

## Breaking Up Is Hard to Do: Is Collaborative Law an Option for Resolving M&A Disputes?

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A lawyer is never entirely comfortable with a friendly divorce, anymore than a good mortician wants to finish his job and then have the patient sit up on the table.

~ Jean Kerr

### Introduction

Breaking up is hard to do, especially when the corporate romance sours in a merger or acquisition. Post-closing disputes in mergers and acquisitions (“M&A”) are complex, costly and time-consuming. In the courtship stage of an M&A deal, the parties may overlook differences, the seller being intoxicated with dreams of impending wealth and the buyer being blinded by the target’s attractive cash flow. After the completion of the deal, however, the fever may break, and significant disputes may arise. How these post-closing M&A disputes are resolved will impact the parties’ relationship. Post-closing disputes resolved through traditional methods, such as litigation, arbitration or mediation, may leave the parties jaded, bitter and financially exhausted. Is collaborative law—a concept applied successfully in divorces—the answer?

According to lore, the notion of “collaborative law” traces its origins to family law, starting in Minneapolis in 1989.<sup>2</sup> Although the term denotes a body of substantive law, it is instead a form of dispute resolution. In collaborative law, parties to a dispute undertake to resolve their differences outside of court and without a third-party decider of fact, such as a judge or arbitrator. A fundamental tenet of collaborative law “involves a commitment by lawyers on both sides of a case to use a non-adversarial problem-solving approach and to withdraw from the case if they fail.”<sup>3</sup> Collaborative law has been described as follows:

The process of collaborative law is straightforward. Each party is represented by counsel. Both the parties and their attorneys agree, contractually or through a stipulation filed in court, to attempt to settle the matter without litigation or even the threat of litigation. They promise to take a reasoned stand on every issue, to keep discovery informal and cooperative, and to negotiate in good faith.<sup>4</sup>

An additional characteristic common in the collaborative law process is the retention of joint experts to provide

objective opinions or conclusions on specific matters. The principles outlined above are typically memorialized in a “Participation Agreement” that governs the collaborative law process.

The collaborative law process is more akin to settlement negotiations than litigation, although the process retains certain aspects of litigation or arbitration, such as information sharing and obtaining the input of experts. Viewed another way, the collaborative law process is similar to mediation but without trial counsel and perhaps without a third-party neutral. The parties can choose, however, to engage a collaboratively trained facilitator or mediator to help them navigate the process and overcome an impasse. If the parties reach an accord, they enter into a settlement agreement. One important difference, however, is that the parties’ lawyers and law firms in the collaborative law process are disqualified in any subsequent litigation if the collaborative law process fails. The collaborative lawyers are engaged solely to assist their clients in reaching an acceptable settlement, and the disqualification provision is intended to ensure that their focus is on achieving that goal. Another important difference is that the collaborative law process rests heavily on the good faith of the parties.

Proponents of collaborative law cite a number of potential benefits of the process over litigation, such as conserving financial and emotional resources; enabling the parties to maintain greater control over the process and outcome; minimizing demands for information from employees and staff; maintaining a positive relationship with the other party if a business, personal or other relationship after the dispute is likely; and avoiding the negative publicity that may result from litigation. Authors David Hoffman and Pauline Tesler argue that “collaborative law creates stronger incentives for settlement. For the attorney, failure to settle means losing the client’s business on the case, and for the clients on both sides of the controversy, it means the additional expense associated with selecting and educating new counsel.”<sup>5</sup>

Collaborative law has proven to be a successful alternative dispute resolution option in the family law context, particularly with divorces.<sup>6</sup> It has also been used successfully outside the family law context, such as in business partnership dissolutions and employment

disputes. In the M&A context, however, the principles of collaborative law remain largely untested. Our intention in this article is to explore potential issues related to collaborative law in the context of post-closing M&A disputes for private, negotiated transactions without advocating for or against collaborative law but, rather, leaving for further discussion the possible application of collaborative law in the M&A context. We first provide an overview of certain types of post-closing M&A disputes in private, negotiated M&A transactions. Then we discuss the practical implications and issues related to applying collaborative law in the context of post-closing M&A disputes. Finally, we conclude with a few thoughts on collaborative law in the context of M&A disputes.

