the announcement of the deal, and while they did not oppose the deal, they successfully ran a consent solicitation while the deal was pending to obtain representation on the pre-closing and post-closing board of directors of Office Depot.

[36] It should be noted that, prior to engaging in discussions with a potential suitor, Transatlantic had an obligation under its Allied World merger agreement to enter into a confidentiality agreement that was "substantially similar" to its confidentiality agreement with Allied World, and no less favorable to Transatlantic. While Validus argued that a confidentiality agreement with a "standstill" of less than two years could still be viewed as substantially similar, this may have been an uphill battle given that the length of the "standstill" is perhaps by its very nature one of the most important elements of any confidentiality agreement and is often heavily negotiated.

drastically cut the two-year "standstill" it had agreed to impose under its Allied World arrangement and settled on "standstill" periods of approximately 40 days.

"Standstills" received significant attention in 2012, with a particular focus on the impact of "don't ask, don't waive" provisions in two significant bench rulings evaluating the legality of the provisions (see footnote 29). In the Ancestry.com ruling, then-Chancellor Strine engaged in a lengthy discussion regarding the use of these provisions and their potential impact on an auction process. Although the decision rejected the notion that such provisions were per se invalid, then-Chancellor Strine observed they are a potent tool and stated that "when people use something that's potent and they say it's going to be a tool, you would actually like to see the tool employed..." One way to employ such a provision is to reinforce the auction gavel aspect of the provision to incentivize bidders to come forward with their highest bid within the process outlined by the target. There is certainly more to come on this issue as the plaintiffs' bar continues to focus on the use of "standstills" and the application of the "don't ask, don't waive" provision in each process. What is clear is that (i) the scope and terms of the "standstill" provisions contemplated in a sell-side confidentiality agreement should be discussed early in the process with the board, (ii) proxy disclosure will need to specifically address "standstills" and whether any bidders were restricted from making proposals and (iii) where the target is not contractually restricted from waiving the "don't ask" aspect of a "standstill" provision, the target board will need to consider granting the waiver to potentially open the door to other bids following the announcement of a transaction.

It should be also noted that even assuming a desire on the part of the target to actively consider the second bid, the board will have to pay careful attention to the original merger agreement so as not to breach its terms (e.g., so-called "no-shop" restrictions or change of recommendation limitations or prior notice provisions). Even if there would be no breach, it is important to carefully evaluate, and probably avoid, any action that might permit the initial bidder to terminate the merger agreement and/or collect a break-up fee before the target has executed a replacement merger agreement with the second bidder. If the original bidder is no longer bound, either it and/or the second bidder might ultimately fall through or pay less, and few targets would want to be in a position to pay a break-up fee in the absence of a binding second deal.[37] For example, Microsemi Corporation's successful deal-jump of Skyworks Solutions, Inc.'s acquisition of PMC-Sierra, Inc., came after the board of PMC-Sierra ran an auction for over a year, during which time the "standstill" agreed to by Microsemi had expired and it was able to jump back in with a topping bid. During the course of negotiation between Microsemi and PMC-Sierra, Skyworks questioned on multiple occasions whether PMC-Sierra's interactions with Microsemi were consistent with PMC-Sierra's "no-shop" commitments under the original merger agreement, although Skyworks never attempted to terminate the agreement. Recent deals have showcased targets affirmatively stating that they were not "changing their recommendation," or affirmatively reaffirming the original recommendation, within the terms of the merger agreement to avoid triggering termination rights of the current counterparty. For example, Courier Corporation, in initially confirming its receipt of R.R. Donnelley's unsolicited proposal, stated that it was not changing its recommendation in support of its already-pending merger with Quad/Graphics and, the next day, simultaneously announced that R.R. Donnelley's proposal was reasonably likely to result in a superior proposal but that it had not determined that R.R. Donnelley's proposal in fact constituted a superior proposal and reaffirmed its recommendation in support of the Quad/Graphics merger. Similarly, Hillshire simultaneously announced that it was not withdrawing, modifying or qualifying its recommendation with respect to the Pinnacle merger when it reported that it was entering into discussions with Tyson and Pilgrim's Pride concerning their competing

[37] The early 2003 short-lived situation involving Hoover's Inc. is a good reminder of this lesson. There, Hoover's had signed a merger agreement to be acquired by D&B Corp. for $7 per share. Shortly thereafter, a disgruntled shareholder, Marathon Partners, organized a competing bid with Austin Ventures to buy Hoover's for $8 per share. When D&B Corp. indicated that it would not raise its bid, Hoover's Inc. was not yet in a position to close the deal with the interloper, and Marathon Partners and Austin Ventures subsequently withdrew their bid. This sequence highlights the fact that a company should never give up "a bird in the hand" before first assuring that it will be able to close the deal with the interloper, though recently some shareholders have shown a willingness, in deals such as Dollar Thrifty and Dynegy, to opt for the "two(?) in the bush" approach.

offers. Given the Delaware case law arising in the Paramount battle, all the players must also evaluate carefully whether the specific provisions in the original merger agreement will be enforced by a court under the facts of the particular battle.[38]

The threshold judgment that the target's board usually has to make is whether the initial merger agreement permits it to engage in discussions or negotiations with, or to provide information to, a competing "deal-jumping" bidder. This analysis will typically derive from the wording of the so-called "fiduciary exceptions" to the "no-shop" restrictions contained in the merger agreement. As discussed in the following paragraphs and under the heading entitled "Working With No-Shop Covenants," depending upon the terms of the original merger agreement and the circumstances of the overbid, the appropriate analysis and reactions will vary. An important follow-on issue that arises upon a judgment that discussions can begin and/or information can be provided to the deal-jumper is, of course, under what confidentiality and/or "standstill" restrictions those actions take place. Assuming that the deal-jumper is not a party with a pre-existing confidentiality agreement (as discussed above), the bidder must make a critical decision whether it is willing to become subject to customary confidentiality and (of more concern) "standstill" restrictions as the cost of beginning discussions and due diligence. Similarly, few targets wish to expose themselves to due diligence scrutiny and strategic discussions with a party who has not agreed to act confidentially and disavow "hostile" behavior.

The debate on these issues between a target and an unsolicited bidder is always difficult, and one cannot readily identify a consistent pattern of how such debates have historically been resolved. This is true whether or not the context is a pure hostile attack of an independent company or an unsolicited attempt to deal-jump an existing merger agreement. In the context of a deal-jumper situation, the debate is sometimes answered by the terms of the existing merger agreement. One common pre-condition in the fiduciary exceptions to the "no-shop" clause is that information will only be provided pursuant to a confidentiality agreement. There are, however, variations ranging from an explicit requirement that the confidentiality agreement with the competing bidder contain identical terms to the initial merger party's confidentiality agreement (which in most friendly deals would have "standstill" provisions) to more flexible provisions requiring customary confidentiality terms, but not mandating the receipt of "standstill" provisions from the competing bidder. The latter formulation is a negotiated result demanded by some targets who do not wish to be foreclosed from providing information to a later higher bidder who refuses to accept "standstill" provisions. Of course, formulations flatly mandating the form of the confidentiality/"standstill" agreement make the debate easy—the competing bidder agrees or else gets no information as a matter of contract. The greater the flexibility for the target in the original merger agreement, the more open is the door for a broader debate with the second bidder as to the appropriate level of restrictions, and the context and circumstances of the original merger agreement can be relevant to the outcome of this debate.[39]

[38] Of course, the late 2007/early 2008 spate of busted transactions, particularly in the private equity area, highlights the need for careful drafting to avoid potentially providing the bidder with an opportunity to walk from the deal or invoke a purported condition. In the volatile economic environment existing during this period, contracts have been scoured for ambiguities to take advantage of, and even such previously "boilerplate" concepts as "reasonable best efforts" have become the subject of heated litigation (such as in the Blackstone/Alliance Data transaction).

[39] This debate created a great deal of to and fro in the late 2007/early 2008 attempted deal-jump by Sears Holding Corp. of the sale of Restoration Hardware to Catterton Partners. Some of the early press related to the deal-jump revolved around the dance between Sears and Restoration over what "standstill" would be in its confidentiality agreement governing Sears's access to diligence during the "go-shop" period. Given its view that it had been shut out of the process, Sears wanted (and ultimately got a modified version of) an unusual "superior tender offer" exception to the "standstill." ISS even issued an Edge Note on December 6, 2007 discussing the situation and declaring that while they are "agnostic" about "go-shops" and can see that "standstills" can serve a very positive purpose as a tool for a board managing a process to obtain the best value, where the original merger partners leave open the door for debate, by not contractually limiting the permitted terms of the deal-jumper's confidentiality/"standstill", such a "higher offer" exception might have "little downside" in that particular case.

For example, in a strategic merger such as the agreement between Frontier and Global Crossing, the level of commitment to the transaction led Frontier to be insistent that if Qwest wished to discuss its overbid, it had to do so in the context of quite restrictive “standstill” provisions, particularly because the original Frontier/Global Crossing merger agreement provided that if Frontier entered into a confidentiality agreement with lesser “standstill” provisions than that in the Frontier/Global Crossing confidentiality agreement, then Global Crossing would be correspondingly relieved of its “standstill” obligations. Under these circumstances, Frontier and Qwest ultimately entered into a confidentiality/“standstill” agreement which among other things restricted Qwest’s ability to acquire shares, engage in a proxy fight or make tender or other offers to Frontier or its shareholders, with the one exception that if Frontier was a party to a merger agreement with someone else, Qwest could deliver a letter to the board of Frontier making a proposal which constituted a “Superior Proposal” under the merger agreement, and publicly disclose such letter in a manner that would not constitute a solicitation against the original merger.[40]

In the Data Domain/NetApp situation, a restrictive “standstill” that required any third party bidder to enter into a “standstill” that would only be inapplicable if NetApp’s agreement was terminated, almost cost Data Domain’s shareholders real value. When EMC attempted to jump the deal by offering $30 per share in cash (as compared to NetApp’s $30 cash and stock offer), it refused to enter into the confidentiality agreement and “standstill” while emphasizing that its offer was not contingent on receiving or reviewing any information from NetApp. After receiving FTC approval for a potential combination between EMC and Data Domain, EMC then increased its offer to $33.50 per share in cash and offered a merger agreement that did not contain any break-up fee or other deal protection provisions. With EMC’s higher offer and expectation of closing within two weeks of any signed merger agreement, Data Domain ultimately relented, terminating its agreement with NetApp and accepting EMC’s offer.

The IKOS/Synopsys/Mentor fight provides an example of a merger agreement with an extremely restrictive “no-shop” clause. Under the agreement, IKOS could not utilize its “fiduciary out” to discuss Mentor’s overbid until Mentor signed a confidentiality agreement containing a two-year “standstill” clause and a two-year non-solicitation covenant. Even though the IKOS board deemed Mentor’s all-cash tender offer to be “financially superior” to Synopsys’s complicated floating exchange ratio bid, IKOS initially rejected Mentor’s bid because Mentor refused to sign the stringent confidentiality agreement. However, Mentor responded to the restrictive “no-shop” clause on January 16, 2003 by delivering an executed merger agreement to IKOS for its signature. Mentor believed that this action would permit IKOS to consider its bid without violating the IKOS/Synopsys “no-shop” clause because Mentor was not requesting any confidential information or entering into preliminary negotiations or discussions regarding the Mentor merger agreement. Nevertheless, IKOS once

[40] The 2008 merger agreement between Constellation Energy Group, Inc. and Mid-America Energy Holdings Company provides yet another illustration of the lawyer’s favorite cautionary tale—words matter—when drafting such “no-shop” provisions. In the Constellation/Mid-America agreement, the exception to the non-solicitation provision allowed Constellation to engage in discussions or share confidential information with a third-party with respect to an alternative proposal only if, in addition to other conditions, the alternative proposal “constitutes, or is reasonably likely to result in, a Superior Proposal.” As is fairly customary, the term “Superior Proposal” was defined to mean a proposal or offer relating to an acquisition of 50% or more of the net revenues, net income, assets or equity of Constellation. However, in this transaction the alternative proposal submitted by Électricité de France International, SA (EDFI), the ultimately successful deal-jumper, was limited to the purchase of a 49.9% interest in a joint venture involving Constellation’s five nuclear reactors. Thus, it was not clear that EDFI’s proposal constituted a “Superior Proposal” under the terms of the original merger agreement, therefore, Constellation could have been prevented from having any discussions with EDFI to further consider its superior proposal. In the end, Mid-America agreed to step aside (in exchange for an extraordinarily handsome sum of cash and equity), so we will never know whether a challenge on these facts would have had sufficient merit. Regardless, this non-solicitation provision is an instructive example of a restriction (whether intended or unintended) on the ability of a target’s board to consider a proposal that is superior in all respects simply because the structure of the proposal proved to be more innovative than the drafting of the provision. Another recent deal with an interesting aspect to its “Superior Proposal” definition, and reflecting the current economic and credit conditions, is the January 2009 acquisition of Wyeth by Pfizer, where the presence of “seller financing” in a competing proposal (i.e., whereby Wyeth’s shareholders might be issued debt instruments as part of a competing proposal) is deemed not to create an inference that the competing proposal is not “Superior.”

again rejected the Mentor bid because it contained several provisions that made the bid highly conditional in nature. Despite the initial IKOS rejections, Mentor continued its pursuit, calling for a special IKOS stockholders' meeting with the goal of replacing IKOS's board of directors with directors nominated by Mentor's subsidiary, Fresno Corporation. However, prior the stockholders' meeting, Mentor waived a key condition tying its January 16th bid to the lack of declines in certain market indices, and IKOS stated that, as a result of such waiver, the Mentor proposal now constituted a "superior proposal" as defined in the merger agreement with Synopsys. Pursuant to such merger agreement, IKOS informed Synopsys of its determination to proceed with the proposed merger with Mentor, absent receipt within five business days of a superior bid from Synopsys. In light of such developments and the receipt of a $5.5 million termination fee, Synopsys opted to avoid a bidding war and allow Mentor to proceed with the merger.

By contrast, in the IBP deal, IBP's original merger agreement with DLJ was an LBO agreement involving management and other affiliates of the company. As a result, and because the negotiations on behalf of IBP were handled by a special committee of independent board members, the merger agreement provided significant flexibility to IBP to receive and address competing bids, and the only requirement with respect to the confidentiality letter to be entered into with a competing bidder was that it be "deemed appropriate by the Special Committee." Given that context, along with the fact that IBP had been criticized for entering into the original LBO agreement without the solicitation of other bids at a price level deemed low by many analysts and shareholders, the IBP/Smithfield confidentiality letter (and later the IBP/Tyson confidentiality letter) entered into after their respective overbids contained very few "standstill" provisions. Those agreements contained only a four-month restricted period, and during that period essentially permitted substantially all acquisitions, bids or other actions, so long as they were made in connection with a proposal by the bidder for the acquisition of all the outstanding shares of common stock of IBP.

Paramount, Grumman, Reliance, Conrail, National Education, the 1997 MCI transaction, Sports Authority, U.S. West, Newport News, HotJobs and Cole, among others, had merger agreement provisions that constrained the board and clearly affected the dynamic of the bid process. In Paramount, the board determined not to pursue the QVC bids for various reasons, including the highly conditional nature of the QVC bids (including lack of committed financing) and the restrictive terms of its merger agreement with Viacom, until the Delaware court enjoined the application of all the elements of the Viacom merger agreement that constrained Paramount's consideration of the QVC bid and ordered the Paramount board to adopt fair procedures to consider both bids. Similarly, financing commitment problems plagued Moulin's attempt to replace Luxottica as Cole's merger partner but succeeded in driving up the price Luxottica ultimately paid in its cash-for-stock deal with Cole.

In Conrail, the board had resisted earlier overtures from Norfolk Southern about a possible combination and continued to reaffirm its approval of the CSX deal (albeit at raised prices) and to reject Norfolk Southern's bids despite Norfolk Southern's higher all-cash-for-all-stock bids (as compared to CSX's front-end cash, back-end stock bids). In addition to comparing the effects on Conrail's other constituencies permitted by the protective Pennsylvania state anti-takeover laws, the board relied on an unusual "lock-out" provision in the merger agreement with CSX to justify its rejection of the Norfolk Southern bids. The provision prevented Conrail (along with CSX) from amending its approval or recommendation of the CSX/Conrail merger agreement, or recommending or entering into an agreement with respect to a competing bid, for a "lock-out" period of two years after the date of the original merger agreement, notwithstanding the earlier termination of the merger agreement (in the original merger agreement, the "lock-out" period was six months, but as CSX twice raised its bid to respond to Norfolk Southern's higher bids, CSX demanded a nine-month period, and ultimately a two-year period, as deal protections). While the "lock-out" provision was upheld by the Pennsylvania courts, most commentators have suggested that in a jurisdiction like Delaware, such a provision could well be rejected by the courts.

## Working with No-Shop Covenants

In the 1997 MCI transaction, the MCI/BT merger agreement, which had been negotiated as a strategic combination, contained a tight "no-shop" covenant for both parties that required the MCI board to conclude, prior to providing any information to, or engaging in discussions or negotiations with, any competing bidder such as WorldCom or GTE, that the unsolicited proposals made by either such party would, if consummated, result in a transaction more favorable to MCI's stockholders from a financial and strategic point of view than the MCI/BT merger. To the extent its board reached such a superior proposal conclusion, MCI was permitted to provide information to, or discuss or negotiate with, WorldCom or GTE only if the MCI board then determined in good faith after consultation with legal counsel that such action was necessary for the board to comply with its fiduciary duties. Following receipt of the unsolicited WorldCom and GTE proposals, the MCI board was able to negotiate a waiver from BT that enabled MCI to receive information from, and engage in discussions with, WorldCom and GTE concerning their respective offers without satisfying the superior proposal and fiduciary duty elements of the "no-shop" covenant. The waiver was reciprocal in that it also permitted BT to enter into discussions and receive information regarding the WorldCom and GTE proposals, which actions were otherwise prohibited by the "no-shop" covenant. Relying on a waiver as opposed to attempting to satisfy the superior proposal element of the "no-shop" covenant enabled MCI to avoid the potential argument that by reaching a superior proposal conclusion the MCI board could have been deemed to have effectively withdrawn its recommendation of the MCI/BT merger, thereby permitting BT to terminate the merger agreement and collect a very substantial break-up fee. In addition, as discussed at the end of this article, BT had greater than typical contractual rights with respect to approval of MCI business combinations, stemming from its earlier purchase of 20% of MCI in 1994.

Similarly, the board of Sports Authority was constrained by a tight "no-shop" provision that required the board to determine that the Gart Sports bid was more favorable to Sports Authority shareholders than the prior agreement with Venator before commencing discussions with Gart Sports. However, unlike MCI, the Sports Authority board was only able to negotiate a limited waiver from Venator and, consequently, was only able to provide certain permitted information to and to conduct limited discussions with Gart Sports concerning its unsolicited offer.

In the Frontier/U.S. West/Global Crossing/Qwest battle, the respective merger agreements contained two different approaches to the "no-shop" covenant. The Global Crossing/U.S. West merger agreement, similar to that in the 1997 MCI transaction and Sports Authority, contained a "no-shop" covenant that required the U.S. West board to make the good faith determination that the Qwest bid was a superior proposal before providing information to and engaging in discussions with Qwest. On the other hand, the Global Crossing/Frontier merger agreement allowed the Frontier board to engage in discussions with Qwest if the board determined simply that the Qwest bid "could reasonably be expected to constitute a Superior Proposal."

