9. Termination

9.1 TERMINATION EVENTS

By notice given prior to or at the Closing, subject to Section 9.2, this Agreement may be terminated as follows:

(a) by Buyer if a material Breach of any provision of this Agreement has been committed by Seller or Shareholders and such Breach has not been waived by Buyer;

(b) by Seller if a material Breach of any provision of this Agreement has been committed by Buyer and such Breach has not been waived by Seller;

(c) by Buyer if any condition in Article 7 has not been satisfied as of the date specified for Closing in the first sentence of Section 2.6 or if satisfaction of such a condition by such date is or becomes impossible (other than through the failure of Buyer to comply with its obligations under this Agreement), and Buyer has not waived such condition on or before such date;

(d) by Seller if any condition in Article 8 has not been satisfied as of the date specified for Closing in the first sentence of Section 2.6 or if satisfaction of such a condition by such date is or becomes impossible (other than through the failure of Seller or the Shareholders to comply with their obligations under this Agreement), and Seller has not waived such condition on or before such date;

(e) by mutual consent of Buyer and Seller;

(f) by Buyer if the Closing has not occurred on or before _____, or such later date as the parties may agree upon, unless the Buyer is in material Breach of this Agreement; or

(g) by Seller if the Closing has not occurred on or before _____, or such later date as the parties may agree upon, unless the Seller or Shareholders are in material Breach of this Agreement.

COMMENT

Under basic principles of contract law, one party has the right to terminate its obligations under an agreement in the event of a material breach by the other party or the nonfulfillment of a condition precedent to the terminating party's obligation to perform. An acquisition agreement does not require a special provision simply to con-

firm this principle. Section 9.1, however, serves two additional purposes. First, it makes clear that the nondefaulting party may terminate its further obligations under the Model Agreement before the Closing if it is clear that a condition to that party's obligations cannot be fulfilled by the calendar date set for the Closing. Second, it confirms that the right of a party to terminate the acquisition agreement does not necessarily mean that the parties do not have continuing liabilities and obligations to each other, especially if one party has breached the agreement.

The first basis for termination is straightforward—one party may terminate its obligations under the acquisition agreement if the other party has committed a material default or breach. Although there may be a dispute between the parties that results in litigation, this provision makes clear that the nondefaulting party can walk away from the acquisition if the other party has committed a material breach. To the extent that there is any ambiguity in the law of contracts that might require that the parties consummate the acquisition and litigate over damages later, this provision in combination with Section 9.2 should eliminate that ambiguity.

Under subsections (c) and (d), each party has the right to terminate if conditions to the terminating party's obligation to close are not fulfilled unless such nonfulfillment has been caused by the terminating party. Unlike subsections (a) and (b), these provisions enable a party to terminate the agreement without regard to whether the other party is at fault if one or more of the conditions to Closing in Articles 7 and 8 are unfulfilled. For example, it is a condition to each party's obligation to close that the representations and warranties of the other party be correct at the Closing (see Sections 7.1 and 8.1). This condition might fail due to outside forces over which neither party has control, such as a significant new lawsuit. The party for whose benefit such a condition was provided should have the right to terminate its obligations under the agreement, and subsections (b) and (d) provide this right. If the condition cannot be fulfilled in the future, that party need not wait until the scheduled closing date to exercise its right to terminate. Also, unlike subsections (a) and (b), subsections (c) and (d) have no materiality test. The materiality and reasonableness qualifications, where appropriate, are incorporated into the closing conditions of Articles 7 and 8.

Subsections (a), (b), (c) and (d) may overlap to some extent in that the breach of a representation will often also result in the failure to satisfy a condition, and neither provision contains a right by the breaching party to cure the Breach. Either party (more likely the seller) may suggest, however, that the nonbreaching party should be unable to terminate the agreement if the breaching party cures all breaches before the scheduled closing date. This may be reasonable in some circumstances, but both parties (especially the buyer) should carefully consider the ramifications of giving the other party a blanket right to cure any breaches regardless of their nature.

The third basis for termination, the mutual consent of the parties, makes clear that the parties do not the need the consent of the shareholders or any third-party beneficiaries (despite the disclaimer of any third-party beneficiaries in Section 13.9) to terminate the acquisition agreement.

