WINSTON & STRAWN LLP

WEBINAR

Deals Gone Sideways and More: M&A Litigation in COVID-Churned Markets

May 28, 2020

Agenda

- COVID-19 “Busted Deal” Litigation: MAEs and Beyond
- R&W Insurance in the Post-COVID Era
- Earn-Out Litigation in the COVID-19 Era

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COVID-19 "Busted Deal" M&A Litigation: MAEs and Beyond

Busted Deal Basics

- Generally, buyer in an M&A transaction assumes most of the risk that the acquired business will not perform as expected after the deal closes (caveat earn-outs).
- "MAE" or "MAC" refers to "Material Adverse Effect," "Material Adverse Event" or, historically, "Materially Adverse Change" clause(s) in an acquisition agreement.
  - Seeks to allocate risk that certain adverse events may occur and impair the target's business between **(a)** the time a price is struck and an agreement **signed**, and **(b)** the time the deal **closes** and buyer takes ownership.
- Buyers want to allocate to seller as much of the risk of such **pre-closing** adverse changes as possible; sellers, obviously, want the opposite.

Busted Deal Basics (cont'd)

- Typical MAE provision allows buyer to walk away from the deal if target suffers a "Material Adverse Effect" between signing and closing.
- Such MAE "walk rights" generally take one of two forms:
  - Closing condition allowing buyer not to close if target business suffers an MAE between signing and closing;
  - Seller representation that target business has not suffered an MAE between signing and closing, coupled with closing condition allowing buyer to terminate if such representation is not accurate at closing.
- The devil, however, is often in the definition of "Material Adverse Effect," which is heavily negotiated.

Busted Deal Basics (cont'd)

Defining the MAE

- Deal specific, but generally, contracting parties agree to allocate **(i) market, systemic and industrywide risks to buyer**, and **(ii)** target-specific risks – *i.e.*, some adverse event that disproportionately or uniquely harms the target company's business – **to seller**.
- Usually accomplished via a fairly straightforward definition followed (and these days nearly eclipsed) by a litany of exclusions or **"carve-outs."**
  - Adverse events that would otherwise fit the MAE definition, but are expressly "carved out" of it -- as a matter of negotiated risk allocation back to the buyer -- such that they will not provide buyer with a basis to terminate. **Examp.: "Acts of God."**

Busted Deal Basics (cont'd)

- Not for lack of trying by many a remorseful buyer, but until very recently, Delaware Court of Chancery **never squarely found that an MAE had actually occurred**.
  - That recent decision – the *Akorn* case – involved an aberrant set of facts (as in, "Well, if ***that's*** not an MAE, there's just no such thing ...").
- In general, courts require negative impact of event in question to be **(a)** **"durationally significant,"** **(b)** quantitatively **severe** to the business, results of operations or financial condition of the company and **(c)** **company-specific.**

COVID-19 “Busted Deal” Litigation

COVID-19 has unleashed a wave of “busted deal” M&A litigation, with buyers seeking to cancel transactions caught by the virus between signing and closing and sellers suing to compel them.

- Unsurprisingly (given Delaware’s infamous reluctance to find an MAE), there has been a notable uptick over the past month and a half in Delaware court filings by sellers trying to hold buyers’ cold feet to the fire.

COVID "Busted Deal" Litigation (cont'd)

Unprecedented Times Call for Alternative Theories

- Not all buyers are explicitly declaring MAEs
  - Employing alternative strategies to delay or terminate pending deals due to effects of the COVID outbreak on the target's business.
    - Assertion that seller took actions in response to COVID-19 that breached the standard **covenant to operate the target business "in the ordinary course"** consistent with past practices between signing and closing.
      - "[E]xcept as otherwise contemplated by this Agreement ...."
      - Carve-out for compliance with applicable law / requirements of governmental authorities.
      - Buyer consent not to be "unreasonably withheld."

COVID "Busted Deal" Litigation (cont'd)

Unprecedented Times Call for Alt-MAE Theories (cont'd)

- Assertion that sellers failed to provide required pre-closing financial information taking into account anticipated effects of COVID-19 on the company's financial condition.
- One buyer has simply refused to close for a self-declared period in order to determine *whether* an MAE has occurred.
- More recent deals expressly contemplate risk of COVID-19 and appear to allocate it to buyer through negotiated purchase price reduction or MAE carve-out.
  - Yet even those buyers are invoking MAE provisions, along with the "ordinary course" covenant.