## Overview of Certain Post-Closing M&A Disputes

Private, negotiated M&A transactions are generally structured in one of three ways: as a merger; a stock/equity purchase; or an acquisition of assets. Regardless of the form of the M&A transaction, the acquisition agreement typically includes, among other things, a package of representations and warranties concerning the target business, a post-closing purchase price adjustment mechanism (e.g., working capital adjustment, net assets adjustment), post-closing covenants (e.g., non-competition, non-solicitation and confidentiality) and indemnification provisions. Post-closing acquisition disputes typically fall into one or more of the following five general buckets: (1) claims for breach of, or inaccuracy in, representations and warranties concerning the target business, (2) purchase price adjustment disputes, (3) earn-out disputes, (4) claims for breaches of covenants and (5) fraud claims. For ease of reference, we will refer to the “seller” and the “buyer” as the relevant parties to the acquisition agreement, recognizing that the relevant parties will depend on the structure of the particular transaction.

### CLAIMS FOR BREACHES OF REPRESENTATIONS AND WARRANTIES

A typical post-closing M&A dispute may arise when the buyer, for example, makes a claim for indemnification under the acquisition agreement, alleging a breach of, or inaccuracy in, the representations and warranties concerning the target business. A typical acquisition agreement will contain a robust package

of representations and warranties regarding the target business, which cover such topics as title to assets, financial statements, real property, intellectual property, material contracts, compliance with law, labor and benefit matters, taxes, environmental matters and litigation. Subject to indemnification limitations and other guardrails, the buyer is typically entitled to make a claim for indemnification under the acquisition agreement for any losses arising out of a breach of, or inaccuracy in, the representations and warranties concerning the target business. Depending on the structure of the transaction, the buyer may lodge such claim against an indemnity escrow or directly against the seller. Disputes over such claims may be litigated, but the acquisition agreement may alternatively require the parties to submit a dispute to arbitration. In cross-border M&A transactions, the use of alternative dispute resolution, such as arbitration, to resolve indemnification claims may be chosen to avoid undependable courts in one or more jurisdictions or a risk of a judgment not being enforceable in one or more jurisdictions.

#### PURCHASE PRICE ADJUSTMENT DISPUTES

A second type of post-closing M&A dispute may arise in the context of a post-closing purchase price adjustment. In 2012, 85% of purchase agreements in M&A deals involving private targets included a post-closing purchase price adjustment.<sup>7</sup> Of those deals, 91% included a working capital adjustment, 44% included a post-closing adjustment based on debt and 35% included a post-closing adjustment based on cash (note that 59.5% of post-closing adjustment provisions included more than one type of adjustment).<sup>8</sup> Post-closing purchase price adjustment provisions are intended to compensate the appropriate party for changes in the financial condition of the target business, which is accomplished through various means, such as adjustments based on comparing changes in net working capital, net assets or shareholders' equity from an agreed-upon target amount.<sup>9</sup> In essence, a purchase price adjustment provision is a pricing term, and adjustments to the purchase price may occur even in the absence of any breach of any representation or warranty by the seller. Often times, however, purchase price adjustment disputes may be intertwined with breach of representations and warranties claims, and the choice of forum for resolving those disputes,

whether through the purchase price adjustment mechanics, on one hand, or litigation or arbitration, on the other hand, can be significant.<sup>10</sup>

