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The NLRB's Evolving Stance on Regulating Employee Social Media Use

By Susy Hassan

Let's say your company has just learned that an employee has been exchanging work-related gripes with his coworkers on Facebook, including a number of offensive comments about his supervisor. These postings violate your company's social media policy, which prohibits employees from making disparaging comments about the company, its supervisors, or coworkers. Management wants to terminate the employee on the spot. Anything you need to be worried about as general counsel?

Although it may seem counter-intuitive, terminating an employee in this context could lead to liability under the National Labor Relations Act (NLRA), even if the posts are both disparaging and profane.

The NLRA is a federal law that grants employees the right to unionize, bargain collectively through representatives, and otherwise engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Notably, it applies equally to non-union employees—and the National Labor Relations Board (NLRB) has, in fact, recently taken enforcement action against non-unionized employers for interfering with employee NLRA rights. Although these protections have been in place since the 1930s, they have recently received heavy media coverage in the legal community in light of the NLRB's new focus on applying them to the modern workplace, where social media use has become ubiquitous.

This article tracks cutting-edge developments under the NLRA as it relates to limiting an employer's ability to regulate employee social media use, whether by implementing policies to that effect or by taking disciplinary action on the basis of such use when doing so runs counter to employee rights under the act.

Regulating Employer Social Media Use

The law governing the extent to which an employer can regulate employees' use of social media as a forum for work-related gripes is far from clear, but is quickly being developed. It has become a particularly hot topic in the last year, in large part because the NLRB has been devoting significant attention to the issue. In the past few months, there have been three significant developments in this area of law that provide guidance on the interrelation of social media use and employee protections under the NLRA.

First, on August 18, 2011, the NLRB's Office of the General Counsel released a report discussing the outcome of 14 cases its Division of Advice has investigated this year involving social media use in the employment context. While the report does not reflect actual decisions of the NLRB, it does indicate the thinking of the NLRB's chief attorney who sets guidelines for what cases will be presented to the NLRB for litigation and decision.

Second, on September 2, 2011, an NLRB administrative law judge (ALJ) issued the first post-hearing decision regarding employee social media use and NLRA rights in a case that was also the subject of the general counsel's report. This recent decision, *Hispanics United of Buffalo, Inc.*, NLRB ALJ, No.3-CA-27872 (*Hispanics United*), was decided against the employer and resulted in the ordered reinstatement of five employees who were found to have been unlawfully discharged for their use of social media to discuss the terms and conditions of their employment.

Third, on September 28, 2011, another ALJ decision was issued on this topic. In *Karl Knauz Motors, Inc. d/b/a Knauz BMW and Robert Becker,* NLRB ALJ, No. 13-CA-46452 (*Knauz BMW*), an employee was held to have engaged in protected, concerted activity when he complained on Facebook about the quality of food served at a company promotion event. The ALJ additionally ruled on whether particular personnel policies adopted by the employer were invalid infringements on its employees' NLRA rights.

Taken together, the two ALJ decisions and the August NLRB report shed light on two major issues in this area of law: (1) When does employee social media use constitute "protected concerted activity" under the NLRA?; and (2) Where is the line drawn between a valid and invalid employer social media policy?

Protected Concerted Activity

Pursuant to section 7 of the NLRA,

employees have the right to communicate with one another about the terms and conditions of their employment. When such a communication qualifies as protected "concerted activity," an employee cannot legally be disciplined for partaking in it. In the context of social media, the question is when a particular use, such as a Facebook posting, falls under the ambit of section 7's definition of protected "concerted activity."

NLRB Office of Advice

Six of the decisions chronicled in the general counsel's report focused on this issue and offer some guidance as to what kinds of social media use may qualify as protected activity. To begin with, social media use is more likely to qualify as protected concerted activity where the employee discusses the terms and conditions of his or her employment in a manner that is meant to induce or further group action. The general counsel appears more inclined to characterize social media use in this fashion when it is either directed to fellow co-workers or grows out of an earlier discussion about terms and conditions of employment among co-workers. For example, in the third case summarized in the general counsel's report, an employee was terminated for posting photographs and commentary on his Facebook page that criticized a sales event held by the employer. The report indicates that, despite the fact that the employee "posted the photographs on Facebook and wrote the comments himself," the social media use qualified as concerted because the employee was "vocalizing the sentiments of his coworkers and continuing the course of concerted activity that began when the salespeople raised their concerns at the staff meeting."

On the other hand, employee social media use is unlikely to rise to the level of protected concerted activity where it is best characterized as an individual complaint about working conditions specific to the employee, and is not directed to co-workers or meant to induce group action. For instance, in the sixth case summarized in the general counsel's report, the board concluded that an employee's Facebook post complaining about the employer's tipping policy in response to a question from a non-employee did not amount to protected concerted activity. Although the employee was discussing the tipping policy, a term or condition of his employment, the board found no evidence of concerted activity because the employee did not discuss the posting with his coworkers, none of them responded to the posting, there had been no employee meetings or any attempt to initiate group action regarding the tipping policy, and the posting did not grow out of the employee's conversation with a co-worker.

The report also suggests that employee comments that are "maliciously false," a seemingly high standard, will not be protected under the NLRA and that offensive or inappropriate comments about an employer's *clients* are also unlikely to be protected. For instance, in the eighth case summarized in the general counsel's report, the board concluded that an employee's Facebook posts referring to the employer's mentally disabled clients did not qualify as protected concerted activity, not only because the conduct was not concerted, but because the posts "did not mention the terms or conditions of employment" and were better characterized as communications to her "personal friends about what was happening on her shift."

These principles are further developed in the two published decisions recently issued by NLRB administrative law judges: *Hispanics United* and *Knauz BMW*.

Hispanics United *ALJ Decision*

In *Hispanics United*, an employee of a small nonprofit had an altercation with a co-worker who felt the organization's employees were not doing enough to help their clients. The employee decided to vent her frustrations on Facebook, posting: "Lydia Cruz, a coworker feels that we don't help our clients enough . . . I about had it! My fellow coworkers how do you feel?" Several co-workers responded to the post, joining in the employee's sentiment, and a vigorous discussion ensued. The employer caught wind of the posts when Lydia reported them, complaining that she felt bullied and harassed. The employer promptly terminated the five employees who participated in the Facebook discussion, and shortly thereafter, found itself accused of violating the NLRA.

The general counsel investigated the case, and concluded that the terminations violated the five employees' rights under the NLRA. Consistent with this conclusion, the ALJ's opinion explained that the terminations were unlawful because the social media use qualified as protected, concerted activity in that it was discussions between co-workers about the terms and conditions of their employment. The employer was ordered to reinstate all five employees.

