

*THE FOUR RING CIRCUS -
ROUND FOURTEEN;
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 FOURTEEN; 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 7) from 2004 through early 2010 (listed from later years to earlier years) 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 includes²:

- CF Industries Holdings, Inc.'s pending 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Inc., thwarting Yara International ASA's previous merger agreement to acquire Terra, a month after CF Industries had withdrawn its longstanding hostile bid for Terra;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 pending 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 pending deal for Silicon Storage has remained in place (with some upward adjustments) in the face of a number of attempted topping bids for it by Cerberus Capital Management LP;

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."

² A similar list of notable deal-jump transactions from 1994 through 2003 is included on Annex A.

- Green Mountain Coffee Roasters, Inc.'s successful attempt to wrest Diedrich Coffee, Inc. from its previous merger agreement with Peet's Coffee & Tea, Inc., though Green Mountain's acquisition is still subject to FTC approval;
- Prospect Capital Corporation's unsuccessful attempt to disrupt Allied Capital Corporation's pending 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;
- Intercontinental Exchange 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 Applica³;
- 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.;
- 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.;

³ Nacco sued Applica 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 December 2009, the Delaware Chancery court judge hearing the case allowed the case to proceed to the discovery phase.

- 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 Chalone⁴;
- 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;

⁴ 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).

- 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;
- 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.; and
- CEL-SCI Corporation’s unsuccessful bid to acquire Molecular Biosystems, Inc., despite Molecular Biosystems’s earlier merger agreement with Alliance Pharmaceutical Corp.

Over the last several years, deal-jumping activity has increasingly spread to foreign markets with 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 unhook 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 pending 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;⁵ 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; 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,

⁵ 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.

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; and 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.

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The failed attempt to replace Britain's William Morrison Supermarkets in its efforts to buy Safeway exhibits the growing 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 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.

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.⁶ 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

⁶ 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 match 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.

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 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.

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.

A more recent example of the "four ring circus", and one which evidences the prominence which sovereign entities and wealth funds have recently played (and may continue to play, depending on the outcome of the current global economic recovery)⁷ in the M&A arena in the future, was the 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

⁷ 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 pending joint venture with BHP Billiton Ltd.), Chinalco maintained its stake-out 9% position in Rio Tinto and the overall situation perhaps opened the door to the recently announced \$1.35 billion investment by Chinalco alongside Rio Tinto to jointly develop an iron ore project in Guinea.

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.⁸ 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 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. 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

⁸ 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.

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 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' bid was a "superior proposal". Shortly thereafter, Yara informed Terra's board it would not intend to 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.⁹

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.¹⁰ 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

⁹ Promptly after CF Industries entered into the merger agreement with Terra, Agrium withdrew its unsolicited bid for CF Industries.

¹⁰ 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.

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 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 twenty percent 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 Valentines Day, Goldcorp and Wheaton River announced that their transaction had received the necessary support from the Wheaton River shareholders.

Similarly, 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.¹¹ 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.

¹¹ 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.

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 5, 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 26, to raise its bid again, to \$56.3 billion. Endesa's board again endorsed E.ON's offer. On April 2, 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 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 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?¹² Is the target able to rely on a poison pill to defend against an interloper? Or is

¹² 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

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 match 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, “force the vote” provisions, which require the Board to submit the deal to a stockholders vote even if the Board no longer supports the offer, (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).¹³ Given the

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 have 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 have 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.

¹³ 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 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’ 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.

increasingly 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 coming years (subject to the boundaries ultimately permitted by courts assessing the propriety of those mechanisms under applicable state law).¹⁴

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 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 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 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.¹⁵ 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".¹⁶ All of this has made many observers suggest that there may be an emergence of a new "distressed company" standard for deal protection.

¹⁴ Hostile transactions continue to impact the market for corporate control, accounting for 18% and 23% (a five year high) of all announced deals involving full acquisitions of U.S. companies, in 2009 and 2008, respectively. Fueled in part by depressed stock prices, strategic bidders appear to have taken to the hunt to secure strategic assets at conservative prices. And with many financial bidders still smarting from the negative effects of the credit crunch, strategic bidders are more competitive now in the market for corporate control than in any other time in recent years. (See, FactSet MergerMetrics' 2009 Year End Review. Retrieved March 25, 2010. From www.mergermetrics.com; FactSet MergerMetrics' 2008 Year End Review. Retrieved February 26, 2009. From www.sharkrepellent.net).

