KIRKLAND & ELLIS

KIRKLANDPEN
Private Equity Newsletter

June 20, 2013

# Custom (Go-) Shopping

**PENpoints**

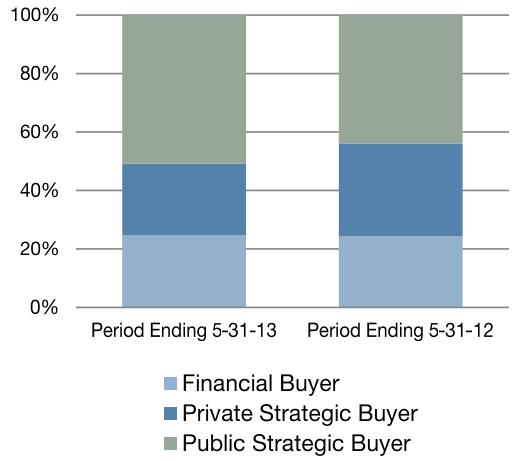
*Deal protections terms should not be viewed as a straight-jacket dictating inflexible boundaries. Instead, there is room for creativity to tailor market terms to the real-world circumstances of a particular transaction, which is precisely what courts expect boards and their advisors to do.*

The Delaware courts have often repeated the bedrock principle that there is no one path or blueprint for a target company board to fulfill its *Revlon* duties of seeking the highest value reasonably available in a sale transaction. The courts have usually deferred to the judgment of the directors as to whether the requisite market-check is best achieved by a limited pre-signing process, a full-blown pre-signing auction or a post-signing fiduciary out. However, as evidenced in a recent decision, it is equally true that Delaware courts will not automatically bless a sale process simply because the deal protection provisions fall within the range of "market" terms. Particularly in a single-bidder sale process, the courts will continue to seek evidence of a fully-informed and thoughtful approach by the target board to the sale process and deal protection terms with the goal of maximizing value for shareholders.

The innovative go-shop, which first gained popularity during the 2006-2008 LBO boom as an alternative to the traditional no-shop, initially reflected such a nuanced approach to balancing the desire to quickly strike a deal with a single buyer with the recognition that a more robust post-signing market check was probably needed. However, it quickly fell victim to the precedent-driven marketplace for deal terms — both in its fairly reflexive deployment as "required" in certain deals (mainly private equity go-privates) and in its largely standardized detailed terms. While the introduction of a "hybrid go-shop" (see October 28, 2010 *M&A Update*) reflected a thoughtful adaptation of the go-shop tool in a different category of deals (sales to strategic buyers in single-bidder processes), the traditional go-shop remained fairly regimented, with any variation mostly residing at the edges — e.g., the number of days the target was permitted to actively solicit competing bids or the percentage of the discount on the full break-up fee for topping deals struck with go-shop participants.

However, a number of recent deals have broken this mold with the go-shop being deployed with significant modifications:

**PENstats**




This chart was generated from data in CTRAN, Kirkland's proprietary database which includes more than 750 private-target M&A transactions closed since 2008 in which Kirkland represented a transaction party.

- In the recent acquisition of Websense by Vista Equity (soon copied in the Shuanghui/Smithfield deal), the merger agreement includes a traditional no-shop, but with a narrow go-shop-like exception that allows the target to continue discussions and due diligence with a limited number of bidders who were active participants in the sale process before the deal was announced. A lower break-up fee (Websense – 50%; Smithfield – 43%) is payable if the target terminates the initial deal to accept a superior offer from one of these "excluded bidders"

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by a specified deadline. The relevant period is relatively short (in Websense, a few weeks) and the topping bid has to be completed and signed (rather than just first made) by the deadline in order to qualify for the lower fee, suggesting that these bidders were well into the bidding process when they lost the pre-signing auction.

- A very different approach was taken in the recent sale of BMC Software to a consortium led by Bain Capital/Golden Gate Capital. While the agreement included, at the target's insistence, a fairly traditional go-shop, the merger agreement provides that certain parties that had participated in the robust and somewhat public auction prior to the announcement of the consortium deal were not eligible for the lower break-up fee payable by go-shop participants who strike a deal on a topping bid before the deadline.

Rather than reflecting random tweaks to the traditional go-shop structure, the seeming discrepancy in outcome between the two approaches instead reflects thoughtful attention to the specific circumstances in each deal. As disclosed in the Websense tender offer documents, the "limited go-shop" construct was proposed by the buyer in the context of an early bid that was made before the final bid deadline that ended an extensive, albeit private, pre-announcement canvass of the market. The narrow go-shop-like exclusion for final round participants could address concerns about the auction being cut short by an advance bid (which the target invited all participants to make) by allowing the Websense board to take the bird-in-hand of the compelling early bid but protecting itself against the possibility (and associated criticism) of leaving a better bid on the table by not playing out the auction to its scheduled conclusion. By contrast, the BMC approach (where the lower fee associated with a go-shop topping bid is not available to pre-signing auction participants) addresses the countervailing concerns of a buyer when a pre-signing auction does in fact reach a conclusion with "best and final" bids, but where the target, perhaps driven by market practice, still insists on a go-shop. In such a case, a buyer can legitimately argue that the go-shop should not be a low-cost open door for losing bidders to have another bite at the apple.