COVID "Busted Deal" Litigation (cont'd)

Cases in Point:

The Victoria's Secret Case: *L Brands, Inc. v. SP VS Buyer LP et al.*

- Buyer, an affiliate of a PE firm, and seller, the owner of Victoria's Secret, PINK and Bath & Body Works, filed dueling lawsuits over proposed transaction, **signed on February 20, 2020** pursuant to which buyer agreed to acquire 55% interest in Victoria's Secret for approximately $525 million.
- Between signing and closing, seller instituted wide-scale closures of Victoria's Secret stores, employee furloughs, reduction in executive comp, reduction of new merchandise receipts, and non-payment of rent in response to the COVID-19 pandemic – certain of which decisions, buyer claimed, (i) were not presented to it for written approval, as required by the transaction agreement, and (ii) resulted in an MAE justifying termination.

COVID "Busted Deal" Litigation (cont'd)

Cases in Point: (cont'd)

Victoria's Secret (cont'd)

- Two-trigger MAE definition encompassing "any state of facts, circumstance, condition, event, change, development, occurrence, result or effect" that:

> "**(i) … would prevent, materially delay or materially impede the performance by [Seller] of its obligations under" the agreement *or***
>
> "**(ii) … has a material adverse effect on the financial condition, business, assets, or results of operations of the Business."**

  - The second clause – a traditional MAE – was subject to a **COVID-19 carve-out** excluding the effects of "pandemics." But that carve-out (and the litany of others) was, by its express terms, limited just to clause (ii).
    - ***Cooper Tire*** precedent

COVID "Busted Deal" Litigation (cont'd)

Cases in Point: (cont'd)

Victoria's Secret (cont'd)

- *Buyer*: Under the first clause, MAE occurred because "state of facts" or "events"–seller's shuttering of stores, furloughing of employees and changes to executive comp, much of which was not governmentally mandated–prevented seller from satisfying contractual obligation to operate business in the ordinary course between signing and closing.

- *Seller*: Parties were well aware of COVID risk when they negotiated the deal; buyer received purchase price concession as a result; post-signing COVID risk was allocated to buyer by the pandemic carve-out; buyer was aware of and effectively acquiesced in the steps taken in response to the outbreak.

- Trial had been scheduled for **late July** before Vice Chancellor Laster. On **May 4**, the parties announced that they had mutually agreed to terminate the deal and withdraw their lawsuits, with neither side paying a termination fee or other consideration.

COVID "Busted Deal" Litigation (cont'd)

Cases in Point: (cont'd)

Realogy Holdings v. SIRVA Worldwide

- PE-owned SIRVA to acquire Realogy subsidiary for $400 million via stock purchase agreement **signed November 6, 2019**.
- Days prior to **April 29, 2020 outside closing date** – after consenting to certain pandemic-related cost cutting measures – buyer indicates that certain closing conditions are not met and **MAE has occurred**.
- Seller sues: declaratory judgment, breach of purchase agreement (efforts provisions, repudiation) and specific performance, good faith and fair dealing
  - Alternative claim: payment of **$30 million termination fee** (by seller) or, failing that, enforcement of limited guaranty (PE owner)

COVID "Busted Deal" Litigation (cont'd)

Cases in Point: (cont'd)

Realogy Holdings v. SIRVA Worldwide

- Dual-barreled MAE definition:
  - Sub (a) – **traditional standard**: event or change that has (or is expected to have) material adverse effect on results of operations or financial condition.
    - **Carve-outs** include "**acts of God**," ***unless*** seller is "disproportionately adversely affected … relative to other similarly situated participants in industries in which [it] operates."
  - Sub (b) – **deal-specific MAE** (a la *L Brands)*:

    "[a]ny change, event, occurrence, circumstance or effect that would or would reasonably be expected to prevent or materially impair or materially delay the ability of [seller] to consummate the Transaction…"
    - **Key distinction from *L Brands* MAE clause: ability to consummate deal vs. ability to satisfy contractual obligations.**

COVID "Busted Deal" Litigation (cont'd)

Cases in Point: (cont'd)

Realogy Holdings v. SIRVA Worldwide (cont'd)

- **Buyer asserts MAE under both clauses**. Pandemic has had a **"disproportionate adverse effect"** on seller and **impairs its ability to close** transaction.
  - First: notoriously difficult to prove.
  - Second: based on premise that future insolvency will impede seller's ability to satisfy post-closing obligations.
- Seller: no future solvency requirements; ready and willing to close.
- **Seller moves to expedite**: Court grants solely with respect to buyer's procedural motion to dismiss argument:
  - Specific performance only available until debt financing commitment terminated
  - Scheduled for mid-July; trial by early December.

