

"Key Issues in Negotiation: Will the Pendulum Swing?"

Michael J. Aiello, *Partner, Weil, Gotshal & Manges LLP*
Eileen T. Nugent, *Partner, Skadden, Arps, Slate, Meagher & Flom LLP*
Clare O'Brien, *Partner, Shearman & Sterling LLP*

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Overview

- Introduction
- Deal Structure and Terms
- Range of Possible Approaches
- Lessons Learned

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Introduction: Financing Conditions and Reactions to Market Changes

Prior to 2005, targets in private equity deals generally shared the risk with sponsors that financing would be unavailable at closing. Financing conditions permitted sponsors to walk away without penalty if financing was ultimately unavailable. Before the advent of the use of "reverse break up" fees, targets were left with no recourse against sponsors if financing could not be obtained.

However, as competition for transactions increased and financing became more readily available, targets had enough leverage to refuse to accept financing conditions and favorable financial terms made sponsors more willing to acquiesce.

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Introduction: Financing Conditions and Reactions to Market Changes (cont.)

As the number and size of private equity transactions increased beginning in 2005, and private equity buyers sought to compete with strategic buyers, sponsors were forced to make their transactions more similar to those of strategic buyers and to give up their financing conditions. In order to at least partially address the recourse targets had against strategic buyers, private equity buyers began to offer target companies a reverse break-up fee in the event transactions failed to close, generally as their sole and exclusive remedy. In the heady markets that prevailed between 2005 and 2007:

- Target companies were willing (and even happy) to accept the limited recourse: certainty of amount of damages seen as an advantage
- In a market where financing was readily available and competition for deals was high, target companies did not fear private equity sponsors walking away from deals
- Reputational damage in an active market was deemed a powerful deterrent to failed transactions

In fact, target companies were more focused on ensuring they could get out of deals if a better offer came along, as was evidenced by the introduction of "go-shop" provisions.

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Introduction: Financing Conditions and Reactions to Market Changes (cont.)

The trade-off between financing conditions and a limited form of recourse seemed to work in a robust market, but stopped working when the financing markets ground to a halt. The implicit understanding of how private equity sponsors would behave could no longer be relied upon:

- The troubled deals of late 2007 and 2008 illustrated that sponsors were prepared to walk away from a signed transaction and suffer whatever reputational damage might befall them if paying a reverse-termination fee made more economic sense than closing the transaction (e.g., Cerberus/United Rentals)
- Some sponsors sought to exit signed transactions on the basis that the target had experienced a material adverse effect, ostensibly providing it with a legitimate reason for walking away (e.g., Hexion/Huntsman), although the presence of a reverse break-up fee affected the risk of unsuccessfully claiming a MAC.

Marketplace reaction to these developments remained unclear in 2009 and going into 2010, due in part to the paucity of deals and the continued lack of availability of financing. Several trends are noticeable, however:

- Transactions have been less levered, with equity financing typically in the 40-50% range
- Some transactions have had no debt financing at closing, being done on an all-equity basis
- Some transactions still employ reverse break-up fees and differing forms of limited recourse, although the amount of the fees have increased to the 4-6% range

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Introduction: Financing Conditions and Reactions to Market Changes (cont.)

The troubled deals of late 2007 and 2008 brought to the forefront significant concerns about so-called "boilerplate" provisions, which remain today:

- Termination rights and effect
- Specific performance
- Dispute resolution
- Governing law and venue for disputes - symmetry of law and venue for all transaction documents (i.e., merger agreement and financing commitments)

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Introduction: Factors at Play

Factors influencing the outcome of recent private equity transactions include:

- Significant curtailment of the availability of financing
 - Although credit markets have loosened since early 2009, they remain challenging
 - At the height of the period of "broken deals," banks seemed willing to risk breach rather than fund into significant loss positions
 - Aided by limited recourse (payment of reverse break-up fee often less than embedded financing loss)
- Market volatility and financial performance of the industry in which the target participates
- Diminished concern on the part of acquirors generally and sponsors in particular about reputational damage from broken deals
- Target's appetite for litigation
 - Differing levels of available remedies, especially specific performance
 - Target's concern regarding collectibility of agreed-upon premium (e.g., Con Edison v. Northeast Utilities; effect on Dow Chemical transaction)

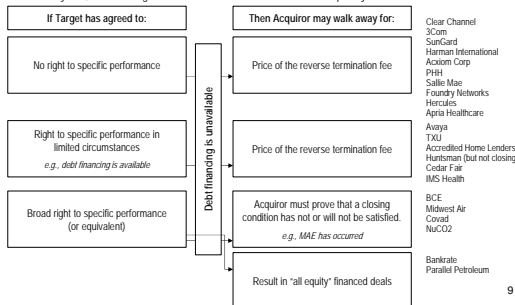
Introduction: Factors at Play (cont.)

