Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Availability Of Specific Performance To Jilted M&A Parties

Law360, New York (July 22, 2016, 12:07 PM ET) --

Especially in these volatile markets, parties to merger and acquisition transactions should plan for the risk that their counterpart may refuse to close. Fortunately for parties confronting this scenario, courts have been receptive to demands that the party threatening not to close should be forced to close against its will, i.e., to requests for specific performance of the M&A agreement.


Stephen L. Ascher


Andrew J. Lichtman

For jilted buyers seeking to force a reluctant seller to close, the argument for specific performance is easy to formulate and frequently successful: A buyer can argue that if the transaction does not close, it will suffer the requisite "irreparable harm," because the buyer has a contract to acquire a unique asset whose combination with the buyer's business will yield synergies that cannot easily be quantified by an award of money damages. Courts have often granted specific performance to buyers of another company's stock or assets.

For sellers, the argument is more difficult: A party that stands to receive cash, or even cash and stock, may have an uphill battle to prove that its damages cannot be remedied by an award of money damages. As a result, courts have granted specific performance to jilted sellers in some circumstances, but not others, depending on the facts.

Whether a buyer or a seller is the party left standing at the altar, time is obviously of the essence — if a decision is not made quickly, the value of the assets may change dramatically, financing for the deal may no longer be available, or other changed circumstances could scuttle the deal. Notably, the Delaware Court of Chancery is more likely to decide issues like these quickly than, for example, a New York court; the Chancery Court considers itself the preeminent forum to decide such disputes, and accordingly it does not require a stringent showing to expedite the proceedings. As a result of this distinction between New York and Delaware courts, companies should consider specifying Delaware law, venue and jurisdiction in their M&A agreements if they want to have the option to seek specific performance if necessary.

We discuss these legal issues, the seminal cases in this area, and some practical considerations for M&A lawyers drafting M&A agreements, in greater detail below.

M&A Transactions

M&A transactions can take different forms. Sometimes two companies merge into one entity, while other times a buyer acquires the stock or assets of a target company.

Regardless of form, M&A contracts are typically structured so that there is a delay of weeks or even months between when the definitive M&A agreement is signed and when the transaction actually closes. That delay allows for the satisfaction of any preconditions to closing, such as obtaining the necessary financing or governmental approvals.

This article focuses on situations where the parties have already entered into a definitive M&A agreement (not just a letter of intent, which may or may not be binding), and the conditions to closing have been satisfied, but a party to the deal nonetheless refuses to proceed with closing.

In that scenario, New York and Delaware law both require a plaintiff to make the same substantive showing to obtain specific performance, namely, (1) the M&A agreement is a valid contract between the parties, (2) the moving party has substantially performed under the contract and is willing and able to perform its remaining obligations, (3) the nonmoving party is able to perform its obligations, and (4) the moving party has no adequate remedy at law, or, in other words, would suffer "irreparable harm" if specific performance were not granted.[1] These are essentially the same factors that a party would need to show to obtain specific performance in any contract dispute.

Whether specific performance is granted typically turns on the fourth factor, and for purposes of this article we assume the other three conditions have been satisfied.

Specific Performance Is Generally Available to Buyers

More often, it is the buyer of a business who seeks specific performance, arguing that "it cannot be made whole unless it can specifically enforce the acquisition agreement, because the target company is unique and will yield value of an unquantifiable nature, once combined with the acquiring company."[2] Although courts generally view specific performance as an extraordinary remedy, buyers in M&A transactions have often been successful in obtaining such relief. As one court explained, "no case that has come to our attention has found a business either not unique or not offering a unique opportunity to the buyer. This militates against treating the plaintiff's burden as an onerous one."[3]

For example, in Allegheny Energy Inc. v. DQE Inc., two publicly traded utility companies entered into a merger agreement in which DQE would become a subsidiary of Allegheny.[4] After DQE attempted to terminate the agreement, Allegheny filed suit seeking specific performance.

In deciding that specific performance was the appropriate remedy, the court first considered the "uniqueness" of the business opportunity.[5] To support its conclusion that the agreed-upon merger "constitutes a unique, non-replicable business opportunity,"[6] the court pointed to the joint proxy statement filed with the U.S. Securities and Exchange Commission and mailed to both corporations' shareholders in which the parties described the expected benefits of the merger.[7] Among other benefits, the corporations said the merger would expand service territory, provide a wider range of services to current customers, create operating efficiencies, and improve financial performance.[8]

After finding the merger opportunity unique, the court rejected the buyer's arguments against specific performance. For instance, DQE argued that specific performance was appropriate only where the target is a nonpublic or closely held corporation, rendering its stock difficult to value.[9] Although this is a relevant consideration, the court found, it is not dispositive.