COVID "Busted Deal" Litigation (cont'd)

But wait, there's more … explicit MAE claims

- *Forescout Techs., Inc. v. Ferrari Group Holdings LP & Ferrari Merger Sub, Inc.,* C.A. No. 2020-0385, compl. (Del. Ch. May 19, 2020) (buyer refuses to consummate $1.9 billion PE takeover set to close on May 18, 2020 on grounds **that MAE occurred** and seller **breached ordinary course covenant;** MAE provision **excludes "epidemics, pandemics** and other force majeure event[s]").
- *In re: Global Business Travel Share Purchase Agreement Litig.,* C.A. No. 2020-0338, compl. (Del. Ch. May 6, 2020) (competing claims in which seller seeks to enforce agreement to purchase majority stake in global travel business for $5 billion, slated to close on May 7, 2020; buyer claims **MAE, failure of closing conditions** (delivery of financial disclosures) and **breach of ordinary course covenant** (use of transaction funding to cover operating losses) under share purchase agreement).
  - Consolidated May 19, 2020 (*Juweel Inv. Ltd. v. Carlyle Roundtrip, L.P., et al.*, C.A. No. 2020-0338, compl. (Del. Ch. May 6, 2020); *Carlyle Roundtrip, L.P. v. Juweel Inv. Ltd. & GBT JerseyCo Ltd.*, C.A. No. 2020-0351, compl. (Del. Ch. May 8, 2020); *Pure Magenta Inv. Pte. Ltd. v. Juweel Inv. Ltd.*, C.A. No. 2020-0351, compl. (Del. Ch. May 8, 2020).
- *Bed Bath & Beyond, Inc. v. 1-800-Flowers.com, Inc., et al.,* C.A. No. 2020-0245, compl. (Del Ch. Apr. 1, 2020) (buyer postpones closing on $252 million equity purchase to **investigate whether an MAE occurred**, which seller claims is impermissible under equity purchase agreement and seeks specific performance).

COVID "Busted Deal" Litigation (cont'd)

But wait, there's more … conditions and covenants

- *AB Stable VIII, LLC v. MAPS Hotel & Resorts One, LLC, et al.,* C.A. No. 2020-0310, compl. (Del. Ch. Apr. 26, 2020) (seller sued to compel performance of $5.8 billion hotel acquisition after buyer tried to stall closing based on debt financing difficulties; buyer claims that **seller failed to satisfy closing conditions**, *i.e.*, **disclosure of ongoing litigation** and **securing marketable title**; purchase agreement provided for sale of hotels "as is" and included a **standard MAE definition** and **no financing condition**).
- *The We Company v. Softbank Group Corp., et al.,* C.A. No. 2020-0258, compl. (Del. Ch. Apr. 7, 2020) (seller seeks to compel specific performance of $3 billion tender offer where transaction agreement has **no MAE provision**; buyer claims **unsatisfied closing conditions** requiring **regulatory approval** and **roll-up of joint venture company**).
- *Oberman, Tivoli & Pickert, Inc. v. Cast & Crew Indie Servs., LLC & Camera Holdings, LP, et al.,* C.A. No. 2020-0257, compl. (Del Ch. Apr. 6, 2020) (seller sought specific performance under agreement with **standard MAE definition**; citing COVID-19-based changes to "general economic, business and regulatory conditions in the United States," buyer declined to consummate based on **failure to deliver pre-closing financial data or obtain third-party approval**; parties have settled the case out of court).
- *Level 4 Yoga, LLC v. CorePower Yoga, LLC, et al.,* C.A. No. 2020-0249, compl. (Del. Ch. Apr. 2, 2020) (buyer seeks to avoid purchase of 34 yoga studios after all studios forced to close per COVID-19-related emergency orders, alleging that closures **violated ordinary course covenant**).