The opinion highlights, among other things, that an employer is only liable for violating an employee's right to engage in concerted activity where it is established that the employer in fact knew of the "concerted nature of the activity." Further, the case confirms a focal point of the general counsel's report: that "individual action is concerted so long as it is engaged in with the object of initiating or inducing group action" and that the "object of inducing group action need not be express." Lastly, by citing to established NLRB precedent outside the social media context, *Hispanics United* is a good reminder that while the medium of communication is a new one, much of the substantive analysis in the social media context remains the same.

Knauz BMW *ALJ Decision*

Knauz BMW is also consistent with the themes developed in the general counsel's report. Here, the employer, a BMW dealership, hosted a promotional event to introduce a new car model and catered the event with a hot-dog cart. Many employees were upset by the catering selection, concerned that it was inappropriately inexpensive and would have a negative impact on employee sales and commissions. One employee took his complaints to Facebook, and posted a picture of the hot-dog cart along with sarcastic commentary about the dealership's decision to go "All Out" for "the most important launch of a new BMW in years." The employee was terminated and the NLRB began an investigation, ultimately leading to the issuance of an ALJ opinion.

The ALJ found that the employee's social media use was protected, concerted activity because it concerned the terms and conditions of employment; discussed a group complaint (which had been previously discussed with other employees) as opposed to an individual gripe; and despite taking a "sarcastic" and "mocking" tone, was not so disparaging so as to lose protected status. Again citing to NLRB precedent outside the social media context, the opinion echoes a guideline in the general counsel's report: "[u]npleasantries uttered in the course of otherwise protected concerted activity does not strip away the Act's protection."

Although the employee's use of social media qualified as protected concerted activity, the employee's discharge was held not to be unlawful under the NLRA because the ALJ found that he was terminated for unrelated misconduct. However, the employer was not let off the hook entirely, as the NLRB also took issue with the relevant personnel policies in place at the time of the termination.

Employer Social Media Policies

The second major issue in this area of law relates to where the line is drawn between a valid and invalid employer social media policy. The report suggests that policies will be found to be invalid where they are overbroad, in the sense that they would effectively prohibit employees from engaging in protected activity. For example, the general counsel found a policy overbroad where it prohibited "inappropriate discussions" about the company, its managements, or its employees because this prohibition encompasses protected concerted activity. Similarly, in *Knauz BMW*, a policy stating that "no one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership" was held to be unlawfully overbroad because the term "disrespectful" in the context of union activity seemed "inherently subjective" and was, therefore, restrictive of employee rights under the NLRA. On the hand, the ALJ held that another policy challenged in *Knauz BMW* was permissible. That policy stated: "A bad attitude creates a difficult working environment and prevents the Dealership from providing quality service to our customers." The ALJ held that this policy did not violate the NLRA because it could be reasonably interpreted to protect the relationship between the employer and its customers, rather than restricting employee rights.

Employers should not only avoid overbroad prohibitions that could be interpreted to prohibit protected concerted activity, but should also consider including a disclaimer in their social media policies specifically indicating that none of the prohibitions contained in their policy should be interpreted to interfere with employee rights under the NLRA.

Conclusion

Whether employee social media use is considered protected concerted activity, and whether an employee social media policy runs counter to the NLRA, is a fact-intensive issue and requires analysis on a case-by-case basis. However, as the general counsel investigates more cases and continues to issue guidance, and as the NLRB continues to issue case decisions, the law in this area will quickly develop and produce more tangible guidelines for employers to consider.

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Making a Mess of Ambiguity:

Lessons from the Third Circuit's Opinion in Meyer v. CUNA Mutual Insurance Society

By Kenneth A. Adams

A complex source of uncertainty in contract language is ambiguity associated with use of plural nouns and the words *and*, *or*, *every*, *each*, and *any*—what this author refers to as "ambiguity of the part versus the whole." In each case, the question is whether a single member of a group of two or more is being referred to, or the entire group.

Most courts that encounter this kind of ambiguity are ill-equipped to analyze it. A noteworthy example of this is the opinion by the Court of Appeals for the Third Circuit in *Meyer v. CUNA Mutual Insurance Society*, 648 F.3d 154 (3d Cir. 2011). Because its flawed analysis caused the court to find ambiguity in an insurance policy where in fact there was none, the court decided the case incorrectly. This case serves as a cautionary tale for judges, litigators, contract drafters, and companies that routinely create contracts.

Background

Plaintiff Meyer, a railroad employee, purchased a credit disability insurance policy from defendant CUNA Mutual Group in connection Meyer's purchase of a car with financing provided by a credit union. Under the policy, CUNA would make car-loan payments on Meyer's behalf if he was deemed disabled. After Meyer injured himself on the job, CUNA made his car payments for approximately three years, then notified Meyer that it would be stopping the payments: Meyer no longer met the definition of "Total Disability," as stated in CUNA's policy, in that Meyer's doctors had determined that he could return to work in some capacity.

Here's how "Total Disability" was defined in the policy:

> . . . during the first 12 consecutive months of disability means that a member is not able to perform substantially all of the duties of his occupation on the date his disability commenced because of a medically determined sickness or accidental bodily injury. After the first 12 consecutive months of disability, the definition changes and requires the member to be unable to perform any of the duties of his occupation or any occupation for which he is reasonably qualified by education, training or experience.

Meyer responded to CUNA's stopping payments on the car by filing a class action with the District Court for the Western District of Pennsylvania. He argued that the policy language was unambiguous and meant that after the first 12 consecutive months, he qualified as totally disabled if he could show either that (1) he was unable to perform the duties of his occupation or (2) he was unable to perform the duties of any occupation for which he was reasonably qualified by education, training, or experience.

By contrast, CUNA argued that for the post-12-month period, the "any occupation" standard applied.

The district court granted Meyer's motion for partial summary judgment, holding that the definition of the term "Total Disability" was ambiguous and so should be construed in favor of Meyer. CUNA appealed; the Third Circuit affirmed.

The Third Circuit's Analysis

In its opinion, the Third Circuit noted that contract language is ambiguous when it's reasonably susceptible of being understood in different ways; that ambiguous language in an insurance policy should be construed against the insurance company; and that words in an insurance policy "should be construed in their natural, plain and ordinary sense." (An insurance policy is a kind of contract.)

After considering the dictionary definition of *or* and citing two cases, the court concluded that "The commonly used and understood definition of 'or' suggests an alternative between two or more choices." In other words, the *or* was, to use the court's terminology, disjunctive rather than conjunctive. The court found unpersuasive the case law cited by CUNA to support its interpretation. The court noted that its conclusion that Meyer's interpretation was reasonable was bolstered by the fact that CUNA could have avoided any ambiguity by using the word *and* instead of *or* to convey that it indeed intended a conjunctive meaning. The court summarized its position as follows: "Based on our analysis of a plain reading of the language and common, disjunctive meaning of the word 'or,' we find that Meyer's interpretation is not unreasonable."

The court went on to decline to accept arguments to the effect that CUNA's interpretation was consistent with the relevant Pennsylvania statute and industry practice. It also rejected, on the grounds that the "substantially all" standard of the first half of the definition differed from the "any" standard of the second half, the argument that the meaning sought by Meyer would result in the same standard applying to both the first 12 months and the following period.

