

Jennifer Wisinski Authors Cover Story in Practical Law Journal: Drafting and Negotiating Financing Provisions in Mergers

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For both sides in a public company merger to come together, the merger agreement must be carefully drafted to avoid the risk of a financing failure, which can have severe consequences for both the buyer and the target company. Counsel must understand how commonly used financing provisions in the merger agreement can mitigate the risk of a financing failure, as well as how the commitment letter and the merger agreement are connected.

Buyers routinely finance some or all of the costs to acquire a target company with committed financing. In these mergers, it is common for buyers to execute binding commitment letters with debt financing parties and, in the case of private equity sponsors, equity financing parties in connection with the execution of the merger agreement. The merger agreement typically also includes representations, covenants, and other provisions relating to the commitment letters and the financing.

The financing provisions contained in the merger agreement are critical to the target company from a deal certainty perspective. Without these provisions, the target company has less certainty that the buyer will have the necessary funds available to close the transaction. A failed transaction often has detrimental consequences for a target company. For example, the target company may incur significant out-of-pocket expenses and lose customers or employees due to the uncertainty of its sale, making an alternative transaction with another buyer either impossible or possible only at a lower price.

Excerpted from the April/May issue of *Practical Law Journal*. To read the full article, click on the PDF below or click [here](#).

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