A typical purchase price adjustment provision, for example, will require the buyer to prepare a closing date balance sheet and its calculation of the change in net working capital of the target business from the agreed-upon target working capital amount reflected in the acquisition agreement. If the closing date working capital is greater than the agreed-upon target amount, then the buyer would pay the seller the amount of such excess. On the other hand, if the closing date working capital is less than the agreed-upon target amount, then the seller would pay the buyer the amount of such shortfall. If the seller disagrees with the buyer's determination of the closing date working capital, the seller typically has a certain number of days to lodge an objection. To the extent the parties cannot resolve the dispute within a given time period, then they typically submit the dispute to a neutral third party, such as an independent accounting firm or a financial advisory firm, due to the technical accounting and financial issues involved. The process is similar to an arbitration proceeding focused on the purchase price adjustment and possibly related issues, and the parties will be bound by the third party's determination.<sup>11</sup>

#### EARN-OUT DISPUTES

A third type of post-closing M&A dispute may arise in the context of an "earnout" provision. As described in a recent article, "[a]n earnout, also known as 'contingent consideration' in accounting parlance, is a contractual provision in an acquisition agreement that adds a variable component to the purchase price for an acquisition. Earnouts allow a purchaser to pay a portion of the purchase price to a seller on a contingent basis if and to the extent the target business reaches certain milestones after the closing."<sup>12</sup> Earnouts can be a useful tool when the buyer and the seller have different valuations of the target business and different views on its prospects, particularly when the target business is relatively young and projected revenue is speculative. According to the ABA's 20<sup>13</sup> Deal Points Study, 25% of private merger and acquisition transactions include an earnout.<sup>14</sup>

In M&A business negotiations, earn-outs may be expressed in straightforward, understandable terms, leaving the parties in general agreement at the time, but the subsequent drafting of the earn-out provisions often reveals a great deal of complexity.<sup>14</sup> Earn-outs are by their nature creatures of accounting and become even more complicated when the seller seeks assurances (and sometimes a degree of control) as to how the target business will be operated after the closing.<sup>15</sup> The buyer, of course, would prefer complete autonomy over the operations of the target business post-closing. Add to this tension the possible claims by the seller for a breach of the implied covenant of good faith and fair dealing, and it is no surprise that earn-outs tend to be a ripe area for disputes, especially when the target business fails to achieve the earn-out targets.<sup>16</sup> The nature of the disputes will often involve technical accounting and financial issues, but also legal issues, such as whether buyer's conduct of the business post-closing breached an express covenant or the implied covenant of good faith and fair dealing.

#### BREACH OF OBLIGATIONS

A fourth type of post-closing M&A dispute may arise in the context of a breach of covenant, such as a seller's obligation not to compete against the target business after the closing or not to solicit its employees or customers or a seller's obligation to keep nonpublic information about the target business confidential. A breach of a non-competition, non-solicitation or confidentiality obligation raises the possibility of damages but also raises the possibility that money damages will not be an adequate remedy. In such a case, the buyer may seek equitable relief, such as an injunction to restrain the seller.

#### FRAUD CLAIMS

A fifth type of post-closing M&A dispute is a claim by the buyer that the seller committed fraud and that the buyer is entitled to remedies that are not subject to the limitations prescribed by the acquisition agreement.

### Analysis: The Potential for the Use of Collaborative Law in M&A Disputes

#### PRACTICAL CONSIDERATIONS

Parties to post-closing M&A disputes have traditional methods for resolving disputes, such as litigation,

arbitration and the purchase price adjustment resolution process. Is collaborative law another possible dispute resolution process? We explore below potential issues related to collaborative law in the context of post-closing acquisition disputes.

#### *Application to Types of Disputes*

As noted above, post-acquisition disputes typically fall into five general categories. The last two categories, claims for breaches of covenants (e.g., non-competition, non-solicitation or confidentiality obligations) and claims sounding in fraud, appear to be the least suitable for collaborative law.

At its core, the collaborative law process relies on the parties negotiating in good faith. A buyer alleging fraud against the seller is not only inflammatory, but also suggests that the relationship may have broken down to a point where good faith negotiations are not realistic. The very allegation of fraud calls into question the character of the other party. If one party is of questionable character, it suggests that collaborative law may not be fruitful, if not a harmful endeavor. Indeed, it is possible that a party who does not act in good faith can take advantage of the other party in the collaborative law process.