When Qwest raised its initial unsolicited bid for U.S. West, the U.S. West board had to negotiate a waiver from Global Crossing in order to open discussions with Qwest. To the contrary, after Qwest's revised bid, Frontier's board directed its advisors and management to provide information to and to engage in discussions with Qwest without seeking a waiver from Global Crossing because the board was able to make the determination that the Qwest proposal could reasonably be expected to constitute a superior proposal, without the need to make the more troublesome and definitive conclusion that the Qwest bid was in fact superior to the Global Crossing bid. Furthermore, in its press release announcing its response to the raised Qwest bid, Frontier took great pains to show support for the prior deal with Global Crossing, stating that the "merger agreement between Frontier and Global Crossing remains in full force and effect" and that the board's decision to begin discussions with Qwest "in no way reflects a change in the Frontier board's current approval and recommendation of the Global Crossing merger agreement."

The “no-shop” provision in the General Dynamics/Newport News merger agreement was similar to the one found in the Frontier/Global Crossing agreement. In both situations the board could negotiate with unsolicited bidders if a superior proposal was “reasonably likely to occur.” Yet unlike Frontier’s decision to negotiate with Qwest, the Newport board chose to defer negotiations with Northrop Grumman pending the outcome of the regulatory review by the Departments of Defense and Justice with regard to these competing offers. The terrorist attacks of September 11th, which occurred during this period of delay, raised the value of Northrop’s stock, thus adding value to its cash-stock bid. Ultimately, the Pentagon supported Northrop’s deal-jump, and the Department of Justice filed suit to block the General Dynamics’s agreement. The boards of Newport and General Dynamics mutually agreed to terminate their agreement, thereby permitting Newport to accept the superior proposal without the need to forfeit the $50 million break-up fee.

The TMP/HotJobs merger agreement contained a similar “no-shop” provision, yet, unlike the Newport News situation, the HotJobs board chose to conclude that the unsolicited Yahoo! offer, which came while the TMP agreement was under FTC review, was a “superior proposal.” Rather than wait for FTC denial as a potential exit strategy, the HotJobs board negotiated a merger agreement with Yahoo! and paid TMP the resulting $17 million break-up fee.

The UPM-Kymmene/Champion merger agreement gave Champion an even greater measure of flexibility by permitting exceptions for providing information and having discussions under the “no-shop” clause if the board of directors of Champion concluded that in response to a competing takeover proposal, taking such actions could be reasonably likely to lead to delivery to it of a “Superior Proposal” (as opposed to having to conclude that the competing proposal itself would reasonably be expected to constitute a “Superior Proposal”). The “no-shop” provision in the Flag/Reliance amalgamation agreement contained a similar prospective exception. Despite the fact that its largest shareholder had already approved the deal with Reliance, Flag was willing to engage in talks with Pivotal because its board concluded that Pivotal’s bid of $220 million (compared to the $207 million agreement with Reliance) “could reasonably be expected to lead to” a superior proposal.[41] In response, Reliance increased its offer to $211 million, with a $1 million payout to Flag’s largest shareholder, and Pivotal withdrew. A last-minute $240 million offer from an undisclosed third party, which was subject to negotiation of a contract and confirmatory due diligence, was rejected by the Flag board because, according to a press release issued by Flag, the board had determined, after consulting with its attorneys and financial advisor, that the offer “did not constitute an offer or proposal that could reasonably be expected to lead to a Superior Proposal”; Reliance therefore clinched the deal. Similarly, the original IBP/DLJ LBO merger agreement set the standard comprising the “fiduciary exception” to the “no-shop”/”no-talk” clause as the determination that the competing offer “is reasonably likely to result” in a “Superior Proposal” (as defined in the merger agreement), a standard which made it quite easy for the IBP Special Committee to promptly determine that they could discuss and provide information in response to the Smithfield $25.00 offer. The original Cima and aaiPharma merger agreement contained a similar flexible “no-shop” clause. Although Cephalon’s competing bid was valued at virtually the same price and thus did not constitute a “superior proposal,” Cima’s board was able to conclude that the bid “would reasonably be expected to result” in a superior proposal when Cephalon altered the terms of its proposal to include a cash component. After Cima exercised its fiduciary termination right and paid aaiPharma an $11.5 million break-up fee, Cephalon was able to walk away with Cima. In 2014, the Family Dollar board focused extensively on the antitrust risk inherent in the Dollar General offer as the basis for not being permitted under the “no-shop” to engage in discussions with respect to the offer. Dollar Tree, the original merger partner, was carefully watching the

[41] Interestingly, although the amalgamation agreement had a “result in” standard, the press release announcing the board’s determination stated that it had “determined that the communications from Pivotal constituted an offer or proposal that could reasonably be expected to lead to a Superior Proposal.” (emphasis added). While it is somewhat odd to see the announcement not mirror the applicable words in the contract, there is probably little, if any, substantive difference between the formulations versus the “constitute” or “be” standard.

process and was not shy in reminding the Family Dollar board of the "is reasonably likely to be completed on the terms proposed" prong of the analysis throughout the process.

In the 2012 example of flexibility in response to unsolicited bids, the "no-shop" provision in the Great Wolf Resorts/Apollo Management, L.P. merger agreement allowed the Great Wolf board to participate in discussions regarding an unsolicited bona fide written takeover proposal in order to clarify the terms of such proposal prior to making any determination as to whether the proposal constituted a superior proposal or would reasonably be expected to lead to a superior proposal.[42] The flexibility of these provisions was tested when KSL Capital Partners Management III, LLC made an unsolicited proposal to acquire all of the outstanding shares of Great Wolf for $6.25 per share in cash—a $1.25 premium over Apollo's agreed upon consideration. Apollo was able to exercise its match rights, which allowed Apollo to offer a transaction that was "no less favorable to the stockholders" than the superior proposal. Apollo and Great Wolf amended the merger agreement to include a consideration of $6.75 per share, and Apollo also negotiated an increased termination fee of $6.7 million (with up to $2.3 million of reimbursed expenses), up from a $5.3 million fee (with up to $1.7 million of reimbursed expenses). KSL persisted in the face of the Apollo amendment and bid $7.00 per share one day later, which the board determined was a superior proposal. Apollo again exercised its match rights and within three days executed a second amendment to the merger agreement with Great Wolf—matching the $7.00 share price and slightly increasing the termination fee. Third time was not a charm for KSL, when it responded with an offer of $7.25 per share, another superior proposal, which Apollo quickly exceeded. Apollo and Great Wolf executed a third and final amendment providing for a $7.85 per share purchase price and a $7.792 million termination fee (with up to $2.675 million of reimbursed expenses). KSL exited the ring, announcing that it did not intend to submit any further proposals. Apollo completed the acquisition in May 2012.

The Clayton Homes/Berkshire Hathaway merger agreement prohibited Clayton Homes from soliciting other offers but did permit the board to accept offers from third parties it considered to be superior during a 37-day window upon payment of a $35 million break-up fee. More than two months after the close of this window and only days before the scheduled shareholder vote on the merger, Cerberus announced its interest in acquiring the troubled Clayton Homes. Six days later, at the Clayton Homes shareholders meeting, the shareholders voted to adjourn the meeting for two weeks following requests from several large institutional shareholders. In connection with the adjournment, the merger agreement was amended to pay Berkshire Hathaway $5 million to alter the terms of the "no-shop" provision to allow other potential suitors to conduct due diligence and engage in discussions with Clayton Homes during the two-week period. Heavyweight private equity firms (Blackstone, Texas Pacific Group and CSFB's private equity arm) descended on Tennessee to review the company, but, in the end, none made overtures, and even Cerberus failed to make a formal offer (perhaps labeling this event nothing more than a "deal-hop," not a deal-jump!). Despite shareholder grumblings, Berkshire Hathaway obtained the requisite shareholder vote by a slim margin—52.4% of the votes cast approved the merger, including the 28% block held by the Clayton family.

## The "Go-Shop"

The natural extension to the negotiated "no-shop" exceptions under appropriate extenuating circumstances are provisions permitting active solicitation entirely, usually for a limited period of time. Historically, these types of provisions had arisen sparingly and generally only in special circumstances—such as where an insider or a fiduciary/board member is the buyer (e.g. the National Gypsum acquisition by its non-executive chairman in 1991; the original acquisition agreement for Chalone Wine Group by DBR, its 49% holder; or Carl Icahn's attempted acquisition of Lear Corp.)—or where a deal had gotten renegotiated downward after signing (such as Leonard Green's second and lower deal to acquire Hollywood Entertainment, which did not have any

[42] In contrast to the permissive nature of the exceptions to the "no-shop" provision, the Great Wolf/Apollo merger agreement included a requirement that Great Wolf implement a poison pill.

"no-shop" restriction). Then, beginning with the Ripplewood agreement to buy Maytag in 2005 discussed earlier in this article, limited windows (30 to 50 days or so) of permitted active solicitation began to appear in some unshopped (and unleaked) LBO transactions (and even an occasional shopped or leaked one), particularly those that were truly founder- or management-led. They even gave rise to a relatively new piece of M&A jargon—the "go-shop" clause.[43] Some of the more notable LBO deals containing a "go-shop" include Solera Holdings, Inc.'s acquisition by Vista Equity Partners, LLC and other investors (28 days), Siris Capital Group, LLC's acquisition of Premiere Global Services, Inc. (45 days), Lone Star Funds's acquisition of Home Properties, Inc. (30 days), Apollo Global Management, LLC's acquisition of OM Group, Inc. (35 days), The Blackstone Group L.P.'s acquisition of Excel Trust, Inc. (31 days), the management-led buyout of SFX Entertainment, Inc. (59 days), Vector Capital's acquisition of ChyronHego Corp. (50 days), Siris Capital's successful acquisition of Digital River, Inc. (45 days), the management-led buyout of Pike Corporation (31 days), Apollo's successful acquisition of CEC Entertainment, Inc. (14 days), the successful acquisition of Material Sciences Corporation by Insight Equity (35 days), Kohlberg & Co.'s ultimately unsuccessful acquisition of Steinway (45 days), Apax Partners Worldwide LLP's acquisition of rue21, Inc. (40 days), the management-led buyout of Dole Food Company, Inc. (30 days), the acquisition of TMS International Corp. by The Pritzker Group (35 days), the founder-led LBO acquisitions of HCA by an investor group including KKR and the Frist family (50 days), Kerzner International by an investor group including KKR and the Kerzner family (45 days), Laureate Education by an investor group including KKR and the founder and CEO of Laureate (45 days), and Dell Inc. by an investor group including Michael S. Dell (Dell's chairman and CEO) and Silver Lake Partners (45 days), and the non-founder LBOs of CKE Restaurants by Apollo (40 days), TXU by KKR (51 days), Realogy by Apollo (61 days), Clear Channel by T.H. Lee and Bain (21 days), Freescale Semiconductor by Blackstone (50 days), Harrah's by Apollo and TPG (25 days), First Data by KKR (50 days), United Rentals by Cerberus (40 days) and Harman International by KKR and Goldman Sachs (50 days).

Historically, "go-shops" generally have not been a feature in strategic non-LBO deals except where, as discussed above, special conflict considerations might exist and, on occasion, when a pre-existing transaction has been "re-cut" downward and, in response, the target's board demands an affirmative market-check period. In part this arises from the need for extra protection that courts want to see in the potentially conflicted LBO deals that have not been auctioned, and in part this arises from the very real differences that exist in the nature of a strategic buyer from an LBO buyer, where the former has a real integration job to perform post-announcement and risks to its own business arising from the announcement that are antithetical to a deal structured where the signing is just the beginning of an active solicitation of a potential other bid. However, that dynamic may be changing. In 2009, Peet's attempted strategic non-LBO acquisition of Diedrich contained a 20-day "go-shop" provision (as further described in this article). In 2011, 2012, 2013, 2014 and 2015, respectively, there were at least eight, 14, 15, eight and 15 strategic non-LBO acquisitions (and none, so far, in 2016) that contained "go-shops," with two of the 2010 deals, one of the 2012 deals, one of the 2013 deals and none of the 2014 or 2015 deals becoming deal-jump situations.[44] The two that turned into

[43] The "go-shop" art form has now even risen to a level where there has to be a debate over how other deal protections interrelate with the "go-shop." For example, should there be a two-tiered break-up fee and should there be stapled financing made available during the "go-shop" period to induce buyers to show up? Should the bidder have a "matching right" in a deal stimulated by the "go-shop" or does that chill the bidding too much? Taking the latter view, some "go-shop" deals have eliminated the matching right or only allowed it to spring into existence after the "go-shop" period. However, Charlesbank was able to obtain a matching right in its merger agreement with DEI Holdings, which Charlesbank ultimately exercised after Gibson Guitar came in with a higher bid right before the 35-day "go-shop" period expired.

[44] These transactions included, in 2010, Nicor/AGL Resources, Hewitt Associates/Aon Corporation, Odyssey Healthcare/Gentiva Health Services, Sandridge Energy/Arena Resources, Inergy L.P./Inergy Holdings L.P., Otix Global/William Demant Holding A/S, and Henry Bros. Electronics/Kratos Defense & Security Solutions; in 2011, Valitás Health Services, Inc./America Services Group Inc., Tomy Company, Ltd./RC2 Corporation, eBay Inc./GSI Commerce, Inc., Rightmark Holdings Limited/China Security & Surveillance Technology, Inc., Perfumania Holdings, Inc./Parlux Fragrances, Inc., CryoLife, Inc./Cardiogenesis Corporation, API Technologies Corp./Spectrum Control, Inc., and Coleman Cable, Inc./Technology Research Corporation; in 2012, Randa Accessories Leather Goods LLC/Swank,

deal-jump situations in 2010 were the acquisition of Otix Global by rival William Demant Holding A/S, which included a 20-day “go-shop” period, and Kratos Defense & Security Solutions’s acquisition of Henry Bros. Electronics, which had a 40-day “go-shop” period, the one that turned into a deal-jump situation in 2012 was the thwarted acquisition of Versant Corporation by UNICOM Systems, Inc., which had a 32-day “go-shop” period, and the deal that was jumped in 2013 was Banner Corporation’s unsuccessful attempt to acquire Home Federal Bancorp., Inc., which included a 30-day “go-shop” period. It is worth noting that (as described above) the 2012 merger agreement between Dollar Thrifty and Hertz contained a “go-shop” provision despite the fact that the Dollar Thrifty deal had been heavily shopped prior to signing the second deal and that the parties’ former deal was the victim of a deal-jumping scenario that ended with Dollar Thrifty shareholders voting down Hertz’s proposal in a “naked” vote-down. However, Hertz was able to seal the deal in November 2012, closing the Dollar Thrifty acquisition without any interlopers looking to enter the ring during the “go-shop” period or afterwards. Given the slow increase in recent years in successful deal-jumps arising out of the “go-shop” process (as described below) and the apparent increase in strategic “go-shops,” notwithstanding the many issues that exist with them, we will likely continue to see “go-shops” featured in certain future transactions, LBO and non-LBO alike.

Although the historical wisdom has been that “go-shops,” for all the flurry of activity that comes with the solicitation, rarely result in new deals, in recent years we are finally seeing a few successful deal-jumps arising out of the “go-shop” process. These successfully completed acquisitions by a “go-shop” deal-jumper include: Paulson’s acquisition of Steinway (after Steinway signed a merger agreement with Kohlberg & Co., which provided a 45-day “go-shop”); Cascade Bancorp’s successful attempt to lure Home Federal Bancorp away from Banner Corporation (prior agreement with Banner Corporation included a 30-day “go-shop” period); Actian’s acquisition of Versant (prior agreement with UNICOM included a 32-day “go-shop” period); Apollo Management’s acquisition of CKE Restaurants (prior agreement with Thomas H. Lee Partners included a 40-day “go-shop” period); TransForce’s acquisition of Dynamex (prior agreement with Greenbriar included a 40-day “go-shop” period); Merge Healthcare’s acquisition of AMICAS (prior agreement with Thoma Bravo included a 45-day “go-shop” period); Microchip Technology’s acquisition of Silicon Storage Technology (prior

Inc., Titanium Metals Corp./Precision Castparts Corp., TurboSonic Technologies, Inc./MEGTEC Systems, Inc., Versant Corporation/UNICOM Systems, Inc., Dollar Thrifty Automotive Group, Inc./Hertz Global Holdings, Inc., U.S. Home Systems Inc./Home Depot Inc., Credo Petroleum Corporation/Forestar Group Inc., GTSI Corp./UNICOM Systems, Inc., PLX Technology, Inc./Integrated Device Technology, Inc., AboveNet, Inc./Zayo Group LLC, eDiets.com, Inc./As Seen On TV, Inc., Network Engines, Inc./UNICOM Systems, Inc., North Central Bancshares, Inc./National Australia Bank Limited and Advance America, Cash Advance Centers, Inc./Grupo Elektra S.A. de C.V.; in 2013, Metals USA Holdings Corp/Reliance Steel & Aluminum Co., Smithfield Foods, Inc./Shuanghui International Holdings Limited (“go-shop” as to two bidders who submitted acquisition proposals during the period from March 24, 2013 until May 28, 2013 (the date of the agreement)), Medistem Inc./Intrexon Corporation, Symmetricom, Inc./Microsemi Corporation, Edgen Group Inc./Sumitomo Corporation, Home Federal Bancorp. Inc./Banner Corporation, Kaydon Corporation/SKF AB, Saks Incorporated/Hudson’s Bay Company, Corporate Property Associates 16 – Global Incorporated/W.P. Carey Inc., Lender Processing Services, Inc./Fidelity National Financial, Inc., Caplease, Inc./American Realty Capital Properties, Inc., Multiband Corporation/Goodman Networks Incorporated, Ebix, Inc./The Goldman Sachs Group, Inc., Aerosonic Corporation/TransDigm Group Incorporated, MISCOR Group, Ltd./Integrated Electrical Services, Inc. and Asset Acceptance Capital Corp./Encore Capital Group, Inc.; in 2014, Safeway, Inc./Albertson’s (Cerberus Capital Management LP and other investors), LCA-Vision/PhotoMedex, Inc., Protective Life Corporation/The Dai-ichi Life Insurance Company Limited, Fortegra Financial Corporation/Tiptree Financial Inc., Taminco Corporation/Eastman Chemical Company, LipoScience, Inc./Laboratory Corporation of America Holdings, World Energy Solutions, Inc./EnerNOC, Inc. and Ceasars Acquisition Company/Ceasars Entertainment Corporation; and in 2015, Vitesse Semiconductor Corporation/Microsemi Corporation, CIG Wireless Corp./Vertical Bridge Holdings LLC, Norcraft Companies, Inc./Fortune Brands Home & Security, Inc., GrafTech International Ltd./Brookfield Asset Management Inc., PMFG, Inc./CECO Environmental Corp., JPS Industries, Inc./Handy & Harman Ltd., Martha Stewart Living Omnimedia, Inc./Sequential Brands Group, Inc., Vivint Solar, Inc./SunEdison, Inc., Thoratec Corporation/St. Jude Medical, Inc., StanCorp Financial Group, Inc./Meiji Yasuda Life Insurance Co., Tecumseh Products Co./Mueller Industries, Inc. (with Atlas Holdings LLC as a co-investor), EMC Corporation/Dell Inc. (Silver Lake Partners and other investors), Constant Contact, Inc./Endurance International Group Holdings, Inc., Roundy's, Inc./The Kroger Co. and Breeze-Eastern Corporation/TransDigm Group Incorporated.

agreement with Prophet Equity included a 45-day "go-shop" period)[45]; Green Mountain's acquisition of Diedrich (prior agreement with Peet's included a 20-day "go-shop" period); Platinum Equity's acquisition of Pomeroy IT Solutions (prior agreement with an MBO group included a 20-day "go-shop" period); Vista Equity Partners's acquisition of SumTotal (prior agreement with Accel-KKR included a 30-day "go-shop" period); Microsoft's acquisition of Greenfield Online (prior agreement with Quadrangle included a 50-day "go-shop" period); the acquisition of Community Health Systems by the Triad Hospitals (prior agreement with CCMP included a 40-day "go-shop" period); the acquisition of Catalina Marketing Corp. by Hellman & Friedman (prior agreement with ValueAct Capital Partners included a 45-day "go-shop" period); Aeroflex Incorporated's purchase by Veritas Capital (prior agreement with General Atlantic and partners included a 47-day "go-shop" period); and Everlast Worldwide's merger with Sports Direct International (prior agreement with the Hidary Group and partners included a 30-day "go-shop" period).[46] Advocates of "go-shops" would argue that these deals are evidence of the ability of the "go-shop" to maximize shareholder value and thus the use of such provisions should be promoted—critics would argue that the time to solicit is before the definitive is signed embedding break-up fees and aligning management with the original merger partner. An empirical analysis of "go-shop" provisions published in 2008 found significant post-signing competition in "go-shop" deals that were not MBOs but no post-signing competition in "go-shop" deals that were MBOs.[47] However, interestingly, in 2009, there was a successful deal-jumper in a "go-shop" MBO deal, when Platinum Equity prevailed over two other bidders in wresting away Pomeroy IT Solutions from an MBO group.[48]

EGL's willingness to rely on Deutsche Bank's (its financial advisor) pre-signing market check to forego a "go-shop" in its merger agreement with the consortium of Centerbridge Partners, L.P., Woodbridge Co. Ltd's and EGL's CEO James Crane did not go unnoticed by ISS (now RiskMetrics Group). ISS noted that although it had "skepticism with respect to the efficacy of "go-shops," it's curious that the board did not negotiate one here considering their current prevalence." ISS did not focus on the fact that EGL was in essence already in play following Crane's bid earlier in 2007 with General Atlantic that failed when General Atlantic dropped out of the process. The background section of the proxy statement also revealed that the Crane group did at one point in the negotiations offer a "go-shop" subject to EGL agreeing to cut the pre-signing market check it was conducting short. Although the special committee did not take the Crane group up on that offer, it would ultimately agree to cut the pre-signing market check short following a bump in price from the Crane group to $38 per share and a face-to-face meeting where Centerbridge communicated that it would publicly pull its support of the Crane group offer if the proposal was not accepted. At the special committee's request, the Crane group did lower its ask with respect to the break-up fee from $48 million to $30 million (approximately 2% of the equity value). EGL announced the sale to the Crane group at $38 per share on March 19th.