Other courts have similarly awarded specific performance to buyers in disputes arising out of M&A agreements or contracts to sell businesses or franchises.[10] Courts may, however, deny specific performance if the buyer's damages are readily ascertainable.[11]

Specific Performance May Sometimes Be Available to Sellers

Less common is the seller of a business who seeks specific performance from a buyer — presumably because the seller's damages are easily calculated as the difference between the lost sale proceeds and the value of the business to the seller without the premium paid by the buyer or because protections for a buyer failing to close were already built into the acquisition agreement. There is favorable precedent, however, for the position that sellers in M&A agreements should have the same right to specific performance as buyers.

In In re IBP Inc. Shareholders Litigation, IBP, the nation's no. 1 beef distributor, entered into a merger agreement with Tyson Foods, the nation's leading chicken distributor.[12] Both companies performed poorly in the months following the merger agreement and, as a result, Tyson Foods began to have "buyer's regret."[13] After Tyson Foods terminated the agreement, IBP sought specific performance.

In addressing whether a seller has the right to sue for specific performance, the court considered the difference between buyers and sellers, but ultimately found no "compelling reason why sellers in mergers and acquisitions transactions should have less of a right to demand specific performance than buyers."[14] Because IBP's shareholders were offered stock in consideration for the deal, they, like the shareholders in a company that was buying another company, had a "chance to share in the upside of what was touted by Tyson as a unique, synergistic combination."[15]

Based on this factor and others, the court concluded that specific performance was the appropriate remedy. First, determining cash damages would be "very difficult" and the amount of any award would be "staggeringly large."[16] Second, specific performance was practicable because Tyson admitted at trial that the combination "still makes strategic sense" — it just wanted a lower price.[17] Third, the court believed that the combined management would be able to work together. And finally, the court considered the impact on the buyer's shareholders and found they "would be better served on the whole by a specific performance remedy, rather than a large damages award that did nothing but cost Tyson a large amount of money."[18]

In another leading case, the court granted specific performance to a seller even in an all-cash transaction. In Genesco Inc. v. Finish Line Inc., the footwear and apparel company Finish Line agreed to acquire Genesco for $1.5 billion.[19] Following signing, Genesco's financials dropped significantly short of projections and its bankers at UBS refused to proceed with financing. Genesco responded by suing Finish Line and UBS and asking the court to order them to close the deal.

The court agreed with Genesco, finding that its business would be irreparably harmed by the stalled merger. The uncertainty had negatively affected Genesco's "stock price, vendor relationships, employee morale, public perception, and virtually every other aspect of its business during the pendency of the merger."[20] Moreover, the M&A agreement contained restrictions on Genesco's activities pending closing that "would be inconsistent with Finish Line's plan for Genesco but that would be necessary or desirable for an independent Genesco."[21] For example, Genesco had planned to open a new distribution facility, but in reliance on the planned merger with Finish Line, accepted a provision in the M&A agreement restricting its ability to make significant capital expenditures or open new stores. In addition, Genesco had "invested substantial funds" and its employees had spent "massive amounts of time" providing financial information and complying with Finish Line's detailed requests in preparation for the planned integration.[22] The court concluded that specific performance would minimize these collateral but substantial costs of the breach.

As these cases illustrate, despite the generally extraordinary nature of forcing a breaching party to perform a contract rather than pay money damages, both buyers and sellers in M&A agreements should consider making use of the specific performance remedy in the face of a terminating party. If the party seeking specific performance can identify business synergies that would result from the deal (e.g., operational efficiencies, expanded service territory), it will likely be able to convince a court that the transaction is unique and it cannot be made whole by money damages. Indeed, the factors courts have found persuasive in ordering specific performance — public statements about the benefits of the merger, and opportunities squandered in reliance on the deal, to name a few — are present in many M&A agreements.

Availability of Expedited Review in Delaware and New York

Because time is of the essence when it comes to M&A disputes, the typical multiyear timeline of complex litigation may be inadequate to meet the needs of a party suing for specific performance. We expect that the Delaware courts, if they are available, will be most receptive to requests to expedite the decision of these types of disputes. As a practical matter, the Delaware Court of Chancery often holds trials within a few months of filing.

