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Suzanne L. Saxman
Partner
Seyfarth Shaw LLP
What Does A Trump Win Mean?

Ted Koenig
President & CEO
Monroe Capital LLC
What Does A Trump Win Mean?

- Interest rates will rise
- Taxes will go down
- Federal government spending will go up
- Federal budget deficit will go up
- Import prices will rise on most things
- Some policies will result in inflation and some will result in deflation – likely result is stagnation, and turf wars in Washington over regulation reform
- Overall a net positive result for capital formation, both debt and equity
- Current credit cycle will last longer, “the game has been pushed back a couple of innings”
A Trump Administration Will...

- Reduce taxes
- Reform immigration
- Reform Obamacare
- Reform Dodd Frank
- Appoint a more conservative nominee to the Supreme Court
- Increase defense spending
A Trump Administration will be good for the following industries:

- Energy
- Materials and Manufacturing
- Financials
- Healthcare
- Infrastructure
- Defense
A Trump Administration will be bad for the following industries:

- Clean Energy – wind, solar, electric, etc.
- Companies with large amounts of non-U.S. based revenue
- Media
- Emerging Markets
- Hospitals and other healthcare providers
- Gun industry, in the short term
Potential Game Changers

- Declaring China a “currency manipulator”
- If NATO becomes a lower priority
- If South Korea and Japan decide to “arm up” in response to threats from China and North Korea
- The entire Middle East
Bruce Lubin

Executive Managing Director and
President of Illinois Commercial Banking
9th Annual M&A Preview: A Middle Market Perspective

November 15, 2016

Jeffrey Golman
Vice Chairman, Head of Investment Banking
## Then and Now

**A look at how the deal making environment has changed over the past year**

**WHERE WE WERE IN 2015…**

- M&A deal value expected to exceed $3.8 trillion
- Private equity deal volume will decrease as they grow wary of paying multiples that will affect their ability to control future exits
- Add-on activity is on track for record levels as firms utilize “buy-and-build” approach
- Future LBOs may be less reliant on debt financing
- Private equity firms will be challenged to generate acceptable returns with prices high and strategic acquirers competing for deals
- Environment is unlikely to change dramatically, absent surprises by the Fed, contraction in economic activity or exogenous event (i.e. political conflict)
- Declining confidence and global economic instability could make deal makers more likely to hit pause

**WHERE WE ARE IN 2016**

- M&A deal volume is down relative to the past two years, but remains at near historic levels
- “Mega-Mergers” are driving M&A deal value and suggests the broader M&A markets are still as active as ever
- Record valuations are making it difficult for private equity firms to compete with strategic acquirers
- While debt levels remain near record levels, more equity is being used to complete deals
- Add-on activity remains at record levels as firms continue to utilize the “buy-and-build” approach
- Family office M&A activity is increasing as wealthy families begin to “side-step” private equity firms
- Private equity firms are considering new long-term strategies with more reasonable return expectations

*Sources: Financial Times, Fortune, Reuters, U.S. Commerce Department, Wall Street Journal.*
Strategic Acquirers Driving M&A Activity

The global deal-making environment has remained robust through the first nine months of 2016

- Global M&A reached $4.26 trillion in deal value in 2015, the highest annual value on record, and 29.4% above 2014’s annual total ($3.29 trillion)

- In Q1-Q3 2016 both global M&A and North American targeted M&A were softer compared to Q1-Q3 2015, yet still robust
  - Global M&A of $2.2 trillion in Q1-Q3 2016 compared to $2.9 trillion in Q1-Q3 2015

Source: MergerMarket.
Strategic Acquirers Driving M&A Activity

Despite lower deal volume, M&A deal value is booming as a result of strategic mega-mergers

- M&A markets remain active, as the week of October 23rd was the largest week of M&A since 1999 with global volume totaling $207 billion
- October was the busiest month on record for announced deals in the United States and the 5th busiest globally
  - Consolidation is occurring across multiple sectors
  - Strategic buyers are increasingly turning to acquisitions as a source for future growth, while the private equity community has also been aggressive in deploying significant “dry powder”
  - Stagnant top line growth, coupled with cheap debt and record cash levels, continues to make M&A very attractive

