



## PRACTICE SPOTLIGHT

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Fresh from advising Thermo Fisher on its acquisition of One Lambda, WilmerHale's Hal Leibowitz talks with Business Law Currents about the nuances of complex deal structures and the role corporate attorneys play in strategically framing a deal.

**Business Law Currents: What trends have you seen lately in the capital markets space, and particularly on the lending side of the equation?**

**HL:** One of the things that we've seen this year, particularly for the mature strategic buyer, is that the capital markets have been relatively friendly. If you're doing a meaningfully sized acquisition and you are a public company, there seems to have been a steady availability of funds that you can go to the public markets to attain to complete those deals.

We've certainly seen a number of our clients avail themselves of those opportunities through either debt or equity offerings post-announcement of a large M&A transaction to fund all or a portion of the purchase price.

**Business Law Currents: You recently participated in the ThermoFisher Scientific/One Lambda deal. This has all the elements of a complex deal, including it being a cash deal and a reverse triangular merger. Could you break this deal structure down for us?**

**HL:** Sure. A reverse triangular merger is an acquisition where the buyer creates a merger subsidiary and causes that subsidiary to be merged into the target company, which survives the merger and becomes a wholly owned subsidiary of the buyer. That creates a number of benefits for the buyer and some for the target as well.

From the buyer's perspective, you end up with the acquired business continuing to exist in a separate legal entity which mitigates concerns about potential liabilities. From the perspective of both parties, you have the benefit of limiting the number of required consents because with a reverse triangular merger the legal entity that was the business of the target before closing isn't changed.

**Business Law Currents: What role does a corporate attorney play in the strategic framing of a deal? Why does a merger take one form over another, for example?**

**HL:** That's an interesting question. Sometimes it's driven by tax considerations, particularly where stock is a primary or exclusive component of the purchase price.

Other times it is driven by liability issues. If you're concerned about limiting the buyer's exposure to certain types of liabilities, then that may influence your choice of transaction structure.

Sometimes it's an issue regarding consent to assignment. There have been transactions where although people typically think of a reverse triangular merger as a way to limit the need for consent, sometimes the terms of particular contracts might dictate a different structure if you're trying to avoid giving a particular counterparty a termination right or a consent or veto right.

These are all issues we would discuss with the client and its other advisors as we deliberate the right structure for a particular deal.

**Business Law Currents: Moving on to your experience in representing life sciences and pharmaceutical industries, can you tell us more about structured M&A?**

**HL:** Our firm has seen a lot of activity recently in the acquisition of life sciences companies, particularly early stage and later-stage biopharmaceutical companies. What is interesting about these deals is that there are a number of different structures used to facilitate the acquisition of those companies at various stages in their life.

Think of a pre-IPO company that is considering whether to go public or be acquired and has drug candidates in late-stage clinical trials. Acquisitions of these types of companies are almost always structured with milestones where there's some component of consideration that's paid up front in cash or in buyer stock, and then a fairly significant second component of consideration that will get paid based on either regulatory or sales milestones. In negotiating these deals, you get all of the aspects of an M&A transaction plus the terms of a collaboration transaction.

For example, with respect to the contingent payments, we end up negotiating the level of efforts to be devoted by the acquirer to the continuing development of the target company's drug candidates as well as net sales provisions and related provisions seen in collaborations.

We also see potential buyers of these businesses looking to tie up these assets and programs much earlier in their existence, even going all the way back to their series A financing. In these deals, the buyer will negotiate an option to acquire the company with a locked-up M&A deal in connection with a collaboration, an investment or both. We've seen some of these done through a warrant structure or an option structure, but in essence you negotiate the M&A exit/option at the time of the collaboration or the investment. And you negotiate how the economics of the acquisition will work at that time.

These option deals in connection with an investment in the company at its earliest stages is a trend that has been developing very quickly but it seems to be getting a lot of interest, particularly from big pharmaceutical companies over the last six to nine months.

**Business Law Currents: Do you make any consideration for future valuation issues?**

HL: We do address what the potential future consideration is going to be up front. What the company, the investors and the potential buyer are getting is in essence a known quantity. They know that if certain milestones are achieved then the buyer can acquire the business on a pre-agreed set of financial terms. Sometimes those terms are going to involve a single payment and sometimes it's going to be an upfront payment plus future milestones after that. But the deal is all locked up.

**Business Law Currents: You basically have to anticipate everything that's going to happen in the future?**

HL: That's absolutely correct. When we negotiate a traditional M&A transaction we deal with operating covenants that will govern the operation of the business between the time you sign and close a deal. Sometimes those are as short as a few days and oftentimes they can be a few months, but in these types of deals this period can last for many years.

It raises some interesting questions about how to deal with covenants regarding the operation of the business. For example, you have the ability to prepare disclosure schedules on a deal that's being signed now but will get closed several years in the future. There's also the risk allocation that comes through that process. So they're very interesting deals.

**Business Law Currents: You've been very involved with the American Bar Association for many years. How has that impacted your practice?**

HL: I've very much enjoyed my involvement with the ABA. The M&A Committee is comprised of lawyers who are very skilled and passionate about what they do, and importantly are very comfortable coming together and sharing their ideas, their views of best practices, and their knowledge of traps for the unwary.

I enjoy hearing other people talk about their practices and engaging in a candid exchange of ideas. Whether you're a young lawyer just getting started in the space or a more experienced lawyer, having an opportunity to go to an environment like that allows you to continue to improve your skills and stay up to date on the latest trends in the market.

**Business Law Currents: Do you encourage your associates to participate in it as well?**

HL: Absolutely, both in terms of the meetings and also in reading all of the materials that are published, which is another of the great benefits of this committee.

*This interview was conducted by Chris Longley, a Senior Business Development Executive at Thomson Reuters*

**ABOUT THE AUTHOR**

**Hal Leibowitz** is Vice Chair of the Corporate and Transactional Department at [WilmerHale](#), and a member of the firm's Mergers and Acquisitions Practice Group. A complete biography is available [here](#).

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