But the court noted a "potential contextual defect" that arises from attributing a disjunctive meaning to the *or* in question—it renders meaningless the second part of the provision relating to the period after the first 12 months. That caused the court to conclude that that definition is ambiguous and that CUNA's interpretation too was reasonable. But the court held that due to Pennsylvania's policy of construing against the insurer any ambiguities in an insurance policy, the meaning claimed by Meyer was the one the applied.

What Are the Possible Meanings?

So the Third Circuit accepted Meyer's argument that the definition applied to him because he was unable to perform any of the duties of his occupation—all that was required for him to fall within the scope of the definition was that his inability apply to only one of the alternatives presented.

But the court's reasoning is deficient in terms of how it determined the possible alternative meanings and which should apply. The approach taken by the Third Circuit is broadly comparable to that taken by other courts, but that doesn't make it any less mistaken. In relying on the dictionary definition of *or* and case law that was essentially irrelevant, the Third Circuit failed to consider unavoidable nuances of the English language. A broader analysis is required, one that recognizes that the ambiguity associated with *or* is a complex issue of English usage rather than a narrow legal question.

As a first step in such an analysis, let's consider the possible alternative meanings. Here's the relevant portion of the definition (emphasis added):

> [a member is] unable to perform any of the duties of his occupation *or* any occupation for which he is reasonably qualified by education, training or experience.

According to the leading reference work *The Cambridge Grammar of the English Language* at page 1298, "When a subclausal *or*-coordination falls within the scope of a negative, it is equivalent to an *and*-coordination of negative clauses." In other words, the natural interpretation of *I didn't like his mother or his father* is *I didn't like his mother and I didn't like his father*.

It follows that a natural interpretation of the language at issue in Meyer is the following:

> [a member is] unable to perform any of the duties of his occupation *and* [a member is] unable to perform any of the duties of any occupation for which he is reasonably qualified by education, training or experience.

That is the meaning advocated by CUNA.

As regards alternative meanings, *I didn't like his mother or his father* could conceivably mean *I didn't like his mother or his father, but I don't recall which* or *I didn't like his mother or his father, I liked them both*. But because the language at issue in *Meyer* isn't a statement of fact but a statement of the circumstances that give rise to a legal arrangement, only one possible alternative meaning presents itself—that advanced by Meyer.

Is CUNA's Meaning Reasonable?

That the language at issue gives rise to two alternative meanings isn't enough to make it ambiguous. For that to be the case, each alternative meaning would have to be reasonable.

Given that *The Cambridge Grammar of the English Language* acknowledges the reading giving rise to the meaning advanced by CUNA, any court should be willing to hold that that meaning is a reasonable one.

But the Third Circuit pointed to use of "any occupation" in the language at issue rather than "any other occupation" as an argument against CUNA's interpretation:

> Reading the phrase conjunctively, one could argue that inclusion of continued coverage if one cannot perform "any of the duties of one's former occupation" is redundant or unnecessary if "duties of any occupation for which one is reasonably qualified" includes one's own occupation.

The court is correct—omitting *other* does render superfluous the reference to "his occupation," and contract language should avoid redundancy. But omission of *other* doesn't leap out at the reader—in everyday English it's commonplace to link with *or* a reference to a member of a class and a reference to the entire class, without carving out that member—for example, *I can't eat ice cream or any dairy products*. (In speech, you'd stress the "any.")

And more importantly, that overlap is benign—the meaning conveyed by the whole is unaffected. So the court has no basis for hinting that omission of *other* brings into question whether the language at issue conveys CUNA's meaning.

Is Meyer's Meaning Reasonable?

By contrast, Meyer's meaning is problematic—if you assume that the *or* is disjunctive, the remainder of the definition is rendered superfluous.

Understanding how this plays out requires first considering a second potential ambiguity in the definition of "Total Disability"—the alternative meanings conveyed by the word *any*, which can mean one of a number of items, or all of them.

The word *any* occurs twice in the language at issue. The phrase "any of the duties of his occupation" could be taken to mean *one of* the member's duties, but the context makes it clear that the intended meaning is *all* duties—the standard for the first 12 months refers to substantially all duties, and it's clear that the intention was to make the standard for the following period more onerous.

The second instance of *any* occurs in the phrase "any occupation for which he is reasonably qualified." This could be taken to mean "one of the occupations for which he is reasonably qualified." But that would suggest that inability to perform the duties of a single occupation—say, truck driver—would be enough to satisfy the second part of the standard relating to the post-12-months period. The member's ability to perform any number of other occupations would be irrelevant. But it would be nonsensical to allow the member to meet the requirements for total disability simply by finding a single occupation that the member is unable to perform the duties of. Instead, the phrase makes sense only if it's understood as referring to all occupations for which the member is qualified.

With that in mind, if you accept that the language at issue conveys Meyer's meaning, a member who is unable to perform any of the duties of his former occupation wouldn't have to worry about establishing that no suitable occupation remained available to him. The court says as much:

> If he cannot perform any of the duties of his occupation, construing 'or' disjunctively, he is qualified for coverage, and there is no need to move to the second part of the clause—whether he can perform the duties of any occupation for which he is qualified—to determine coverage.

And the court noted that second part of the language at issue is similarly superfluous if the member is able to perform any of the duties of his former occupation:

> If, on the other hand, an insured can perform one or more tasks of his former occupation, he is not qualified for coverage and there is no need to look to the second part of the clause because he has already failed to qualify for coverage—his own occupation is a subset of any occupation for which he is qualified.

So accepting Meyer's meaning requires that you disregard the second part of the language at issue. As a matter of contract interpretation, that's deeply problematic, particularly when compared to the benign overlap in CUNA's meaning caused by the absence of *other*. If the meaning that you seek to apply to a provision renders redundant half that provision, the only possible conclusion is that the meaning doesn't make sense—that it's unreasonable.

The court notes that "Courts should not distort the meaning of the language or strain to find an ambiguity," but that's exactly what the Third Circuit does in nevertheless endorsing Meyer's meaning. It blithely dismisses the problem as a "potential contextual defect," offering in support of its disregard of the redundancy only one case, one that has only the most remote bearing on the issue.

Mixing Analyses of Different Meanings

The court capped its flawed analysis by concluding that the redundancy inherent in accepting Meyer's meaning "does lead us to find that the phrase is capable of being understood in more than one sense and that a conjunctive interpretation is also reasonable." That doesn't make sense. When weighing the reasonableness of alternative possible meanings, you consider them independently. The defects in one possible meaning go only to its reasonableness—they don't serve to bolster the reasonableness of the other possible meaning. The conclusion that follows from the redundancy required by Meyer's meaning is that Meyer's meaning is unreasonable, not that CUNA's meaning is somehow made more palatable.