### TOP TEN M&A DEALS (WEEK OF OCTOBER 23RD)

<table>
<thead>
<tr>
<th>Target</th>
<th>Buyer</th>
<th>Sector</th>
<th>Transaction Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Time Warner Cable</td>
<td>at&amp;t</td>
<td>Media</td>
<td>$108,700</td>
</tr>
<tr>
<td>NXP</td>
<td>Qualcomm</td>
<td>Technology</td>
<td>$47,000</td>
</tr>
<tr>
<td>Rockwell Collins</td>
<td></td>
<td>Aerospace</td>
<td>$8,210</td>
</tr>
<tr>
<td>HILTON Worldwide</td>
<td>HNA</td>
<td>Leisure</td>
<td>$6,500</td>
</tr>
<tr>
<td>Scottrade</td>
<td>Ameritrade</td>
<td>Financial Services</td>
<td>$4,000</td>
</tr>
<tr>
<td>Genworth</td>
<td>Asia Global Capital Group</td>
<td>Financial Services</td>
<td>$2,700</td>
</tr>
<tr>
<td>vtti</td>
<td>BUCKEYE PARTNERS, L.P.</td>
<td>Energy</td>
<td>$1,150</td>
</tr>
<tr>
<td>ODEBRECHT</td>
<td>Brookfield</td>
<td>Environmental Services</td>
<td>$768</td>
</tr>
<tr>
<td>China Shengmu Organic Milk Ltd.</td>
<td>Yili</td>
<td>Food</td>
<td>$680</td>
</tr>
<tr>
<td>PENNEFLEX</td>
<td></td>
<td>Energy</td>
<td>$640</td>
</tr>
</tbody>
</table>

### TOP TEN M&A DEALS YEAR TO DATE

<table>
<thead>
<tr>
<th>Target</th>
<th>Buyer</th>
<th>Sector</th>
<th>Transaction Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allergan</td>
<td>Pfizer</td>
<td>Healthcare</td>
<td>$160,000¹</td>
</tr>
<tr>
<td>Time Warner Cable</td>
<td>at&amp;t</td>
<td>Media</td>
<td>$108,700</td>
</tr>
<tr>
<td>United Technologies</td>
<td>Honeywell</td>
<td>Technology</td>
<td>$91,120¹</td>
</tr>
<tr>
<td>MONSANTO</td>
<td>bayer</td>
<td>Agriculture</td>
<td>$66,000</td>
</tr>
<tr>
<td>NXP</td>
<td>QUALCOMM</td>
<td>Technology</td>
<td>$47,000</td>
</tr>
<tr>
<td>syngenta</td>
<td>CHEM-HINA</td>
<td>Agriculture</td>
<td>$43,000</td>
</tr>
<tr>
<td>ARM</td>
<td>SoftBank</td>
<td>Technology</td>
<td>$32,400</td>
</tr>
<tr>
<td>Shire</td>
<td>Shire</td>
<td>Healthcare</td>
<td>$32,000</td>
</tr>
<tr>
<td>Crop Science</td>
<td>MONSENTO</td>
<td>Healthcare</td>
<td>$30,000</td>
</tr>
</tbody>
</table>

(USD in millions)

Source: MergerMarket.
1. Transaction was not completed.
Private Equity Deal-Making Taking a Back Seat to Strategic Deals

Private equity buyers struggle to compete with corporate acquirers amid high valuations

- Sustained high valuations, volatility in public markets and a decline in the number of attractive targets are some of the drivers behind the slide in private equity activity
  - Private equity deal flow is well below 2015 levels, with total counts declining 26% year-over-year in the third quarter
- Companies in the S&P 500 held a combined cash and short-term investment balance of $1.46 trillion as of July 2016—the second highest total in the past decade
  - Companies can utilize their balance sheets to grow inorganically and be more willing to accept lower returns in the near term
  - Excess cash, cheap leverage and inflated stock valuations for strategics drive valuations beyond that of financial sponsors
- PE shops are wary of paying multiples that will affect their ability to control future exits, thus driving lower deal counts, values and capital invested
- Private equity dry powder has reached record levels through Q3 2016 at $839 billion—up 11% from $757 billion at the end of 2015
- Total leverage in 1Q–3Q 2016 for middle market issues with less than $50 million of EBITDA averaged 4.8x, lower than the previous two years, but still near record levels