Claims concerning breaches of post-closing covenants, such as non-competition, non-solicitation or confidentiality obligations, also appear to be problematic from a collaborative law perspective. As with claims of fraud, a breach of this type by a seller may call into question the character of the party. In addition, the buyer's preferred remedy may be injunctive relief to restrain the seller. While we could imagine a case where collaborative law may play a role in resolving such disputes, our sense is disputes of this type will likely lend themselves to traditional dispute resolution methods.

Although it may be problematic to apply collaborative law to the foregoing disputes, the remaining three categories of disputes may hold greater promise for the application of collaborative law. For example, in the breach of representations and warranties context, there might be no dispute as to the existence of a breach, but, rather, the focus may be on the proper measure of damages and the allocation of damages among the parties, issues where lawyers and experts can play an important role in resolving the matter. If there is a dispute as to whether a representation or

warranty has been breached, the collaborative law process still may be able to resolve the dispute if the parties both act in good faith. In the purchase price adjustment context, there might be no dispute as to there being a need for a purchase price adjustment, but, rather, the focus may be on a specific balance sheet item, such as inventory, and the applicable treatment under generally accepted accounting principles. In that case, the parties in the collaborative law process may be comfortable with a jointly retained expert and a collaborative process to resolve the dispute. In the earn-out context, there may be strong incentives for the parties to resolve the dispute amicably, because, for example, the seller is a key driver of revenue of the acquired business, and both parties stand to suffer financially if the relationship dissolves. Indeed, the earn-out example may be most similar to a divorce where both parties have a shared financial interest in resolving the dispute, and collaborative law has achieved its greatest success.

Outside of the earn-out context or some other ongoing commercial relationship between the parties, however, the beneficial effects on the relationship of the parties espoused by proponents of collaborative law may not be particularly relevant in many M&A deals. In many M&A deals, the completion of the transaction may represent the beginning and the end of the parties' relationship. This lack of an ongoing relationship between the parties may not be fatal to the use of collaborative law in the M&A context, but it may limit the circumstances in which parties are willing to use the process.

Although it is conceivable that parties in post-closing acquisition disputes may engage in the collaborative law process, the application of collaborative law in the M&A context still presents challenges, as we discuss further below.

#### *Disqualification of Counsel*

An important tenet of collaborative law is the parties' agreement to be represented by dedicated settlement counsel (the "collaborative lawyers") and the collaborative lawyers and their law firms being disqualified in any subsequent litigation or arbitration should the collaborative law process fail. Proponents of collaborative law view the disqualification of counsel requirement as a strong incentive for settlement in the collaborative law process. Indeed, a process without

disqualification of counsel has been labeled an entirely different process, sometimes called "cooperative law."

In the M&A context, the disqualification of counsel requirement can present significant challenges. First, the complexity of M&A transactions means that there is a steep knowledge curve, considering that the closing binders for transactions may contain thousands of pages. Beyond the sheer volume of documents, the history and context of the deal will be important. In light of this knowledge curve, it is likely that deal counsel, possibly alongside a litigator, will take the lead in resolving a post-closing dispute. If deal counsel is disqualified because the collaborative law process fails, the party with less financial resources may be at a significant disadvantage in its efforts to bring new counsel up to speed in any subsequent litigation. Equally important, it may be difficult for the new counsel to effectively understand the issues without the history and context that the deal counsel can provide, having lived through all stages of the transaction. As we understand collaborative law, the outgoing collaborative lawyers may brief incoming litigation counsel about what transpired in the collaborative law process but, beyond that, would not be permitted to work or consult with litigation counsel.

Another practical issue is that the deal lawyer may not be trained in collaborative law. To participate in the collaborative law process, a party may be faced with hiring both the deal lawyer and a collaborative lawyer to represent its interests. Alternatively, the party could engage only a collaborative lawyer, but that might require the collaborative lawyer to spend a significant amount of time to conquer the knowledge gap created because he or she did not handle the M&A deal. The successful use of collaborative law, therefore, may be dependent in part on the size and complexity of the M&A transaction.