Similarly, it didn't make sense for the court to conclude that reasonableness of Meyer's meaning was bolstered by the court's mistaken view that CUNA could have avoided any ambiguity by using the word *and* instead of *or*. Again, the ostensible weakness of one alternative meaning doesn't serve to bolster the reasonableness of another alternative meaning.

Lessons for Judges

The Third Circuit's analysis of the contract language at issue in *Meyer* has lessons to offer different constituencies—judges, litigators, contract drafters, and companies that routinely create contracts.

Judges who wish to avoid being responsible for a mess such as the *Meyer* decision should familiarize themselves with recurring sources of confusion in contracts, in particular the different forms of ambiguity. They should also recognize that relying on dictionary definitions—something that's increasingly in evidence in opinions—often represents a poor substitute for the semantic acuity required to rigorously parse confusing contract language. Nevertheless, it's increasingly in evidence in opinions, as noted in this article by Adam Liptak in the *New York Times*.

And courts should recognize that just because judges speak and write in English, that doesn't mean they have the expertise necessary to diagnose ambiguity. The prevailing rule is that no expert testimony is admissible for purposes of determining whether contract language is ambiguous. *Meyer* is the latest of many cases showing that that rule doesn't make sense.

Lessons for Litigators

Litigators should be aware that disputes over contract language may well be more complex than first appears, and that judges may not be equipped to make sense of them. Litigators should be prepared to make available to a judge presiding over any such dispute a clear and complete linguistic analysis of the issues. The outcome in *Meyer* may well have been different if CUNA's counsel had included in its filings an analysis comparable to that contained in this article.

Lessons for Drafters

Meyer serves as a reminder that if you draft contracts, it would be reckless of you not to be alert to ambiguity of the part versus the whole. Unless you're attuned to it, the odds are that you'll be oblivious to any instance of such ambiguity until such time as it blossoms into a dispute.

And *Meyer* suggests that drafters might want to reconsider how far they need to go in seeking to avoid ambiguity. Alternative meanings caused by *or* and *and* are virtually inescapable in contract language. Consider two components of the definition of "Total Disability" that weren't at issue in *Meyer*. The definition refers to "a medically determined sickness or accidental bodily injury." Does that mean that disability that is due to both sickness and injury doesn't fall within the definition? And consider the reference to "any occupation for which he is reasonably qualified by education, training or experience." Does that mean that if the member is qualified because of some combination of education, training, and experience, it would be irrelevant for purposes of the definition?

You could revise contract language to eliminate the possibility of alternative meanings, but that would make it more wordy. If one of any given set of alternative meanings isn't a reasonable one, you could elect to leave the language as is, on the grounds that the limited risk of ambiguity doesn't warrant the extra verbiage. For example, it would be outlandish to revise the definition of "Total Disability" to rule out the possible meanings suggested in the immediately preceding paragraph.

But *Meyer* serves as a reminder that you cannot expect courts to be equipped to determine whether the alternative meanings of a given provision are reasonable and so give rise to ambiguity. If an alternative meaning appears unreasonable but could result in mischief if misconstrued by a court, the cautious drafter should consider redrafting that provision to eliminate the alternative meaning. The meaning attributed by Meyer to the language at issue in his dispute perhaps represents just such an alternative meaning.

Lessons for Companies

Meyer also offers a lesson to companies looking to put their contract process on a more efficient footing. It's ironic that the language at issue was compiled as part of an effort by CUNA to make its policies easier to read. In addition to the three sets of alternative meanings included in, and omission of the word *other* from, the second sentence of the definition, the definition as a whole isn't a model of clarity.

Here's an alternative version that, among other things, goes out of its way to eliminate the alternative meanings and restores the missing *other*.

> . . . due to sickness or accidental bodily injury, (1) the member is unable to perform substantially all of the duties of his occupation (applies only during the first 12 consecutive months of that disability) and (2) the member is able to perform none of the duties of his occupation and is able to perform duties of none of the other occupations for which he is reasonably qualified by education, training, or experience (applies thereafter), with disability being determined by a doctor in each case.

The shortcomings on display in CUNA's policy are hardly exceptional, in that the language of mainstream contract drafting is dysfunctional. Fixing a company's template contracts requires a concerted effort and some resources, the main obstacles being institutional inertia and obliviousness to the shortcomings of traditional contract language. But the fact that CUNA's revised policy gave rise to litigation shows that willingness to effect change isn't enough—you also need clear and modern contract language that complies with a rigorous set of guidelines.

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The Implied Covenant of Good Faith and Fair Dealing:

Does It Protect Members of Delaware LLCs?

By Lewis H. Lazarus and Jason C. Jowers

The one duty that parties cannot waive in a Delaware limited liability company (LLC) agreement is the duty to act consistently with the implied contractual covenant of good faith and fair dealing. The governing statute, 6 *Del. C.* § 18-1101(c), provides that "the member's or manager's or other person's duties," including fiduciary duties to the extent they are otherwise owed, "may be expanded or restricted or eliminated by provisions in the limited liability company agreement; provided, that the limited liability company agreement may not eliminate the implied contractual covenant of good faith and fair dealing." The Delaware Supreme Court's three to two decision in *Nemec v. Shrader*, 991 A.2d 1120 (Del. 2010), raises two issues regarding Delaware's application of the implied covenant. First, while the traditional test of when to apply the covenant, in part, asked whether the parties at the time of formation would have proscribed the conduct had they thought to negotiate about that conduct, the *Nemec* majority limits the application of the implied covenant to situations where the parties could not have anticipated, rather than simply failed to consider, the conduct later sought to be proscribed. Second, although *Nemec* did not involve an LLC dispute, the majority's opinion illustrates limitations on the ability of members of LLCs to use the implied contractual covenant to police the exercise of an LLC manager or managing member's discretion. We begin by explaining the pre-*Nemec* standard, then examine the *Nemec* decision, and conclude by discussing *Nemec's* implications for practitioners advising members and managers of Delaware LLC's.

The Pre-*Nemec* Standard of the Implied Covenant

To prove a breach of the implied covenant of good faith and fair dealing under Delaware law, a plaintiff must allege: (1) implied contractual terms; (2) a breach of the implied terms; and (3) damages. Although that general standard is easily articulated, the circumstances in which terms may be implied are not clear. As former Chancellor Chandler observed, "the exact contours of the implied covenant of good faith and fair dealing are not always easily discernable in the case law. This is partly driven by the fact-intensive nature of the doctrine. Courts routinely invoke the specific contours of the covenant that are relevant to the case at hand without attempting to articulate an all-encompassing definition that could be applied to any factual circumstance."