It remains to be seen whether public company target Boards will remain comfortable with financing issues presented by PE buyers, particularly if recourse is limited to the amount of a reverse break-up fee or otherwise, especially if strategic buyers are available.

It is also unclear whether PE buyers can compete with strategic buyers on price, absent "cheap" debt.

Deal Structure and Terms: Deal Structures

In recent years, the following deal structures have been used most frequently:



Deal Structure and Terms: Reverse Termination Fees		
<p>Common Approach</p> <ul style="list-style-type: none"> Acquiror agrees to pay a reverse termination fee if it breaches the agreement and such breach gives rise to a failure of a condition or it otherwise fails to close the transaction This gives the acquiror a pure walk away right if it pays the fee 	<p>Two-tiered Approach</p> <ul style="list-style-type: none"> Acquiror agrees to pay: <ul style="list-style-type: none"> one reverse termination fee if acquiror fails to close because the debt financing is unavailable a second higher termination fee if acquiror fails to close but the debt financing has or will be funded <p>(3Com Corp)</p> <ul style="list-style-type: none"> This gives the acquiror a pure walk away right only if it pays the higher fee 	<p>Liability Cap Approach</p> <ul style="list-style-type: none"> Acquiror agrees to pay a reverse termination fee if acquiror fails to close because the debt financing is unavailable If the acquiror breaches the agreement in other circumstances, it agrees to be liable for damages up to a capped amount (the "liability cap") <p>(Michaels Stores; Goodman Global; Actxion; CDW Corp; Bright Horizons, Getty Images)</p> <ul style="list-style-type: none"> If the buyer walks away in circumstances where the debt financing is available, its liability is capped at a higher amount than the amount of the reverse termination fee or uncapped (Huntsman) <ul style="list-style-type: none"> Uncapped liability approach only practical where acquiror is sufficiently capitalized

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Deal Structure and Terms: Reverse Termination Fees (cont.)
<p>Size of the fee</p> <ul style="list-style-type: none"> Historically the same amount as the target's termination fee (typically, 2% to 4% of the transaction value), although 2% to 4% fee does not reflect appropriate pricing if the transaction is a true option. There have been a number of transactions in which the reverse termination fee has been significantly greater than the company termination fee, particularly in more recent deals (e.g., IMS Health, Cedar Fair, Getty Images, Goodman Global and Michaels' Stores) <p>Disincentive to walking away?</p> <ul style="list-style-type: none"> From the sample of transactions we surveyed, it was inconclusive as to whether the size of the reverse termination fee impacted the deals' success or failure, taken as a whole <p>Effectiveness of the two-tier structure: financing considerations</p> <ul style="list-style-type: none"> Target needs to ensure that there is no gap between the conditions in the merger agreement and the conditions in the debt commitments to avoid the debt financing being "unavailable," although recent transactions exhibit less parallelism in conditions between commitment papers and merger agreements Target should consider insisting on signed credit agreements at time of deal signing rather than commitment papers (e.g., InBev); UK Style financing a possibility

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Deal Structure and Terms: Reverse Termination Fees (cont.)
<p>US/ Delaware law implications</p> <ul style="list-style-type: none"> Delaware courts permit a target's board of directors to approve a "break-up" fee as a deal protection device. Delaware courts will review the size of the fee to ensure the amount of the fee does not preclude an alternative transaction <ul style="list-style-type: none"> Delaware courts will typically approve of a break-up fee in the 2-4% range Acquirors that pay a "reverse break-up" fee will not be subject to similar judicial scrutiny; amount merely a contractual matter <p>Who pays the fee?</p> <ul style="list-style-type: none"> Target wants to avoid any third parties (e.g., financing sources) paying the fee because this would make it easier for an acquiror to walk away; however, sponsors may want financing sources to "share the pain"

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Deal Structure and Terms: Use of Tender Offers

Use of tender offers as first step of two-step merger transactions continues to increase, although not to the levels the structure was used in the '80s and early '90s.