[45] Taking full advantage of the "go-shop" provision in its agreement with Prophet Equity, Silicon Storage engaged in what RiskMetrics called an "exhaustive go-shop process" (in an M&A Edge Analysis email on March 26, 2010), contacting 140 prospective buyers within the 45-day period.

[46] It should also be noted that while not resulting in successful deal-jumps, the "go-shop" process did result in competing bids, and ultimately greater value to shareholders, in Charlesbank's acquisition of DEI Holdings, William Demant Holding S/A's acquisition of Otix Global, and Kratos Defense and Security Solutions's acquisition of Henry Bros. Electronics. In the KCI/Apax Partners situation, the "go-shop" process resulted in a joint offer during the "go-shop" period from two unnamed parties, which ultimately did not come to fruition.

[47] See Guhan Subramanian, "Go-Shops vs. No-Shops in Private Equity Deals: Evidence and Implications", The Business Lawyer (Vol. 63, May 2008) (concluding that "go-shops" should generally survive Revlon scrutiny, but courts should pay attention to their specific structure, particularly in "go-shop" MBOs). "Go-shop" provisions have gotten mixed reactions in the Delaware courts, even from the same Vice-Chancellor! Then-Vice Chancellor Strine criticized the Netsmart deal for not using a "go-shop" given its micro-cap nature and seemed to bless a 40-day "go-shop" with a matching right in Topps (leading to the classic Strine quip "for 40 days, the Topps board could shop like Paris Hilton"), but criticized the "go-shop" structure in Lear.

[48] However, Platinum Equity actually made its offer outside of the "go-shop" period, as did Microchip Technology (in its bid for Silicon Storage) and Merge Healthcare (in its bid for AMICAS), casting some doubt on the causality between the presence of a "go-shop" provision and the emergence of successful third party bids in the MBO context.

Immediately following the public announcement of the transaction, Apollo Management, L.P., which had been steadily increasing its bids throughout the process and had proposed a $40 a share offer late in the evening of March 18th (following the board meeting where the Crane group proposal was approved), sent the special committee a letter criticizing the process and confirming its $40 per share offer. The board directed EGL management to share all the information that had been provided to the Crane group and fully cooperate with Apollo's due diligence efforts with the view toward obtaining a superior proposal from Apollo. On March 27th, Apollo increased its offer to $41 per share. On the same day, Apollo filed a lawsuit against EGL and its management team alleging the merger agreement with the Crane group was "the product of a sham process, controlled and manipulated by Crane," and a "coerced, self-dealing transaction."

On May 6th, after over a month of discussions with Apollo, the EGL special committee determined that Apollo's increased offer of $43 per share was a superior proposal under the merger agreement and gave the Crane group the required notice under the merger agreement to trigger their matching right. On May 12th, the last day of the match period, the Crane group offered $45 per share, and an increased break-up fee of $55 million (a strategy that was similarly used in Blackstone's battle for EOP described below). Apollo countered with an increased bid of $46 the next day. Following the public announcement on May 17th (after the expiration of the Crane group's matching right) by EGL that the special committee was recommending Apollo's $46 offer, the Crane group made its last offer of $46.25 and a $30 million break-up fee. Apollo increased its offer to $47.50 and, presumably confident that their bid would not be topped, proposed a $20 million break-up fee. The Crane group declined to match, and EGL accepted the Apollo offer. Unfortunately for the Crane group, EGL never agreed to the increased break-up fee, and the Crane group had to settle for the original $30 million break-up fee.

In an interesting example of a modified "go-shop" in the face of a potential interloper, Auxilium Pharmaceuticals, Inc. was permitted to shop its QLT, Inc. deal with any third party if it received a written, unsolicited acquisition proposal from a third party—a "springing go-shop" of sorts. On June 25, 2014, Auxilium and QLT entered into a definitive merger agreement, whereby Auxilium was to merge with and into an acquisition vehicle wholly owned by QLT, with Auxilium surviving as a wholly owned subsidiary of QLT. Auxilium shareholders were to receive 3.1359 QLT common shares in exchange for each Auxilium share, plus additional shares in certain circumstances. The exchange ratio represented a 25% premium based on a calculation of the closing NASDAQ stock prices of Auxilium and QLT the last trading day prior to announcement of the merger, and an aggregate total consideration of approximately $852.70 million in value to Auxilium's shareholders.

The QLT-Auxilium merger agreement subjected both Auxilium and QLT (who required its own shareholder vote in the transaction) to the standard restrictions on shopping. The agreement, however, contained an unusual exception to Auxilium's non-solicitation obligations which provided that, if Auxilium received a written, unsolicited acquisition proposal from a third party, Auxilium could provide information to, and engage in negotiations with, any third party for purposes of soliciting alternative acquisition proposals.

On September 5, 2014, the Transactions Committee of Endo International plc decided to enter the ring. On September 12th, Endo's representatives called Auxilium's representatives and made a non-binding proposal to acquire all of Auxilium's outstanding shares for $28.10 per share comprising an approximately equal mix of cash and Endo shares (which Endo reported was valued at $2.2 billion). Auxilium notified QLT of Endo's proposal on September 13th. Endo publicly announced its proposal on September 16th and, that same day, the Auxilium board adopted a one-year poison pill "in light of the unsolicited proposal from Endo" (which QLT consented to).

On September 17th, pursuant to the "springing go-shop" in the QLT Merger Agreement, representatives of Auxilium began contacting third parties to gauge interest in a transaction involving Auxilium. Of the 20 parties contacted, all were either not interested in a transaction with Auxilium or stated that they would have to consider the matter further. On September 21st, the Auxilium board determined that Endo's proposal significantly undervalued Auxilium and, on September 22nd, publicly reaffirmed its recommendation to Auxilium shareholders that they vote in favor of the adoption of the QLT merger agreement. The Auxilium board, however, maintained that it could continue to shop the deal.

On September 25, 2014, Endo raised its offer price to $32.35, which would be comprised of approximately half Endo shares and half cash, and requested access to Auxilium's non-public information so that it could begin its due diligence.

On October 6th, representatives of Endo and Auxilium met to discuss the outstanding legal and business issues in the Endo merger agreement. Representatives of Auxilium notified Endo that the price of $32.35 per share still undervalued Auxilium and that there needed to be a significant reverse termination fee if Endo terminated the merger agreement based on certain tax events. Representatives of Endo responded by proposing a price of $33.25 per share, which would be comprised of approximately half Endo shares and half cash, now representing a reported approximately $2.6 billion in total value to Auxilium's stockholders, and a $150 million reverse termination fee related to a specified tax termination event.

On October 8, 2014, the Auxilium board of directors accepted Endo's terms, terminated the QLT merger agreement (with Endo paying the $28.4 million termination fee on Auxilium's behalf) and executed the merger agreement with Endo. The merger closed on January 29, 2015.

## Break-Up Fee Alternatives

As noted above, with the rise of the "go-shop" has come an increasing focus on creative approaches to dealing with break-up fees to potentially enhance the post-signing auction process. While historically an occasional deal would have had a two-tier break-up fee where the fee is less during the earlier period after signing, Delcor's acquisition of National Gypsum, L-3's 2004 acquisition of Titan (2% in the first 30 days and 3% thereafter) and Pfizer's acquisition of Wyeth (2.2% for first 30 days and up to 4% thereafter)[49] are noteworthy examples of how many transactions that incorporate a "go-shop" also split the break-up fee to have a smaller fee (often by as much as 40-50%) during the "go-shop" period. In HCA, for example, the fee was $300 million inside the "go-shop" period and $500 million thereafter. In TXU, the fee was $375 million inside the period and $1 billion thereafter. In Diedrich's original merger agreement with strategic acquirer Peet's, the fee was $6.4 million inside the period and $8.5 million thereafter. In Laureate, there was a 2 to 1 ratio, and, in Kerzner, there was actually a 3 to 1 ratio. In Freescale, the ratio was 2 to 1, but the applicable lower fee period was only for the first 10 days of the "go-shop" window. In Catalina, the fee was a modest $8.4 million inside the 45-day "go-shop" period (0.5%) and 50.6 million (3%) thereafter.[50] In CKE Restaurants, the fee was $9.3 million (1.5%) inside a 40-day "go-shop" period (which could be extended an additional 20 days for competing proposals received during such period) and $15.5 million (2.5%) thereafter. In Dynamex, the fee was $4.2 million (2%) for deals with an "excluded party" that had made a takeover proposal "reasonably likely to result in a 'superior proposal'" during a 40-day "go-shop" period and $6.3 million (3%) for transactions with parties other than an "excluded party."[51] In Versant, the fee was doubled for superior proposals received

[49] Another example of this two-tier concept in a non "go-shop" (and ultimately unsuccessful) deal- jump transaction appeared in Energy Transfer Equity's acquisition of Southern Union Company, where a fee of 2.2% was payable in the first 40 days following signing and a 3.2% fee applied thereafter.

[50] Catalina's "go-shop" was further crafted to encourage competing bids as buyout firm ValueAct agreed to vote its 15.6% stake in favor of any higher bids. It is also interesting to note that Hellman & Friedman's topping bid was only $0.40 per share above ValueAct's $32.10 per share agreed-to deal.

[51] In that case, after the deal was announced, TransForce submitted a takeover proposal of $23.50 per share in cash, which the board determined was reasonably likely to result in a "superior proposal." This determination had the effect of

at any time following the "go-shop" period. The Dell Inc. sale discussed earlier in this article included a 45-day "go-shop" period (during which two buyer consortiums led by Blackstone and Icahn Enterprises, and one potential strategic bidder, submitted alternative, unsuccessful transaction proposals) and a related two-tier break-up fee structure—in the event of a termination in connection with Dell's entry into an alternate acquisition agreement with a party who made a qualifying proposal during the "go-shop" period, the break-up fee was $180 million (less than 1% of the equity value); in contrast, a similar termination in connection with a party who made a proposal after the expiration of the "go-shop" triggered a $450 million (or 2.5 times greater) break-up fee (which was subsequently reduced to $180 million in the final, amended merger agreement). The Digital River sale also included a 45-day "go-shop" period and a two-tier break-up fee structure in which, if Digital River entered into an alternative acquisition agreement during or within 5 business days following the end of the "go-shop" period, it would be obligated to pay a $12.6 million break-up fee (approximately 1.5% of the equity value of the deal). If Digital River, however, terminated the agreement to enter into an alternative acquisition agreement after the "go-shop" period deadline, the termination fee more than doubled to approximately $27 million (approximately 3.29% of the equity value).

The Smithfield Foods merger presented an interesting "go-shop"/break-up fee structure in which Smithfield could solicit two pre-existing bidders throughout the period until the shareholder vote. If Smithfield terminated the merger agreement with Shuanghui International to enter into an acquisition agreement with either bidder during the 30 days after the signing of the merger agreement, the break-up fee would be $75 million (approximately 1.60% of the equity value of the deal). However, if Smithfield terminated the agreement to enter into an acquisition agreement with a pre-existing bidder after the 30-day period, or with any other party during or after the 30-day period, the break-up fee would be $175 million (approximately 3.72%). Similarly, the CEC Entertainment (the parent company of Chuck E. Cheese's) merger contained a "go-shop"/break-up fee structure in which CEC could solicit acquisition proposals from certain pre-existing bidders until the CEC shareholder vote. If CEC terminated the merger agreement with Apollo within the "go-shop" period (50 days), plus five calendar days, to enter into an alternative acquisition agreement with a pre-existing bidder, CEC would be obligated to pay a break-up fee of approximately $23 million (or approximately 2.46% of the equity value of the deal). If, however, CEC terminated the agreement to enter into an alternative acquisition agreement with a third party, it would be obligated to pay approximately $47 million (or approximately 4.92% of the equity value).

The two-tier break-up fee approach was on display prominently in the battle for control of Diedrich. On November 2, 2009, Peet's and Diedrich entered into a merger agreement whereby Diedrich shareholders would receive $26 in cash and stock, which agreement included a 20-day "go-shop" provision (as noted above,

designating TransForce as an "excluded party." After Greenbriar matched (within its four business day matching period) and TransForce raised its bid to $24, Greenbriar again offered to match, but asked for a higher $7.7 million termination fee for transactions with parties other than an "excluded party" while offering to raise the reverse termination fee in case debt financing was unavailable to $14.3 million and, in the case of a material breach, to $21.4 million. The Dynamex board determined the TransForce offer was no longer superior and amended Dynamex's agreement with Greenbriar to reflect the higher offer price and termination fees. However, when TransForce delivered a new binding offer to Dynamex a week later worth $25 per share in cash, which the Dynamex board found to be a "superior proposal" and Greenbriar refused to match, Dynamex owed Greenbriar the higher $7.7 million termination fee since TransForce had lost its "excluded party" status the week before when its prior outstanding offer was determined not to be superior. Given that TransForce showed up with a binding and superior offer within the "go-shop" period and continued to actively participate in the bidding, one could argue it should not have lost its "excluded party" status (and additional fee money!) so easily. Similar to the Dynamex agreement, KCI's agreement with a consortium of funds led by Apax Partners had a 40-day "go-shop" period and a two-tier break-up fee approach. The agreement had a break-up fee of $51.8 million (1%) for a transaction with an "excluded party" that had made an acquisition proposal during the "go-shop" period that was reasonably expected to result in a superior proposal, and a break-up fee of $155.4 million (3.1%) for a transaction with a party that was not an "excluded party." While two unnamed parties did make a joint acquisition proposal within the "go-shop" period and were each designated an "excluded party," following such designation and subsequent discussions, such parties notified KCI that they did not intend to make a definitive acquisition proposal.

one of the first of a recent spate of "go-shop" provisions involving a strategic acquirer without some special circumstance, such as a downward renegotiation, to justify it) and a two-tier break-up fee of 3% within the "go-shop" period and 4% thereafter. However, unlike most provisions, which allow for the lower break-up fee if a third-party bidder had emerged within the "go-shop" period with a superior proposal or one reasonably likely to be one, the Diedrich/Peet's merger agreement required that definitive documentation with the third party be entered into within the "go-shop" period. As a result, even though Green Mountain had submitted an all-cash $30 per share offer deemed to be a "superior proposal" on November 23, 2009 (the last day of the "go-shop" period) and ultimately prevailed with a $35 all-cash offer, upon terminating its agreement with Peet's, Diedrich was obligated to pay to Peet's the higher 4% break-up fee (which Green Mountain agreed to pay on behalf of Diedrich).

A different need for a two-tiered termination fee was apparent in the fight for Quest, as a potentially uncooperative major shareholder who had entered into a voting agreement with Insight in the original deal, created a need for a bifurcated style merger agreement with alternate scenarios depending on his willingness to support a new deal going forward (and at what cost!). When Dell stepped into the ring, it insisted on a higher termination fee in the event the key shareholder would not get behind a transaction between Quest and Dell—it proposed a 2.5% termination fee if the majority shareholder entered into a voting agreement supporting the deal; without that support, Dell would require a 3.5% termination fee. Ultimately, Dell was victorious by increasing its price to "buy" the major shareholder's support and his signature on a voting agreement. In the end, Dell did not need the two-tiered termination fee structure, but still negotiated an approximately 2.5% termination fee in the event shareholder approval was not obtained (even in the absence of the completion of an alternative deal).