The Delaware Supreme Court has found that courts should imply obligations using the implied covenant in "rare" cases. The court also has said that implying terms pursuant to the implied covenant is a "cautious enterprise." Although difficult to define for all circumstances, decisions from the Delaware courts provide some guidance. First, the implied covenant is not a free-floating duty divorced from the language of the contract. Instead, it prohibits acts by one party that deprive another of the fruits of the bargain, even though the challenged conduct is not expressly prohibited by the agreement. Second, a plaintiff must allege the breaching party's actions were motivated by an improper purpose reflecting bad faith. Third, an implied obligation may not prohibit acts that the terms of the parties' agreement expressly permit. This is true even when the act expressly permitted favors one party's interests. A Delaware court will not hesitate to enforce a contract that in hindsight proves to be a bad bargain for one of the parties. Delaware courts protect the parties' reasonable expectations at the time of contracting. The difficult issue with which the courts continue to grapple is how to determine those reasonable expectations.

Prior to *Nemec*, in the right set of factual circumstances, the implied covenant could apply as a potential gap-filler for situations parties had not considered at the negotiating table, and thus were not expressly addressed in the contract. In *Cincinnati SMSA Ltd. Partnership v. Cincinnati Bell Cellular*, 708 A.2d 989, 992 (Del. 1998), a case involving the interpretation of a partnership agreement, the Delaware Supreme Court stated that "[i]n cases where obligations can be understood from the text of a written agreement but have nevertheless been omitted in the literal sense, a court's inquiry should focus on 'what the parties likely would have done *if they had considered* *the issue involved.*'" (Citations omitted and emphasis added). More recently, the Delaware Supreme Court reiterated this standard and stated that "[o]nly when it is clear from the writing that the contracting parties 'would have agreed to proscribe the act later complained of . . . *had they thought to negotiate with respect to that matter*' may a party invoke the covenant's protections." *Dunlap v. State Farm Fire and Cas. Co.*, 878 A.2d 434, 442 (Del. 2005) (quoting *Katz v. Oak Industries, Inc.*, 508 A.2d 873, 880 (Del. Ch.1986)) (emphasis added). Based on these cases and their progeny, it appeared a party could use the implied covenant to fill gaps in an agreement so long as the parties had not considered the issue at the time of contracting, the challenged conduct was not expressly permitted by the agreement, and the failure to imply terms prohibiting the conduct would deprive one party of the benefit of the bargain. Courts determined the parties' reasonable expectations by asking what they would have bargained for had they considered the issue at the time of the negotiation of the agreement. As discussed next, *Nemec* asks a different question, i.e., could the parties have anticipated the issue at the time of contracting, and thus arguably limits the circumstances in which the courts may imply a covenant for which the parties did not expressly bargain.

Limits to the Implied Covenant Doctrine in *Nemec*

In *Nemec*, former officers of Booz Allen, a Delaware corporation, brought claims against the corporation for breach of the implied covenant of good faith and fair dealing. The company compensated the former officers, in part, through annual grants of stock rights that were convertible into common shares. Under the stock plan, each retired officer had a "put" right for the first two years after retirement to sell his or her shares back to the company at book value. After the first two years, the company had a right to repurchase the shares at book value. In 2008, Booz Allen sold its government service business to the Carlyle Group for $2.54 billion. Prior to the transaction, the directors caused Booz Allen to repurchase the stock of the two former officers at book value. Had the officers been allowed to hold the shares through the time of the transaction with the Carlyle Group, they would have received $60 million dollars more for their stock.

The plaintiffs claimed that the timing of the repurchase shortly before the transaction with the Carlyle Group breached the implied covenant. The *Nemec* court initially states that "[t]he implied covenant of good faith and fair dealing involves a 'cautious enterprise,' inferring contractual terms to handle developments or contractual gaps that the asserting party pleads neither party anticipated." At first reading, this language appears to echo the standard discussed in *Cincinnati* and *Dunlop*. The plaintiffs in *Nemec* argued that no one at the time of the negotiation of the stock plan anticipated that part of the company would be sold. Rejecting this argument and clarifying the standard, the Delaware Supreme Court found that "[t]he implied covenant only applies to developments that could not be anticipated, *not developments that the parties simply failed to consider* . . . ." (Emphasis added). Moreover, the court found that "[a] party does not act in bad faith by relying on contract provisions for which that party bargained where doing so simply limits advantages to another party." Under this standard, the court found that Booz Allen had not breached the implied covenant by exercising the company's bargained for right to repurchase the former officers' shares. Given the wording of the Delaware Supreme Court's standard, drafters of contracts, including LLC operating agreements, must carefully consider developments that may be anticipated at the time they are sitting at the bargaining table, and determine whether the agreement should address those anticipated situations. Parties should not expect a court to use the implied covenant to reform an agreement that is silent on an issue that the parties could have anticipated, but failed to consider.

Post *Nemec*: Exercising Discretion in Good Faith

Prior to *Nemec*, the Delaware courts had found that the implied covenant of good faith and fair dealing prohibited "arbitrary and unreasonable conduct" by one party that prevented the counter-party from enjoying the benefit of its bargain. Out of this rule arose a line of Delaware cases holding that where the parties' agreement grants one contracting party discretion to act, that party must exercise such discretion in good faith. Because parties may waive fiduciary duties in the LLC agreement, the requirement that managerial discretion be exercised in good faith appeared to create an important tool to limit manager misconduct.

The Court of Chancery's holding in *Bay Center Apartments Owner, LLC v. Emery Bay PKI, LLC*, 2009 WL 1124451 (Del. Ch. Apr. 20, 2009) illustrates the application of the requirement that a party exercise discretion in good faith to protect the reasonable expectations of a member of a Delaware LLC. Bay Center brought an action against Emery Bay PKI (PKI) for, among other things, breach of the implied covenant of good faith and fair dealing in the Emery Bay LLC Agreement. Bay Center and PKI formed Emery Bay to develop a condominium project. The LLC agreement named PKI as the managing member. The LLC agreement allowed PKI to manage the affairs of the LLC, and it also contemplated that PKI would be responsible for the condominium project. PKI then designated an affiliate, Emery Bay ETI (ETI), as the development manager, which signed the development management agreement outlining the responsibilities for developing the project. Plaintiff alleged mismanagement and poor financial performance that injured the condominium development project.

Under the terms of the LLC agreement, PKI had the "power and authority" to: (1) cause the development manager to perform its obligations; (2) perform or cause to be performed Emery Bay's obligations under any agreement; and (3) "take all proper and necessary actions reasonably required" to cause Emery Bay to carry out the provisions of loan commitments or other contracts. Bay Center alleged that these provisions, in conjunction with the statement in the LLC agreement that PKI "shall manage" the affairs of the LLC, created an express obligation for PKI to meet the LLC's loan obligations and to ensure the development manager carried out its obligations if the development manager failed to perform. PKI argued that these provisions empowered but did not require PKI to take action. Alternatively, if the court found there was any ambiguity in PKI owing an express obligation, Bay Center claimed that the implied covenant of good faith and fair dealing required PKI to exercise discretion, its "power and authority," in good faith. PKI moved to dismiss the implied covenant claim, but not the express breach of contract claims.

