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“No Way Out”
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CRAVATH, SWAINE & MOORE LLP

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Private Equity deals of the year

U.S.

NO WAY OUT

BRISTOL-MYERS DEMANDED A DEGREE OF DEAL CERTAINTY WHEN IT AUCTIONED ITS CONVA TEC UNIT

by David Marcus

In the largest leveraged buyout announced this year, **Nordic Capital** and **Avista Capital Partners** agreed to purchase **Bristol-Myers Squibb Co.**'s ConvaTec wound-therapeutics and ostomy unit for \$4.1 billion on May 2. Like every other seller contemplating the large LBOs that have crumbled in the last year, Bristol-Myers emphasized deal certainty in running its auction for ConvaTec. And with both private equity investors and strategic buyers participating, the robust auction created negotiating leverage for Bristol-Myers, says Todd Giardinelli, a managing director in **Morgan Stanley's** M&A group who helped advise Bristol-Myers.

Last year, many companies that agreed to LBOs trumpeted that their deals weren't subject to financing contingencies, only to learn the hard way that they were. To avoid an ugly

surprise, Bristol-Myers stressed its desire for deal certainty to auction participants. "That was a key part of the mantrathatweset to every participant in the auction: value, certainty and timing," says Susan Webster, a partner at **Cravath, Swaine & Moore LLP** in New York who led Bristol-Myers' legal team.

New York-based Avista and Nordic, which has offices in Stockholm, Copenhagen and Helsinki, were given little opportunity to walk from their \$2.1 billion equity commitment. The size of the equity check—at more than 50% of the deal's value—was significant.

Critically, the merger agreement

gives Bristol-Myers the right to seek specific performance from the buyers—to sue them to fulfill their

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agreement to provide equity financing.

The merger agreements in many of the buyouts that collapsed last year, such as **SLM Corp.** and **Harman International Industries Inc.**, explicitly

allowed buyers to walk for any reason upon payment of a breakup fee.

Furthermore, the buyers explicitly agreed that their "obligations

to consummate the transaction are not conditioned upon the availability

or consummation of the debt financing or receipt of the proceeds therefrom.” In short, Avista and Nordic were forced to get ironclad financing commitments from banks.

There were instances when, even amid opposition from banks, the sponsors went through with a deal anyway, as happened in the dispute over the **Clear Channel Communications Inc.** LBO. But the banks’ unease with a deal makes it easier for an LBO shop to abandon it. To avoid that fate, Bristol-Myers and the buyers imported a U.K. concept, called certain funds financing, in which a bank gives an irrevocable commitment. The parties lined up a consortium led by **J.P. Morgan Chase & Co.**, including seven European financial institutions.

It helped that Nordic knew ConvaTec’s sector from its previous ownership of **Mölnlycke Health Care Group**, Giardinelli notes. Nordic sold the business to **Apax Partners Worldwide LLP** in 2005 for \$1.2 billion, and Apax then sold it to **Investor AB** and Morgan Stanley Principal Investments Inc.

“In the U.S., it would be unusual that at the time the acquisition agreement was signed that you would have an existing loan agreement,” says Webster. “You would have

a commitment letter with material terms. Here, there is an actual, signed agreement. That’s a major difference. The other difference is that generally there would be substantially less conditionality in the certain funds-style financing.”

Not only is the deal being financed with “certain funds”; the merger agreement allows Bristol-Myers to force Avista and Nordic “to enforce [their] rights under any of the financing letters.” Webster says that’s only a modest expansion of the usual language on the point in M&A agreements. Still, she adds, “we wanted to be crystal clear on the point.”

Bristol-Myers’ success in getting the certainty it wanted is unusual. Of the \$1 billion-plus U.S. buyouts announced since Aug. 1, only **H&R Block Inc.**’s sale of Option One Mortgage Corp. to **WL Ross & Co. LLC** contains similar terms, though that deal contains a financing out. In the past few years, many companies lucky enough to attract interest from more than one PE firm pushed for a better price rather than better terms. This year, as ConvaTec shows, sellers are placing a higher premium on deal certainty. ■



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