AVERAGE DEBT MULTIPLES OF MIDDLE MARKET LBO LOANS
(ISSUERS WITH LESS THAN $50M OF EBITDA)

<table>
<thead>
<tr>
<th>Year</th>
<th>Senior Debt / EBITDA</th>
<th>Sub Debt / EBITDA</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>5.6x</td>
<td>0.8x</td>
</tr>
<tr>
<td>2007</td>
<td>5.2x</td>
<td>0.8x</td>
</tr>
<tr>
<td>2008</td>
<td>5.6x</td>
<td>0.7x</td>
</tr>
<tr>
<td>2009</td>
<td>4.5x</td>
<td>0.8x</td>
</tr>
<tr>
<td>2010</td>
<td>4.2x</td>
<td>0.8x</td>
</tr>
<tr>
<td>2011</td>
<td>4.3x</td>
<td>0.8x</td>
</tr>
<tr>
<td>2012</td>
<td>4.5x</td>
<td>0.8x</td>
</tr>
<tr>
<td>2013</td>
<td>4.8x</td>
<td>0.6x</td>
</tr>
<tr>
<td>2014</td>
<td>5.3x</td>
<td>0.6x</td>
</tr>
<tr>
<td>2015</td>
<td>5.4x</td>
<td>0.6x</td>
</tr>
<tr>
<td>Q1-Q3 2016</td>
<td>4.8x</td>
<td>0.6x</td>
</tr>
</tbody>
</table>

Leverage remains near record highs

U.S. PRIVATE EQUITY DEAL FLOW BY YEAR

<table>
<thead>
<tr>
<th>Year</th>
<th>Capital Invested (US$bn)</th>
<th>Deal Volume</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>$432</td>
<td>2,798</td>
</tr>
<tr>
<td>2007</td>
<td>$415</td>
<td>2,593</td>
</tr>
<tr>
<td>2008</td>
<td>$370</td>
<td>1,782</td>
</tr>
<tr>
<td>2009</td>
<td>$389</td>
<td>2,620</td>
</tr>
<tr>
<td>2010</td>
<td>$413</td>
<td>2,907</td>
</tr>
<tr>
<td>2011</td>
<td>$453</td>
<td>3,165</td>
</tr>
<tr>
<td>2012</td>
<td>$505</td>
<td>3,840</td>
</tr>
<tr>
<td>2013</td>
<td>$616</td>
<td>3,744</td>
</tr>
<tr>
<td>2014</td>
<td>$620</td>
<td>3,303</td>
</tr>
<tr>
<td>2015</td>
<td>$645</td>
<td></td>
</tr>
<tr>
<td>2016E</td>
<td>$4,500</td>
<td></td>
</tr>
</tbody>
</table>

Sources: S&P Capital IQ LCD, Pitchbook.
1. Deal volume and deal value have been annualized based on Q1-Q3 2016 results.
Enterprise Value-to-EBITDA multiples through Q3 2016 are at 11.2x—up from 10.2x in 2015

There has been an uptick in private investment in the healthcare and IT sectors, both of which tend to trade at higher EV/EBITDA multiples due to their high perceived potential for growth

- With many companies struggling for top-line growth, money managers are focusing more on growth investing and “recession-proof” industries
- In 2016, healthcare and IT industries have accounted for 15% and 17% of private equity deals, respectively

Since 2013, median debt percentages for United States M&A activity have fallen 21.5% from 61.7% to 48.4%

- Although debt levels remain relatively high, the broader trend reflects that more and more equity is being used to complete transactions
- In often cases, small and middle market firms will over-equitize transactions as they pursue roll-up strategies and gradually increase leverage as they build up their asset base

In 2015, buyout funds generated an average internal rate of return of 17.1%, which is below the traditional 20% mark

Records Valuations and Increasing Equity Contributions

Sky high deal multiples affect the returns and appetite of PE buyers

MEDIAN EBITDA MULTIPLES OF U.S. M&A (INCLUDING PE BUYOUTS)