In current deal-jump situations, the third party will often be required to agree to pay all or a portion of the target's break-up fee to its original partner, sometimes in addition to a reverse termination fee (or embedded in a higher reverse termination fee) to give comfort that upon appropriate terminations of the agreement the target would end up with the correct net amount of the break-up fee. For example, in the Diedrich/Peet's/Green Mountain situation, the deal-jumping Green Mountain agreed to pay upfront the full $8.5 million break-up fee to Peet's on behalf of Diedrich, while also agreeing to a $8.5 million reverse termination fee (which could have increased to $10.5 million) to Diedrich if Green Mountain had failed to obtain regulatory approval for its acquisition of Diedrich. Similarly, after Community Bancorp outbid Trustmark Corporation's current merger agreement with Cadence Financial, prompting Cadence Financial to terminate the agreement, Community Bancorp advanced the $2 million termination fee to Cadence Financial. Lastly, in the multi-ring Fundtech-S1 situation, GTCR agreed to pick up Fundtech's fee to S1 for breaking up the deal, although one questions how much that was worth to Fundtech as GTCR made the undertaking while reducing its original bid to reflect the amount of the S1 break-up fee (along with a downward adjustment for lower-than-expected cash at closing). In another example, to solidify its acquisition of Quest, Dell agreed to loan $13.3 million to Quest in order to help Quest pay Insight the $25 million termination fee that would be triggered when Quest terminated its original merger agreement with Insight and moved forward with Dell. In 2014, Endo paid Auxilium's $28.4 million termination fee to QLT, Tyson paid the $163 million termination fee owed by Hillshire (the original acquiror) to Pinnacle and Donnelley reimbursed Courier for the termination fee it paid to Quad. In 2015, Icahn paid the $39.5 million termination fee owed by Pep Boys to Bridgestone under its original merger agreement, GameStop paid the $3.7 million termination fee owed by Geeknet under its original merger agreement with Hot Topic, Montage agreed to pay the $15 million termination fee owed by Pericom under its original merger agreement with Diodes and Microsemi paid PMC-Sierra the $88.5 termination fee it owed to Skyworks. Meanwhile, China Resources agreed to pay the $72 million termination fee payable by Fairchild Semiconductor to ON Semiconductor should their agreement be terminated. In an interesting variation, Endo agreed to pay the $356.4 million termination fee owed by Salix Pharmaceuticals in the event the original merger agreement with Valeant Pharmaceuticals was terminated in exchange for an option to acquire shares, which option would serve as a termination fee in a definitive merger agreement between Endo and Salix Pharmaceuticals (i.e., exercisable upon termination), unless such termination was due solely to Endo's failure to obtain shareholder approval of the proposed transaction, in which case Endo would pay a $356.4 million cash termination fee.[52]

The dynamics of termination fees and the advancement of such fees by a second bidder may also have affected Avis Budget's approach in its deal-jump of Dollar Thrifty's proposed merger with Hertz in 2010. As described above, the reverse termination fee against antitrust risk was a main source of contention between Avis Budget and Dollar Thrifty, with Avis Budget offering a last-minute $20 million reverse termination fee to placate Dollar Thrifty's concern over deal certainty. However, some have speculated that fee issues continued to affect the deal as Avis Budget and Dollar Thrifty never entered into a merger agreement since doing so would have resulted in a $44.6 million termination fee being payable to Hertz under its agreement with Dollar Thrifty. Under its 2010 agreement with Hertz, if within twelve months of termination Dollar Thrifty entered into a definitive agreement to consummate a competing takeover transaction, it would owe Hertz the termination fee. With Avis Budget apparently unwilling to advance the termination fee to Dollar Thrifty upon signing (perhaps concerned about deal certainty as the Dollar Thrifty board had been), rather than exercise its "fiduciary out" and pay the fee itself upon entering into a merger agreement with Avis Budget, Dollar Thrifty chose to move forward without fully replacing the "bird in the hand" it had in Hertz, hoping to gain greater certainty of the regulatory outcome. In an interesting development, despite the deal-jump history, Hertz and Dollar Thrifty's 2012 merger agreement, which (as discussed above) included a very favorable "go-shop" provision for Dollar Thrifty, contained no termination fee payable to Hertz in the event of a proposal topping Hertz's. Even so, Avis did not make a competing bid, and the Hertz-Dollar Thrifty deal finally closed in November 2012.

It does not go without saying, however, that receiving a break-up fee will be sufficient to persuade a pre-existing deal partner to give up bidding on its target. In the 2007 battle for Everlast Worldwide, a consortium led by the Hidary Group entered into a merger agreement that included a 30-day "go-shop" period as well as a bifurcated termination fee of $3 million if the agreement was terminated during the "go-shop" and $4.5 million if the agreement was terminated thereafter. As a result of shareholder pressure, Everlast requested that their financial advisor actively contact potential purchasers of the company. During this "go-shop" period, Brand Holdings Limited (a unit of Sports Direct International plc) submitted an offer at $30 per share. In response, the consortium raised its offer to $30.55 per share on the final day of the "go-shop" period. Everlast's board reviewed both offers and discussed the ability of both potential acquirers to finance their acquisition. The board was "more confident" of the financing capabilities of Brand Holdings (financing was 100% guaranteed by its parent) than those of the consortium (whose financing letters were conditional). As a result, Everlast's board decided that Brand Holdings's proposal was a "superior proposal," delivered a cashier's check in the amount of the $3 million break-up fee to the consortium and executed a merger agreement with Brand Holdings. The consortium refused to cash its check, and instead raised its offer the next day to $31.25 per share and provided an "equity stub" that would allow Everlast's shareholders to rollover up to 50% of their shares into an equity interest in the combined entity. Brand Holdings increased its offer to $33 per share in response, and the board approved this offer. While continuing to refuse the check, the consortium next sent a letter to Everlast stating that "the prior merger agreement had not been validly terminated" and filed a complaint in Delaware state court alleging breach of the consortium's merger agreement. The Hidary Group eventually settled for the $3 million termination fee, and Brand Holdings emerged victorious.

The sellers have made the size of the break-up fee a high level negotiating point interrelated to price and process in a few recent non-"go-shop" deals as well. As discussed more fully below, Blackstone's initial agreement with EOP provided for a $200 million break-up fee, or 1% of the cash value of the transaction. Such a fee was far below the market break-up fee for such real estate acquisitions, generally considered to be

[52] Another unusual variation from a recent deal is the $225 million regulatory reverse termination fee included in the EXOR and PartnerRe merger agreement, which is styled as "partial reimbursement for the payment by [PartnerRe] of the [termination fee paid to Axis]."

Simpson
Thacher

about 3%. Once Vornado jumped the deal, Blackstone responded with a sweetened cash offer and also tipped the scales a little more in its favor by revising the termination provision of its initial agreement. While Blackstone hiked its offer by 11%, it demanded a higher break-up fee. The revised $500 million fee amounted to about 2% of the cash value of the transaction.[53] After Vornado increased its bid, Blackstone stepped up its offer again, to $23 billion cash, but required that EOP agree to a higher break-up fee of $700 million. Such a fee amounted to about 3% of the cash transaction value.[54] Similarly, in the Graham Packaging situation, with Blackstone on the other side as the controlling shareholder, Silgan increased its offer for Graham Packaging while also increasing the termination fee to $75 million (approximately 4%) from $39.5 million (approximately 3%). However, this offer was rejected by Graham Packaging, and Silgan ultimately collected the lower break-up fee when it lost the transaction to the Reynolds Group. As discussed above, when Dell entered the ring in the bidding war for Quest, Insight struck a deal where it increased its purchase price (though not to the top of its indicated range) and simultaneously negotiated an increase in the break-up fee from $6.3 million to $25 million. Ultimately, Quest favored an agreement with Dell and had to pay out the $25 million fee.

The size of the break-up fee and its interplay with price and process played a significant role in the deal-jump situation involving MSC Software. In July 2009, MSC Software entered into a merger agreement with Symphony Technology Group for $7.63 per share in cash that contained a break-up fee of 3.3%, only to be jumped in September 2009 by a joint topping bid by two private equity investors of $8.00 per share in cash that included a 4% break-up fee. In response to this offer, which was deemed "superior" by the MSC Software board, Symphony matched the cash offer (but raised its break-up fee to 4%), prompting the private equity investors to increase their offer to $8.15 per share in cash and dramatically reduce the break-up fee to 2%. In turn, Symphony matched the $8.15 offer and reduced its break-up fee to 3%. The private equity investors again followed up with an $8.30 cash per share offer, without increasing the break-up fee, which proposal was deemed "superior" by the MSC Software board. In response, Symphony increased its offer to $8.40 per share in cash and increased the break-up fee back to the original 3.3%, an offer which the MSC Software board deemed "superior" and accepted, granting Symphony control of MSC Software and a hard-fought victory.

In the "delayed" deal-jump situation in Dynegy (described above), the initial bidder almost lost out on its agreed termination fee due to the subtle approach and delayed bid by Icahn, which was actually made after the Blackstone transaction was voted down. Since, despite Icahn's strong intimations that he would bid for Dynegy, there was no alternative "Acquisition Proposal" outstanding at the time of the shareholder vote, a so-called "naked" vote-down, the original merger agreement, as is typical, did not entitle Blackstone to the $50

[53] In the quest to acquire SumTotal, Accel-KKR took an even more aggressive approach. After Vista Equity attempted to jump the SumTotal/Accel-KKR transaction with a $4.75 per share offer, Accel-KKR increased its $3.80 offer to $4.80 per share, topping Vista Equity's bid by only $.05, and increased the break-up fee from $3.1 million to $6.67 million (or from 2.5% to 4.5%). In response, Vista Equity offered its own $.05 topping bid of $4.85 per share, but with a formulaic wrinkle based on the break-up fee. Vista Equity's offer was $4.85 per share at a minimum, but if Accel-KKR's increased break-up fee were "invalidated or otherwise reduced" toward the original amount, then Vista Equity's offer would increase proportionately up to $4.95 per share. In the end, the break-up fee was not adjusted and SumTotal accepted Vista Equity's topping $4.85 per share offer, paying the higher $6.67 million break-up fee to Accel-KKR.

[54] The burden of the break-up fee ordinarily falling upon the third party who steps in to jump the deal is compounded in a double deal-jump. When Woodside Petroleum Ltd. jumped the Energy Partners Ltd. agreement with Stone Energy Corp., and Energy Partners had previously jumped Stone's deal with Plains Exploration & Production Co., Woodside challenged such a double break-up fee, citing to the Delaware Chancery Court that the combined $69.1 million payment obligation by Energy Partners to Stone amounted to 10% of Energy Partners's total market capitalization. (The Plains/Stone deal's break-up fee was $43.5 million, which Energy Partners agreed to advance to Stone, and Energy Partners was obligated to pay Stone $25.6 million to terminate their deal.) Energy Partners and Stone subsequently agreed to a reduced $8 million break-up fee to mutually terminate their merger agreement and release certain claims against each other (reducing the combined break-up fee to $51.5 million). Interestingly, notwithstanding Energy Partners's termination of its deal with Stone, Energy Partners continued to resist the Woodside hostile offer, and the Woodside offer ultimately expired with no acquisition of Energy Partners. Energy Partners instituted a strategic review which resulted in no ultimate acquisition of the company.

million termination fee (or even the $16.3 million termination fee relating to alternative “Acquisition Proposals” within the 40-day “go-shop” period).[55] Given how Icahn’s strong hinting of a bid negatively affected the shareholder vote, potential initial bidders should be wary of how similar situations might deprive them of termination fees due to there not being an alternative proposal, on a strictly technical basis, at the time of the shareholder vote. The ultimate post-amendment resolution, at least for Blackstone, is instructive in that any alternative transaction consummated within 18 months at a price higher than the original $4.50 per share bid, would entitle it to the lower “go-shop” termination fee of $16.3 million. A similar approach, whether with a termination fee at the “go-shop” level or somewhat higher, for alternative transactions entered into within a specified period of time after the vote down (perhaps somewhat shorter than 18 months) would provide some protection for initial bidders when alternative proposals are lurking and affect their transaction but have not yet crystallized by the time of the shareholder vote.

Furthermore, while Delaware courts have been more vocal (and less formulaic) in scrutinizing break-up fees in notable decisions by both then-Vice Chancellor Strine in the Toys ‘R Us case and Chancellor Chandler in one of the Caremark decisions (neither case actually striking down the fees at issue), in the deal-jump situation for the target ElkCorp, a Texas court actually enjoined the payment of a fee. Carlyle’s December 2006 agreement to acquire ElkCorp via tender offer included the adoption of ElkCorp’s poison pill and the payment of a break-up fee upon termination. BMCA, as a competing suitor, offered what commentators considered to be a higher bid. A Dallas (Texas) County Court judge issued a temporary injunction against the payment of the break-up fee to Carlyle and against implementation of the poison pill. BMCA found the court’s two-week period enjoining enforcement of the fee and poison pill provisions to be sufficient time to close the acquisition of ElkCorp.

However, a continuing trend revolving around break-up fees is for the fee to be raised when the initial bidder increases its offer in the middle of a deal-jump. Many of the deal-jump situations listed in this article that involve multiple rounds also increase the absolute amount of the break-up fee at some point, if for no other reason than to just maintain the fee at its originally conceptualized percentage in the context of the now higher price (or occasionally to try to materially increase it, as occurred in the 2013 Outdoor Channel Holdings situation discussed earlier).

In a fascinating example of a deal in which the size of the winner’s break-up fee kept getting raised as the size of the deal increased, the heated contest of Blackstone Group and Vornado Realty Trust for Equity Office Properties ended up being an intense bidding war which pitted an all-cash deal against a higher cash-and-stock deal. The $39 billion Blackstone/EOP deal was, at its time, the largest leveraged private equity buyout of all time, and the second to exceed the landmark $30 billion RJR Nabisco deal.[56] After Blackstone bid $48.50 per unit of EOP and agreed to a $200 million termination fee, and the parties executed a merger agreement in November 2006, Samuel Zell, Chairman of EOP’s board, reportedly sent Steven Roth, Vornado’s CEO, a poetic email: “Roses are red, violets are blue; I hear a rumor, is it true?” Roth’s response: “Roses are red, violets are blue. I love you Sam, our bid is 52.” (Vornado’s January 17, 2007 non-binding proposal was composed of 60% cash and 40% stock, and was subject to a due diligence review.) Vornado agreed to provide EOP with a draft merger agreement by January 23rd, and any definitive proposal by January 31st. EOP’s board disfavored Vornado’s bid, since it was only a non-binding proposal, its value, tied to the price of

[55] However, the agreement was amended when Blackstone increased its bid on the eve of the vote to provide a $16.3 million termination fee to Blackstone in case an alternative transaction was consummated for greater than $4.50 within 18 months.

[56] The buyout of hospital operator HCA by a group led by KKR for $33 billion in summer 2006 was the first to top RJR Nabisco. The buyout of energy utility TXU by KKR and TPG for $44 billion in October 2007 eclipsed the Blackstone acquisition of EOP. The 2007 announced buyout of telecom company BCE by Ontario Teachers’ Pension Plan, Providence Equity Partners and Madison Dearborn Partners for Cdn$52 billion would have once again raised the bar but for BCE’s inability to meet the test for a solvency opinion allowed the investor consortium to terminate the merger agreement due to BCE’s failure to satisfy a mutual closing condition.

Vornado stock, was uncertain, it was contingent on Vornado shareholders' approval and the deal would take months to close. Blackstone's offer, on the other hand, provided the certainty of an all-cash deal and was scheduled to close quickly on February 8th, three days after EOP's shareholder's meeting. Even so, Vornado claimed its bid was superior to Blackstone's, as it would allow EOP's shareholders to participate in the upside of the proposed strategic deal.

In response to Vornado's proposal, but instead of waiting for Vornado to finalize its offer, on January 23rd Blackstone aggressively upped its own offer to $54 cash, but only did so in return for requiring a $500 million (but still below market) termination fee. EOP again recommended Blackstone's bid to its shareholders. Vornado responded on February 1st with a $56 bid, comprised of $31 cash and the balance in Vornado common shares. EOP continued to recommend Blackstone's offer, as Vornado's proposal did not address any of the board's concerns about the timing or uncertainty of closing; the two dollar premium in Vornado's bid failed to adequately compensate EOP shareholders for the uncertainty of the transaction closing; Vornado's proposed collar would only protect against fluctuations in Vornado stock price within a certain range; and the composition of the bid was upped to 45% stock from 40%. Vornado, on February 4th restructured its bid as a tender offer (while keeping the per share consideration the same) for up to 55% of EOP's shares at $56 cash, with the back-end coming in Vornado stock; Blackstone's response on February 5th was to raise its bid to $55.25 in cash with a $700 million termination fee. Later that day, EOP asked Blackstone for $55.50, which it agreed to in exchange for the deal's termination fee being upped to $720 million (3% of the total equity value of EOP). Vornado dropped out of the bidding on February 7th, and EOP's shareholders voted for the Blackstone deal later that day.

In some of the 2010 deal-jump cases (in addition to the increases in Dynegy, described elsewhere in this article), after another bidder threatened to interrupt the original transaction, the original parties increased the termination fee along with the offer. When a third party jeopardized Kratos Defense & Security Solutions's merger with Henry Bros. Electronics by offering $8, Kratos Defense & Security Solutions submitted a signed amendment to its merger agreement providing for $8.20 per share (bumped from $7) and an increase in the termination fee to $2.2 million (from $1.8 million). Henry Bros. Electronics executed the amendment and closed its transaction with Kratos Defense & Security Solutions a month later. After Gores Capital Partners deal-jumped the merger between Phoenix Technologies and Marlin Capital Partners, Marlin Capital amended its agreement to first match the $4.05 Gores Capital offer and then to match Gores's later $4.20 bid. The resulting second amendment raised Marlin Capital's offer to $4.20 per share and increased the termination fee by 50% of the incremental amount of any topping bid. When initial bidder Greenbriar raised its bid for Dynamex a second time in the face of a competing offer from TransForce, it was also able to increase the non-“excluded party” termination fee payable by Dynamex to $7.7 million from $6.3 million. However, the reverse termination fees payable by Greenbriar in case of its material breach or failure to obtain debt financing also increased. In a case of an initial bidder singling out one's main competitor, after Apollo came in to bid $12.55 for CKE Restaurants, the initial bidder Thomas H. Lee Partners offered to match that amount but also sought to raise the termination fee applicable to a CKE Restaurants transaction with Apollo to $29.8 million (from the potentially reduced termination fee of $9.3 million if a definitive agreement with Apollo signed within the extended “go-shop” period). However, CKE Restaurants determined the Apollo offer to be a “superior proposal” and terminated its agreement with Thomas H. Lee Partners.

In another colorful bidding contest between two industry heavyweights that reached dizzying heights as the offers and termination fees increased, Hewlett-Packard ultimately outbid Dell to jump its original transaction with 3PAR. On August 15, 2010, Dell announced it would acquire 3PAR for $18 per share in cash pursuant to an agreement containing a “no-shop” clause with a “fiduciary out”, a 3% termination fee and matching rights giving Dell three business days not only to match any competing bid but also requiring 3PAR to negotiate in good faith with Dell during that period. Dell would use those matching rights after Hewlett-Packard announced a bid to acquire 3PAR for $24 per share in cash. After the 3PAR board determined Hewlett-Packard's proposal was superior, during the three-business day window Dell amended its agreement to offer

$24.30 and revised the termination fee upward to $72 million (4.2%). The same process unfolded after Hewlett-Packard upped its bid to $27, prompting Dell to match at $27 (but with no increase in the termination fee). However, when Hewlett-Packard then increased its offer to $30 per share, Dell offered to raise its bid to $31, conditioned on increasing the termination fee to $92 million (a portion of which could be paid in 3PAR stock) and entering into a long-term reseller agreement to which a third-party bidder would be subject, which was rejected by 3PAR. Dell then raised its bid to $32, subject to the same conditions, prompting Hewlett-Packard to go for the jugular and offer $33 per share in cash, an 83% increase from the original $18 deal 3PAR had with Dell. After Dell announced it would not submit a revised proposal, 3PAR entered into a merger agreement with Hewlett-Packard and terminated its agreement with Dell, paying the increased $72 million termination fee.

While Dell's matching right allowed it to sit back and match or slightly exceed Hewlett-Packard's bids, rather than ratchet up its own bids, it looks like this bidding war, involving two intense technology rivals each recovering from its own bruising internal issues and public relations battles, may have led each organization to view 3PAR as a "must-have" target to put it back on track, and perhaps suspend its normal economic rationality in the process. In the end though, regardless of the reasons, with 3PAR ultimately valued at almost double the $18 per share for which it received a fairness opinion from its investment banker, 3PAR may have been wondering if, at $33, it might be receiving a "double fairness" opinion![57]

While a target board can usually justify trading a higher termination fee in exchange for the initial bidder's increased offer to keep the initial bidder involved, or to induce a higher bid from this initial bidder (particularly if the higher fee is just maintaining the same percentage), some commentators have argued that, in the face of a clear second bidder and auction, perhaps the fee percentage being offered should go down to enhance the auction. There is obviously no right answer in all situations, and the individual deal dynamic will determine the right approach by the board.