Special issues in leveraged transactions:

- Potential high financing costs associated with two closings (with different collateral packages): bridge financing
- Margin rule implications
- Timing of the "go shop": can the tender offer commence prior to the end of the go-shop period (e.g., GenTek, Hypo Real Estate, Laureate Education) or not (e.g., Lifecore Biomedical)?

From a practical point of view, tender offers might be useful in sponsor transactions only if they are financed with 100% equity.

- In some 2009 sponsor transactions, the sponsor provided an equity commitment equal to the full transaction consideration (no debt financing was used) and the transaction agreement permitted the seller to specifically enforce the equity commitment (e.g., Thoma Bravo/Entrust, Apax/Bankrate and Apollo/Parallel Petroleum)
 - Relatively modest transaction values (\$114 million, \$571 million and \$483 million, respectively), difficult credit markets and the use of a tender offer structure in Apax/Bankrate and Apollo/Parallel Petroleum likely influenced the use of an all equity structure.
 - None of these transactions included a "market" reverse-termination fee (in Apax/Bankrate, Apax could walk away by paying the full amount of the transaction consideration)

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Deal Structure and Terms: Material Adverse Effect

- The definition of MAE has again hit the spotlight
 - Because most LBO acquisition agreements did not include a financing condition, the MAE has become acquirors' primary "escape route"
 - Inclusion of "reverse break up" fee in deal altered risks of buyer alleging an MAE and refusing to close
- Successfully asserting an MAE is a challenge, given the customary language used to define material adverse effect and the limited, and relatively unfavorable (from an acquiror's perspective), judicial interpretation of that language
 - Case law MAE interpretive issues:
 - "durationaly significant" (IBP v. Tyson)
 - MAE an "uncertain notion" - litigation result must be discernible (Frontier Oil v. Holly)
- In the Huntsman case (discussed below), Vice Chancellor Lamb reminded the corporate world at large that Delaware courts have never found a material adverse effect to have occurred in the context of a merger agreement
- Recent Delaware decisions confirm the view that target companies will prefer to have Delaware law as the governing law, and Delaware as the venue for all disputes
 - The Court of Chancery's posture with respect to MAE claims is clearly target company-friendly
 - The Court of Chancery will act quickly in responding to transactional disputes

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Deal Structure and Terms: Material Adverse Effect (cont.)

- One clear trend over the last several years has been the ability of target companies to include a number of exceptions to the standard MAE definition. These exceptions often include:
 - Changes in general economic, financial market or political conditions
 - Changes generally affecting the industry or industries in which the company operates
 - Changes in applicable laws or accounting standards
 - Acts of terrorism or war
 - Failure by the company to meet any published analyst estimates or expectations or internal projections or budgets
 - Changes in the price or trading volume of the company's stock
 - Changes resulting from the announcement or pendency of the transaction: and
 - Changes resulting from the company's compliance with the terms of the acquisition agreement
- Important for acquirors to make clear that with respect to certain of these exceptions the underlying causes of such events are not excluded from determining whether an MAE has occurred
 - Often, disproportionate impact on a target company can be an MAE (issues regarding application thereof - SLM Corp v. Flowers)
- Huntsman and Genesco: Threshold question is whether an MAE has occurred

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Deal Structure and Terms: Material Adverse Effect (cont.)

- Generally, there has been little change in the drafting of MAE provisions, which, on the whole, continue to include multiple exclusions
- However, three transactions have addressed particular concerns of the acquiror during the period between signing and closing
 - In Deb Shops, Goodman Global, and Getty Images, the closing conditions of the acquiror included a minimum EBITDA requirement for a period or periods following or ending after the signing date
 - As lenders exert greater influence on borrowers, lenders may revert to including an MAE provision in loan documents. As such, targets must be mindful of any differences in the MAE provisions in all transaction documents
 - It is rare for transactions to be done without MAEs (although the Ikon/Ricoh transaction is an example of a deal without a MAE)
- In Radiation Therapy, changes in general conditions that have a materially disproportionate adverse effect on the industries in which Radiation Therapy operates (not just on Radiation Therapy) constitute an MAE for the purposes of the closing condition (prior example: travel industry after September 11)

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Deal Structure and Terms: Material Adverse Effect (cont.)