For corporations, private equity firms and others with in-house legal counsel, collaborative law presents another challenge as to the role of the party's in-house counsel and general counsel in the process. For such parties, their in-house counsel or general counsel likely played a significant role in the M&A transaction and may, in fact, have served as sole deal counsel. Even if he or she did not serve as sole deal counsel, in-house legal counsel might typically serve as the

party's legal representative in disputes or otherwise play an active role in the matter. Under the Uniform Collaborative Law Act (the "UCLA"), which has been enacted in several jurisdictions, the entire legal department would be disqualified in any subsequent litigation if any lawyer in the department acts as the collaborative lawyer in the process.<sup>17</sup> This broad disqualification requirement might be addressed by having in-house counsel serve in a client or consulting capacity rather than as the collaborative lawyer or, in jurisdictions in which the UCLA has not yet been adopted, by agreement of the parties that only the in-house attorney serving as collaborative counsel shall be disqualified, an arrangement similar to the UCLA's provisions for the participation of government attorneys in the collaborative law process. Absent such arrangements, however, the requirement that the collaborative lawyer's law firm or legal department be disqualified from participating in subsequent litigation would seem to be a significant impediment to the use of collaborative law in the M&A context by corporations and other organizations with in-house legal staff.

Thus, the successful use of collaborative law in the corporate setting may hinge on whether the parties' use of the collaborative law process can be structured in such a way as to protect their legal departments, or at least the general counsel, from the disqualification requirement. Given that the process for collaborative law is contracted for freely in states without the UCLA or a similar act, there may not be inherent restrictions to doing so in such states.

#### *Application to Purchase Price Adjustment Disputes*

As discussed above, unresolved purchase price adjustment disputes will typically be submitted to a third party, such as an independent accounting firm or a financial advisory firm, due to the technical accounting and financial issues involved. The third-party role is typically neutral, and its determination is binding on the parties. Although a neutral expert in the collaborative process does not issue a binding decision, in other respects this process incorporates some of the basic principles of collaborative law. By selecting a knowledgeable third party to assess the claims, the parties have made a threshold decision to avoid litigation with respect to the matters submitted to the third party. This alternative process may be evidence that the market has already built in an

effective dispute mechanism. From another perspective, it might show that parties are open to the idea of an alternative dispute resolution process like collaborative law. The selection and execution of the dispute resolution process is generally considered a business decision.<sup>18</sup> As noted above, parties will still face the challenges related to disqualification of legal counsel.

#### *Lack of Definitive Rules*

Another practical concern with collaborative law is the lack of clearly defined rules other than the agreement to follow what collaborative attorneys commonly refer to as the "road map to resolution." The road map to resolution is essentially a staged negotiation process involving identification of concerns and goals, sharing of information and engagement of any necessary neutral experts, option development, option evaluation, and entry into a settlement agreement. Although participation agreements typically outline certain rules applicable to the process, a review of several common forms indicates that these agreements tend to rely significantly on the parties' commitment to dealing in good faith. By contrast, litigation in court is backed by the Federal Rules of Civil Procedure or corresponding state laws, and arbitration is typically governed by the rules of an arbitration institution selected by the parties, such as the American Arbitration Association, the International Chamber of Commerce International Court of Arbitration (ICC) (Paris), the London Court of International Arbitration, the Singapore International Arbitration Centre and the Hong Kong International Arbitration Centre. Although parties may grow more comfortable with the collaborative law process over time, it does not yet carry the same reliability and predictability as federal and state law (including extensive case law interpreting these laws) or well-known arbitration institutions. The Federal Rules of Civil Procedure and comparable state laws carry with them consequences enforceable by a court. On the other hand, the collaborative law process lacks a similar deterrent against a party acting in bad faith to, for example, delay the proceedings in order to drain the resources and the will of a smaller adversary.