¹⁵ See In re: Bear Stearns Litigation, 870 N.Y.S.2d 709. (N.Y.Sup., Dec. 4, 2008).

¹⁶ See Ehrenhaus v. Baker et al., No. 2008 NCBC 19 (N.C. Super. Ct. Dec. 5, 2008).

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 termination of such agreement in order to avoid possible change of 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. 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.

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 IBP/DLJ/Smithfield/Tyson battle later in this article and 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,¹⁷ 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 Intercontinental Exchange below, where the ability to integrate the two exchanges and create

¹⁷ 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.

synergies driving long-term value for the combined shareholder base were factors stressed in supporting what appeared to be a lower priced deal.¹⁸

Certain of the key deal-jump battles of the last couple of 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.¹⁹ 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 Exxon-Florio, which requires a review of certain foreign investments to protect national

¹⁸ 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 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.

¹⁹ 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.

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 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.²⁰ It is unclear how a court will

²⁰ 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 votedown). 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 has 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

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.

For example, antitrust concerns 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

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.

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 (soon to be the beginning of the current "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 may 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 no-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 phrase "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. The case has not yet been resolved. Johnson & Johnson is seeking at least \$5.5 billion in damages.

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 "match right", a \$675 million (under 3%) reciprocal break-up fee and a "force 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 9, 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 16, 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 12, ISS recommended that Caremark shareholders vote against the merger with CVS. On February 13, CVS and Caremark increased the dividend to \$6.

In a round of bidding on March 7, 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 8 CVS and Caremark boosted the Caremark special dividend to \$7.50, turned its post closing share repurchase into a self tender and declared this 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 12 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 16. 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 compensates 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, is not unreasonable so as to preclude Express Scripts from making an unconditional superior offer, and wondering if Express Scripts is serious about its tender offer or merely seeking to disrupt a strategic merger. On March 16, 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 13, 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 12, 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 17, 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.

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 the 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.

A recent 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 the IntercontinentalExchange ("ICE"), 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).

* * * * *

Since the Delaware amendment to DGCL § 251(c) 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), 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 15 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.

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.

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.

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.

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."

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. 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 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 match 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.

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.

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.²¹

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.

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 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.

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

²¹ 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. 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, 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 requires Sunrise to withhold its consent of HCP's offer and adhered to the standstill. HCP was forced to abandon its offer.

Topps board could waive the standstill in order to meet its fiduciary duties. In this instance, the Court found the agreement to be unproblematic and only 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.

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.²² 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.²³

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

²² The early 2003 short-lived situation involving Hoover's Inc. is a good reminder of this lesson. There, Hoover 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.

²³ 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).

wording of the so-called “fiduciary exceptions” to the “no-shop” restrictions contained in the merger agreement. As discussed in the following paragraphs, 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 mandate 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.²⁴

²⁴ 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’ 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.²⁵

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

²⁵ The 2008 merger agreement between Constellation Energy Group, Inc. ("Constellation") and Mid-America Energy Holdings Company ("Mid-America") 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".

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 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' 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.

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.²⁶ 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.

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

²⁶ 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.

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 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 "no shop" restriction). More recently, beginning with the Ripplewood agreement to buy Maytag in 2005 discussed earlier in this article, limited windows (30-50 days or so) of permitted active solicitation began to appear in some unshopped (and unshared) 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.²⁷ Some of the more notable deals containing a "go-shop" include 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), and Laureate Education by an investor group including KKR and the founder and CEO of Laureate (45 days), and the non-founder LBOs of 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). To date, "go-shops" have not generally been a feature in strategic non-LBO deals except where, as discussed above, special conflict considerations might exist and on occasion, when a pre-

²⁷ 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 the bidder have a "match right" in a deal stimulated by the "go-shop"; or does that chill the bidding too much (some "go-shop" deals have eliminated the match right or only allowed it to spring into existence after the "go-shop" period)? As discussed further below, should there be a two-tiered break-up fee? Should there be stapled financing made available during the "go-shop" period to induce buyers to show up?

existing transaction has been “re-cut” downward and, in response, the target’s Board demands an affirmative market check period.²⁸