COVID "Busted Deal" Litigation (cont'd)

But wait, there's more … conditions and covenants

- *XHR Santa Barbara LLC v. SBG US Holdings,* C.A. No. 2020-0395, compl. (Del. Ch. May 22, 2020) (buyer seeks to postpone, and ultimately aborts, closing on acquisition of seven hotels for $483 million on ground that **seller breached ordinary course covenant** in acquisition agreement).
- *Snow Phipps Group, LLC v. KCAKE Acquis., Inc., et al.,* C.A. No. 2020-0282, compl. (Del. Ch. Apr. 14, 2020) (despite COVID-driven purchase price reduction, buyer seeks to terminate stock purchase agreement with **standard MAE language**, citing **financing difficulties** and asserting that **seller breached ordinary course covenant**).
- *Omar Khan, SCGC, Inc., et al. v. Cinemex USA Real Estate Holdings, Inc., et al.,* No. 20-1178, compl. (S.D. Tex. Apr. 2, 2020) (buyer seeks to avoid performing under agreement to acquire theaters on ground that government closures and travel restrictions prevented it from **physically inspecting theaters**, despite negotiating **COVID-19-based 10% purchase price reduction** and an **MAE clause expressly carving out "pandemics"**; case is stayed as of April 27, 2020 following defendant's notice of bankruptcy filing).
- *BRE Atlas Prop. Owner LLC v. KS Dev., LLC,* No. 20STCV12247, compl. (Cal. Sup. Ct. Mar. 26, 2020) (seller seeks specific performance of agreement to acquire nine hotels for $265 million, claiming buyer agreed to purchase "as is"; buyer cites changed market conditions and claims that **reduced occupancy and revenues** constitute **breach of ordinary course covenant**).

COVID "Busted Deal" Litigation (cont'd)

And not to be left out …

Local 464A UFCW Union Pension Fund v. Antonellis, et al.

- The **shareholder class action** rears its head.
- Stockholder plaintiff claims board of Xperi breached fiduciary duties by failing to reevaluate stock-for-stock "merger of equals" acquisition by TiVo **signed in Dec. 2019**.
- Plaintiff made books-and-records demand in April 2020 on the basis that the board had contractual and fiduciary obligations to reevaluate agreement to determine whether COVID-19 had caused TiVo to suffer an MAE that would allow Xperi to terminate or constituted an intervening event that would allow the Xperi board to change its recommendation.
- Complaint alleges that the board breached fiduciary duties by failing to do so, declining to determine that all-cash offer made in February 2020 was reasonably likely to lead to a superior proposal and issuing misleading proxy disclosure regarding the effects of the pandemic on the two companies.
- Stockholder vote slated for May 29th.

COVID "Busted Deal" Litigation (cont'd)

Practical Takeaways

Old School MAE: Buyers declaring a straight-up MAE based on COVID-19 face an uphill battle – precisely because of the pandemic's unprecedented reach.

- Severity may be a virtual layup for some.
- Durational significance TBD.
- But unless target is disproportionately – and perhaps uniquely – affected, not only in comparison with the economy generally, but within the confines of its own industry, traditional MAE carve-outs suggest that the virus doesn't fit the bill.
  - In other words, MAE carve-outs drafted before COVID-19, with no express reference to "pandemics," may nevertheless prove sufficient to save the day for sellers.

COVID "Busted Deal" Litigation (cont'd)

Practical Takeaways (cont'd)

"Alt-MAE": Stay tuned. No court has issued a substantive ruling in the COVID context to date, but litigation stemming from the pandemic is poised to:

- Shake up interpretation and drafting of future MAE provisions and carve-outs.
- Increase negotiation and use of formerly less prominent potential "escape hatches" in purchase agreements, *e.g.* interim operating covenants.
- Even adverse events expressly (or arguably) carved out from MAE definition can impact target so as to affect seller's material compliance with covenants, representations and closing conditions.
- How courts deal with these "alt-MAE" theories may not simply decide the fate of deals currently at risk due to COVID-19, but have a lasting effect on "busted deal" litigation long after the pandemic has (hopefully) receded into the past.

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R&W Insurance In The Post-COVID Era

Pre-COVID Claims Snapshot

- Claims are made in approximately 25% of all transactions. Approximately half of these claims, however, are never seriously pursued.
- The most frequently asserted claims are:
  - Financial statements – 13%
  - Compliance with laws – 12.5%
  - Tax – 11%
  - Employment – 10%
  - Undisclosed liabilities – 10%
- Approximately 13% of claims are submitted are paid.
- The average claim payout is $10.7mm.
- The majority of claims are resolved in less than 12 months in the claims handling phase prior to litigation.