- Strategic acquirors may currently find a less competitive deal environment and may be seen as more attractive partners than financial sponsors
 - Accordingly, strategic acquirors may be able to narrow MAE carve-outs or add defined MAEs or termination rights
 - Alternatively, as lenders seek more stringent MAE provisions, strategic acquirors that are not dependent upon third-party financing may be able to differentiate themselves by agreeing to MAE definitions that provide greater certainty to targets
 - Conversely, some strategic deals have used reverse termination fees, illustrating sensitivity to tight credit markets (e.g., Pfizer/Wyeth, Merck/Schering and Xerox/Affiliated Computer Services)
 - Fees of 5%-6.6% of transaction value, and are the target's sole remedy in the event of a financing failure (in the case of Pfizer/Wyeth, the failure must be due to a ratings downgrade of Pfizer)
 - Large transaction value (relative to the size of the buyer) and financing of a meaningful portion of the transaction consideration in each of the transactions likely influenced the inclusion of the reverse-termination fees

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Deal Structure and Terms: United Rentals Litigation

Specific Performance Provision

- Specific performance section of the merger agreement expressly permitted URI to enforce performance by Cerberus of its financing covenant and to require it to consummate the transaction
- However, the provision was subject "in all respects" to the provisions of one of the termination sections of the merger agreement, which provided, among other things, that in no event, whether or not the merger agreement has been terminated, will the buyer be subject to liability in excess of the reverse termination fee and in no event will URI "seek equitable relief or seek to recover any money damages" in excess of such fee

Delaware Court's Decision - December 2007

- The language of the merger agreement presents a direct conflict on two provisions which renders the agreement ambiguous
- Extrinsic evidence does not clearly show that URI's interpretation of the agreement (that the two sections can be reconciled on the basis that the termination provision limits equitable remedies other than specific performance) represents the common understanding of the parties
- Under the "forthright negotiator" principle, the subjective understanding of one party may bind the other if the other party knows or has reason to know of that understanding - because the evidence showed Cerberus understood the agreement to preclude specific performance and URI knew or should have known of this, Cerberus' understanding binds URI, and URI was not entitled to specific performance

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Ambiguous drafting may, at times, be seen as beneficial; however, if a specific remedy is desired, such position must be clearly communicated to the other side and boilerplate provisions must be carefully reviewed

Deal Structure and Terms: Genesco Litigation

Genesco and Finish Line Merger – The banks participate in a settlement

- \$1.3 billion leveraged strategic merger. In August 2007, Genesco reported Q2 net earnings loss of \$4.2 million (a 170% decrease from previous year's Q2) after which Finish Line claimed it was not required to close the transaction because Genesco withheld key financial data that would have predicted such losses. One month later Genesco (a Tennessee-based company) filed suit seeking an order for Finish Line to close the deal. One of the three defenses asserted by Finish Line (an Indiana-based company) was the occurrence of an MAE
- During the trial, on almost every issue where the judge had to judge credibility of Genesco or Finish Line witnesses, the Tennessee judge found Genesco witnesses to be more credible
- In December, the Tennessee Court decided, among other things, that although a MAE had occurred (the lowest earnings in ten years, lasting for a significant amount of time, and affecting the financing of the transaction), the circumstances fell within the carve-outs to the MAE provision (i.e., Genesco's decline was due to general economic conditions such as higher gasoline, heating oil and food prices, housing and mortgage issues, and increased consumer debt loads and was not disproportionate to others in the industry)
- **Conclusion:** Finish Line was required to specifically perform the agreement and close the merger; however, consummation was subject to the resolution of the UBS (financing source) solvency lawsuit filed in NY
- On March 3, 2008, Genesco, Finish Line and UBS entered into a settlement agreement pursuant to which:
 - The merger agreement and the UBS financing commitment were terminated
 - UBS and Finish Line agreed to pay Genesco (i) \$175 million in cash and (ii) Class A shares of Finish Line common stock equal to 12.0% of the total post-issuance Finish Line outstanding shares of common stock
 - The Class A shares of Finish Line will be returned to Genesco's shareholders as soon as reasonably practicable following the registration of these shares by Finish Line