As the nation's pre-eminent forum for business disputes, and a court of equity, the Court of Chancery has broad powers to order expedited proceedings "to accommodate the business timetables of the parties."[23] To obtain expedited review under Delaware law, a plaintiff must show only a "sufficiently colorable claim" and a "threatened irreparable injury"[24] — a standard that, according to the Court of Chancery, is "low."[25] In reaching a determination on a motion to expedite, the court does not judge the merits of the complaint, but rather accepts its well-pleaded allegations as true.[26]

The first prong is not difficult to satisfy — a colorable claim is a "nonfrivolous cause of action."[27] The second prong — threatened irreparable injury — will likely determine whether expedited review is granted and will turn on whether a plaintiff sufficiently alleges that money damages are inadequate. A party moving for expedited proceedings must generally show it would suffer irreparable injury if the case were to proceed along a normal litigation schedule.

In one example, after the buyer and seller entered into an M&A agreement, the buyer obtained debt financing that was available only through a date certain.[28] In its motion to expedite, the buyer argued that the seller's alleged breach — failing to negotiate with a union, thereby delaying closing — threatened the financing for the deal.[29] In these circumstances, the court found threatened irreparable harm and granted the motion to expedite to consider the issue of specific performance.[30] A month after the seller filed suit, the court held a trial at which it ultimately denied the request for specific performance, finding that the buyer did not breach the contract.[31] Other Delaware courts have similarly ruled on disputes arising out of alleged breaches of M&A agreements on an expedited basis.[32]

New York courts may be tougher. Although New York practice includes at least three vehicles for obtaining expedited review, none is easy to invoke. First, unlike the Delaware Chancery Court, New York courts generally are skeptical of requests for preliminary injunctions in business disputes, except when the plaintiff makes a strong argument that the failure to grant relief quickly will cause irreparable harm.[33] New York courts are much more likely to grant injunctive relief in cases outside the business context, for example, where First Amendment rights are at stake.[34] Second, New York Civil Practice Law and Rule 3213 will be of no use to a party seeking specific performance in an M&A deal; that rule provides for expedited proceedings only when a party sues to collect on a note or judgment.[35] Finally, although the Commercial Division of the New York Supreme Court has a relatively new rule that allows parties to consent to accelerated pretrial procedures, that rule requires only that the parties be ready for trial within nine months — a timeline that will often still be too slow to obtain meaningful relief in an M&A dispute.[36]

Note, however, that Delaware law has one subtle disadvantage relative to New York law. New York law requires the party seeking specific performance to establish its entitlement to that remedy by a preponderance of the evidence, while Delaware law requires a high burden, "clear and convincing evidence."[37]

Practical Advice for M&A Lawyers

This background law suggests several considerations for M&A lawyers who are negotiating M&A agreements.

First, as noted above, a party who wants the option of expedited litigation should consider specifying Delaware law, venue, and jurisdiction in its M&A agreements.

Second, if a company believes specific performance may be a desired remedy, it should consider including a specific performance stipulation in its M&A agreements providing that a breach of the agreement results in irreparable harm. It should be noted, however, that such a stipulation is far from conclusive; courts generally give them at least some weight — with some courts even finding them sufficient to award specific performance — but other Delaware and New York courts have given little deference to such provisions.[38] On the flip side, if parties want to foreclose the option of specific performance, they should include a provision to that effect.[39]

In any event, practitioners should recognize that courts generally have been considerably more willing to grant specific performance as a remedy in disputes over broken M&A transactions than in other types of business disputes.

—By Stephen L. Ascher and Andrew J. Lichtman, Jenner & Block LLP

Stephen Ascher is a partner in Jenner & Block's New York office and co-chairman of the firm's securities litigation and enforcement practice.

Andrew Lichtman, also based in New York, is an associate in the firm's litigation department.

[1] See In re IBP Inc. S'holders Litig., 789 A.2d 14, 52 (Del. Ch. 2001).

[2] Id. at 83.

[3] Allegheny Energy Inc. v. DQE Inc., 171 F.3d 153, 163 (3d Cir. 1999).

[4] Id. at 154.

[5] Id. at 159 (applying Pennsylvania law).

[6] Id.

[7] Id. at 164.

[8] See id. at 155-56.

[9] Id. at 165.

[10] See, e.g., C & S/Sovran Corp. v. First Fed. Savs. Bank of Brunswick, 463 S.E. 2d 892, 894 (Ga. 1995) (enforcing merger agreement between two publicly traded banks following the nonmoving party's breach of contract); Medcom Holding Co. v. Baxter Travenol Labs., 984 F.2d 223, 227 (7th Cir. 1993) (affirming specific performance that required seller to convey all its shares to a buyer because (1) the shares were not publicly traded so valuation would be imprecise and (2) the business in question was a unique asset); Triple-A Baseball Club Assocs. v. Ne. Baseball Inc., 832 F.2d 214, 224 (1st Cir. 1987) (affirming specific performance in the sale of a minor league baseball franchise because the franchise was a unique business and there was no readily ascertainable market value).