Source: Aon Inaugural Claims Study

The Effect On Policies Bound Pre-COVID

- We anticipate a modest increase in claims as policyholders look to more aggressively monetize litigation assets to make up for revenue shortfalls in their businesses.
- This trend has not yet been felt as many policyholders are currently focused on stabilizing their businesses instead of pursuing claims, however, we expect claims activity to pick up in the second half of 2020.
- As a result, now is a good time to bring a claim. If you have a claim pending, now is a good time to press it aggressively towards resolution.
- Ultimately, we expect carriers to become slightly more stringent with their analysis and settlement values of claims.

The Effect On Policies Bound Post-COVID

- The R&W insurance marketplace remains open. Other than the emphasis on the impacts of COVID, it remains business as usual.
- There has been a dramatic reduction in deal volume; as a result, insurers are eager to pursue active deals.
- Underwriting timelines remain the same as pre-crisis, however, underlying deals are taking longer.
- Retentions / premiums remain the same as pre-crisis.
- The desire to raise rates is being counterbalanced by the competition amongst insurers for the few available deals, keeping premiums relatively flat.

The Effect On Policies Bound Post-COVID

- All policies for the foreseeable future will have a COVID exclusion. The breadth of those inclusions will vary from deal-to-deal and carrier-to-carrier. Here are some sample exclusions:
  - **Insurer 1**: Loss arising out of, resulting from or to the extent it is increased by (i) the presence, transmission, threat or fear of a novel coronavirus, including the coronavirus disease (COVID-19) or any evolution thereof, and/or (ii) any mandatory or advisory restriction issued, or action ordered or threatened, by any public authority, regulatory body or government in connection therewith (including any federal, state, local or foreign regulation, rule, statute or law)
  - **Insurer 2**: Loss arising from or relating to business interruption or other business downturn solely to the extent such interruption or downturn arises out of or relates to the Coronavirus including (any COVID-19 illness) or any government or other regulatory sanctioned response thereto
  - **Insurer 3**: Loss arising out of or resulting from a suspension of or disruption to the ordinary course operation of the Company's business (including any disputes or any impact on revenues or profitability) relating to a pandemic or epidemic disease outbreak from the COVID-19 virus or evolution thereof or any government response thereto
  - **Insurer 4**: Loss arising out of or relating to the COVID-19 disease or the SARS-CoV-2 virus, or any evolution thereof.

Source: Marsh

Breaking News: The AIG Approach

- **20% premium increase** (to reflect recent uptick in claims + COVID policy enhancement)
- **New COVID-19 Exclusion**: "Losses arising out of, resulting from or to the extent increased by the failure to protect any employee, contractor, officer, director, manager, agent, customer, client, supplier, distributor or any other person from the transmission of a novel coronavirus, including the coronavirus disease (COVID-19) or any evolution thereof."
- **Conditional Interim-Period Exclusion**: "Losses arising out of, resulting from or to the extent increased by a Breach that first occurred during the Interim Period or at the Closing arising out of, resulting from or to the extent increased by (a) the presence, transmission, or threat of a novel coronavirus, including the coronavirus disease (COVID-19) or any evolution thereof, and/or (b) any mandatory or advisory restriction issued, or action ordered or threatened, by any public authority, regulatory body or government in connection therewith including any federal, state, local or foreign regulation, rule, statute or law."

The Effect On Policies Bound Post-COVID

- In terms of claims in the post-COVID era with the COVD exclusion, the key will be ***disaggregation*** of loss—separating the effects of the breach from the effects of COVID.
  - Example #1: Seller breached financial statement representation by representing A/R was collectible when it was not. COVID worsens the collectability of the A/R.
  - Example #2: Seller breached material customer representation by representing Customer A was not going to materially reduce its business when it knew pre-closing that Customer A was planning to reduce its purchases by 25%. COVID forced Seller to actually reduce its purchases by 50%.
- Getting experienced and sophisticated counsel and damages experts involved early (before filing the claim) will become even more paramount.