Denying the motion to dismiss, the court found that where an LLC agreement grants a manager discretion, that discretion must be exercised in good faith. Analogizing to the corporate context, then Vice Chancellor, now Chancellor, Strine explained that "[p]art of corporate managers' proper performance of their contractual obligations is to use the discretion granted to them in the company's organizational documents in good faith." The court found that PKI was obligated to manage the LLC, and that it had discretion to ensure that the development manager performed its duties. PKI had to exercise this obligation and discretion in good faith. It could not take arbitrary or unreasonable action that prevented Bay Center from receiving the fruits of the bargain. In this case, Bay Center contributed the real estate in exchange for PKI's proper management of the enterprise. The court found that Bay Center had alleged that PKI failed to carry out this task. Furthermore, the court found that Bay Center had alleged that PKI had acted in bad faith, i.e. with an improper purpose, because the conduct at issue was self-interested. PKI misdirected loan funds to its advantage, and the decision not to enforce the development management agreement was conflicted because the same party controlled Emery Bay and the development manager. Accordingly, the court refused to dismiss the implied covenant claim.

The *Nemec* opinion casts doubt as to whether a court following its rationale would necessarily reach the same result in *Bay Center*. The agreement at issue in *Nemec* permitted rather than required the company to repurchase the former officer's shares. Accordingly, when the company authorized the repurchase of shares, the Booz Allen directors were arguably exercising the company's discretion under the contract to decide if and when to repurchase the former executive's shares. Consequently, the dissenting justices argued that the line of Delaware cases finding that discretion must be exercised in good faith should prevent the plaintiffs' claims from being dismissed. Rejecting this argument, the majority found that the discretion line of cases did not apply in *Nemec* because Booz Allen had a specific right to take the action it did, i.e., to repurchase the shares, and thus exercised no discretion. Disagreeing with that narrow understanding of "discretion," the dissenting justices explained: "The Company's decision whether or not to redeem was discretionary, in the sense that Booz Allen, as the right holder was not *obligated* to redeem the shares at the time it chose to do that. Exercising a contractual right under circumstances detrimental to the counterparty and where the right holder has nothing to gain, is arguably not in good faith, unless the contract expressly allows the exercise for any (or even no) reason." The facts of *Nemec* and the arguments raised by the *Nemec* dissent suggest that a majority of the Delaware Supreme Court would support using the implied covenant to limit managerial discretion only where discretion exercised by a manager could not be construed as an act that was expressly permitted.

Post-*Nemec*: Careful Drafting of LLC Agreements is Critical

In light of the Delaware Supreme Court's decision in *Nemec* and the limitations placed on the implied contractual covenant through prior case law, what protection does the implied covenant offer a member of an LLC, and conversely what risks does it present for a defendant manager or managing member of an LLC, where the parties in their LLC agreement have waived fiduciary duties and the contract provides the manager with discretion to carry out a designated act?

As noted above, under Delaware law, the implied covenant is, at best, a weak tool for plaintiffs. It cannot be used as an amorphous or free-floating duty detached from the contract itself. It cannot be used paternalistically to rewrite provisions that, in hindsight, advantage one party over the other. It cannot be used to prohibit acts that are expressly permitted by the parties' bargained for agreement. Furthermore, because *Nemec* makes clear that "[t]he implied covenant only applies to developments that could not be anticipated, not developments that the parties simply failed to consider," parties must be vigilant in negotiating express terms regarding any significant developments that could be anticipated at the time of contracting. Although much will turn on how future decisions interpret the above quoted language, developments like change of control transactions or the sale of a division of a company often can be anticipated, particularly by sophisticated parties, and parties proceed at their own risk if they do not reflect in their operating agreement the treatment they expect in the event of such developments.

In the LLC context specifically, it is well-settled that the implied covenant cannot revive fiduciary duties expressly waived in the operating agreement. Furthermore, although *Bay Center* and similar cases offer some comfort to members of LLCs that the implied covenant may protect them even when fiduciary duties have been waived, it is uncertain after *Nemec* whether the Delaware Supreme Court will permit a claim based on the implied covenant if the parties expressly bargained that management has sole discretion to determine how to operate the LLC. LLC agreements often are drafted that way, allowing discretion to carry out or delegate to others the company's ordinary operations with member majority approval only necessary for specified major transactions. One could argue based on *Nemec* that the parties negotiating an LLC agreement, particularly where they are sophisticated parties, are perfectly capable of determining what, if any, limitations to place on a manager's authority. Furthermore, extending the majority's logic in *Nemec*, one could argue that PKI in *Bay Center* had been contractually granted the "power and authority" to manage certain aspects of the condominium project and simply exercised its contractually granted right to determine if, when, and how to exercise that contractually granted "power and authority." Since a majority of the Delaware Supreme Court appears to have a narrow view of what is an exercise of discretion versus an expressly permitted act, counsel to members of LLC must be cautious in placing too much weight on the implied covenant to police manager misconduct based on discretionary acts.

Conclusion

In light of the uncertainty in the vitality of the discretion line of cases following the Delaware Supreme Court's apparent narrowing of the reach of the implied covenant in *Nemec*, careful drafting of LLC agreements is more critical than ever. Even under the pre-*Nemec* case law, plaintiffs rarely succeeded on implied covenant claims. In a post-*Nemec* world, stating a breach of the implied covenant claim likely will prove even more difficult. Parties and their counsel should carefully consider at the time of formation whether managers should owe fiduciary duties to account for the uncertainty of whether the implied covenant of good faith and fair dealing will rectify future wrongs that the parties did not expressly anticipate in their contract. Although parties may reflexively believe that it is better to agree in the LLC agreement that neither party owes the other fiduciary duties, such belief may prove short-sighted given the limitations on the implied covenant of good faith and fair dealing to remedy an alleged wrong. Based on *Nemec*, the question of what terms should be added to an agreement to govern potential misconduct could be called the $64 million question.

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BUSINESS LAW TODAY
The ABA Business Law Section's Online Resource

Keeping Current: Social Media

Retaining and Supervising Social Media Communications under New FINRA Regulatory Notice 11-39

By Philip J. Favro

Is your organization among those that have jumped with both feet into the world of social media?

Survey results confirm that social media use is on the rise for almost all organizations across the globe. This is particularly the case in the financial services industry. A recent survey conducted by Cerulli Associates confirms that nearly two-thirds of all asset managers are actively using social media for marketing purposes.

Despite its increasing popularity, the securities industry is experiencing growing pains with social media. Just like other industries, financial services providers are struggling with applying notions of information governance to these non-traditional forms of communication. Indeed, with social media becoming an increasingly important data source for both business and legal purposes, it behooves enterprises to develop a governance strategy with respect to this information. That is particularly the case with respect to retaining and supervising communications made through social networking sites.

The Challenges for Financial Services Companies

Many financial services companies are experiencing difficulty retaining or supervising social media communications as required by the Financial Industry Regulatory Authority (FINRA). FINRA—the largest private regulator of the U.S. securities industry—promulgated a landmark regulation last year to protect investors from false or misleading claims made on social networking sites. To comply with this regulation, securities firms will have to develop protocols that enable them to retain and supervise social media content and ensure conformity by their representatives.