<table>
<thead>
<tr>
<th>Year</th>
<th>Debt/EBITDA</th>
<th>Equity/EBITDA</th>
<th>Valuation/EBITDA</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010</td>
<td>3.7x</td>
<td>4.8x</td>
<td>8.5x</td>
</tr>
<tr>
<td>2011</td>
<td>4.1x</td>
<td>5.5x</td>
<td>9.6x</td>
</tr>
<tr>
<td>2012</td>
<td>3.7x</td>
<td>5.0x</td>
<td>8.7x</td>
</tr>
<tr>
<td>2013</td>
<td>3.9x</td>
<td>6.3x</td>
<td>10.2x</td>
</tr>
<tr>
<td>2014</td>
<td>4.3x</td>
<td>5.6x</td>
<td>9.9x</td>
</tr>
<tr>
<td>2015</td>
<td>4.5x</td>
<td>5.7x</td>
<td>10.2x</td>
</tr>
<tr>
<td>2016</td>
<td>5.8x</td>
<td>5.4x</td>
<td>11.2x</td>
</tr>
</tbody>
</table>

MEDIAN DEBT PERCENTAGES FOR U.S. M&A (INCLUDING PE BUYOUTS)

<table>
<thead>
<tr>
<th>Year</th>
<th>Debt/EBITDA</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010</td>
<td>50.0%</td>
</tr>
<tr>
<td>2011</td>
<td>61.7%</td>
</tr>
<tr>
<td>2012</td>
<td>65.0%</td>
</tr>
<tr>
<td>2013</td>
<td>55.0%</td>
</tr>
<tr>
<td>2014</td>
<td>57.0%</td>
</tr>
<tr>
<td>2015</td>
<td>54.0%</td>
</tr>
<tr>
<td>2016</td>
<td>48.4%</td>
</tr>
</tbody>
</table>

More equity is being used to complete deals

Sources: S&P Capital IQ LCD, Pitchbook, Financial Times.
Private Equity Firms Get Creative to Close Deals

Private equity firms still need to put record levels of dry powder to work

- Private equity buyers seeking lower valuations have been exploring alternate strategies, such as:
  - Purchasing minority stakes
  - Employing the “buy-and-build” approach
  - Refocusing their efforts on the middle- and lower-middle-markets

- Through Q3 2016, 1,750 deals were closed with an enterprise value of less than $100 million, accounting for 70% of all completed deals
  - Deals under $25 million have accounted for over 46% of activity thus far in 2016, the highest proportion since 2009

- Add-on activity is on track for a record year in 2016
  - As a percentage of buyouts, add-ons have accounted for a record 64% thus far into the year
  - PE buyers are implementing roll-up strategies and multiple arbitrage to reduce blended multiples

Sources: S&P Capital IQ LCD, Pitchbook.
The Rise of Family Offices

More and more family offices have moved towards direct investing and away from traditional money managers

COMMENTARY

- High valuations and stiff competition among private equity groups make new deals more expensive and traditional returns of 20% difficult to achieve
- Wealthy families see value in “side-stepping” private equity firms’ fees and in holding stakes for longer than many traditional funds
  - An April 2016 survey conducted by the Family Office Exchange showed that direct investing returned 15% on average—more than double that of private equity firms
  - Traditional private equity firms typically charge a 2% annual management fee and claim 20% of the profits
- A family has the ability to hold a business for decades while private equity firms must periodically return capital to its shareholders
  - Family offices aren’t restricted by investment horizons
- Large private equity firms including Blackstone, Carlyle and CVC Capital Partners are following suit by offering long-term (10-15 years) investment vehicles with target yields between 12-15%
  - New structure will curb “forced” sales
  - Longer investment horizons will lower the number of sales between private equity groups as an exit strategy, which has surged this year
  - Lower return targets represent an attempt to reset investor expectations in a low yield environment