Although the historical wisdom has been that “go-shops”, for all the flurry of activity that comes with the solicitation, rarely resulted in new deals, in the last couple of years we are finally seeing a few successful deal-jumps arising out of the “go-shop” process. These pending or successfully completed acquisitions by a “go-shop” deal-jumper include: Merge Healthcare’s pending acquisition of AMICAS (prior agreement with Thoma Bravo included a 45-day “go-shop” period); Microchip Technology’s pending acquisition of Silicon Storage Technology (prior agreement with Prophet Equity included a 45-day “go-shop” period)²⁹; Green Mountain’s pending 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 Hiday Group and partners included a 30-day “go-shop” period). 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. One recent empirical analysis of go-shop provisions finds significant post-signing competition in “go-shop” deals that are not MBO’s, but no post-signing competition in “go-shop” deals that are MBO’s.³⁰ 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.³¹

²⁸ However, the merger agreement in the recent strategic non-LBO acquisition of Diedrich by Peet’s contained a 20-day “go-shop” provision (as further described in this article).

²⁹ 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.

³⁰ 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! 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 match 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.

³¹ 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

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). RMG's commentary on the transaction, 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.

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 match 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 match 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

doubt on the causality between the presence of a "go-shop" provision and the emergence of successful third party bids.

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.

* * * * *

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 and L-3’s 2004 acquisition of Titan (2% in the first 30 days and 3% thereafter) are historical examples and a recent, very visible, example is Pfizer’s acquisition of Wyeth (2.2% for first 30 days and up to 4% thereafter), now many of the 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 2/1 ratio, and in Kerzner there was actually a 3/1 ratio. In Freescale, the ratio was 2/1, 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.³²

The two-tier break-up fee approach was on display prominently in the very recent 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 one of the few (if not the first) recent “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).³³

³² 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.

³³ 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

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 Hiday 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 Hiday 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 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.³⁴ After Vornado increased its

\$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 increase to \$10.5 million) to Diedrich if Green Mountain failed to obtain regulatory approval for its acquisition of Diedrich, which is still pending.

³⁴ 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

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.³⁵

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.

Furthermore while Delaware courts have been more vocal (and less formulaic) in scrutinizing break-up fees in notable decisions by both 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

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.

³⁵ 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’ 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’ 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.

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.

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, and in which the size of the winner's break-up fee kept getting raised as the size of the deal increased. 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.³⁶ After Blackstone bid \$48.50 per unit of EOP, 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, 40% stock, and was subject to a due diligence review.) Vornado agreed to provide EOP with a draft merger agreement by January 23, and any definitive proposal by January 31. EOP's board disfavored Vornado's bid, since it was only a non-binding proposal, its value, tied to the price of 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 8, three days after EOP's shareholder's meeting. Even so, Vornado claimed its bid 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 23 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 1 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 4 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 5 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

³⁶ 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.

value of EOP). Vornado dropped out of the bidding on February 7, and EOP's shareholders voted for the Blackstone deal later that day.

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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 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. 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 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.

* * * * *

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 than 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. 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.

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.

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. 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 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.

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. 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, but 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 & 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 9, 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 side lines. In early October 2000, IBP, the largest U.S. beef producer and second largest 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 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 4 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, was it 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 29 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 28, 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 29. However, on December 30, creatively interpreting its non-disclosure commitment, the IBP Special Committee convinced Tyson to increase their 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 31 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 1.³⁷

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 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

³⁷ 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).

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.³⁸

While the elimination of pooling treatment has neutralized the most potent feature of the lock-up option in a banking context, one recent example showing that the lock-up option can still act as a useful deal protective device is Microchip Technology's pending 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 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.

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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

³⁸ 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).

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 recent example of 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 transaction³⁹, 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.

³⁹ 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.

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 pending merger with Arch Communications Group Inc. In that case, following PageNet’s filing a voluntary plan of re-organization 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 8, 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.

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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 Messrs. Spatt and Martelli are members of the firm of Simpson Thacher & Bartlett LLP, which, of the transactions referenced in this article, served as counsel 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.

Below is a list of other notable U.S. and foreign deal-jump transactions from 1994 through 2003 (listed from later years to earlier years):

U.S. Deal-Jumps

- 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-2004 foreign deal-jump transactions remain quite notable, including:

- 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 (Zimplats 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 Generale SA, notwithstanding the earlier merger agreement executed by Paribas and Société Generale.