It is no secret that social media communications continue to bedevil financial services providers. Indeed, 63 percent of surveyed asset managers reported that "regulatory recordkeeping" remains their greatest challenge with respect to social media. And as more firms move toward social media marketing, the number of financial services companies experiencing difficulty with retention is also likely to increase.

The challenges firms are experiencing with social media are not limited to retention. They also include the need to properly supervise communications their employees made through social networking sites. This was acknowledged by FINRA chairman and chief executive Richard Ketchum at an industry event this past June. Among other social media issues, Ketchum explained that firms have questioned how they can most effectively supervise their employees' use of smart phones and tablet computers that can access company sites.

Clarifications Regarding Retention and Supervision

In response to these matters, FINRA issued Regulatory Notice 11-39 in August 2011 to help clarify several lingering questions regarding retention and supervision of social media content. The key points that financial services companies will want to know from this regulatory notice are as follows.

Content vs. Device

The content of a communication with an investor through a social networking site determines whether or not the communication should be retained. It does not matter that the communication was made from a desktop, laptop, or smartphone. If the communication relates to the "business as such" of the firm, it falls within the preservation scope of section 17a-4(b)(4) of the Securities Exchange Act of 1934 (SEA).

Employee Use of Personal Devices

Firms may allow their employees to communicate with investors from their personal devices such as smartphones and tablet computers; they are not limited to using work-issued devices. This, however, does not obviate the requirement that such communications should be preserved. As the notice makes clear: "The firm must be able to retain, retrieve and supervise business communications regardless of whether they are conducted from a device owned by the firm *or* by the associated person." To ensure those communications are preserved, firms should use an "application" to ingest communications from employees' personal devices into its retention files.

Technology that Eliminates Content

Certain devices and social media sites can be programmed to automatically delete communications. Because such a feature would potentially circumvent document retention obligations under SEA Rule 17a-4, financial services companies and their employees are forbidden from using sites or devices equipped with that technology.

Third-Party Posts

There is generally no obligation to keep third-party posts to firm-hosted social media sites unless the firm "adopts" or becomes "entangled" with the content of those third-party posts.

Best Practices

Given the complexity of these issues, regulated enterprises need to implement best practices to ensure compliance with pertinent SEA and FINRA requirements. While there are perhaps many steps that could be taken, three stand out as indispensable for firms.

The first is that companies should develop a global plan for how they will engage in social media marketing. This initial step is particularly important for groups that are just now exploring the use of social media to communicate with investors. Having a plan in place that maps out investor contact and communication strategy, provides required supervision of firm representatives, and accounts for compliance with regulatory requirements is essential for securities firms. Failing to take these steps could result in fines, suspensions, or worse.

The next step involves educating and training employees regarding the firm's social media plan. In FINRA 11-39, firms were repeatedly urged to train and educate their employees regarding applicable social media policies. This should include instruction regarding what content may be posted to social networking sites and the internal process for doing so. Policies that describe the consequences for deviating from the firm's social media plan should also be clearly delineated. Those policies could detail the legal repercussions for both the employee and the firm for any social media missteps.

Third, firms can employ technology to ensure compliance with their social media plan. Indeed, FINRA 10-06 specifically emphasizes the importance of deploying technological systems to facilitate conformity with the regulation's "Recordkeeping Responsibilities" requirement. Those systems include archiving software and other technology tools. With the right tools in place, firms can perform a cost-effective supervisory review of content to help ensure compliance with corporate policy and regulatory bodies. Moreover, an effective system will implement legal holds and efficiently retrieve archived social media content in response to regulatory and legal requests. All of which enables a company to establish the reasonableness of its retention and e-Discovery processes and demonstrate compliance with relevant SEA and FINRA requirements.

By following these steps and other best practices, financial services companies can begin to reasonably address the challenges of social media. And knowing that those challenges are being dealt with in an effective manner will enable firms to confidently engage in social media marketing and reap the financial benefits of doing so.

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BUSINESS LAW **TODAY**
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Focusing on Pro Bono

Pro Bono in a Green Sense

By Allyn O'Connor

The Evergreen Brick Works is a former quarry and industrial site locate in the Don River Valley in Toronto. For nearly 100 years, it provided the bricks used to build many Toronto businesses and homes, some of which are well-known landmarks. The nonprofit organization Evergreen has acted as steward for the site since 1997. Geoff Cape, Evergreen's executive director, had a vision for transforming the site into a public-use space, including an international center for the study and promotion of urban sustainability.

Cape recently spoke to Section members about the Evergreen Brick Works, describing the many entities with diverse interests in the site: railroads, commuters, highway authorities, wealthy and poor residents, and city, provincial, and federal governments. Cape noted the difficulties in working with politically complex and often conflicting interests. He also described the challenging geographic and environmental issues that came with rehabilitating a former industrial site.

Cape reiterated Evergreen's biggest challenges—facing multiple interest groups while lacking lobbying or other governmental relations experience, working on sophisticated financial transactions, and focusing on risk management. In order to make the project succeed, Cape knew he needed the assistance of lawyers with finance, real estate, regulatory and other experience. He turned to Lynn Burns of Pro Bono Law Ontario (PBLO).

Burns is PBLO's executive director. PBLO is a Toronto-based nonprofit "that promotes access to justice in Ontario by creating and promoting opportunities for lawyers to provide pro bono legal services to persons of limited means" and to organizations with limited resources. Among other things, PBLO provides consultative services to law firms interested in developing formal pro bono programs. It identifies and develops pro bono projects for firms, focusing only on matters not otherwise handled by publicly-funded legal assistance organizations.

Burns met with Cape in 2003 and immediately realized how ambitious his plans for Evergreen were. She and Cape developed a proposal to solicit pro bono legal assistance. Burns knew the Blakes law firm was a pro bono leader in the Toronto legal community and directed the Evergreen opportunity there. Blakes had been searching for pro bono matters for its corporate lawyers and invited Cape make a presentation.

The Evergreen-Blakes relationship began with a two-year memorandum of understanding. It's since been renewed seven times. Blakes partner Peter MacGowan has worked on several Evergreen matters. MacGowan notes the benefits of working with a social innovator like Cape. It teaches lawyers new ways of thinking, he explains, training them to take new approaches to challenging projects.

So far, a total of 85 Blakes timekeepers have worked on Evergreen matters, covering finance, real estate, general corporate, intellectual property, tax, and municipal law (sorry, no litigators). MacGowan characterized the Blakes relationship as a partnership. "And with the right type of partnership, lots of opportunities for benefits on both sides of the ledger," he says. MacGowan has transferred to his finance practice some of the new skills he acquired working on this sustainable development project.