SELECT FAMILY OFFICE TRANSACTIONS

<table>
<thead>
<tr>
<th>DATE</th>
<th>BUYER</th>
<th>TARGET</th>
<th>DESCRIPTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pending</td>
<td>Pritzker Group</td>
<td>ProAmpac</td>
<td>Manufactures flexible packaging products including dairy laminates, labels and lidding</td>
</tr>
<tr>
<td>Oct-16</td>
<td>McNALLY Capital</td>
<td>GENESYS AEROSYSTEMS</td>
<td>Provides avionics solutions and technology for rotorcraft and fixed wing aircraft</td>
</tr>
<tr>
<td>Oct-16</td>
<td>DNS CAPITAL</td>
<td>Financeit</td>
<td>Provides a platform for businesses to offer consumer financing solutions</td>
</tr>
<tr>
<td>Aug-16</td>
<td>MAY RIVER CAPITAL</td>
<td>AMERICA Capital</td>
<td>Designs and manufactures tight tolerance machined components</td>
</tr>
</tbody>
</table>

FAMILY OFFICE DEAL ACTIVITY

<table>
<thead>
<tr>
<th>Year</th>
<th>Deals</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006-2010</td>
<td>56</td>
</tr>
<tr>
<td>2011-2015</td>
<td>97</td>
</tr>
</tbody>
</table>

Sources: S&P Capital IQ LCD, Pitchbook.
1. Only includes publicly reported family office transactions.
### Post Election Implications for M&A Environment

#### Economy
- Fundamental shift away from monetary policy and toward fiscal stimulus
  - Infrastructure spending, tax reform and deregulation is likely to stimulate growth
- $5 trillion in potential tax cuts will lower both individual and corporate tax rates
- Possible repatriation of $100 billion of overseas cash, which will likely be used for dividends, share repurchases, M&A and capital investment
- Possible repeal or nulling of all or parts of the Dodd-Frank Act

#### Trade
- Trans-Pacific Partnership deal is dead, potentially favoring China
- Increased tariffs on imports from China and Mexico could increase prices and inflation

#### Mergers & Acquisitions
- Pro-business tilt and relaxed anti-trust enforcement will likely support M&A activity
- Bias toward domestic economy may favor domestic M&A activity vs. cross border deals
  - Trump administration may view domestic M&A activity as an opportunity for companies to grow and compete internationally
- Increased interest rates may affect valuations and debt capacity

#### Favorable Sector Environments
- Healthcare
  - Fear of tighter regulations on drug pricing eliminated
- Financial Services
  - Steepening yield curve will help bolster profits
- Infrastructure
  - Increased spending will boost top and bottom line growth for companies such as Caterpillar
9th Annual M&A Preview

Legal Developments and Current Trends

Tyler VanLonkhuyzen
Seyfarth Shaw LLP
November 15, 2016
A. Earnouts

• Condition a portion of the purchase price on the post-closing financial performance of the acquired business. Bridge valuation gaps when the nature of the business or other conditions undermine the parties’ ability to agree on the future prospects and ultimate value of a business.

• Approximately 15% to 20% of private acquisition agreements contain an earn out with most focused on EBTIDA or Revenue targets.

• Breach of the implied covenant of good faith and fair dealing based on the buyer not using best efforts to achieve the earnout targets.
A. Earnouts

Haney vs. Blackhawk (Delaware)

1. Alleged that Blackhawk capitalized on information unknown to the Sellers by including an earnout structure that would lessen payments to the Sellers.

2. Sellers argued that (1) Blackhawk breached the implied covenant by deliberately acting to keep Sellers from earning the 2015 contingency payment, and (2) Blackhawk breached the implied covenant by failing to disclose the existence of an exclusivity agreement.

3. Court ruled against Sellers noting that “where the contract specifically addresses the issues complained of, existing contract terms control, and implied good faith cannot be used to circumvent the parties bargain, or to create a free floating duty, unattached to the underlying legal document.”
A. Earnouts

Fortis vs. Dialog (Delaware)

1. The parties agreed that the Buyer would use commercially reasonable best efforts to meet the revenue goals and pay the earnout payments in full. Further, the parties negotiated specific obligations and prohibitions related to how the business would be conducted after the merger.

2. Court explained that the implied covenant of good faith and fair dealing - defined as a covenant “attaching to every contract by operation of law” and “requiring a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain” - only comes into play when a contract is missing specific language on an issue.

3. The implied covenant does not create an independent duty for the contracting parties if the contract expressly addresses the issue.
A. Earnouts

Lazard vs. Qinetiq (Delaware)

1. The buyer paid $40 million at closing and agreed to pay up to an additional $40 million if revenue goals were achieved.