Governing law and venue are important

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Deal Structure and Terms: Alliance Data Systems Litigation

Alliance Data Systems ("ADS")/ Blackstone

- Blackstone agreed to buy ADS for ~\$6.4 billion
- The transaction required approval from the US Office of the Comptroller of the Currency (the "OCC")
- January 25, 2008 → Blackstone said it did not anticipate a closing condition being met as the OCC put "unprecedented and unacceptable financial and operational requirements" on the acquisition
- January 30, 2008 → ADS brought suit against Blackstone in Delaware seeking specific performance claiming:
 - Blackstone didn't exercise "reasonable best efforts" to obtain regulatory approval
 - The request of the OCC for a \$400 million backstop was reasonable
- February 8, 2008 → lawsuit was suspended after Blackstone agreed to work towards closing
- March 18, 2008 → the "drop-dead" date for the merger agreement passed and Blackstone tried to terminate
 - ADS notified Blackstone that it was in breach of the merger agreement for failing to use reasonable best efforts to obtain the requisite regulatory approvals to complete the transaction
 - ADS then terminated the agreement and sued for payment of the \$170 million business interruption fee, but later dropped the suit

Targets must make clear the obligations of the acquirer in the merger agreement

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Deal Structure and Terms: Huntsman Corporation Litigation

Huntsman Corporation

- After outbidding Basell, Apollo Management LP (through Hexion Specialty Chemicals) agreed to buy Huntsman for ~\$10.6 billion
- Not structured as a typical sponsor transaction
 - Antitrust "hell or high water" clause
 - Reasonable best efforts to consummate financing
 - Huntsman entitled to specifically enforce the covenants in the agreement (other than to close)
 - Hexion required to sue the banks in the event of a breach
- Uncapped damages in the event of a "knowing and intentional breach"
 - Damages calculated as aggregate consideration that would have been paid to Huntsman stockholders (a ConEd provision)
 - Difference between \$28 plus "ticking fee" and current trading price

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Deal Structure and Terms: Huntsman Corporation Litigation (cont.)

Litigation timeline:

- May 9, 2008 → Huntsman reports a 37% decrease in operating income for Q1 2008 from Q1 2007
- June 18, 2008 → Hexion files a lawsuit in Delaware against Huntsman alleging that it is not required to complete the merger because an MAE has occurred (due to the decline in Huntsman's financial condition) and that the combined company would be insolvent
 - Huntsman counterclaimed that Hexion knowingly and intentionally breached the merger agreement by failing to use its "reasonable best efforts" to obtain financing; trial was set for September 8th
- June 23, 2008 → Huntsman files a \$3 billion fraud lawsuit in Texas against Apollo (and its partners) alleging that Apollo misrepresented the price it was willing to pay in order to get Huntsman to terminate its contract with Basell
- July 2, 2008 → Huntsman extends the drop-dead date from July 4th until October 2nd
- July 18, 2008 → shareholder files a proposed class action suit against Hexion and its executives claiming that Hexion damaged Huntsman investors when it did not publicly disclose its concerns about purchasing Huntsman
- August 28, 2008 → Apollo/ Hexion rejects a proposal by shareholders, including Citadel Investment Management and D.E. Shaw, to provide at least \$500 million in additional financing to help Apollo/ Hexion finance the transaction

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Deal Structure and Terms: Huntsman Corporation Litigation (cont.)

Delaware Court's Decision – September 29, 2008

- No MAE had occurred
 - MAE should be measured in terms of whether a company has suffered a material deterioration measured against its past performance, and whether the deterioration is likely to cause substantial long-term effects on the earning power of the company
 - Huntsman had experienced year-over-year decreases of 19.9% to adjusted EBITDA and 73.3% to EPS beginning the month prior to signing
 - These results, while disappointing, were not compelling as a basis to claim an MAE
 - Carve-outs to MAE definition not examined as MAE has not occurred as a threshold issue
 - MAE is a very narrow "out" under Delaware law
 - Merger agreement: MAE must be measured against historic performance rather than projections created pre-signing; no reliance on forecasts
 - Projections explicitly carved out of company representations and warranties
- Hexion had knowingly and intentionally breached the merger agreement (including implied covenant of good faith and fair dealing) by releasing insolvency opinion and failing to communicate concerns to Huntsman
- Order: Hexion must use reasonable best efforts to take all actions necessary, proper or advisable to consummate the merger
- Damages: If Hexion chooses not to close where all preconditions to closing have been met, it will remain liable to Huntsman for uncapped damages not limited by the \$325 million reverse termination fee if its refusal to close amounts to a breach of the agreement
- Conclusion: Huntsman is entitled to specific performance of all covenants other than closing