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Earn-Out Litigation in the COVID-19 Era

Earn-Outs: Often Postponing Inevitable Disputes

- "[A]n earn-out provision often converts today's disagreement over price into tomorrow's litigation over the outcome."
  - Vice Chancellor Laster, *Airborne v. Squid Soap*

- "Earnouts are typically used where the buyer and seller cannot agree on a price because the seller is more optimistic about future prospects of a business than is the buyer."
  - Vice Chancellor Lamb, *Comet v. Miva*

- The very existence of an earn-out provision in a purchase agreement demonstrates an underlying valuation dispute between buyer and seller

Earn-Outs Are Prone to Post-Closing Litigation

- Even in stable economic environment, earn-outs often lead to litigation:
  - Buyers and sellers view earn-outs differently (very contingent vs. deferred compensation)
  - Buyer largely assumes control of business operations post-closing
  - And even if seller remains involved in business post-closing, buyer and seller often have different motivations
- But as a principal mechanism to bridge valuation disagreements, earn-outs nevertheless are expected to increase in this COVID-19 era
  - Allowing for closing of transaction despite seller concerns that the company is undervalued at closing due to a COVID-induced valuation dip
  - Execution of deal vs. increased risks of not recovering earn-out

Post-Closing Crisis and Business Operations

- *Airborne v. Squid Soap* (Del. Ch. 2009):

  > "The price of the greater consideration that [seller] hoped to achieve through the earn-out was the risk that [buyer] would fail. Unfortunately for [seller], [buyer] did not succeed, but that does not allow [seller] to rewrite the deal it cut in more optimistic days."

- But sellers in *Airborne* did not insist upon any specific contractual obligations regarding post-closing expenditure of resources to promote the acquired business unit or any "efforts" obligation.

"Efforts" Provisions and Post-Closing Operations

- Buyer's operation of business post-closing has been, and will likely remain, the crux of earn-out litigation (*e.g.*, failure to maximize earn-out, invest, or take advantage of opportunities)
- Breach of contract or implied covenant of good faith and fair dealing
- How existing Delaware law informs "efforts" negotiations in COVID-19 era:
  - Enumerate with specificity obligations and prohibitions in "efforts" clause: *Fortis Advisors v. Dialog* (Del. Ch. 2015); *see also Himawan v. Cephalon* (Del. Ch. 2018)
  - Narrow interpretation of post-closing obligations: *Lazard v. Qinetiq* (Del. 2015)
  - Anticipated vs. unanticipated circumstances: *American Capital Acquisition v. LPL Holdings* (Del. Ch. 2014)

Seller Considerations in COVID-19 Era

- Graduated vs. all-or-nothing structure
- Longer earn-out period
- Post-Closing Buyer Covenants
  - Concrete, clearly defined "efforts" provision tailored to specific deal, target business, and COVID-19 concerns
  - Seller control of business post-closing (*e.g.*, positions and roles of "carry-over" employees and contractual right to participate in certain business decisions)
- Delaware courts have rarely recognized earn-out claims under the implied covenant of good faith and fair dealing
  - Sellers' strongest protection is language of purchase agreement and implied covenant should not be relied upon to "fill in the gaps"
  - Negotiation / drafting history (*American Capital Acquisition v. LPL Holdings* (Del. Ch. 2014) and *Lazard v. Qinetiq* (Del. 2015))

Buyer Considerations in COVID-19 Era

- Delaware as governing law
- Provisions that buyer has "sole discretion" in operating the business post-closing (both general and specific provisions)
- Middle ground "efforts" provisions
  - Negative covenant not to "take any action to divert or defer [revenue] with the ***intent*** of reducing or limiting the Earn-Out Payment." *Lazard v. Qinetiq* (Del. 2015)
  - General "efforts" provisions to provide flexibility in light of COVID-19
- "Past practices" covenants may no longer be relevant
- Well-defined process for submission of earn-out calculations, including party preparing calculations and "finality" of calculations. *Greenstar v. Tutor Perini* (Del. Ch. 2017)

WINSTON & STRAWN LLP

Thank You!

Speakers

EVA DAVIS

CO-CHAIR, PRIVATE EQUITY
Los Angeles
+1 (213) 615-1719
evadavis@winston.com

JAMES P. SMITH III

CHAIR, SECURITIES LITIGATION
New York
+1 (212) 294-4633
jpsmith@winston.com

MATTHEW L. DIRISIO

PARTNER
New York
+1 (212) 294-4686
mdirisio@winston.com

THOMAS G. WEBER

PARTNER
Chicago
+1 (312) 558-3260
tgweber@winston.com

WILLIAM O'NEIL

PARTNER
Chicago
+1 (312) 558-5308
woneil@winston.com