## Navigating Termination Rights

Break-up fees, when coupled with restrictive "no-shop" provisions and the termination rights of the first buyer, clearly constrain the ability of a target's board to cavalierly negotiate or shift allegiance to a possible second bid without careful consideration due to the risk of prematurely triggering the existing merger partner's termination right and incurring a break-up fee. In Grumman, the board remained essentially silent on the $5 higher Northrop offer, even to the extent of remaining neutral in the SEC-mandated Schedule 14D-9 response to its stockholders. Until the end of the process, Grumman took the position that it could not "negotiate" with Northrop, most likely for fear of triggering a termination right and break-up fee in the Martin Marietta merger agreement stemming from such "negotiation."

Similarly, in the Reliance Electric/General Signal/Rockwell battle, Reliance had until the end taken no position on the economics of Rockwell's bid, despite the marketplace valuing it demonstrably higher than the General Signal merger. Reliance's stock-for-stock merger agreement with General Signal did not provide Reliance with a "fiduciary out", thus requiring it to wait for the expiration of the "drop-dead date" or stockholder rejection in order to terminate; it contained restrictions on any "shopping" activity by Reliance (including providing information and having unsolicited discussions); and it incorporated triggers that

[57] Dell's experience with 3PAR likely led it to seek an expansive set of deal protections in its late 2010 merger agreement with Compellent Technologies, Inc. The litigation that followed with respect to the transaction was settled through various modifications to the deal protections in the merger agreement. Vice-Chancellor Laster's decision (In re Compellent Technologies, Inc. Shareholder Litigation, C.A. No. 6084 (Del. Ch., Dec. 9, 2011) awarding plaintiffs' fees provided an expansive review of a number of the deal protections features highlighted in this article. Vice-Chancellor Laster was careful to clarify that his discussion of the deal protections was limited to an evaluation of benefits of the settlement (i.e., the increased likelihood of a topping bid) and not "how the challenged defensive measures might have fared under enhanced scrutiny…."

allowed General Signal to terminate and collect a large break-up fee. In light of certain “uncertainties” in Rockwell’s offer and the restrictions in the merger agreement, Reliance determined it was “unable” to take a position in its Schedule 14D-9 response. Subsequently, concerns about Reliance’s possible fiduciary obligations and the recognition that its stockholders would in any event have the final vote resolved the impasse. Reliance and General Signal eventually announced that they had agreed to a limited period during which Reliance could attempt to negotiate a merger agreement with Rockwell and that, if a Rockwell deal was entered into but did not close on a timely basis, General Signal would re-enter into its merger agreement with Reliance. This was shortly followed by a Rockwell/Reliance merger agreement and a successful tender offer.

Similar to the Reliance/General Signal situation, National Education’s stock-for-stock merger agreement with Sylvan Learning did not contain a “fiduciary out” for National Education, but in light of the adverse stock market reaction to the original deal and Sylvan’s determination not to rebid, the parties eventually agreed that so long as Harcourt General and National Education entered into a merger agreement at a specific price within four days and promptly paid Sylvan its break-up fee, the Sylvan/National Education merger agreement would be automatically terminated. This allowed National Education to accept Harcourt General’s higher bid.

In Outboard Marine, the board also cited in its Schedule 14D-9 response “uncertainties” in the Greenway Partners’s offer as the justification for its determination that it was in the best interests of the Outboard Marine stockholders for the board not to take a position on the Greenway Partners’s offer. Greenway Partners was not a typical third-party buying group but instead was a group comprised of stockholders of Outboard Marine who had expressed dissatisfaction with the price to be paid by Detroit Diesel for their shares pursuant to the original merger agreement. Some questions had therefore been raised about Greenway Partners’s seriousness in actually acquiring Outboard Marine as opposed to forcing an increase in the price to be paid for their Outboard Marine shares. Subsequently, in light of Detroit Diesel’s determination not to rebid, the board decided to give the Greenway Partners group a window of opportunity in which to conduct a take-down with its proposed tender offer. The board agreed (with Detroit Diesel’s consent and the payment of an up-front negotiated fee to Detroit Diesel in lieu of its contingent break-up fee) to amend Outboard Marine’s poison pill in order to permit Greenway Partners to complete its tender offer if Greenway Partners consummated the tender offer before a specified time and successfully purchased a certain percentage of shares. Greenway did consummate the tender offer during the specified time and successfully acquired Outboard Marine.

In both LIN Television and Cerulean, the boards signed revised merger agreements with the original bidders when Hicks Muse (in the case of LIN Television) and Wellpoint (in the case of Cerulean) made overbids of unsolicited proposals. Similarly, in TPC, in response to a proposal from a competing bidder that might have led to a superior proposal, First Reserve and SK Capital preemptively served up an amendment to their merger agreement with TPC, sweetening the price but also negotiating an increase in the termination fee and insisting that negotiations with the interloper cease. TPC countered, and the parties ultimately settled on a new price of $45 per share, up from $40 per share in the original agreement, and revised termination fee protections. However, it is important to note that First Reserve and SK Capital had matching rights under the original merger agreement, so this was a preemptive defensive move. In each of Ply Gem and Xpedite, the original bidders chose not to compete with the unsolicited bid of Nortek (in the case of Ply Gem) and the preemptive second bid of Premiere (in the case of Xpedite), and both original bidders walked away with their break-up fees.

Similarly, in each of Unisource, Avondale and Ralcorp, the original bidders walked away with their break-up fees when the targets accepted the unsolicited bid of Georgia-Pacific (in the case of Unisource), the all-cash unsolicited bid of Litton (in the case of Avondale) and the unsolicited cash bid of Cargill (in the case of Ralcorp). When MediaOne accepted the unsolicited bid of AT&T, in addition to its $1.5 billion break-up fee, Comcast, the original bidder for MediaOne, also walked away with an agreement with AT&T to engage in a significant cable property swap, which, along with a multi-billion dollar cash payment, would allow Comcast to increase its cable subscribers by approximately 750,000 (and have an option for 1,250,000 more). In the

Consolidated Gas situation, Consolidated Gas rejected Columbia Energy's unsolicited proposal and affirmed its agreement with Dominion Resources after the two original partners revised their merger agreement to compensate for downward movement in Dominion Resources's stock price after announcement of the prior deal. In Thermo Cardiosystems, Thermo Cardiosystems rejected ABIOMED's three attempts to restructure the mix of cash and stock in its unsolicited $11.50 per share offer, ultimately reaffirming its agreement to be acquired by Thoratec in its all stock deal (even though the value of that deal had decreased by the time of the reaffirmation). In Rental Service, the Rental Service board rejected United Rental's unsolicited bid, but Rental Service and its original partner NationsRent ultimately called off their prior deal after investors soured on the deal. Similarly, while Sports Authority did not ultimately pursue the Gart Sports bid, the original merger agreement between Sports Authority and Venator was terminated because of the significant drop in the value of Venator's stock. In The Learning Company situation, while TLC initially rejected SoftKey's front-end cash, back-end stock tender offer because of, among other things, the uncertainties associated with valuing the SoftKey equity to be received by TLC stockholders in the back-end, TLC later accepted a SoftKey all-cash bid.

The volatility of an all-stock deal can both create an opening for a competing bidder and enhance the target board's ability to satisfy "no-shop" provisions. In March 2001, London-based Prudential plc entered into a stock-for-stock merger agreement with American General Corp. with an initial implied value of $22 billion. Yet, the deal price dropped by more than $2 billion as Prudential's stock plummeted amid investor concern that the British insurer overpaid and that the new company's shares would flood the UK market. Less than three weeks later, American International Group made an unsolicited all-stock overbid for $23 billion with a 5% collar on the downward movement of AIG stock. In response to this hostile bid, AmGen signed a confidentiality agreement with AIG and immediately began negotiations, since the $2 billion drop in Prudential's offer made it clear that AIG's bid was "reasonably likely to result in a superior proposal." Initially, Prudential insisted that it would continue with its acquisition of AmGen and filed a lawsuit against AIG for its "tortious interference" with Prudential's signed deal (an extremely tenuous claim given the explicit presence in the merger agreement of a condition requiring target shareholder approval be received). Nevertheless, in early May, Prudential agreed to drop its suit, terminate its agreement and accept the $600 million break-up fee, thereby clearing the way for AmGen to sign a new deal with AIG.

In Paramount, Grumman, Grow Group, the 1997 MCI transaction and IBP, the stage was set for each of their boards to ultimately run an auction between the two (or in the case of MCI and IBP, three) potential acquirers to see who would provide the better value to the target. In Santa Fe, the board arguably didn't run an auction but stayed somewhat allied with Burlington Northern, its first bidder, while Union Pacific and Burlington Northern waged an intensive public bidding war between them that did result in higher value for Santa Fe's stockholders. In Conrail, the board continued to remain allied with CSX while CSX and Norfolk Southern engaged in a public bidding war. Conrail entered into a series of revised merger agreements with CSX providing for higher value for Conrail's stockholders (and also providing for longer "lock-out" periods, as discussed earlier). Nevertheless, when Conrail stockholders rejected a proposal to amend Conrail's charter that was critical to CSX's tender offer, and regulatory resistance mounted against any single competitor walking away with all of Conrail and its coveted northeastern railroad routes, the united resistance of CSX and Conrail to Norfolk Southern's higher bids began to unravel. Notwithstanding the fact that later CSX/Conrail merger agreements contained an "anti-carve-up" provision precluding CSX and Conrail from discussing the sale of their assets with other railroads (Norfolk Southern was named specifically in the provision), CSX and Conrail determined to engage in discussions with Norfolk Southern pursuant to which the parties negotiated a three-way revised deal in which Conrail and CSX merged and a significant portion of Conrail's assets were sold to Norfolk Southern.

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## Auctions: Considerations in Structuring and Management

As is often the case, even the decision by a target board to conduct an auction between the original merger partner and the deal-jumper begins yet another debate—how to structure and run the auction? While numerous variations exist, there are two basic templates for such auctions. One is the traditional private auction process that allows for informal competitive price discussions or for a more formal process that provides for bids to be delivered to the board by a certain time and date, with the board having a period of time to evaluate such bids, to seek further value from the bidders, if appropriate, and to determine the winner and document that transaction. The other bidding structure is the more "public" one reminiscent of an art auction. In this structure the bids are presented publicly to the stockholders or the board, each bidder having an opportunity in a predetermined time to rebid publicly until only one bidder remains. The public bidding process treats the board much like the art auctioneer, whose position is more mechanical then judgmental.

The public bidding process has surface appeal from a stockholder's perspective and clearly minimizes the risk of a board unfairly orienting the process towards one bidder.[58] However, the private auction fairly applied should generate higher value for the stockholders because of the uncertainty on the part of each bidder as to the other's offer and whether there will be an opportunity for another round. This uncertainty will tend to pressure a bidder into putting a higher bid on the table, even if it is already at a higher price level and therefore potentially bidding against itself. Furthermore, few boards will willingly submit to the abdication of control inherent in a truly public auction process.

The Paramount board chose a blend of the two approaches—an initial private round, but with complex public bidding procedures to follow the merger agreement entered into as a result of the private round. This decision reflected at least three factors: 1) notwithstanding QVC's demand for a fully public procedure, Paramount's board and financial and legal advisors informed QVC that "your notion of 'open and public bidding' will risk failing to achieve the best value to Paramount stockholders"; 2) each of Viacom's and QVC's bids to that date indicated a willingness to keep bidding against each other in a very public manner; and 3) the harsh tone of the Delaware Court's opinion and QVC's strident assertions that the Paramount board would not treat it fairly led the board to determine that from the standpoint of stockholder confidence it was better to let a public process play out.

The structure instituted was quite complex in order to lock each bidder into a new merger agreement (without any termination penalty for the exercise of the board's "fiduciary out") at each subsequent level, to provide an opportunity for each bidder to rebid on an equivalent time schedule, and to allow the stockholders to exercise their own choice free of the coercive pressures of the two-tiered, cash front-end/stock back-end bids by ensuring that all stockholders would have time to tender into the ultimate winning bid.

[58] However, as the board of directors of Del Monte Foods encountered, there are still other risks to the integrity of the process, including potential conflicts that may impact how its financial advisor runs the process. In In re Del Monte Foods Company Shareholders Litigation, Consol. C.A. No. 6027-VCL (Del. Ch. Feb. 14, 2011), Vice-Chancellor Travis Laster enjoined the shareholder vote on the sale of Del Monte Foods to private equity firms KKR, Vestar Capital and Centerview Capital for 20 days, and suspended certain deal protection mechanisms such as the initial bidder group's matching right, "no-shop" restrictions and $120 million termination fee in the event of a topping bid. Drawing the Vice-Chancellor's ire, among other things, was the allegation that Del Monte Foods's financial advisor Barclays Capital not only was advising the company on the transaction but also was "secretly and selfishly manipulating the sale process" toward a transaction that would add fees to Barclays as a source of buy-side financing on the transaction. The Vice-Chancellor also criticized the Del Monte Foods board for allegedly not supervising its financial advisor closely enough and allowing Barclays to participate in the buy-side financing and run a "tainted" "go-shop" process, despite knowing of Barclay's conflict of interest with regard to the financing fees. While heaping blame primarily on Barclays, the Vice-Chancellor emphasized that "the buck stops with the board." However, during the 20-day extension no bidders emerged and the transaction closed on March 7, 2011, with Barclays providing part of the debt financing.

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The process, while lengthy, resulted in QVC initially winning the private round by increasing its already higher bid, but QVC was ultimately topped by a later Viacom bid that it was not prepared to make in the private round. However, when Dollar Thrifty imposed an early October 2011 deadline for best and final definitive proposals from Hertz and Avis Budget, the move backfired when neither party submitted a bid by the public deadline.

In Grumman/Northrop, after about three weeks Grumman declared that it would institute procedures for a traditional private auction, declaring that "the most prudent course of action is to bring this process to a prompt and orderly close." The process was designed to "constitute a single and final round of bidding," although, as is typical, the Grumman board reserved the right to change its own rules. The publication of the procedures began a heated public debate between Grumman and Northrop, not over the price to be paid, but over the auction process itself.

Northrop asserted that it was unable to accept the rules, insisting that to be fair a procedure had to be "open and public." Given that Northrop's offer was already $5 higher and Martin Marietta had made no indication of going up, Northrop was concerned about being forced either to bid against itself or to let Grumman steer the deal to its original merger partner. Northrop was so concerned about the process that it offered a one-day increase of $2 over its existing $60 bid if the Grumman board accepted the higher bid prior to two hours before the private auction deadline. The board let the period pass, and Northrop was faced with the difficult quandary of whether and how to rebid.

Northrop took a highly creative approach to balancing its concerns by delivering a "formula bid," the amount of which was mathematically derivable from the combination of their bid letter and any Martin Marietta bid letter delivered at the deadline. Possible bids under the formula ranged in $1 units from no increase if Martin Marietta did not rebid, to as high as $66 if Marietta bid at least $64.01.[59] The bid did not require Grumman to shop Martin Marietta's bid to Northrop and was non-binding if disclosed to Martin Marietta. Interestingly, the viability of this mechanism was helped by a hole in Grumman's own bidding procedures, which did not exclude such a responsive bid. Ultimately, Martin Marietta did not rebid, and after a few days of negotiations Northrop agreed to go up to the $62 per share it had flagged in the one-day bump.

Grow Group also ran a private auction between Imperial Chemical and Sherwin-Williams, which resulted in an increased victorious bid from Imperial Chemical. One of the most interesting aspects of that auction was the clear provision in the auction procedures that not only was the auction intended to be a "single and final round of bidding," but that this design would be enforced by the grant to the winner of a significantly enhanced break-up fee over the break-up fee contained in the merger agreement originally executed by Imperial Chemical. One should expect to see in future deals similar pressure to extend the envelope of what constitutes a normally acceptable level of "lock-up" protection, at least in situations like Grow Group, where a post-merger agreement auction puts the participants on clear notice that the extra lock-up protection will be granted to induce a best-and-final bid.

The roots of the MCI transaction go back to 1994 when BT acquired a 20% ownership interest in MCI, and in 1996 MCI and BT entered into a merger agreement providing for a strategic combination of MCI and BT. However, in light of subsequent events and its institutional stockholders' criticism of the deal, BT demanded price concessions from MCI, which it won in August of 1997. In response to the renegotiated MCI/BT deal, first WorldCom and then GTE launched their bids to acquire MCI in October of 1997. To manage this turbulent climate, the MCI board chose to utilize a modified private auction in which formal bid procedures were never provided to the three competing bidders—BT, WorldCom and GTE—since BT was already party to a merger agreement with MCI that contained constraints on MCI's ability to conduct an auction. Instead, the MCI board was forced to walk a tightrope through a veritable four-ring circus by negotiating simultaneously

[59] Years later, a similar derivative bidding formula was employed by Icahn in his successful bid to acquire Pep Boys, as discussed on pages 59-60, above.

with the three competing bidders while adhering to the terms of the MCI/BT merger agreement and avoiding any action that might permit BT to terminate the merger agreement and collect a very substantial break-up fee before MCI had an executed replacement merger agreement with any of the three bidders. In lieu of creating formal auction procedures and reserving the right to change its own rules, the MCI board essentially conducted a private auction pursuant to fluid procedures that enabled it to keep three competing bidders at the table in an atmosphere of uncertainty on the part of each bidder as to the offers of the other bidders and the opportunity for subsequent bids.

The “no-shop” covenant contained in the merger agreement prohibited MCI from soliciting, encouraging or facilitating an acquisition proposal. Formal bid procedures which explicitly stated that they were designed to elicit further value from the bidders could potentially have violated the “no-shop” covenant and permitted BT to terminate the merger agreement and collect its break-up fee (on the purported basis that the MCI board had withdrawn or modified in an adverse manner its recommendation of the MCI/BT merger). While it could have been argued that formal bid procedures were being used merely to negotiate with bidders who had already made unsolicited offers, but not to encourage or solicit acquisition proposals, such a position would have required the MCI board to make the superior proposal determination described above in order to satisfy the exception to the “no-shop” covenant, which in turn could have led to the argument that such a determination was tantamount to a withdrawal of the MCI board’s recommendation of the MCI/BT merger.

After receiving the unsolicited WorldCom and GTE offers, the MCI board and its advisors spent the first several weeks gathering information concerning WorldCom and GTE and their respective offers in order to assess the feasibility of the offers and determine whether either offer could provide greater value to the MCI stockholders than the MCI/BT merger. Following this initial review and after obtaining the waiver from BT permitting MCI to discuss the proposals with WorldCom and GTE, the MCI board directed MCI management and its advisors to commence a process designed to more fully inform the MCI board concerning the two unsolicited proposals and the MCI/BT merger. This process was also intended to attempt to achieve the objectives of a private auction without contravening the provisions of the MCI/BT merger agreement.

In the subsequent weeks leading up to the merger agreement between MCI and WorldCom, representatives of MCI and its advisors conducted discussions with each of BT, WorldCom and GTE and encouraged each of the bidders to increase their bids (or, in the case of BT, to increase the merger consideration provided for in the MCI/BT merger agreement) and to provide certainty of closing a transaction. Discussions between MCI and WorldCom on the one hand and MCI and GTE on the other hand were complicated by the fact that BT was frequently also a party to such discussions. BT was able to participate in such discussions because of certain contractual rights that BT had negotiated in connection with its acquisition of the 20% ownership interest in MCI in 1994, including the right to a separate class vote (as the holder of all the outstanding shares of MCI Class A common stock) with respect to a business combination between MCI and a party other than BT that occurred prior to October 1, 1998. These contractual rights required the MCI board to consider in its evaluation of the competing offers whether either of the WorldCom or GTE offers would be acceptable to BT.

MCI was ultimately able to induce WorldCom to bid $51 a share in WorldCom stock, and, with BT’s consent, MCI entered into a definitive agreement with WorldCom, resulting in the largest domestic corporate transaction to that date.