In many ways, the collaborative law process is more analogous to deal negotiations, which also have no external rules of procedure or third-party neutrals enforcing good faith obligations. Collaborative law is

voluntary from inception to closure, with each party having the right to terminate the process at will, without explanation, just as in deal negotiations. The parties themselves evaluate the utility of the process and the good faith of the participants as negotiations proceed. Unlike deal negotiations, however, the parties' lawyers are disqualified in any subsequent litigation if the collaborative law process fails.

Advocates of collaborative law contend that, in addition to the use of dedicated settlement counsel, the flexibility and informality inherent in the collaborative law process are major contributors to its success. This view may be correct. However, the underpinning of this success may be the parties' desire to preserve a relationship, an incentive that provides a check against bad behavior. Without an ongoing relationship of some sort, the parties in an M&A dispute may be less inclined to commit to a process without clear rules and enforcement mechanisms.

#### *Ethical Considerations—Advocating for Other Rules?*

Does the use of collaborative law create any ethical issues for the attorneys involved? Some commentators have raised the issue of whether additional or supplemental ethics rules would be useful in relation to the collaborative law process.

Under the Model Rules of Professional Conduct (the "Model Rules"), a lawyer "may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."<sup>19</sup> "The crucial ethical obligation for a collaborative law attorney is to fully inform the client and provide him or her with an objective opinion of the advantages and disadvantages of collaborative law."<sup>20</sup> After proper discussion between a lawyer and his or her client, a client may be able to agree to limit the scope of the representation to the collaborative law process and exclude litigation. The term "informed consent" is defined in the Model Rules as an agreement by a client to a "proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."<sup>21</sup> Collaborative law advocates argue that collaborative lawyers are "as zealous and devoted" to client interests as are non-collaborative lawyers, but "[t]he difference is that

collaborative law attorneys and their clients have decided on a set of objectives different from those in a non-collaborative law case...."<sup>22</sup> It should also be remembered that, while the collaborative lawyers have forsaken litigation or other adversary processes to resolve the dispute, the parties have not. If the collaborative settlement negotiations fail, the parties are free to pursue all avenues of litigation or arbitration that are available to them.

Another aspect of collaborative law that has garnered discussion about legal ethics is whether a separate body of ethical rules should be created for collaborative law. A mediator, for instance, is subject to the "Model Standards of Conduct for Mediators,"<sup>23</sup> a recognition of the distinct role played by a mediator *vis-à-vis* a lawyer representing a client. "It has been suggested that what distinguishes collaborative law from mediation is the increased commitment to and incentive for settlement. What, then, are the ethical parameters for an attorney who aspires to engage in a model of practice which is non-adversarial, offers clients the services of collaborative problem-solving, and provides limited legal representation?"<sup>24</sup>

As to whether additional or supplemental ethics rules might be useful for the collaborative law process, suffice it to say that the area of collaborative law will continue to evolve.

#### *Additional Considerations*

Can a breakdown in the collaborative law process lead to additional legal claims by the parties in subsequent litigation? A key aspect of the collaborative law process is that the parties commit to acting in good faith toward a negotiated resolution.<sup>25</sup> This commitment may be memorialized in the participation agreement, both as a general matter and with respect to specific aspects of the process (e.g., discovery). To what extent can these contractual obligations become the basis for additional legal claims in subsequent litigation? If the collaborative law process breaks down, there may be even greater animosity between the parties, and it could lead to claims by one party that the other party breached its obligation to act in good faith. For example, formal discovery during the course of litigation may reveal that one party did not disclose all pertinent documents during the collaborative law process. If true, what are the damages of the

non-breaching party? Should that party be entitled to a return of all or a portion of attorneys' fees incurred during the collaborative law process?

To address the foregoing concerns, parties in the collaborative law process may feel the need to include additional provisions in the participation agreement intended to mitigate such risk. A related concern may be that a larger corporate party may use collaborative law as a tool to drain resources from a smaller adversary. In essence, the need to "start over" if one party opts for litigation may simply be too expensive for the smaller party that has already engaged in full discovery, incurred attorneys' fees, etc. At that point, the larger party would have a significantly greater bargaining position from which to dictate terms of a settlement.