2. The merger agreement prohibited the buyer from taking any action to divert or defer revenue with the intent of reducing or limiting the earnout payment.

3. Buyer did not breach the contract when it failed to meet revenue targets for the given product because it did not intend to reduce or limit the earnout, even though the buyer may have known that its actions would have resulted in the failure to achieve the milestone.
A. Earnouts

American Capital Acquisition Partners LLC. v. LPL Holdings (Delaware)

1. The purchase price included a contingent payment of up to $15 million based on the achievement of gross margin thresholds.

2. Sellers argued that the implied covenant of good faith and fair dealing imposed on Buyer an obligation to make the technological adaptations necessary to enable Buyer to provide custody services for the combined division.

3. Court found that the Sellers did prevail in the claim of breach of the implied covenant as it related to the diversion of resources and business from the combined division to another entity.
B. Fraud Claims and Disclaimers of Reliance

[PE Firm] v. Double E Holding (Delaware)

1. Buyer claimed fraud, aiding and abetting fraud, and conspiracy to commit fraud against the Seller and two members of company management.

2. Buyer made clear to company management that if the company missed its sales figures, they reserved the right to terminate the deal.

3. Company management provided false sales information.

4. Delaware law does not require magic words. Exclusive reps/warranties clause and the integration clause combined to mean that the Buyer did not rely on other information.
C. Appraisal Claims

• Has relevance in the context of both public and private transactions, including private equity buyers purchasing public companies.

• In Delaware, only mergers, consolidations and asset sales trigger appraisal rights.

• Stockholders in private companies have more reason to exercise appraisal rights.

• Appraisal rights closing conditions are becoming much more common in merger agreements.
C. Appraisal Claims

Dell Appraisal (Delaware)

1. Delaware Court of Chancery awarded an appraisal judgment in Dell, holding that the management buyout of Dell undervalued the company by 28%.

2. Court noted that a sale process that passes muster may still fail to set the proper value for the company. Court confirmed that the board’s sale process would pass even under entire fairness standard because the stockholders were fully informed and a majority of the disinterested stockholders approved the deal.

3. Because the decision gives no credit to a price negotiated in a fair process with no intimation of favoritism or other untoward conduct on the part of the target board, it raises alarm bells for financial buyers.

4. Amendments to Section 262 of the Delaware Corp. Law.
C. Appraisal Claims

Private Company Appraisal Claims

1. Section 262 of the Delaware Corp. Law gives a stockholder the right to seek appraisal of the fair value of its shares if the stockholder does not vote in favor of the merger.

2. Appraisal claims derive from: a conflicted board, a defective sale process, allocation of little or no merger proceeds to common stockholders, allocation to management of merger proceeds that otherwise would be allocated to common stockholders, or a dissatisfied stockholder base.
C. Appraisal Claims

- **In Roam-Tel Partners vs. AT&T Mobility (Delaware)**, a stockholder who received no consideration for a waiver of appraisal rights was permitted to revoke the stockholder’s waiver within the 20 day statutory exercise period where the stockholder did not actually accept the merger consideration. The court distinguished the facts from a prior case where the stockholder was offered $2 per share for an appraisal rights waiver in addition to the merger consideration and that created an enforceable contract regarding the waiver of appraisal rights.

- **In Halpin vs. Riverstone (Delaware)**, in response to the majority stockholder’s argument that a drag-along provision obligated minority stockholders to consent to a merger after its effectiveness and that such consent would constitute a waiver of the minority stockholders’ appraisal rights, the court held that the minority stockholders were not obligated to consent to the merger after the fact because the majority stockholder failed to provide prior notice of the merger, as required by the terms of the drag-along provision, thereby resulting in an ineffective exercise of the majority stockholder’s drag-along rights.
D. Business Judgment Rules Applies with Disinterested Stockholder Vote

- In a few recent decisions, the Delaware Supreme Court confirmed that when a merger is approved by a fully informed vote of a majority of the disinterested stockholders, the business judgment rule, not entire fairness, will apply to breach of fiduciary duty claims.
- The **business judgment rule** is a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.
- The **entire fairness standard** is triggered where a majority of the directors approving the transaction are interested or where a majority stockholder stands on both sides of the transaction. In such a situation, the burden shifts to the corporation to prove that both the process that was followed and the price that was achieved are fair to the stockholders of the corporation.
D. Business Judgment Rules Applies with Disinterested Stockholder Vote

Corwin vs. KKR (Delaware)

1. Plaintiffs alleged that KKR was a controlling stockholder of Financial Holdings requiring review of the merger terms under the entire fairness standard as opposed to the business judgment rule.