## Comparing Apples to Oranges: Evaluating Competing Bids

Frontier and U.S. West had to evaluate their respective Qwest interloping bids in the unusual context of a single interloper making simultaneous stock or stock and cash bids for multiple targets. This significantly complicated the evaluation of the Qwest bid, particularly by the smaller Frontier, because it was difficult to assess whether the stock currency being offered was that of Qwest (assuming that Qwest did not also acquire U.S. West) or was effectively that of a combined Qwest/U.S. West (assuming that Qwest did also acquire U.S.

West). In Frontier's case, it also had to assess significant speculation that Qwest's offer for Frontier was merely a tactical device meant to pressure Global Crossing to let Qwest achieve its "real" goal of acquiring U.S. West. While in each case Qwest's initial "fixed exchange ratio" offer had a higher "headline" price based on Qwest's pre-announcement market price, Qwest's proposal had none of the value-protective structural elements of the Global Crossing/Frontier fixed-value structure (i.e., $63 worth of Global Crossing stock), and perhaps not surprisingly, Qwest stock fell 25% in the week after the announcement. Both Frontier and U.S. West issued press responses to the initial bids indicating that in light of the "no-shop" contractual limitations in their respective merger agreements with Global Crossing (as discussed earlier in this article), no discussions would be appropriate at that time. This response (which could be considered a form of "public auction" negotiation) effectively signaled that neither Frontier nor U.S. West were prepared to make the requisite "Superior Proposal" finding. The Frontier release did indicate certain of its concerns with the Qwest bid in explaining its actions (but were careful not to be accused of "soliciting" a new Qwest bid); however, the Frontier response did not purport to "reject" the concept of a Qwest bid.

After about a week, Qwest made revised bids for both companies, building in collar mechanisms to add some greater certainty of value, but still containing some significant issues relating to the sufficiency of the collar mechanism, the stated value, and, from Frontier's perspective particularly, whether the significantly long regulatory timetable for an acquisition of U.S. West would delay the regulatory timetable for the Frontier acquisition. In response, Frontier made its "could reasonably be expected to constitute a Superior Proposal" finding in a press release discussed earlier (and U.S. West obtained its waiver from Global Crossing) and began to privately negotiate to induce each of Qwest and Global Crossing to improve their bids.

Were the two companies poised to be the beneficiaries of a lengthy Paramount-style bidding war? It was not to be, as the earlier speculation about Qwest being more interested in U.S. West and Global Crossing being more interested in Frontier seemed to be confirmed as the two bidders got together quickly and agreed to split the companies and not compete with the other's deal. This effectively ended the auction for Frontier (leaving the Global Crossing deal in place) and permitted Qwest to sign a merger agreement with U.S. West with only a few variations in terms from its revised bid.

In the AHP/Warner-Lambert/Pfizer battle, Warner-Lambert was faced with the unfortunate (or fortunate, depending upon your perspective) situation of having Pfizer announce a hostile stock-for-stock deal-jump while the respective CEO's of Warner-Lambert and AHP were still giving interviews on the announcement day of the AHP/Warner-Lambert "merger of equals." Warner-Lambert had spent over six months evaluating its strategic alternatives and had determined that its best course of action was a strategic "merger of equals" in which its holders would have a large stake in the benefits of the combined company, and that their preferred merger partner was AHP. While Warner-Lambert had an ongoing co-marketing agreement with Pfizer relating to Warner-Lambert's wildly successful Lipitor anti-cholesterol drug, and Pfizer had made some inconclusive approaches to Warner-Lambert about interest in a possible deal, Warner-Lambert did not think that absorption by the much larger Pfizer was the right approach at the time.

As such, the Warner-Lambert board and management initially remained quite supportive of their no-premium "merger of equals" with AHP, notwithstanding the large initial value gap inherent in Pfizer's premium hostile take-over bid. This position was enhanced as Pfizer's stock fell after the announcement, and the gap closed after a time to a manageable few billion dollars. In fact, the Warner-Lambert board took the position for an extended period of time that, since Pfizer's bid was conditioned on the elimination of AHP's $1.8 billion break-up fee and the cross-options arrangements which would prevent Pfizer from acquiring Warner-Lambert in a pooling transaction, the Pfizer bid was "not reasonably capable of completion" and Warner-Lambert was therefore not even permitted under the "no-shop" clause of the AHP merger agreement to engage in discussions with Pfizer. As the level of rhetoric and accusations in both the public relations and litigation arena grew more acerbic, the Warner-Lambert board evidenced even greater disdain for the prospect of a viable relationship between Warner-Lambert and Pfizer and ultimately sued to terminate its

Lipitor relationship with Pfizer (it is generally assumed that the imminent presence of the hearing date for that Lipitor lawsuit was a stimulus for the reaching of a deal between Warner-Lambert and Pfizer).

Notwithstanding all this background, when the gap in value began to significantly climb to greater than $20 billion, aided by a stronger Pfizer stock price and AHP's stock price having been hurt by the outcome of certain diet-drug litigation cases, it was reported in the Wall Street Journal that some key large institutional stockholders of Warner-Lambert had begun to pressure its management and board to recognize that the odds of stockholder approval of an AHP/Warner-Lambert deal were very low and that Warner-Lambert needed to commence talks with Pfizer. Interestingly, under the AHP/Warner-Lambert merger agreement, since Warner-Lambert had no fiduciary termination right and the stockholders meeting to vote on the transaction was agreed to be no earlier than May 15, 2000, AHP's cooperation would be necessary to let Warner-Lambert move ahead with another deal without waiting and to permit a pooling transaction to occur. Ultimately, after the termination of widely reported preliminary discussions with The Procter & Gamble Company as to the possibility of a three-way merger between Procter & Gamble, Warner-Lambert and AHP, Warner-Lambert agreed to an enhanced bid by Pfizer, and AHP stepped aside to permit that transaction to proceed on a pooling basis, with AHP receiving $1.8 billion as a break-up fee as provided in the original merger agreement.

In the UPM-Kymmene/Champion International/International Paper battle, IP waited two and a half months after the February 2000 announcement of the UPM-Kymmene/Champion deal to surface with its competing proposal. The UPM deal had been in the form of 1.99 shares of UPM stock or ADR's for each share of Champion stock. While the initial implied value of that deal in February had been over $66 per Champion share, by late April the value of UPM shares had fallen to approximately $53. IP's initial competing proposal on April 24, 2000 was for $64 per Champion share in cash and stock. For approximately two weeks, the Champion board discussed the competing proposals but did not commence negotiations with IP. On May 5, 2000, after IP signaled a willingness to increase its offer, the Champion board made its determination under the merger agreement that the IP bid could reasonably be likely to lead to a superior proposal and, after entering into a confidentiality agreement, began discussions with IP. A few days later, UPM-Kymmene privately raised their proposal to $70 in cash conditioned on non-disclosure of its terms to IP. On May 9th, IP countered with a $75 cash-and-stock proposal with a tight time deadline for acceptance. The Champion board concluded that the $75 IP offer was a "Superior Proposal" within the meaning of the UPM-Kymmene merger agreement and gave UPM-Kymmene the formal notice of termination that triggered a three-day negotiation period during which, if UPM-Kymmene matched or beat the $75 proposal, Champion would under the contract no longer be able to terminate unless it could make a new "Superior Proposal" determination after giving effect to any revised UPM-Kymmene bid. UPM-Kymmene chose not to raise its $70 bid, however, and Champion terminated the merger agreement, paid UPM-Kymmene its break-up fee and expense reimbursement, and signed a new merger agreement with IP.

The late 2000/early 2001 IBP/DLJ/Smithfield/Tyson melee reflected the unusual situation of competing bids between two different deal-jumpers, with the original merger partner quickly heading for the shelter of the sidelines. In early October 2000, IBP, the largest U.S. beef producer and second largest U.S. pork producer, announced an LBO merger agreement for $22.25 per share in cash with a buyout group comprised of affiliates of DLJ, IBP management and certain large shareholders of IBP. The price and lack of auction process in the deal were criticized by analysts and IBP shareholders, and, in late October, IBP's largest shareholder that was not part of the buyout group filed a Schedule 13D insisting that it would vote against the transaction. In mid-November, Smithfield Foods, the nation's largest pork producer, submitted a "deal-jump" bid letter to the Special Committee of IBP's board, offering $25.00 per share in Smithfield stock, subject to a collar mechanism to determine the precise exchange ratio. The IBP Special Committee promptly declared that it was permitted to engage in discussions with Smithfield under the "Superior Proposal" terms of the DLJ merger agreement, and began such discussions pursuant to a confidentiality agreement containing (as discussed earlier in this article) very few "standstill" provisions. The discussions centered around how Smithfield could better assure the value of its bid given its all-stock nature and issues relating to certainty of

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closure given the antitrust regulatory process triggered by the pork overlap. Interestingly, the commentators at the time were suggesting that the original DLJ buyout group with which IBP had a merger agreement did not appear to be interested in matching or attempting to compete with the new bid. The financing markets were not strong at that time, and since the LBO was conditioned on receipt of financing, it would have been difficult to have closed that highly leveraged transaction even at the original price. Some commentators even speculated that Credit Suisse First Boston, which had just agreed to acquire DLJ, was delighted that the Smithfield bid provided a graceful way to avoid the risk of financing embarrassment and would provide DLJ with a significant break-up fee to boot.

The plot thickened when, on December 4th, Tyson unexpectedly bid $26.00 for IBP—half in cash and half in Tyson stock. This began a period of jockeying among Tyson, Smithfield and the IBP Special Committee over who would rebid and under what process, if any, would it be appropriate for the auction to occur. As in the Grumman/Northrop transaction discussed above, there were differences in viewpoint as to whether the auction process should be public or private. For a number of weeks Smithfield had insisted that while it was evaluating whether it would increase its $25.00 bid, it would not want to do so except on an exclusive basis or pursuant to a procedure which privately solicited best and final bids from Tyson and Smithfield on a "blind" basis. The Special Committee of IBP ultimately concluded that the best way to induce a higher bid from Smithfield was to institute such a process and in late December sent a letter to each of Smithfield and Tyson requesting them to submit best and final bids at 5:00 p.m. on December 29th and committing not to disclose the bid price of one bidder to the other. At Smithfield's request in order to preserve the confidentiality of its bid and in recognition of DLJ's apparent decision not to compete with the overbids, IBP had also arranged for DLJ to waive its right under the original merger agreement to see the terms of any bids and to have a three-day period to match any higher bid. On December 28th, however, Tyson, apparently thinking a private auction process was inappropriate (not surprisingly given its status as the then higher bidder not wanting to bid against itself) publicly raised its bid to $27.00 per share in stock and cash and made certain other structural commitments with respect to its bid. Tyson sent IBP a letter claiming that it would not participate in the private bidding process because it believed a more public auction structure was appropriate. Pursuant to the requested process, Smithfield did privately submit a bid of $30.00 in stock subject to a collar mechanism late in the day on December 29th. However, on December 30th, creatively interpreting its non-disclosure commitment, the IBP Special Committee convinced Tyson to increase its bid to $28.50 in cash and stock, concluded that the increased Tyson bid "would have greater current value and greater certainty than the Smithfield $30.00 per share all stock proposal" and informed Smithfield that the Special Committee had determined to "go in a different direction." After Smithfield privately delivered a letter on December 31st increasing its offer to $32.00 per share in stock, IBP once again induced Tyson to increase its price to $30.00 per share in cash and stock, concluded that that proposal had more current value than the revised Smithfield proposal and entered into a merger agreement with Tyson on January 1st.[60]

SunTrust's unsuccessful attempt to break up the Wachovia/First Union deal—the largest hostile takeover attempt in U.S. banking history and the first ever attempt following the elimination of pooling accounting treatment—illustrates the significant impact that this accounting change may have on the tactics and options available to the combatants in deal-jump situations. Prior to the elimination of pooling treatment, virtually all bank mergers were accounted for using the pooling method and had the benefit of an extremely effective

[60] After winning the bidding war for IBP and following the execution of the definitive merger agreement, Tyson attempted to back out of the deal. Tyson claimed that IBP's failure to disclose an SEC investigation into IBP's accounting practices, the need for a restatement of IBP's earnings, and bad results in the spring of 2001 constituted a "Material Adverse Change" and grounds for termination. In reviewing the case, the Delaware Chancery Court rejected such contentions and compelled Tyson to consummate the merger. In examining this precedent in the deal-jumping context, as a target chooses between competing acquirers, it must anticipate the behavior patterns of unsolicited suitors and predict whether a given deal will close. For further information on this groundbreaking case, please refer to the publication entitled, "Delaware Chancery Court Orders Specific Performance of Merger Agreement: An Analysis of the IBP- Tyson Litigation" available on the Simpson Thacher & Bartlett LLP website (www.simpsonthacher.com).

deterrent to third-party interlopers—the so-called “lock-up” stock option. These options—which provided one or both of the friendly parties with an option to buy up to 19.9% of the merger partner’s stock in the event of a third-party offer and to sell that stock or option back to the merger partner at a specified price in the event the third-party transaction was consummated—had the effect of depriving the interloper of the ability to account for its transaction as a pooling-of-interests. Since pooling treatment was a practical requirement for virtually all banks under the old accounting rules, these options were an extremely potent deal protective device. With the elimination of pooling treatment, the most potent feature of the lock-up option—its pooling-killing feature—has been neutralized. While First Union and Wachovia nonetheless granted each other cross options in connection with their friendly merger, SunTrust’s willingness to pursue its hostile acquisition in the face of those options demonstrates the limitation of this device in the post-pooling world.

As noted, SunTrust was ultimately unsuccessful in its deal-jump attempt. While its all-stock bid initially represented a premium of 17% over the First Union deal, that premium literally evaporated overnight, and SunTrust was unable to recoup the premium in spite of a hard fought proxy fight. SunTrust’s bid was further challenged when the SEC changed its interpretation of Regulation M in connection with hostile transactions, therefore not allowing SunTrust to repurchase its own shares during the offer. The SEC determined that this regulation, which prevents a stock-for-stock acquirer from purchasing its own shares during the proxy solicitation period, applies equally to a hostile proponent of a stock-for-stock transaction such as SunTrust—even if that transaction is not yet the subject of a merger agreement or exchange offer. As a result of this change in interpretation, SunTrust, like First Union, was precluded from repurchasing its own shares once it began mailing proxy cards soliciting shareholder votes against the First Union merger.[61]

While the elimination of pooling treatment has neutralized the most potent feature of the lock-up option in a banking context, one example showing that the lock-up option can still act as a useful deal protective device is Microchip Technology’s acquisition of Silicon Storage. After wresting Silicon Storage away from Prophet Equity, Microchip amended its agreement with Silicon Storage to increase its offer to $3.05 per share to fend off a bid from Cerberus, which had entered into voting agreements with two major Silicon Storage shareholders. In connection with the amended agreement, which retained the original 3.5% break-up fee, Microchip purchased 19.9% of Silicon Storage stock at the $3.05 per share deal price and had the right to sell such shares to Silicon Storage at $3.05 per share if Silicon Storage pursued an alternative transaction, essentially giving Microchip an option (albeit through a put). The overall value Microchip could realize in the case of an alternative transaction was capped (including through its ownership of the stock it purchased) at a multiple of the break-up fee that essentially increased the break-up fee to 4.5%. Owning the block of shares gave Microchip some added votes in favor of its transaction with Silicon Storage (so long as the transaction remained supported by the Silicon Storage board) to offset the possibility of negative votes from the shareholders with voting agreements tying them to Cerberus, but, in return, Microchip agreed to vote all such shares (or, in the case of a Cerberus transaction, a portion of such shares in proportion to how other non-Cerberus shareholders voted) in favor of an alternative transaction recommended by the Silicon Storage board.

[61] Following the transaction, the SEC adopted amendments to Rule 10b-18 to create a so-called “merger exclusion” to the safe harbor and thereby further limited an issuer’s ability to repurchase shares in connection with a merger. This exclusion provides that the Rule 10b-18 safe harbor is not available for repurchases made “pursuant to a merger, acquisition or similar transaction involving a recapitalization.” For further information on amendments to Rule 10b-18 and its interplay with Regulation M, and a November, 2004 Q&A on the Rule, please refer to the December 19, 2003 publication entitled, “SEC Amends Issuer Common Stock Repurchase Safe Harbor” and the February 24, 2005 publication entitled “A Primer on Share Repurchases in Connection with Mergers and Acquisitions”, both available on the Simpson Thacher & Bartlett LLP website (www.simpsonthacher.com).

## The Bankruptcy Case

Similar to the public bidding process used in the traditional deal-jump paradigm, the agreement to acquire a company on the verge of bankruptcy often leads to an open auction among two or more suitors even after a merger or acquisition agreement is executed. A comprehensive treatment of bankruptcy-related M&A would take up far more space than permitted here, and in these troubled times will likely become a larger component of the M&A world, but it is worth focusing on the essential distinction from non-distress deals—i.e., the overriding presence of the bankruptcy court as an active participant in the process. Compared to a typical bidding contest, where the target may consider various non-financial factors, bankruptcy courts generally base their determination on the best price offered. For example, a battle began over the technology services unit of Comdisco Inc. when Comdisco filed for voluntary reorganization and at the same time announced its asset purchase agreement with Hewlett-Packard. Shortly thereafter, Sungard Data Systems Inc. entered the fray with a higher all-cash bid for the business unit. Sungard ultimately won the court-approved bankruptcy auction and closed the deal shortly thereafter because, in the bankruptcy context, cash talks.

The bankruptcy court-controlled auction of Neuberger Berman, the investment-management division of Lehman Brothers, illustrates how a bankruptcy court may consider the interplay between a high cash bid and deal completion risk. Shortly after Lehman filed bankruptcy in September 2008, Bain Capital and Hellman & Friedman's $2.15 billion bid for the Neuberger Berman unit was selected at the conclusion of an auction process that included several of the largest private equity firms. However, Carlyle Group, which had participated in the initial auction, convinced the bankruptcy court to reopen the bidding by arguing that Bain Capital and Hellman & Friedman were paying too little for the unit. Although Carlyle eventually dropped out of the reopened auction, the new auction included a management-buyout proposal from executives of the Neuberger Berman unit. The bankruptcy court ultimately approved the management buyout of the unit despite the fact that the management proposal was a no-cash deal that included $813 million in new dividend-paying preferred shares, plus common stock representing a 49% stake in the new company. At the time Lehman made its decision to accept the management-buyout bid, it believed (and the bankruptcy court concurred) that the management proposal was superior to the Bain/Hellman proposal because, among other reasons, the certainty of closing the transaction with Bain/Hellman was "eroding rapidly due to several closing conditions," including that Bain/Hellman had the right to walk away from the deal if the S&P 500 had an average closing price of less than 902 in the 10 days before the closing of the transaction[62], and the value of the Bain/Hellman bid was decreasing due to a purchase-price adjustment tied to the value of Neuberger Berman's assets under management.

These bankruptcy-related deal-jumps are often subject to protracted legal proceedings. Ultimately, it is the bankruptcy court that will structure the auction procedures, supervise the bidding and approve the superior proposal. Such was the case in the battle for Einstein/Noah Bagel Corp. In April 2000, as part of a prepackaged reorganization, Einstein entered into an agreement to sell all of its assets to the private equity firm, Three Cities III LP. After fifteen months and several rounds of bidding and litigation posturing, in which Einstein rival, New World Coffee-Manhattan Bagel Inc., and Einstein majority shareholder, Boston Chicken Inc., submitted competing bids in an attempt to thwart the others' plans, the bankruptcy court rejected the Three Cities agreement in favor of the New World bid.