Cape is pleased with the outcome so far. Evergreen now houses a LEED-certified platinum office complex. The site also includes a nature education center and a farmers market. Cape values the pro bono legal assistance Evergreen has received so far at over C$1 million. Cape expects the pro bono community to see far more public-private partnerships throwing off pro bono opportunities in the future, especially where complex urban issues are involved. PBLO's Burns says the success of the Evergreen-Blakes relationship has spurred Toronto large firm interest in environmental work.

MacGowan shares that he regularly bicycles to his Blakes office through the Evergreen site. He reflects on the rewards of working on a project like Evergreen. "It's a tangible thing," he says.

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Speaking Volumes

A Review of *Model Merger Agreement for the Acquisition of a Public Company*

Mergers & Acquisitions Committee, ABA Business Law Section
Diane Holt Frankle, Editor; ABA Publishing
2011, 300 pages, $189.95

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Reviewed by David A. Katz

M&A practitioners can rejoice; there is a new bible for professionals involved in the acquisition of public companies. For the first time, there is a single source that will appeal to the law student, the young corporate associate, as well as the seasoned professional, that uses a model merger agreement to discuss the ins-and-outs of acquiring a U.S. public company. The *Model Merger Agreement for the Acquisition of a Public Company*, developed by the ABA Business Law Section's Mergers and Acquisitions Committee (through its Subcommittee on Public Company Acquisitions), was 17 years in the making and is an outstanding publication that offers practical advice and form documents. This publication is bound to become a trusted resource for practicing lawyers, in-house attorneys and general counsel, investment bankers, and members of the judiciary, who deal with various aspects of public company M&A issues, whether on a daily basis or for a once-in-a-lifetime transaction.

The Model Merger Agreement is intended to represent a strategic buyer's initial draft of a merger agreement for the acquisition of a public company in a stock-for-stock merger transaction. Thus, the Model Merger Agreement is not the result of a negotiated transaction but shows a reasonable starting point for the buyer to take and then, in the commentary, addresses the range of responses a target company could take in response to the buyer's initial position. When using the Model Merger Agreement, it is important for the reader to understand the basic fact pattern for the agreement, as deviations from the fact pattern must be identified so that particular circumstances can be addressed. The commentary does an excellent job of describing how subtle variations from the given fact pattern might impact the negotiation of the actual merger agreement.

The commentary that accompanies the Model Merger Agreement is invaluable. In the introduction, the commentary focuses the reader on the purpose of the initial draft of the merger agreement, the role that leverage plays in deal negotiations, and differences in negotiating styles. The introduction also highlights the differences between acquisitions of public companies and private companies, the use of stock versus cash for the acquisition consideration and the impact of these differences on language and structure of the merger agreement. The introduction concludes with a comprehensive discussion on providing advice to the target company's board of directors and the circumstances when different standards of judicial review might apply to board decisions.

The Model Merger Agreement is organized along the lines of a typical merger agreement: Article 1 deals with the mechanics of the proposed merger, including the conversion of shares; Article 2 discusses representations and warranties of the target company, while Article 3 covers the representations and warranties for the buyer and its acquisition subsidiary; Article 4 deals with covenants; Articles 5 and 6 deal with conditions precedent for each party; Article 7 describes termination provisions and their effect; and Article 8 describes miscellaneous provisions that often do not get sufficient focus during deal negotiations but, in fact, often prove to be outcome determinative when the deal goes astray.

Several of the comments to the Model Merger Agreement deserve special attention. The comment at the beginning of Article 2 starts with the two basic purposes of the representation and warranty provisions and then goes on to describe how these provisions can be limited by disclosure schedules, dates, SEC filings, knowledge qualifiers, and other provisions that effectively transfer risk from one party to the other. Article 4 has a comprehensive discussion of fiduciary duties under various circumstances and how the no-shop provisions and fiduciary-out provisions operate in tandem with obligations with respect to the target company's shareholder meeting and board recommendation of the proposed merger. The detailed commentary accompanying section 4.6 highlights the various positions the buyer and the target company might take with respect to the negotiation of the changes to the target board's recommendation. The commentary to section 5.7 has an excellent discussion of the material adverse change provision and how it operates in the context of the merger agreement. Article 7 has a detailed discussion of the impact of various termination provisions and the limitations on break-up fees. Finally, Appendix A to the Model Agreement has a 10-page detailed commentary on exchange ratios, collars, and walkaway provisions, with helpful charts, showing how various provisions operate in practice; in my view this section should be required reading for all corporate associates.

The Model Merger Agreement also includes three other model agreements with detailed commentary: a confidentiality agreement, an exclusivity agreement, and a voting agreement. Not only does the commentary discuss how these agreements are negotiated, but the discussion includes a number of practical applications that will allow these agreements to be tailored to specific circumstances. For example, the model confidentiality agreement talks about the different approaches the parties might take when information is shared by both parties—either doing a single mutual confidentiality agreement or having two one-way agreements, each of which covers a particular party's sharing of confidential information. The commentary also notes the relevance of Regulation FD to the confidentiality agreement and has a detailed discussion regarding the negotiation of standstill provisions in the context of the confidentiality agreement. With respect to the model exclusivity agreement, there is a detailed discussion regarding the important issues to be considered by both parties in entering into such an agreement (such as fiduciary exceptions and the need for board approval) as well as a discussion of recent Delaware cases involving exclusivity agreements. The commentary accompanying the model shareholder voting agreement identifies a number of important issues that a buyer should consider in negotiating such an agreement, tackling everything from avoiding the triggering of Delaware's antitakeover statute section 203, to the impact of gun-jumping and proxy solicitation issues, to Exchange Act section 13(d) implications.

The Model Merger Agreement includes a CD-Rom with the full text of each of the model agreements: the merger agreement; the confidentiality agreement; the exclusivity agreement; and the shareholder voting agreement. This feature will be very helpful to a draftsperson who wants to utilize particular portions of the model agreements without the hassle of retyping them.

The Mergers and Acquisitions Committee is to be applauded for their perseverance over the last 17 years to develop a truly working model of a merger agreement with practical applications that are discussed in detail in the commentary. Even seasoned M&A professionals will learn something from the commentary, which provides useful references to case law, as appropriate. While focus of much of the commentary is on Delaware law, and the Delaware Bar has been actively engaged in explaining the operation of various provisions of the Model Agreement, differences in other state's laws are identified, such as in the discussion of the case law regarding the operation of material adverse change clauses.

All-in-all, *The Model Merger Agreement* is an excellent contribution to the M&A practice landscape. The Mergers and Acquisitions Committee has accurately captured many of the practical aspects of negotiating public company merger agreements. This publication will educate countless corporate lawyers so that they can better counsel their clients on the ins-and-outs of public company acquisition transactions. It will also be a great teaching tool for law school classes that seek to impart practical advice to soon-to-be lawyers. My only hope is that this can be a dynamic work that is supplemented as the case law develops and merger agreement provisions adapt to changes in the regulatory landscape and deal practice.

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