2. Court held that the business judgment rule is the appropriate standard of review in post-closing damages suits involving mergers that have been approved by a fully informed, uncoerced majority of the disinterested stockholders, even where such a vote is statutorily required.
D. Business Judgment Rules Applies with Disinterested Stockholder Vote

Singh vs. Attenborough (Delaware)

1. Delaware Supreme Court affirmed dismissal of aiding and abetting claims against a financial advisor to Zale Corporation in connection with the company’s sale to Signet Jewelers Ltd. because of the cleansing effect of a fully informed, uncoerced vote of Zale’s disinterested stockholders.

2. Since there was no viable claim against the directors for breach of fiduciary duty under the business judgment standard of review, there could be no aiding and abetting claim against the financial advisor.
D. Business Judgment Rules Applies with Disinterested Stockholder Vote

RBC Capital (Delaware)

1. Delaware Supreme Court affirmed the Delaware Court of Chancery’s decision holding a financial advisor liable for approximately $75.8 million (plus interest) in damages for aiding and abetting breaches of fiduciary duty.

2. Confirmed that financial advisors that fail to disclose material information to a board regarding actual or potential conflicts can be held liable for damages that flow from knowing participation in unreasonable sale processes.
E. Private Merger Structure - Binding Stockholders

Cigna Health vs. Audax Health (Delaware)

1. Cigna was a stockholder of Audax. The merger was approved by a majority of Audax’s stockholders, but not Cigna.

2. The terms of the merger agreement conditioned receipt of the merger consideration on execution of a Letter of Transmittal requiring a release of claims, broad indemnification and appoint of representative.

3. Court held that Cigna’s right to the merger consideration vested upon consummation of the merger. No valid consideration for Release.
F. Rep/Warranty and Related Insurance

- Number of insurers has increased dramatically.
- Studies show the following (both insured and non-insured deals):
  1. Approximately 25% of deals end up having a breach of a rep/warranty and most that do have a claim normally have at least 2 claims.
  2. 30% of claims have a value in excess of $500,000 and 21% have a value in excess of $1 million.
F. Rep/Warranty and Related Insurance

3. Breach of customer contract claims had the greatest severity, followed (in order) by breaches of the intellectual property, financial statements and undisclosed liabilities reps.

4. Breaches of tax reps were the most frequent, followed (in order) by intellectual property, undisclosed liabilities, and employee-related matters.

5. Claims on Insured Deals - High frequency of claims against issued policies and the financial statement and tax reps are the most frequently breached.
G. 2016 Deal Terms (Seyfarth Shaw Middle-Market Survey)

• Increase in the use of escrow periods of 12 months or less, a decrease in median escrow amounts, and a higher percentage of deals with an indemnity cap of 10% or less.
• Indemnity Escrow Amount - Approximately 52% of deals surveyed provided for an indemnity escrow with a median escrow amount of 6%.
• Indemnity Escrow Period - The median escrow period increased slightly to 16.5 months, but the percentage of deals with an indemnity escrow of 12 months or less increased to over 46%.
G. 2016 Deal Terms (Seyfarth Shaw Middle-Market Survey)

- Survival Periods - Median survival period for general reps/warranties remained at 15 months. Approximately 80% of deals had survival periods of between 12 and 18 months.
- Carve-Outs to Standard Survival Period - Authority (81%); Organization (77%); No Conflicts (30%); Capitalization (72%); Title to Assets (51%); and Taxes (75%).
- Indemnity Basket Type - 25% Threshold/Tipping (Dollar One) and 75% True Deductible. The use of Dollar One Baskets has increased.
- Indemnity Basket Size - Median basket size stayed consistent at 0.75% of the purchase price.
- Indemnity Cape Size - Median cap size stayed consistent at 10% of the purchase price. Caps of less than 5% rose to 14% of all deals with a cap.
Thank You!