Although the initial agreements in both the traditional merger and bankruptcy contexts contain similar provisions, the target board in this "hybrid" bankruptcy deal-jump cedes much of its control to third parties. In addition to recommendations from the target board on the relative merits of the competing proposals, both secured and unsecured creditor committees chime in. Losing the backing of Paging Network Inc.'s bondholders was the fatal blow to Metrocall Inc.'s attempt to block PageNet's merger with Arch

[62] At the close of the last trading day prior to the Bankruptcy court's approval of the management buyout the S&P 500 had fallen below 900.

Communications Group Inc. In that case, following PageNet's filing a voluntary plan of reorganization pursuant to its merger agreement with Arch Communications, Metrocall submitted a competing plan to acquire PageNet. Although PageNet's official committee of unsecured creditors initially backed the Metrocall plan, they changed allegiances when Metrocall failed to submit a sweetened bid. Persuaded by the committee's rejection, the bankruptcy court ruled that the Metrocall bid was not superior to Arch's. This cleared the way for PageNet to emerge from bankruptcy and consummate its original agreement with Arch.

Creditors also played an important role in Trinity Time Investments Ltd.'s defeat of Cerberus's challenge to its acquisition of Air Canada. Air Canada filed for bankruptcy protection in April 2003 and, following an auction, announced a deal with Trinity on November 8th, pursuant to which creditors would get a significant minority stake in the restructured airline. Less than two weeks later, Cerberus, who had lost in the auction, informally made an unsolicited revised investment proposal, which would have offered creditors a significantly larger stake. Several creditors then sent a letter to the bankruptcy court requesting that the court briefly re-open the solicitation process in order to consider the Cerberus bid, despite Air Canada's concerns that a Cerberus deal would not pass regulatory scrutiny and the court-appointed monitor's urging that the court approve the deal with Trinity. The bankruptcy court did approve Trinity's proposal but also permitted Cerberus to submit one formal investment proposal and Trinity to then amend its initial offer. In the end, Trinity amended its proposal and succeeded with its second offer, pursuant to which creditors would receive a significantly larger stake in the airline than the original proposal offered.

As this analysis indicates, the bankruptcy mindset is auction-oriented and the court will actively intervene to seek the highest bidder for the target and its assets.

* * * * *

As can be seen from these examples, the road from original announced merger agreement to final resolution of an unsolicited second or third bid is long and arduous. At each stage, complex legal, financial and behavioral judgments will govern the decision-making process of all the players. In the end, the then-timely congratulations are surely well-deserved.

In the interest of full disclosure, note that Mr. Spatt is a member of the firm of Simpson Thacher & Bartlett LLP, which, of the transactions referenced in this article, served as counsel to J.C. Flowers & Co., LLC, one of the members of the Anbang Insurance Group Co., Ltd.-led consortium that, as of the date of this article, had attempted to break-up Marriott International Inc.'s acquisition of Starwood Hotels & Resorts Worldwide Inc., to Zoomlion Heavy Industry Science and Technology Co. in its bid to acquire Terex Corporation, to The Klein Group, LLC, Lazard Frères & Co. LLC and Morgan Stanley & Co. LLC as financial advisors to The Dow Chemical Company in its "merger of equals" with E. I. du Pont de Nemours and Company, to AXIS Capital Holdings Limited in its attempted merger with PartnerRe Ltd., to Siris Capital in its acquisition of Digital River, Inc., to Fyffes in its attempted "merger of equals" with Chiquita International, to Dollar General in its bid for Family Dollar, to Pinnacle Foods in its attempted sale to Hillshire Brands, to Blackstone as the financial advisor to Courier in its sale process, to Microsoft in its acquisition of the devices and services business of Nokia, to Smithfield Foods in its strategic combination with Shuanghui International, to Silverlake Capital Partners in its acquisition of Dell Inc., to the special committee of the board of directors of Clearwire Corporation in connection with the Special Committee's review of strategic alternatives available to the company, including multiple proposals from Sprint Nextel Corporation and Dish Network Corporation and ultimate sale of the minority interest to Sprint Nextel, to Office Depot, Inc. in its strategic "merger of equals" with OfficeMax Incorporated, to Apax in connection with its acquisition of rue21, to JPMorgan Chase in connection with its financing of Minerals Technologies Inc.'s acquisition of AMCOL International Corporation, to Blackstone as financial advisor to Physicians Formula Holdings, Inc. in its sale to Markwins International Corporation, to First Reserve and SK Capital Partners in connection with their acquisition of TPC Group Inc., to J.P. Morgan Securities LLC and RBC Capital Markets and Barclays Capital as lead arrangers for the financing of the attempted acquisition of Quest Software, Inc. by a group of investors including Vincent Smith and Insight Venture Management, LLC, to Rockwood Holdings, Inc. in its attempted acquisition of Talison Lithium Limited, to Credit Suisse in connection with the financing for Energy Transfer Equity's acquisition of Southern Union, to Graham Packaging in the Silgan/Reynolds Group situation, to JPMorgan in their role as the lead arranger in the financing for Validus's attempted acquisition of Transatlantic, to the Apax Partners-led consortium in its acquisition of KCI, to Blackstone in its attempted acquisition of Dynegy, to Goldman, Sachs & Co. and JPMorgan in their role as financial advisors to Dollar Thrifty Automotive in its deal to be acquired by Hertz, to JPMorgan in its role as financial advisor to Deutsche Börse in its terminated merger with NYSE Euronext, to KKR, Vestar Capital Partners and Centerview Partners in their acquisition of Del Monte Foods Company, to Goldman, Sachs & Co. as financial advisor to Odyssey Healthcare, Inc. in its sale to Gentiva Health Services, Inc., to JPMorgan in its role as financial advisor to MSC Software in the MSC Software/Symphony Technology situation, to Peet's (as antitrust counsel) in the Diedrich/Peet's/Green Mountain battle, to Vivendi SA in its tender offer (and related acquisitions of shares) for GVT Holding SA (and in connection with ongoing corporate and litigation matters with respect thereto), to Aluminum Corporation of China (Chinalco), in its investment in Rio Tinto, to Wyeth in its acquisition by Pfizer, to the lead banks in the financing for Precision Drilling's acquisition of Grey Wolf, to Quadrangle Group in the contest for Greenfield Online, to Blackstone in its acquisition of EOP, to KKR and TPG in their acquisition of TXU, to KKR in its acquisition of First Data Corporation, to JPMorgan in its role as financial advisor to NASDAQ in the OMX AB/NASDAQ Stock Market Inc./Borse Dubai Ltd./Qatar Investment Authority battle, to Gas Natural in its bid for Endesa, and later for Enel in its subsequent bid, in the Endesa/Gas Natural/E.ON/Enel/Acciona battle, to the acquisition financing source in the merger of CME and CBOT, to Centerbridge in the EGL/Centerbridge & Woodbridge/Apollo battle, to KKR in its investment in Harman International (which was the result of an abandoned deal for the entire company), to Hellman & Friedman in its acquisition of Catalina, to Blackstone in its acquisition of Alliance Data, to the acquisition financing source for General Atlantic and Francisco Partners in the Aeroflex situation, to United Rentals in its aborted deal to be acquired by Cerberus, to a group led by KKR in its acquisition of HCA, to the financial advisor to CVS in the CVS/Express Scripts battle for Caremark, to KKR in the acquisition of RJR Nabisco, to Pinnacle's financial advisors in its bid for Aztar, to the financial advisor to Marsh Supermarkets in its sale to Sun Capital, to the Mays family and management in their bid to buy out Clear Channel, to an investor group including KKR in the Kerzner International LBO, to J.P. Morgan Chase in its merger with Bank One, to the financial advisor to a special committee of Lear Corp. in connection with Carl Icahn's bid for the company, to an investor group including KKR in its acquisition of Laureate Education, to the financial advisors to Freeport-McMoRan Copper & Gold in its acquisition of Phelps Dodge, to the financial advisors to Phelps Dodge in the Inco/Phelps Dodge agreement, to Mellon Financial in its merger with Bank of New York, to Blackstone as financing counsel in the Freescale Semiconductor LBO, to Abbott Laboratories in its investment in and acquisition of certain businesses of Guidant Corporation from Boston Scientific, to the financial advisors to MCI in the Verizon/Qwest melee, to the financial advisor to CNOOC Ltd. in its pursuit of Unocal Corporation, to Ripplewood's financiers in its agreement to purchase Maytag, to the financial advisor to KLA Tencor in its topping bid for August Technology and the financial advisor to Fillmore Capital Partners in its offer to buy Beverly Enterprises, to Harmony Gold Mining in its attempt to acquire Gold Fields, to UFJ in connection with its merger with Mitsubishi Tokyo Financial Group, to Wachovia in the First Union/Wachovia/SunTrust contest, to Smithfield Foods in the IBP/DLJ/Smithfield/Tyson battle, to L-3 in its acquisition of Titan Industries, to American Home Products in the AHP/Warner-Lambert/Pfizer contest, to Frontier in the Frontier/Global Crossing/Qwest battle, to Global Crossing in the U.S. West/Global Crossing/Qwest fight, to NationsRent in its terminated merger with Rental Service, to Dominion Resources in its successful acquisition of Consolidated Gas, to MCI in the MCI/BT/WorldCom/GTE battle, to Paramount in the Viacom/QVC contest, to NBC in its overbid for Outlet, to Harcourt General in the National Education Corp. acquisition, to LIN Television in the Hicks Muse acquisition, to Western Multiplex Corp. in its acquisition by Proxim Inc., to the financial advisor to UPM-Kymmene in the UPM-Kymmene/Champion International/International Paper battle, to the financial advisor to Dime Bancorp in its terminated merger agreement with Hudson United Bancorp and in its defense against North Fork Bancorp., to the financial advisor to Cyprus Amax in the Cyprus Amax/Asarco/Phelps Dodge battle, to the financial advisor to MediaOne in the Comcast/AT&T competition, to Sports Authority's financial advisor in its terminated merger with Venator, to Northrop's financial advisor in the Grumman acquisition, to Imperial Chemical's financial advisor in the Grow Group acquisition, to CSX's bank lenders in the Conrail/CSX/Norfolk Southern contest, to SoftKey's financial advisor in its successful bid to acquire The Learning Company, to Detroit Diesel's financial advisor in its attempt to acquire Outboard Marine, to Hicks Muse's financial advisor in its bid to acquire Ply Gem, to Xpedite's financial advisor in connection with the original buyout group agreement and the subsequent Premiere acquisition, to one of the competing bidders for Safeway, to the financial advisor to Clayton Homes in connection with its search for a higher bidder than Berkshire Hathaway, to the financial advisor to Centerpulse in the Centerpulse/Smith & Nephew/Zimmer Holdings battle and to a special committee of National Gypsum in its acquisition by Delcor.

# ANNEX A

Below is a list of other notable U.S. and foreign deal-jump transactions from 1994 through 2010 (listed from later years to earlier years):

## U.S. Deal-Jumps

- Hospira, Inc.'s successful attempt to interrupt a stock-for-stock merger agreement between Javelin Pharmaceuticals, Inc. and Myriad Pharmaceuticals, Inc.;
- Apollo Management, L.P.'s acquisition of CKE Restaurants, Inc. after entering the ring during the "go-shop" period provided for in a standing merger agreement between CKE and Thomas H. Lee Partners, L.P.;
- Accelrys, Inc.'s successful defense of its "merger of equals" with Symyx Technologies Inc. against separate unsolicited bids from Certara Corporation and an unnamed private equity fund;
- Blackstone's unsuccessful attempt to acquire Dynegy, which was voted down by Dynegy's shareholders in light of Carl Icahn's strong suggestion of an overbid, followed by a formal Icahn-led agreement to acquire Dynegy,[63] later terminated due to a lack of shareholder support for Icahn's offer;
- Hewlett-Packard Company's acquisition of 3PAR Inc. for almost double the $18 per share in cash offered in the original merger agreement between 3PAR and Dell, after a multi-round heated bidding war involving deep corporate pockets and big corporate egos;
- Avis Budget's success in pushing Hertz out of an initial deal to acquire Dollar Thrifty Automotive Group Inc. (which transaction was the subject of an excellent Delaware Chancery Court case discussed in footnote 28), though Hertz would later acquire Dollar Thrifty without interruption;
- Marlin Capital Partners perseverance through two rounds of overbids in matching Gores Partners III, L.P. as it attempted to jump in on Marlin's acquisition of Phoenix Technologies Ltd.;
- GN ReSound A/S's unsuccessful attempt to break up William Demant Holding A/S's acquisition of Otix Global, Inc. by overbidding during a "go-shop" window;
- Vector Capital's acquisition of RAE Systems Inc. after successfully breaking up a deal between RAE Systems and Battery Ventures, and later fighting off and emerging victorious from a battle with a returning Battery that had allied with SFW Capital Partners;
- Community Bancorp LLC's successful attempt to acquire Cadence Financial Corporation after breaking up a deal between Cadence and Trustmark Corporation;
- TransForce Inc.'s successful acquisition of Dynamex Inc. despite a prior agreed-upon deal with Greenbriar;
- Kratos Defense & Security Solutions, Inc.'s acquisition of Henry Bros. Electronics, Inc. despite a third-party attempt to break up the deal;
- Golden Gate Capital's successful acquisition of Conexant Systems, Inc., replacing the transaction Conexant had entered into with Standard Microsystems Corporation;

[63] While Icahn had not made a formal bid at the time the Dynegy shareholders voted down the Blackstone transaction, making his subsequent formal bid technically not a deal-jump situation, Icahn's clear indication that he may offer a superior bid affected the Dynegy/Blackstone transaction much the way a formal second bidder would have in a deal-jump situation.

- CF Industries Holdings, Inc.'s acquisition of Terra Industries, Inc., thwarting Yara International ASA's previous merger agreement to acquire Terra, a month after CF Industries had withdrawn its longstanding hostile bid for Terra;
- Merge Healthcare Incorporated's acquisition of AMICAS, Inc. after successfully disrupting Thoma Bravo, LLC's previous merger agreement to acquire AMICAS;
- in an example of a "checkers"-like attempted "double-jump," Microchip Technology's successful break-up of an acquisition by Prophet Equity LP of Silicon Storage Technology; Microchip's deal for Silicon Storage remained in place (with some upward adjustments) in the face of a number of attempted topping bids for it by Cerberus Capital Management LP;
- Green Mountain Coffee Roasters, Inc.'s successful attempt to wrest Diedrich Coffee, Inc. from its previous merger agreement with Peet's Coffee & Tea, Inc.;
- Prospect Capital Corporation's unsuccessful attempt to disrupt Allied Capital Corporation's acquisition by Ares Capital Corporation;
- Symphony Technology Group's successful defense of its acquisition of MSC Software against joint bids by two unnamed private equity firms;
- Platinum Equity's successful attempt to disrupt a management-led buyout of Pomeroy IT Solutions, Inc.;
- EMC Corporation's successful outbidding of an offer from NetApp Inc. for Data Domain, after Data Domain's board had signed a merger agreement accepting NetApp's offer;
- United Financial Bancorp's successful acquisition of CNB Financial Corp. in a deal that thwarted Berkshire Hills Bancorp's previous agreement to acquire CNB Financial;
- Vista Equity Partners's successful acquisition of SumTotal Systems, after SumTotal had signed an earlier agreement with Accel-KKR;
- CVS/Caremark Corp.'s successful defense of its acquisition of Longs Drug Stores Corp. against Walgreen Co.'s hostile overtures;
- Precisions Drilling Trust's successful acquisition of Grey Wolf, Inc., which disrupted a "merger of equals" between Grey and Basic Energy Services Inc.;
- Électricité de France International, SA's successful acquisition of a 49% interest in a joint venture involving Constellation Energy Group's nuclear generation business after Constellation had signed an earlier purchase agreement with Mid-America Energy Holdings Company (an affiliate of Berkshire Hathaway);
- Quadrangle's unsuccessful effort to fight off Microsoft Corp.'s hostile offer topping Quadrangle's previously executed agreement with Greenfield Online, Inc.;
- Waste Management Inc.'s failed attempt to disrupt the strategic merger between Allied Waste Industries, Inc. and Republic Services, Inc.;
- Sears Holdings Corp.'s failed repeated attempts to break up the various incarnations of the acquisition of Restoration Hardware Inc. by Catterton Partners;
- Hexion Specialty Chemicals Inc.'s "successful" effort to wrest Huntsman Corporation from its previous merger agreement with Basell Holdings (only to later refuse to close under heavily litigated circumstances);
- Sports Direct International plc's outbidding of an offer from the Hidary Group consortium for Everlast, after Everlast's board had accepted Hidary's offer;

- Advanced Medical Optics Inc.'s unsuccessful attempt to break up Bausch & Lomb Incorporated's agreement to be acquired by Warburg Pincus Partners LLC;
- The Upper Deck Company's unsuccessful attempt to wrestle away The Topps Company, Inc. from the hands of Tornante Co. and Madison Dearborn Partners LLC (another heavily litigated situation, as discussed below);
- Veritas Capital's acquisition of Aeroflex Incorporated, despite Aeroflex's prior merger agreement with General Atlantic LLC and Francisco Partners;
- Winston Hotels, Inc.'s merger with Inland American Real Estate Trust, Inc., after Winston had signed an earlier agreement with Wilbur Acquisition Holding Co. LLC;
- Hellman & Friedman LLC's take-private acquisition of Catalina Marketing Corporation, trumping Catalina's earlier deal with ValueAct Capital Partners, L.P. (which owned 15.6% of Catalina);
- Community Health Systems, Inc.'s acquisition of Triad Hospitals Inc., despite a prior agreed-upon deal with CCMP Capital Advisors LLC and Goldman, Sachs & Co.;
- the failed bid of Fillmore Capital Partners, LLC to acquire Genesis HealthCare Corporation, after Genesis had previously agreed to a merger agreement with Formation Capital and JER Partners (the reverse of the 2005 scenario where Formation tried to break up Fillmore's acquisition of Beverly (see above));
- Apollo Management, L.P.'s successful acquisition of EGL, Inc. in a deal that thwarted Centerbridge Partners L.P.'s and Woodbridge Co. Ltd.'s (a consortium that backed CEO James Crane's offer to acquire EGL) previous agreement to acquire EGL;
- IntercontinentalExchange Inc.'s failed attempt to acquire CBOT Holdings, Inc. in a bidding war with Chicago Mercantile Exchange Holdings Inc., after CBOT had signed a merger agreement with the Chicago Mercantile Exchange;
- Harbinger Capital Partner LLC's acquisition of Applica Inc., after NACCO Industries, Inc. had signed an earlier agreement with Applica;[64]
- the failed and unraveled consortium bid by Macklowe Properties, Carl Icahn and Mack-Cali Realty Corp. to split up SL Green Realty Corp.'s acquisition of Reckson Associates Realty Corp.;
- Simon Property Group Inc.'s and Farallon Capital Management LLC's agreement to acquire Mills Corp., despite its previous merger agreement with Brookfield Asset Management Inc.;
- Building Materials Corp. of America's agreement to acquire ElkCorp, despite ElkCorp's merger agreement with Carlyle Group;
- Drawbridge and Cardinal Paragon's unsuccessful attempt to outbid Sun Capital Partners Inc. for Marsh Supermarkets Inc. in the face of Marsh's merger agreement with Sun (where a "standstill" agreement also played a key role);
- Morgan Stanley Capital Group Inc.'s successful bid for TransMontaigne Inc., after it signed a merger agreement with SemGroup LP;
- Woodside Petroleum Ltd.'s ultimately unsuccessful bid for Energy Partners Ltd. (but which did effectively break up Energy Partners's agreement to acquire Stone Energy Corp.), after Energy Partners deal-jumped Stone's prior agreement with Plains Exploration and Production Co.;

[64] Nacco sued Applica and Harbinger for breach of the "no-shop" and related provisions in the merger agreement as well as other claims that Applica improperly aided Harbinger in its ultimately successful bid for Applica. In February 2011, Nacco announced it had settled the lawsuit for $60 million.