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While the market for deal terms will continue to evolve and precedent-based arguments will persist in negotiations, as we have argued in the past (see November 10, 2009 *M&A Update*) in deal protection "one size does not fit all". The "market" for deal protections terms should not be viewed as a straightjacket that dictates inflexible boundaries, as Delaware courts expect boards (and their advisors) to creatively tailor market terms to the real-world circumstances of a particular transaction.

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If you have any questions about the matters addressed in this *KirklandPEN,* please contact the following Kirkland authors or your regular Kirkland contact.

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PENbriefs

# U.S. Supreme Court Strikes Compromise on Patentability of Human Genes

In a sweeping decision affecting the biotech industry, the U.S. Supreme Court recently ruled that a naturally occurring DNA segment is a product of nature and thus not patent-eligible, and that synthetically created strands of DNA derived from naturally occurring DNA may be patented. To read more about this decision, see our recent *Alert.*

# New U.S. Sanctions Target Non-U.S. Firms Doing Business with Iran

A new U.S. executive order, which becomes effective July 1, 2013, significantly expands the reach of U.S. sanctions against Iran to new industries and non-U.S. companies (and their U.S. partners) doing business in Iran. To learn more, see our recent *Alert.*

PENnotes

**Private Equity Forum (Fourteenth Annual)**
**New York, New York**
**July 8 - 9, 2013**

The Practising Law Institute will host its "Private Equity Forum (Fourteenth Annual)" on July 8-9 in New York. A distinguished panel of experts will discuss the basics of the private equity practice from fund formation to private equity M&A. Kirkland partner John O'Neil will participate in a panel discussion about the regulatory issues that must be considered when raising a private equity fund. Click here for more information or to register for this event

**5th Annual TMA Western Regional Conference**
**Laguna Beach, California**
**July 17 - 19, 2013**

Partner Samantha Good will be a featured panelist at the 5th Annual Turnaround Management Association (TMA) Western Regional Conference on July 17-19 in Laguna Beach, California. Samantha's panel will discuss "Contrasting Restructurings of Large vs. Middle Market Companies." The panel will provide a contrast between various cases, from small cap restructurings to mega-size restructurings, from the perspectives of the various constituents involved in such cases, as well as thoughts on the current restructuring market and near-term outlook. To register, click here.

**Structuring and Negotiating LBOs**
**Chicago, September 12, 2013**
**New York, September 19, 2013**
**San Francisco, September 27, 2013**

This biennial event, chaired by partner Jack S. Levin, focuses on the legal, tax, structuring and practical negotiating aspects of buyouts and other complex private equity deal-doing. Registration details to come.

**Hot Topics in Mergers & Acquisitions 2013**
**Chicago, September 19, 2013**
**New York, October 15, 2013**

With the equity markets climbing into record territory in early 2013 and the debt markets continuing to experience favorable pricing, the environment seems ripe for a strong M&A rebound. Join our expert faculty of lawyers, general counsels, regulators and investment bankers as we explore the fascinating state of M&A and the trends you need to be aware of for the year ahead. Kirkland partners R. Scott Falk and Sarkis Jebejian are co-chairs of the event. Also, Kirkland partner Jon A. Ballis will be speaking at the Chicago seminar and partner Taurie M. Zeitzer will be speaking at the New York seminar. Click here for more information.

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# Private Equity Practice at Kirkland & Ellis

Kirkland & Ellis' nearly 400 private equity attorneys have handled leveraged buyouts, growth equity transactions, recapitalizations, going-private transactions and the formation of private equity, venture capital and hedge funds on behalf of more than 400 private equity firms around the world.

Kirkland has been widely recognized for its preeminent private equity practice. The Firm was named "Private Equity Group of the Year" in 2012 and 2013 by *Law360* and was commended as being the most active private equity law firm of the last decade in *The PitchBook Decade Report*. In addition, Kirkland was awarded "Best M&A Firm in the United States" at *World Finance*'s 2012 Legal Awards and was honored as the "Private Equity Team of the Year" at the 2011 *IFLR* Americas Awards.

The Firm was ranked as the #1 law firm for both Global and U.S. Buyouts by deal volume in Mergermarket's *League Tables of Legal Advisors to Global M&A for Full Year 2011 and 2012*, and has consistently received top rankings among law firms in Private Equity by Chambers & Partners, *The Legal 500*, the Practical Law Company and *IFLR*, among others.

*The Lawyer* magazine has recognized Kirkland as one of its "Transatlantic Elite" every year since 2008, having noted that the firm is "leading the transatlantic market for the provision of top-end transactional services ... on the basis of a stellar client base, regular roles on top deals, market-leading finances and the cream of the legal market talent."

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