## Conclusion

As discussed above, there are many issues related to the application of collaborative law to post-closing M&A disputes. There are benefits, risks and challenges to using collaborative law to resolve post-closing M&A disputes. Parties should consider carefully whether a particular dispute is appropriate for the collaborative law process. Traditional dispute resolution processes, however, whether it is litigation, arbitration or mediation, have pitfalls as well. The mere existence of collaborative law is *prima facie* evidence of deficiencies in traditional dispute resolution processes. Whether collaborative law is a good option for the resolution of post-closing M&A disputes remains an open question. We anticipate that the discussion will continue, and collaborative law will continue to evolve as parties look for more efficient ways to resolve disputes.

Indeed, James C. Freund, a highly respected corporate transactional lawyer, has advocated for a more prominent role for "settlement counsel" in business disputes.<sup>26</sup> As described by Mr. Freund, the role of settlement counsel resembles, in some sense, a lawyer engaged in collaborative law in terms of objectives sought and means deployed to achieve those objectives. The use of settlement counsel, though, lacks the benefits of avoiding the tangible and intangible costs of litigation, as settlement counsel operate in parallel with trial counsel, whereas collaborative lawyers operate prior to the commencement of adversary proceedings and seek to avoid such proceedings altogether. "In addition to the deal lawyer's presumed negotiating

skill, there are frequently tax, accounting or valuation aspects to the dispute that she may be better qualified to handle than a litigator, who is less likely to come into contact with these issues on a regular basis."<sup>27</sup> A deal lawyer is also likely to possess a greater familiarity with the language of acquisition agreements. When it is not thought to be desirable to enter into the collaborative law process to avoid litigation, use of "settlement counsel" can be an excellent option. Indeed, the role of "settlement counsel" in complex business disputes bears a resemblance to the role of a collaborative lawyer, and perhaps this is another logical point where the principles of collaborative law will meet the needs of complex business disputes. ♦

## Endnotes

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<sup>2</sup> David Hoffman and Pauline Tesler, *Collaborative Law and the Use of Settlement Counsel*, in The Alternative Dispute Resolution Practice Guide, ed. Bette J. Roth (West Publishing 2002), reprinted at <http://bostonlawcollaborative.com/blc/65-BLC/version/default/part/AttachmentData/data/2005-07-collaborative-law-and-settlement-counsel.pdf?branch=main&language=default>, pp. 2-3.

<sup>3</sup> *Id.* at pp. 1-2.

<sup>4</sup> *Id.* at p. 2.

<sup>5</sup> *Id.* at p. 12.

<sup>6</sup> *Id.* at p. 3 ("Collaborative law has achieved its greatest success in the area of family law. Several thousand family law attorneys currently practice collaborative law with reports of success in the vast majority of cases in which it is used.").

<sup>7</sup> "Private Target Mergers & Acquisitions Deal Points Study (Including Transactions Completed in 2012)," December 31, 2013, M&A Market Trends Subcommittee, Mergers & Acquisitions Committee of the American Bar Association's Business Law Section, slide 13.

<sup>8</sup> *Id.*

<sup>9</sup> See, for example, *Model Asset Purchase Agreement with Commentary* (ABA Book Publishing, 2001), pp. 60-64.

