

## Recent Developments in Private Equity Dealmaking

Three recent merger agreements in which private equity sponsors agreed to acquire a public company show that the standards for certain important transaction terms are providing public targets with increased certainty of closing. These transactions show that public targets have been able to avoid structures like the one in *United Rentals Inc. v Ram Holdings, Inc.*, which permitted Cerberus to pay a \$100 million termination fee instead of being required to close a \$4 billion transaction.

As a general matter, the recent transactions:

- require the private equity firms to increase the financial obligations they undertake at the time of signing pursuant to an equity commitment to the newly-formed buyer entity that may be equal to the purchase price;
- permit the target to specifically enforce the equity commitment received by the newly-formed buyer entity;
- do not permit the buyer to walk away from the transaction by payment of a “reverse break-up” fee;
- provide for a narrower definition of “material adverse effect,” which reduces the number of adverse events that would give the buyer the ability to walk from the deal; and
- appear to be moving in a direction where the buyer is willing to close without requiring the target to have a minimum amount of working capital at closing.

In particular, the acquisitions of (a) Bankrate, Inc., a consumer finance website, by Apax Partners (announced in July 2009) for \$571 million, (b) Entrust, Inc., a data security company, by Thoma Bravo for \$114 million (announced in April 2009) and (c) SumTotal Systems, Inc., a software developer, by Accel-KKR for \$124 million (announced in April and subsequently increased by Accel-KKR to \$157 million but terminated in May by SumTotal which instead accepted a proposal by Vista Equity Partners to acquire the 87% of SumTotal that they did not previously own for \$139 million) had the following key transaction terms:

- **Equity Commitments/Guarantees:**
  - **Generally:**
    - The private equity fund buyer in each transaction provided an equity commitment needed to fully finance the acquisition (without any debt financing).
    - Each merger agreement permitted the target to require the buyer to specifically enforce the equity commitment (see discussion of specific performance below).
  - **Bankrate:** Various Apax funds (severally and not jointly) provided an equity commitment that would generally provide the newly-formed buyer entity with the funds it needs to satisfy any damages resulting from its breach of the merger agreement. This commitment was limited to an aggregate of \$571 million, which was equal to the purchase price. Unlike the acquisitions of Entrust and SumTotal, the acquisition of Bankrate is a tender offer, which should limit the amount of time between signing and closing.
  - **Entrust:** The target received a guarantee by Thoma Bravo of the newly-formed buyer entity’s obligation “with respect to the obligations and liabilities” of such entities “arising under or in connection with” the merger agreement. Entrust’s SEC filings did not provide any further description of the guarantee provided by Thoma Bravo.
  - **SumTotal:** The target received a guarantee by the private equity fund of the newly-formed buyer entity’s obligation to pay the merger consideration and the obligation of

such entities to pay damages to the extent contemplated by the merger agreement (see discussion of damages below).

- **Specific Performance/Damages:**
  - **Bankrate and SumTotal:**
    - Both merger agreements permit each party to seek specific performance and, except as described below, provide that specific performance is the target's only remedy.
    - Bankrate is permitted to seek money damages if a court declines to specifically enforce the agreement and permits Bankrate to enforce an award for money damages only if the buyer does not consummate the tender offer contemplated by the merger agreement within two weeks after such award.
    - Bankrate is permitted to seek damages equal to "the benefit of the bargain lost by the [Bankrate]'s shareholders (taking into consideration relevant matters, including other combination opportunities and the time value of money)[.]" However, there is a cap on damages equal to \$571 million (i.e., the private equity sponsor's total equity commitment, which was equal to the purchase price).
    - SumTotal does not appear to be permitted to seek money damages but may enforce an award for money damages from a court that has declined to specifically enforce the agreement only if the buyer is not "willing to consummate" the transaction within two weeks after such award.
    - SumTotal is permitted to collect "damages based on a decrease in share value or lost premium[.]"
  - **Entrust:** This agreement also includes a right for the target to request specific performance, with the buyers waiving any right of objection to such remedy, but the target is not limited to specific performance as a remedy in the first instance.
- **No "Typical" Reverse Break-Up Fees:**
  - **Bankrate:** Apax can walk away from the transaction if it pays Bankrate \$571 million.
  - **Entrust and SumTotal:** There is no reverse break-up/termination fee, and as noted above, the targets may force performance of the agreement.
- **Material Adverse Effect:**
  - **Bankrate:** The merger agreement has a relatively broad list of exceptions to the events that constitute a "material adverse effect," and the exceptions do not exclude events that disproportionately affect the target. Accordingly, the definition is somewhat broader than is often the case.
  - **Entrust and SumTotal:** The merger agreements have a very broad list of exceptions to the events that constitute a "material adverse effect," but the exceptions exclude events that disproportionately affect the target.
- **Financing/Working Capital Condition:**
  - **Bankrate:** The merger agreement did not provide the buyer with an "out," even if the target did not have a specified minimum amount of working capital at closing.
  - **Entrust and SumTotal:** Each merger agreement provided the buyer with an "out" if the target did not have a specified minimum amount of working capital at closing.

---

Ellen S. Friedenberg  
(212) 837-6465  
[frieden@hugheshubbard.com](mailto:frieden@hugheshubbard.com)

Kenneth A. Lefkowitz  
(212) 837-6557  
[lefkowit@hugheshubbard.com](mailto:lefkowit@hugheshubbard.com)

Charles A. Samuelson  
(212) 837-6454  
[samuelseo@hugheshubbard.com](mailto:samuelseo@hugheshubbard.com)

Michael Weinsier  
(212) 837-6690  
[weinsier@hugheshubbard.com](mailto:weinsier@hugheshubbard.com)

Ray LaSoya  
(213) 613-2834  
[lasoya@hugheshubbard.com](mailto:lasoya@hugheshubbard.com)

M&A/Private Equity  
August 2009



Hughes Hubbard & Reed LLP  
One Battery Park Plaza | New York, New York 10004-1482 | 212-837-6000

Attorney advertising — prior results do not guarantee a similar outcome.

This e-ALERT is for informational purposes only and is not intended to be and should not be relied on for legal advice. If you wish to discontinue receiving e-ALERTS, please send an email to [opt-out@HughesHubbard.com](mailto:opt-out@HughesHubbard.com).

© 2009 Hughes Hubbard & Reed LLP