[11] See, e.g., Miller v. LeSea Broad. Inc., 87 F.3d 224, 230 (7th Cir. 1996) ("In a case in which, although the contract is for the sale of an entire business, the buyer's negotiations to resell the property enable his loss from the breach to be exactly monetized, the case for specific performance collapses.").

[12] 789 A.2d 14, 21 (Del. Ch. 2001) (applying New York law).

[13] Id. at 22.

[14] Id. at 83.

[15] Id.

[16] Id.

[17] Id.

[18] Id. at 84.

[19] No. 07-2137-II(III), at 1& 8 (Tenn. Ch. Ct. Dec. 27, 2007) (applying Tennessee law).

[20] Id. at 40.

[21] Id.

[22] Id.

[23] USA Cable v. World Wrestling Fed. Entm't Inc., 766 A.2d 462, 464-65 (Del. 2000).

[24] Morton v. Am. Mktg. Indus. Holdings Inc., 1995 WL 1791090, at *2 (Del. Ch. Oct. 5, 1995).

[25] In re 3Com S'holders Litig., 2009 WL 5173804, at *2 n.10 (Del. Ch. Dec. 18, 2009).

[26] Morton, 1995 WL 1791090, at *2.

[27] In re K-Sea Transp. Partners LP, 2011 WL 2410395, at *4 n.8 (Del. Ch. June 10, 2011).

[28] Cooper Tire & Rubber Co. v. Apollo (Mauritius) Holdings Pvt. Ltd., 2013 WL 5565634, at ¶¶ 5-6 (Del. Ch. Oct. 4, 2013) (motion to expedite proceedings).

[29] Id. ¶ 18.

[30] Cooper Tire & Rubber Co. v. Apollo (Mauritius) Holdings Pvt. Ltd., 2013 WL 6181715 (Del. Ch. Oct 9, 2013) (teleconference on plaintiff's motion to expedite and the court's ruling).

[31] Cooper Tire & Rubber Co. v. Apollo (Mauritius) Holdings Pvt. Ltd., 2014 WL 5654305, at *7 (Del. Ch. Oct. 31, 2014).

[32] See, e.g., Hexion Specialty Chems. v. Huntsman Corp., 965 A.2d 715, 723 (Del. Ch. 2008) (granting request for expedited proceedings and holding trial two months after filing of complaint); In re IBP, 789 A.2d at 23 n.1 (hearing trial on the question of whether specific performance was appropriate after parties agreed to expedite proceedings).

[33] See, e.g., Greystone Staffing Inc. v. Goehringer, 2006 WL 3802202, at *4 (N.Y. Sup. Ct. Nov. 27, 2006).

[34] See, e.g., Uhlfelder v. Weinshall, 810 N.Y.S. 2d 275, 282 (N.Y. Sup. Ct. 2005).

[35] See N.Y. C.P.L.R. 3213 (permitting party to file a motion for summary judgment in lieu of a complaint when the action "is based upon an instrument for the payment of money only or upon any judgment").

[36] See N.Y. Ct. Rules § 202.70(g) (Rule 9 of the rules of practice for the Commercial Division).

[37] See In re IBP, 789 A.2d at 52.

[38] For example, some courts in Delaware have found these provisions are entitled to weight but are "not dispositive," Flight Options Int'l Inc. v. Flight Options LLC, 2005 WL 5756537, at *10 (Del. Ch. July 11, 2005), while others have found they "alone suffice[]" to establish irreparable harm, Vitalink Pharmacy Servs. v. Grancare Inc., 1997 WL 458494, at *9 (Del. Ch. Aug. 7, 1997). In New York, some courts have paid little heed to such provisions, see Agee v. Paramount Commc'ns Inc., 932 F. Supp. 85, 88 n.4 (S.D.N.Y. 1996), while others afford them "great weight," Alpha Capital Aktiengesellschaft v. Advanced Viral Research Corp., 2003 WL 328302, at *5 (S.D.N.Y. Feb. 11, 2003) (citations omitted).

[39] In United Rentals Inc. v. RAM Holdings Inc., for example, the buyer and seller entered into a merger agreement providing that the termination fee was the "sole and exclusive" remedy for any loss or

damage suffered as a result of termination. 937 A.2d 810, 816 (Del. Ch. 2007). Looking to the contractual language and the parties’ actions throughout the negotiating process, the court held that specific performance was not an available remedy. See id. at 836.