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Deal Structure and Terms: Huntsman Corporation Litigation (cont.)

- December 14, 2008 → After appeal filed and activity in other litigation, Huntsman entered into a Settlement Agreement and Release with Hexion and other Apollo affiliates
- Upon an aggregate payment of \$1 billion to Huntsman (\$425 million in cash, purchase of \$250 million of Huntsman's 7% Convertible Senior Notes and \$325 million termination fee), the parties agreed to take all necessary action to obtain the dismissal with prejudice of (i) the lawsuit in Delaware, (ii) Huntsman's lawsuit against Apollo (but not the Banks) in Montgomery County, Texas and (iii) Apollo's and Hexion's lawsuit against Huntsman in New York state court
- Hexion agreed to seek leave to withdraw its claims in New York against the Banks (other than claims related to a termination facility with the Banks under an existing commitment)
- May 2009 → Texas judge rules against Banks' motion to dismiss Huntsman's common law fraud and tortious interference claims against the Banks, clearing the way for a possible jury trial in Texas in June 2009
- June 23, 2009 → Banks settle litigation by agreeing to pay \$1.73 billion to Huntsman (\$632 million in cash and \$1.1 billion in senior debt financing)

Proving an MAE in Delaware is very difficult

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Deal Structure and Terms: Governing Law

While governing law is important for substantive reasons (e.g., shareholder approval requirements – which may become particularly important if we see an increase in activist hedge funds or institutional investors), the venue for disputes under agreements can be an influential factor if a deal ends up in litigation

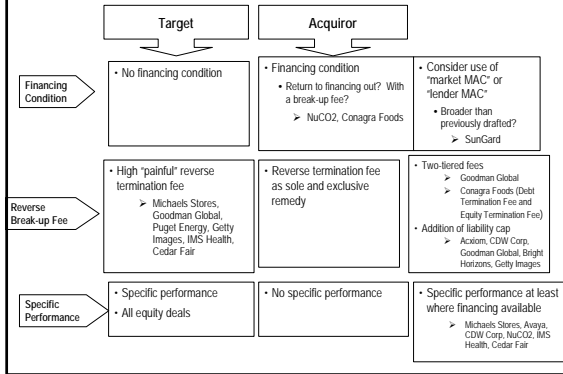
- Genesco – Tennessee Law (merger agreement); New York Law (commitment papers)
- Clear Channel – Delaware Law; Texas suits for “tortious interference”
- Penn National Gaming – New York Law, but forum in Court of Common Pleas of Berks County, Pennsylvania
- Huntsman – Delaware Law (merger agreement); New York Law (commitment papers); Texas Law (suits against Apollo for tortious interference and fraud in the inducement)

Alternative Dispute Resolution

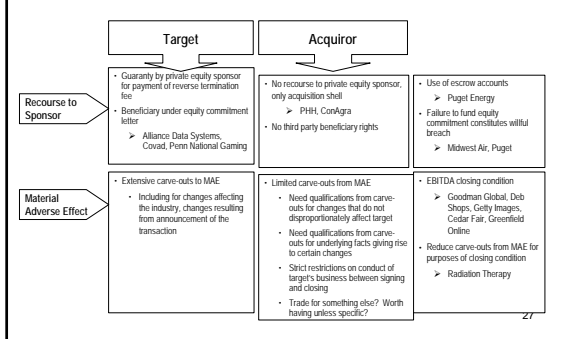
- US courts (particularly those in Delaware and New York) will commence expedited hearings to allow for transactions to close within reasonable time periods
 - Delaware proceedings generally most expedient
- Transaction dynamics may be such that arbitration, which can often allow for significant time to elapse (i.e., 30 days to choose an arbitrator), may be more appealing