- 10 For an excellent discussion on dispute resolution clauses in acquisition agreements, please see “Dispute Resolution Clauses in Purchase Price Adjustment Provisions,” M&A Lawyers Library, published by the Business Law Section of the American Bar Association, August 2011, and “Mergers and Acquisition Disputes” in the *AICPA Forensic and Valuation Services Section Practice Aid* (American Institute of Certified Public Accounts, Inc., 2012).
- 11 See “Dispute Resolution Clauses in Purchase Price Adjustment Provisions,” M&A Lawyers Library, published by the Business Law Section of the American Bar Association, August 2011, for a discussion on the interplay between the purchase price dispute mechanics and other dispute clauses in the acquisition agreement.
- 12 Rick D. Blumen, “How to Account for Earnouts in Financing Agreement,” published on Law360.com, June 8, 2014, <http://www.law360.com/articles/554909/print?section=mergersacquisitions>.
- 13 “Private Target Mergers & Acquisitions Deal Points Study (Including Transactions Completed in 2012),” December 31, 2013, M&A Market Trends Subcommittee, Mergers & Acquisitions Committee of the American Bar Association’s Business Law Section, slide 20.
- 14 For a discussion on earn-outs, please see Paul M. Crimmins, Ben Gray and Jessica Waller, “Earn-outs in M&A Transactions—Key Structures and Recent Developments”, *The M&A Journal*, Volume 10 Number 10.
- 15 18% of private transactions in 2012 included a covenant to run the business consistent with past practice; 6% included a covenant to run the business to maximize earnout. “Private Target Mergers & Acquisitions Deal Points Study (Including Transactions Completed in 2012),” December 31, 2013, M&A Market Trends Subcommittee, Mergers & Acquisitions Committee of the American Bar Association’s Business Law Section, slide 22.
- 16 See Kevin C. Cunningham, “Earnout Provisions and Covenants of Good Faith: What’s Left Unsaid Says It All,” *The M&A Journal*, Volume 14 Number 9.
- 17 See Rules 2 and 9 of the Uniform Collaborative Law Act of 2010, drafted by the National Conference of Commissioners on Uniform State Laws.
- 18 “Purchase Price Disputes and Arbitration: Cost-Benefit Assessment from the Arbitrator’s Perspective.” *Valuation Insights*, Duff & Phelps LLC, 4th Quarter 2005 (arguing that selecting arbitration or other processes and managing the company’s participation in the resolution of corporate M&A disputes, such as purchase price disputes, is a critical strategic process and that parties should undertake a cost-benefit assessment of such disputes).
- 19 Model Rules of Professional Conduct, Rule 1.2(c).
- 20 David Hoffman and Pauline Tesler, *Collaborative Law and the Use of Settlement Counsel*, in *The Alternative Dispute Resolution Practice Guide*, ed. Bette J. Roth (West Publishing 2002), reprinted at <http://bostonlawcollaborative.com/blc/65-BLC/version/default/part/AttachmentData/data/2005-07-collaborative-law-and-settlement-counsel.pdf?branch=main&language=default>, p. 13.
- 21 Model Rules of Professional Conduct, Rule 1.0(e).
- 22 David Hoffman and Pauline Tesler, *Collaborative Law and the Use of Settlement Counsel*, in *The Alternative Dispute Resolution Practice Guide*, ed. Bette J. Roth (West Publishing 2002), reprinted at <http://bostonlawcollaborative.com/blc/65-BLC/version/default/part/AttachmentData/data/2005-07-collaborative-law-and-settlement-counsel.pdf?branch=main&language=default>, p. 13.
- 23 The “Model Standards of Conduct for Mediators” was adopted by the American Arbitration Association on September 8, 2005, was approved by the American Bar Association on August 9, 2005 and was adopted by the Association for Conflict Resolution on August 22, 2005.
- 24 “Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated Into the Practice of Law,” *Baylor Law Review*, Vol. 56, No. 1, 2004, p. 153.
- 25 See Douglas C. Reynolds and Doris F. Tennant, “Collaborative Law—An Emerging Practice,” *Boston Bar Journal*, Volume 45, Number 5, November/December 2001, and David Hoffman and Pauline Tesler, *Collaborative Law and the Use of Settlement Counsel*, in *The Alternative Dispute Resolution Practice Guide*, ed. Bette J. Roth (West Publishing 2002), reprinted at <http://bostonlawcollaborative.com/blc/65-BLC/version/default/part/AttachmentData/data/2005-07-collaborative-law-and-settlement-counsel.pdf?branch=main&language=default>.
- 26 “Calling All Deal Lawyers—Try Your Hand At Resolving Disputes,” James C. Freund, 62 Bus. Law. 37.
- 27 *Id.* at p. 44.

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