Merger Agreements Are Too Long

By: Melissa Sawyer[1]

When I first started doing M&A deals in 2000, the average public company merger agreement was about 50 pages long. Twenty-five years later, the average length of a merger agreement has more than *doubled*.

This 25-year period of increasing verbosity coincided with M&A lawyers having better access to copy material from their competitors' drafts. Often, one of a deal team's first tasks is to create a reference set: an electronic compilation of the counterparty's, its key competitors' and its primary outside counsel's publicly available merger agreements. A variety of legal tech tools, now super-charged with AI, then make it possible for deal lawyers to cobble together Frankenstein drafts from different sources within the reference set in record time.

This practice of using a reference set and document assembly tech to prepare a merger agreement has two detrimental effects on the quality of legal drafting: (1) feature creep; and (2) recency bias.

Feature creep. "Addition by subtraction" is virtually unheard of in M&A drafting. Document assembly almost always results in supplementation: more "belts and suspenders", more "provided howevers", more "for the avoidance of doubts" and more "notwithstandings". For example, the 2009 ABA Public Company Target Deal Points Study analyzed *five* potential carve-outs to "material adverse effect" ("MAE") clauses that had become customary at that time. That list of customary carve-outs had more than *tripled* by the time of the 2024 study, with many MAE definitions now covering over a page and a half of dense text. With scant evidence of reliance on these carve-outs in the real world, the utility of all this extra wording is largely untested.

Recency bias. Examples of recency bias abound in merger agreement drafting. Since COVID-19, almost every merger agreement has included explicit pandemic-related clauses. After the publication of an influential article in 2014, almost all merger agreements have defined the term "Fraud". Since the height of the #metoo movement, many merger agreements now include sexual misconduct reps. The triggers for new provisions are variable – Delaware judicial opinions, geo-political events, broken deals, academic literature – but the results are the same: more words on the page and more time spent negotiating whatever issue is the latest flavor of the day, often without regard to whether those issues are likely to be material to the parties and in some cases long after the waning of the socio-political discourse in which concept originated.

Feature creep and recency bias now also pervade the process of preparing SEC disclosures for M&A transactions, where drafting trends tend to be hyper-reactive to recent Delaware case law. For example, the average length of a "background of the merger" section of a proxy statement has ballooned, with absolutely riveting *(sarcasm intended*) additional disclosure about events like due diligence meetings between outside advisors and other routine or immaterial interactions.

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Meanwhile, this explosion in the level of detail in proxy disclosure has *not* reduced the costs of litigation settlements in public company M&A transactions. According to Cornerstone Research, the median settlement amount for merger litigation-related settlements in Delaware Chancery in 2014 was $12.2 million. By 2024, this median settlement cost had only increased, to $16.5 million (albeit not adjusted for inflation). These rising settlement costs arose in a decade during which the Delaware courts purported to limit merger challenges through the application of the *Corwin* doctrine and *Trulia*'s push-back on disclosure only settlements. Moreover, these settlement cost statistics do not even take account of the growing costs of managing books and records demands and plaintiffs' other emerging pre-discovery maneuvers.

Admittedly, when drafting a merger agreement or proxy disclosure, it is hard to deviate from what has become a market norm to try to skinny down unnecessary wording. Following the crowd can help to expedite negotiations and regulatory review by wrapping the parties in the warm embrace of familiar wording. However, there really is a risk of missing the forest for the trees or injecting inconsistencies into a draft by layering in too many words. Sometimes a draftsperson just needs to take a step back and ask themselves "What is unique about this deal or this business that is distinct from all other deals and businesses? What are the biggest risks facing these parties or this deal? What do these particular parties care about most?" Instead of approaching the process of drafting and negotiating a merger agreement the way my grandmother used to stock her capacious handbag – "everything but the kitchen sink" – perhaps we should all challenge ourselves to deploy the engineering principles of lean manufacturing and minimalist product design to see if we can edit our merger agreements down to a more reasonable length that succinctly addresses the parties' key concerns.