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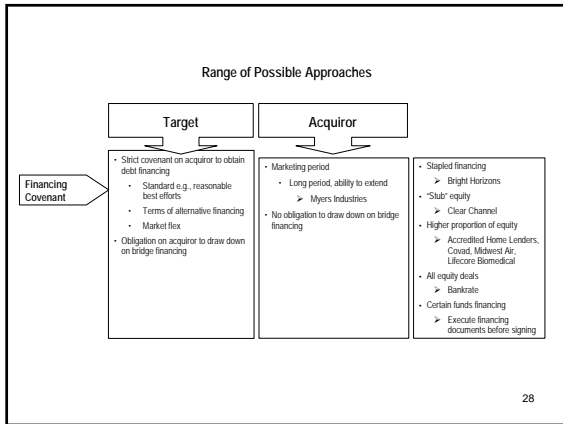
Range of Possible Approaches



Range of Possible Approaches



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- Lessons Learned**
1. Drafting matters
 - Specific performance
 - Dispute resolution
 - Choice of law/ forum
 - MAE definition
 - Ambiguous drafting may, at times, be beneficial; however, if a specific remedy is desired, this should be clearly communicated to the other side and boilerplate provisions should be carefully reviewed
 2. Establishing an MAE is very difficult – the Huntsman case confirmed the high standard required to establish a MAC, and the Genesco case confirmed the effectiveness of the typical carve-outs
 - These may also be risks related to strategic deals
 3. The distinction between risks associated with private equity acquirors and strategic acquirors may be greater than previously thought
 - Era of presumed good behavior on the part of private equity sponsors appears to be over
 - Target companies may have to calculate how much they should discount private equity bids for financing risk and lack of recourse
 - There may be an opportunity for well-financed strategic acquirors in light of reduced private equity competition
 - There may also be risks related to strategic deals
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- Lessons Learned (cont.)**
4. Financing risk may be reallocated between sellers and buyers
 - Strategic acquirors may get financing conditions/some aspects of limited recourse in financed deals
 - Sellers may insist that sponsors commit to finance transactions with all, or a significant portion, of equity (2009 deals exhibit higher equity contributions by sponsors)
 - Many of the recent all-equity sponsor transactions have been relatively small (at least compared to the transaction sizes seen in the LBO boom) and it is less likely (though not impossible) that a sponsor (or consortium of sponsors) would engage in an all-equity "mega deal" or be willing to provide remedies up to the amount of the larger equity commitment in these "mega deals"
 - The recently announced TPG/IMS Health transaction had a substantially higher transaction value (\$5.4 billion) than the recent sponsor transactions and is being financed in significant part with debt
 - The Apollo/Cedar Fair transaction announced in December (with a transaction value of approximately \$2.4 billion) also is being financed with a significant amount of debt
 - Target companies may require buyers to agree to sue financing sources, and targets may be third party beneficiaries of buyers' funding commitments; although lenders are seeking limits on the ability of targets to compel buyers to sue
 - Tighter financing covenants and ability to recover beyond a reverse-termination fee may be an attractive structure to targets that can be used in both sponsor and strategic transactions going forward
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Lessons Learned (cont.)

5. Definitive credit agreements and not just debt commitment letters may be negotiated prior to signing in financed deals (certain funds)
 - Eliminates any ambiguity in banks' commitment
6. Tender offers may have a role in private equity transactions (e.g., Thoma Bravo/Entrust, Apax/Bankrate and Apollo/Parallel Petroleum)
 - If transactions are financed with 100% equity, then a tender offer could be used to acquire control, which would, among other things, limit the length, and possibly utility, of a "go-shop" provision (but see Lifecore Biomedical (tender offer commenced after completion of go-shop period), GenTek, Hyco Real Estate, Laureate Education (tender offer commenced prior to completion of go-shop period))
7. Litigation may play a larger role in transactions
 - Courts may play a role not previously needed because of sponsors' reluctance to risk their reputation by walking away
 - Ambiguity in merger agreements will face more scrutiny in challenging deal environment

Facts, circumstances and competitive dynamics are likely going to continue to be the key drivers of the appropriate structure and terms for any particular transaction, and we are likely to continue to see a wide range of structures and terms in sponsor (and strategic) transactions