- Oshkosh Truck Corp.'s unsuccessful effort to make a higher bid (because of a "standstill" agreement imposed against it notwithstanding its attempt to enjoin enforcement) for Stewart & Stevenson Services Inc., after Stewart's merger agreement with Armor Holdings, Inc.;
- Wimar Tahoe Corp./Columbia Sussex Corp.'s acquisition of Aztar Corp., breaking up its merger agreement with Pinnacle Entertainment Inc.;
- Cherokee Inc.'s unsuccessful bid for Mossimo Inc., after Mossimo signed a merger agreement with Iconix Brand Group Inc.;
- Cathay General Bancorp's acquisition of Great Eastern Bank of New York, despite a prior agreed-upon deal with UCBH Holdings Inc.;
- Oriole Partnership LLC's failed attempt to acquire Town and Country Trust in a bidding war with Morgan Stanley Real Estate and Onex Real Estate Partners, after Town and Country signed a merger agreement with Morgan Stanley and Onex;
- Vornado Realty Trust's unsuccessful bid for Equity Office Properties Trust, despite EOP's merger agreement with Blackstone Real Estate Partners;
- Express Script Inc.'s unsuccessful attempt to outbid CVS Corp. for Caremark Rx Inc., despite Caremark's agreement to merge with CVS;
- Fillmore Capital Partners buyout of Beverly Enterprises Inc., in spite of a hostile bid from a consortium led by Formation Capital, LLC and after North American Senior Care, Inc. failed to come up with the equity commitment required under its prior acquisition agreement;
- Prentice Capital Management LP and GMM Capital LLC's joint acquisition of Goody's Family Clothing Inc., breaking up its prior agreement with Sun Capital Partners;
- Allergan Inc.'s successful effort to acquire Inamed Corp., despite its agreement to be acquired by Medicis Pharmaceutical Corp.;
- Rudolph Technologies Inc.'s outflanking of rivals KLA-Tencor Corp. and Nanometrics Inc. in its acquisition of August Technology Corp.;
- Boston Scientific Corp.'s successful battle to acquire Guidant Corp. and break up Guidant's combination with Johnson & Johnson;
- Oracle Corp.'s successful attempt to replace SAP AG in its acquisition of Retek Inc.;
- CNOOC's failed attempt to acquire Unocal Corp. in the face of its agreement with Chevron;
- Whirlpool Corp.'s successful effort to wrest Maytag Corp. from its prior agreement with Ripplewood Holdings LLC;
- Qwest Communications International Inc.'s persistent but unsuccessful bid for MCI Inc. attempting to break up MCI's agreement to be acquired by Verizon Communications Inc.;
- Rudolph Technologies Inc. and KLA-Tencor Corp.'s bids for August Technology Corp., notwithstanding August Technology's earlier agreement to merge with Nanometrics Inc.;
- Trilogy Inc.'s unsuccessful offer to acquire Selectica Inc., conditioned on Selectica's termination of its agreement to acquire I-Many Inc.;
- Blockbuster Inc.'s failed battle to acquire Hollywood Entertainment Corp. and break up its merger agreement with Movie Gallery Inc., following Movie Gallery's successful jump of Leonard Green & Partners, L.P.'s re-negotiated reduced value acquisition of Hollywood Entertainment;
- Pershing Square LP and Leucadia National Corp.'s failed joint bid to break up Vulcan Capital's acquisition of Plain's Resources Inc.;

- Inovis International Inc.'s successful effort to acquire QRS Corp., despite its merger agreement with JDA Software Group Inc. and four other unsolicited offers;
- Robertson-Ceco Corp.'s unsuccessful attempt to break up BlueScope Steel Ltd.'s friendly acquisition of Butler Manufacturing Co.;
- Wine Group Inc.'s successful bidding war for Golden State Ventures Inc., notwithstanding an agreement with an investor group headed by Golden State's CEO to take Golden State private and a series of counter-offers from the investor group;
- Moulin International Holding Ltd.'s unsuccessful attempt to break up Luxottica Group S.p.A.'s acquisition of Cole National Corp. (with substantial financing for Moulin's unsuccessful hostile bid to have come from Cole's largest shareholder, HAL Holding NV);
- Diageo North America Inc.'s successful bid to acquire Chalone Wine Group Ltd., despite its agreement to be acquired by Domaines Barons de Rothschild's (Lafite), a 48.9% shareholder of Chalone;[65]
- Berkshire Hathaway Inc.'s successful acquisition of Clayton Homes Inc., despite a delayed shareholder vote to entertain Cerberus Capital Management LP's overtures and the (fleeting) interest of several private equity firms;
- FuelCell Energy Inc.'s successful attempt to replace Quantum Fuel Systems Technologies Worldwide Inc. in its acquisition of Global Thermoelectric Inc.;
- Open Ratings's quickly rejected effort to acquire Information Resources Inc. and thwart Symphony Technology Group's tender offer for all of Information Resource's outstanding shares;
- the short-lived attempt of Marathon Partners and Austin Ventures to acquire Hoover's Inc., despite an already signed merger agreement with D&B Corp;
- Omnicare's successful campaign to acquire NCS HealthCare Inc. and break up an earlier merger agreement with Genesis Health Ventures Inc.;
- DMC Stratex Networks Inc.'s unsuccessful campaign to wrest Western Multiplex Corp. from its "merger of equals" with Proxim Inc.;
- Carnival Corp.'s successful attempt to replace Royal Caribbean Cruises Ltd. in its acquisition of P&O Princess Cruises plc;
- SunTrust Bank's unsuccessful attempt to acquire Wachovia Corp. and break up Wachovia's existing merger agreement with First Union Corp;
- Mentor Graphic Corp.'s successful effort to wrest IKOS Systems Inc. from its competitor Synopsys Inc., despite the initial rejection of Mentor's bid by the IKOS board;
- the successful higher bid of Yahoo! to acquire HotJobs.com in the face of an already signed merger agreement with TMP Worldwide Inc.;
- American International Group Inc.'s successful bid to acquire American General Corp., notwithstanding an earlier merger agreement between American General and London-based Prudential plc.;
- R J Reynolds's successful all-cash overbid acquisition of privately held Santa Fe Natural Tobacco Co., which had announced a cash-stock merger agreement with Rothmans Inc.;
- Northrop Grumman's successful campaign to acquire Newport News and break up an earlier merger agreement with General Dynamics;

[65] The DBR/Chalone merger agreement contained a "majority of the minority voting condition" and a "market check" provision (that in more recent times has been labeled with the "go-shop" jargon).

- Abiomed Inc.'s ineffective campaign to acquire Thermo Cardiosystems Inc., notwithstanding Thermo Cardiosystems's previously executed merger agreement with Thoratec Laboratories Corporation;
- Trigon Healthcare, Inc.'s unsuccessful attempt to replace Wellpoint Health Networks Inc. in acquiring Cerulean Companies, Inc.;
- Cargill, Incorporated's successful attempt to acquire Agribrands International, Inc. and break up Agribrands's earlier agreement to be acquired by Ralcorp Holdings, Inc.;
- CEL-SCI Corporation's unsuccessful bid to acquire Molecular Biosystems, Inc., despite Molecular Biosystems's earlier merger agreement with Alliance Pharmaceutical Corp;
- Ambanc Holding Co. and Trustco Bank Corp.'s unsuccessful competing bids for Cohoes Bancorp, notwithstanding Cohoes's earlier agreement to be acquired by Hudson River Bancorp;
- North Fork Bancorp's failed hostile bid for Dime Bancorp and the successful break-up of Hudson United Bancorp's merger agreement with Dime;
- Deutsche Telecom's short-lived unsuccessful attempt to break up the Qwest Communications/U.S. West merger by bidding for Qwest alone;
- International Paper's successful acquisition of Champion International Corporation, overbidding UPM-Kymmene Corporation's prior merger agreement with Champion;
- the successful competing bid of Guardian Industries Corp. (in competition with Bradco Supply Corp.) to acquire Cameron Ashley Building Products Inc., notwithstanding Cameron Ashley's previously executed merger agreement with an investor group that includes members of Cameron Ashley's senior management;
- Landry's Seafood Restaurants Inc.'s successful bid to acquire Rainforest Cafe Inc., despite Rainforest Cafe's earlier merger agreement with Lakes Gaming Inc.;
- Pfizer Inc.'s successful campaign to wrest Warner-Lambert Company from its "merger of equals" with American Home Products Corporation;
- Phelps Dodge Corporation's battle to acquire both Asarco Inc. and Cyprus Amax Minerals, which resulted in Phelps Dodge's acquisition of Cyprus Amax despite the previously executed Asarco/Cyprus merger agreement;
- the unsuccessful battle by United Rentals, Inc. to acquire Rental Service Corporation even though Rental Service had signed a merger agreement with NationsRent, Inc. (which merger agreement later collapsed);
- Litton Industries, Inc. successful bid to replace Newport News Shipbuilding Inc. in acquiring Avondale Industries, Inc.;
- the failed attempt of Columbia Energy Group to acquire Consolidated Natural Gas Company, despite Consolidated's merger agreement with Dominion Resources, Inc.;
- Georgia-Pacific Corporation's successful campaign to acquire Unisource Worldwide, Inc. and break up Unisource's earlier merger agreement with UGI Corp.;
- AT&T Corporation's successful bid to acquire MediaOne Group Inc., notwithstanding MediaOne's earlier merger agreement with Comcast Corporation;
- Gart Sports Company's unsuccessful attempt to replace Venator Group Inc. in acquiring The Sports Authority, Inc.;
- the unsuccessful higher bid of Crane Co. to acquire Coltec Industries Inc., despite Coltec's earlier merger agreement with The B.F. Goodrich Company;

- American Business Information, Inc.'s failed campaign to wrest Metromail Corp. from its merger agreement with Great Universal Stores plc;
- Southern Union Company's unsuccessful attempt to acquire Southwest Gas Corp. and break up Southwest Gas's earlier merger agreement with Oneok, Inc.;
- Allegheny Teledyne Incorporated's unsuccessful bid to acquire Lukens Inc., notwithstanding Lukens's existing merger agreement with Bethlehem Steel Corporation;
- SoftKey International Inc.'s successful overbid acquisition of The Learning Company, notwithstanding The Learning Company's earlier stock-for-stock merger agreement with Broderbund Software, Inc.;
- National Broadcasting Company, Inc.'s successful higher bid to acquire Outlet Communications, Inc., notwithstanding Outlet's earlier merger agreement with Renaissance Communications Corp.;
- The Sherwin-Williams Company's unsuccessful overbid of a merger agreement executed by Grow Group, Inc., providing for its acquisition by Imperial Chemical Industries PLC;
- Harcourt General, Inc.'s successful bid to acquire National Education Corporation and break up an earlier merger agreement between National Education and Sylvan Learning Systems, Inc.;
- Premiere Technologies, Inc.'s successful campaign to replace a buyout group led by UBS Partners LLC and Fenway Partners Inc. as the acquirer of Xpedite Systems, Inc.;
- Nortek, Inc.'s successful bid to wrest Ply Gem Industries, Inc. from its merger agreement with Hicks, Muse, Tate & Furst's Atrium Corporation;
- Raycom Media Inc.'s unsuccessful attempt to replace buyout firm Hicks, Muse, Tate & Furst Inc. in acquiring LIN Television Corporation;
- the successful higher bid of Greenway Partners, L.P. to acquire Outboard Marine Corporation, notwithstanding Outboard Marine's merger agreement with Detroit Diesel Corporation;
- Union Pacific Corporation's unsuccessful attempt to wrest Santa Fe Pacific Corporation from its merger agreement with Burlington Northern Inc.;
- Rockwell International Corporation's successful cash tender offer for Reliance Electric Company, which had announced a stock-for-stock merger with General Signal Corporation;
- Northrop Corporation's successful campaign to replace Martin Marietta Corporation in acquiring Grumman Corporation;
- the battle for Paramount Communications Inc. between Viacom Inc. (the original and ultimately victorious merger partner) and QVC Network Inc.; and
- the contest for and the split-up of Conrail Inc. between Norfolk Southern Corporation and CSX Corporation (the original merger partner).

## Non-U.S. Deal-Jumps

Many of the pre-2011 foreign deal-jump transactions remain quite notable, including:

- BG Group plc's successful acquisition of Pure Energy Resources Limited, trumping Pure Energy's earlier deal with Arrow Energy Limited, a 20% shareholder of Pure Energy;
- Vivendi SA's successful defense of its acquisition of GVT Holding SA against Telefonica SA's subsequent bids for GVT;

- Research in Motion's successful acquisition of Certicom Corp. after Certicom had entered into a plan of arrangement with VeriSign Inc.;
- L-1 Identity Solutions, Inc.'s successful rebuttal of Safran, S.A.'s hostile attempt to disrupt its merger agreement with Digimarc Corporation;
- Illinois Tool Works Inc.'s failed bid to unhinge the definitive agreement between Enodis PLC and The Manitowoc Company, Inc.;
- NASDAQ Stock Market Inc.'s successful combination with Nordic OMX AB, after a bidding war against Bourse Dubai Ltd., who later joined forces to thwart the competing bid of the Qatar Investment Authority;
- Health Care Property Investors's unsuccessful attempt to outbid Ventas Inc. for Canada's Sunrise Senior Living REIT, despite Sunrise's purchase agreement with Ventas;
- the finally successful acquisition of Spanish electric utility Endesa SA by Enel SpA of Italy and Acciona SA of Spain, despite a prior unsolicited unendorsed bid by Spain's Gas Natural SDG and an ultimately endorsed bid by Germany's E.ON AG;
- the successful acquisition of ABN Amro Bank NV by a multi-national consortium consisting of Royal Bank of Scotland plc, Fortis Bank and Banco Santander S.A. notwithstanding ABN Amro having endorsed a combination with British bank Barclays plc (who had earlier agreed to sell its "crown jewel" LaSalle Bank to Bank of America);
- Gores Group and Calgary Group's failed attempt to break up the merger of Canadian SITEL Corporation and fellow Canadian ClientLogic Corp.;
- Trilogy Energy Trust's agreement to acquire Canada's Blue Mountain Energy Ltd., after terminating Blue Mountain's earlier agreement with Canadian Diamond Tree Energy Ltd;
- Genzyme Inc.'s executed merger agreement with Canadian AnorMed Inc., terminating its support agreement with Millennium Pharmaceuticals Inc.;
- Macquarie Bank Ltd.'s and 3i Group plc's unsuccessful bid to acquire Associated British Ports Holdings plc., after it agreed to be acquired by Goldman Sachs International;
- the all-Canadian scenario where Homburg Invest Inc. agreed to buy Alexis Nihon Real Estate Investment Trust, after its prior agreement with Cominar;
- the acquisition by Luxembourg's Arcelor SA of Canadian Dofasco Inc., after Germany's ThyssenKrupp AG signed an earlier agreement with Dofasco, followed by the successful jump of the agreement of Russian steel company OAS Severstal to purchase Arcelor by Dutch Mittal Steel Co. NV;[66]
- Tata Iron & Steel Ltd.'s successful purchase of the British Corus Group plc, notwithstanding the challenge by Cia. Siderúrgica Nacional SA of Brazil, the largest foreign takeover by an Indian company;
- Bayer AG's merger with Schering AG in spite of Merck KGaA's attempted approach;
- the seemingly six-ring circus in the mining industry that resulted in Brazilian Cia. Vale do Rio Doce's all-cash purchase of Canadian Inco Ltd. in the face of a purchase agreement with Phelps Dodge Corp. and an unsolicited takeover attempt by Teck Cominco Ltd., after Inco terminated its agreement to acquire Falconbridge Ltd., which rebuffed a takeover attempt by Swiss Xstrada plc;

[66] Interestingly, U.S. antitrust approval was originally conditioned on the divestiture of Dofasco. A pre-Arcelor/Mittal combination arrangement was made to sell Dofasco to ThyssenKrupp, but Arcelor's prior defensive transfer of its stake in Dofasco to an independent Dutch foundation prevented this sale of Dofasco to ThyssenKrupp. Ultimately, the U.S. DOJ approved of Mittal's sale of a U.S. tin mill in lieu of Dofasco.

- the success in the bidding war for Britain's Peninsular and Oriental Steam Navigation Co. by Dubai's DP World over Singapore's PSA International Pte. Ltd.;
- the rivalry among Lookers plc, Pendragon plc and a mystery third bidder for Britain's Reg Vardy plc, in which Pendragon was ultimately successful;
- Industrial Alliance Insurance and Financial Service Inc.'s bid, which the board of Canada's Clarington Corporation unanimously accepted, trumping a prior hostile offer from CI Financial Inc.;
- the successful knock-out bid by the Philippine's San Miguel, wresting control of National Foods, Australia's largest public traded dairy company, from New Zealand's Fonterra;
- the successful break-up of the planned merger of Canadian gold companies IAMGold Corp. and Wheaton River Minerals Ltd., caused by competing bids for each of the companies from Golden Star Resources Ltd. and Coeur d'Alene Mines Corp. (which quickly became a free-for-all as described in detail below);
- Danaher Corp.'s successful bid to trump fellow American Illinois Tool Works Inc.'s offer for Britain's Linx Printing Technologies PLC;
- Sumitomo Mitsui Financial Group Inc.'s unsuccessful bid to break up the mega-bank merger of UFJ Holdings Inc. and Mitsubishi Tokyo Financial Group Inc.;
- Phoenix-based Pivotal Private Equity's unsuccessful effort to replace India's Reliance Gateway Net Ltd. in acquiring Flag Telecom Group Ltd.;
- Zimmer Holding Inc.'s successful tender offer to snatch away Centerpulse AG from its rival, Smith & Nephew plc, which had already won acceptance from Centerpulse's board for its bid;
- the successful bid by CDC Software Corp. to replace its rival, San Jose, California-based Talisma Corp., in acquiring Canada's Pivotal Corp.;
- Celltech Group plc's successful overbid acquisition of Oxford GlycoSciences plc, which caused the board to withdraw support for the deal with Celltech's rival, Cambridge Antibody Technology Group plc;
- Barbican Holdings's failed attempt to acquire Zimbabwe Platinum Mines Ltd., despite South African Impala Platinum Holdings Ltd.'s planned buyout of Zimplats's minority shareholders (Implats held a 50.53% stake in Zimplats prior to its takeover offer);
- Randgold Resources Ltd.'s unsuccessful campaign to merge with Ghana's Ashanti Goldfields Co. Ltd., notwithstanding the earlier merger agreement executed by Ashanti and AngloGold;
- the failed attempt to wrest Safeway plc from its takeover by Britain's William Morrison Supermarkets plc;
- the unsuccessful effort of South Africa's AngloGold Ltd. to replace Denver-based Newmont Mining Corp. in acquiring Australia's Normandy Mining Ltd.;
- Lloyds TSB Group plc's unsuccessful bid to acquire Abbey National, despite Abbey National's proposed plan to merge with Bank of Scotland;
- Quebecor and Caisse's successful bid to acquire Videotron Group, Ltd., despite Videotron's earlier merger agreement with Rogers Communications; and
- Banque Nationale de Paris SA's successful tender offer for Paribas SA and unsuccessful tender offer for Société Générale SA, notwithstanding the earlier merger agreement executed by Paribas and Société Générale.