

An Expert's View

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Igor's practice focuses primarily on mergers and acquisitions, activism and takeover defense, corporate governance and general corporate matters. He has advised public and private companies, as well as private equity funds, in connection with mergers and acquisitions, divestitures, leveraged buyouts, joint ventures, cross-border deals, shareholder activism, takeover defenses and corporate governance matters.

Igor examines recent developments in M&A activity:

The inversion boom of 2014 has almost completely ended in 2015, but former US companies that successfully reincorporated overseas have been using their new tax advantages to engage in even more deal-making (for example, Horizon Pharma's acquisition of Hyperion Therapeutics and Actavis's acquisition of Allergan). What role do you think these types of cross-border deals will play throughout the rest of the year?

The inversion boom of prior years has certainly dissipated in the face of regulatory action, but to quote one of my favorite lines from *The Princess Bride*, there is a big difference between "dead" and "mostly dead." We are still seeing inversions and, most importantly, we are seeing the knock-on effects of prior inversions, with foreign companies (inverted or not) using their low-tax platform as a powerful catalyst for acquisitions in the US.

Companies such as Allergan (formerly Actavis), Endo, Mallinckrodt and Valeant have gone on a buying spree, with more than \$130 billion in such deals just for these four companies since 2014. In addition to cost and revenue synergies, US target companies now have to consider tax synergies as an important contributor of potential value creation, thereby giving inverted companies a leg up in a competitive M&A landscape. That, of course, makes previously inverted companies more likely to become

candidates for inversion transactions, as large US companies seek to obtain the same advantage for future acquisitions.

These cross-border deals are likely to continue so long as the US tax regime provides the incentives, including its high corporate tax rates (currently 35%) and approach to territorial taxation. Ireland, meanwhile, has a 12.5% tax rate and allows its domiciled companies to shift some income to still-lower tax jurisdictions. There have been recent efforts in Congress to reform the corporate tax code, and in particular to provide some temporary relief for companies that want to bring back foreign cash into the US. These efforts, if successful, could certainly change the calculus of doing inversion and post-inversion M&A deals, but perhaps only at the margin. Until there is comprehensive corporate tax reform in the US, expect our homegrown PLCs and Ltd.'s to get bigger at the expense of our Inc.'s.

With the collapse of deals such as Comcast/Time Warner Cable and Sysco/US Foods over antitrust hurdles, have you seen antitrust approval become a more front-of-mind issue in deal-making and negotiations? Are parties satisfied with addressing antitrust risk through mechanics like covenants and reverse break-up fees?

Worries about tougher antitrust scrutiny of mergers have been front-of-mind ever since the Obama administration first came to power. The Obama antitrust cops have been aggressive in threatening and pursuing lawsuits to get

- Permit Delaware corporations to designate Delaware as the exclusive forum for internal corporate claims.
- Invalidate any "fee-shifting" provision in the certificate of incorporation or by-laws of a stock corporation that purports to shift the corporation's or any other party's attorneys' fees or expenses to a shareholder who brings an action for an internal corporate claim.

The amendments represent the Delaware legislature's balancing of a desire to stem the tide of rote class action lawsuits that are brought over nearly every public M&A deal against the danger of overly limiting a sometimes valuable enforcement

mechanism. The What's Market public merger agreements database has observed a noticeable rise in announcements by target companies, simultaneous with their announcements of the underlying mergers, that their boards have approved the adoption of a forum selection by-law.

Although the Delaware legislature did not amend its appraisal statute, the Delaware Court of Chancery had several opportunities in the first half of 2015 to address the rights of appraisal "arbitrageurs" and the valuation of target companies at appraisal. While the court has consistently found that a petitioner who acquires shares of a public company after the

better divestiture terms, such as in the American Airlines/United merger and also in the Anheuser-Busch InBev/Grupo Modelo deal.

In 2011, the government succeeded in blocking H&R Block's purchase of TaxAct and AT&T's deal for T-Mobile. As Obama's second term began, a tougher breed of antitrust regulator showed up at the Federal Trade Commission and Department of Justice, and as the old Washington saying has it, "personnel is policy," with the Comcast/Time Warner Cable and Sysco/US Foods ex-mergers proving the point. Deal-makers are focused on protecting against these risks, with covenants getting more stringent and often more specific, and increasingly larger reverse break-up fees (AT&T paid T-Mobile \$3 billion in cash and \$1 billion in spectrum rights and the health insurers that have recently announced mega-deals have also agreed to pay large fees in case of deal failures).

In addition, parties are turning to pre-deal discussions with the government where this strategy is practical. In other cases, deal-makers are simply waiting for a new sheriff to arrive in 2017.

The Affordable Care Act (ACA) may be prompting a wave of merger activity in the health insurance industry, as seen in Aetna's agreement to acquire Humana and Anthem's bid to acquire Cigna. Do you see this as a continuing trend? Are other industries potential candidates for consolidation as a result of changes to the administration of healthcare in the US?

As we have seen with the inversion trend, the government is playing an outsized role in affecting business behavior. The ACA is a prime example, and consolidation in the health insurance space has been exhibit A. It is no coincidence, perhaps, that on the day that the US Supreme Court again ruled to uphold the ACA, stocks of insurers (and hospitals) skyrocketed and the game of merger musical chairs entered a frenetic phase. With Anthem's \$54 billion July 2015 deal for Cigna (after an unsolicited approach), following on the heels of Aetna's \$37 billion

deal to buy Humana earlier in the same month, the big five health insurers in the US are poised to become the Big Three, with UnitedHealth rounding out the lot.

The consolidation reflects several trends. First, the ACA is expected to add 20 million new health insurance customers, and the race is on to capture their business. At the same time, the super-sized law is full of regulations that affect insurers, with stringent requirements to provide more coverage, while squeezing profits. The ability to drive efficiencies, and to diversify the risk pool in an industry that is largely regional, has become a catalyst for consolidation. Insurers are also likely to consider efficiencies through other channels, including vertical integration. For example, UnitedHealth, which had also earlier approached Aetna about a deal, just completed a \$13 billion acquisition of Catamaran, a pharmacy-benefits manager.

Adding to the motivation is the consolidation among other players in the managed care system. The past few years have witnessed record activity in hospital and medical practice consolidations, with more than 100 deals in 2014 alone, as medical providers seek to better prepare for the new world of ACA opportunities and pressures. Pharmacies are getting bigger too, with CVS agreeing to buy nursing home provider Omnicare for almost \$13 billion (and Target's pharmacy business for \$2 billion) and Rite Aid agreeing to buy EnvisionRx for \$2 billion.

Each side has bulked up in part to negotiate better prices against the other, but it remains to be seen whether, when the dust settles, any party in the healthcare-provider chain will capture the sought-after efficiencies at the expense of others, or whether the record M&A activity among them all will cancel each other out. Recall the proverbial person in the stadium who seeks a better view by standing up; it only works so long as others do not do it also, or else everyone is standing and the view remains the same. On the other hand, when the person in front of you stands, there is only one thing left to do if you want to see the game.

announcement of a merger is still entitled to appraisal, the court has also made clear that it views a price reached in arm's length negotiations, in the absence of reliable traditional valuation methodologies, as a strong indicator of value.



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