The final basis for termination is the "drop-dead" date provision. Section 2.6 provides that the Closing will take place on the later of a specified date or the expiration of the HSR waiting period. Section 2.6 states that failure to close on the designated Closing Date does not, by itself, constitute a termination of the obligations under the acquisition agreement. Subsections (f) and (g) of Section 9.1 complement Section 2.6 by enabling the parties to choose a date beyond which either party may call off the deal simply because it has taken too long to get it done. Again, like subsections (c) and (d), this right of termination does not depend upon the fault of one party. Of course, if there is fault, Section 9.2 preserves the rights of the party not at fault. Even if no one

is at fault, however, a nonbreaching party should be entitled to call a halt to the acquisition at some outside date. Sometimes the drop-dead date will be obvious from the circumstances of the acquisition. In other cases, it may be quite arbitrary. In any event, it is a good idea for the parties to resolve the issue when the acquisition agreement is signed.

The parties may negotiate and agree that other events or situations will permit one or both of them to terminate the acquisition agreement. If so, it will be preferable to add these events or situations to the list of "termination events" to avoid any concern about whether Article 9 is exclusive as to the right to terminate and, therefore, overrides any other provision of the acquisition agreement regarding termination.

Such events or situations are similar to the types of matters that are customarily set as conditions to the closing but are of sufficient importance to one party or the other that such party does not want to wait until the closing date to determine whether the condition has occurred, thus avoiding continuing expense and effort in the transaction. The kinds of events and situations a buyer might wish to specify as giving it a right to terminate earlier than the closing date include the buyer's inability to conclude an employment arrangement with one or more key persons on the seller's staff, the buyer's dissatisfaction with something revealed in its due diligence investigation or material damage to or destruction of a significant asset or portion of the assets. The seller might seek the right to terminate earlier than the closing date due to the buyer's inability to arrange its acquisition financing.

9.2 EFFECT OF TERMINATION

Each party's right of termination under Section 9.1 is in addition to any other rights it may have under this Agreement or otherwise, and the exercise of such right of termination will not be an election of remedies. If this Agreement is terminated pursuant to Section 9.1, all obligations of the parties under this Agreement will terminate, except that the obligations of the parties in this Section 9.2 and Articles 12 and 13 (except for those in Section 13.5) will survive, provided, however, that, if this Agreement is terminated because of a Breach of this Agreement by the nonterminating party or because one or more of the conditions to the terminating party's obligations under this Agreement is not satisfied as a result of the party's failure to comply with its obligations under this Agreement, the terminating party's right to pursue all legal remedies will survive such termination unimpaired.

COMMENT

Section 9.2 provides that, if the acquisition agreement is terminated through no fault of the nonterminating party, neither party has any further obligations under the acquisition agreement. The exceptions acknowledge that the parties will have continuing obligations to pay their own expenses (see Section 13.1) and to preserve the confidentiality of the other party's information (see Article 12).

The parties should consider the possibility of preserving the continued viability of other provisions in the acquisition agreement. For example, Sections 3.30 and 4.4 are reciprocal representations by the parties that there are no broker's fees. Although any broker's fee most likely would be due only upon the successful closing of the acquisition, it is possible that a broker will demand payment of a fee after termination, in which case the parties may want this representation to continue in full force and effect.

If the terminating party asserts that the acquisition agreement has been terminated due to a breach by the other party, the terminating party's rights are preserved under

Section 9.2. This provision deals only with the effect of termination by a party under the terms of this section and does not define the rights and liabilities of the parties under the acquisition agreement except in the context of a termination provided for in Section 9.1.

Many times the parties will negotiate specific consequences or remedies that will flow from and be available to a party in the event of a termination of the acquisition agreement rather than rely on the preservation of their general legal and equitable rights and remedies. Such remedies will typically differentiate between a termination that is based upon the fault or breach of a party and a termination that is not. In some transactions, the parties may agree to relieve each other of consequential or punitive damages.

In the former category, the parties may negotiate a liquidated-damages remedy or may agree that, in lieu of damages and an election to terminate, the nonbreaching party (or party without fault) may pursue specific performance of the acquisition agreement. Such remedies must be carefully drafted and comply with any applicable state statutory and case law governing such remedies.

In the latter category, the parties may provide for a deposit by the buyer to be paid to the seller if there is a termination of the acquisition agreement by the buyer without fault on the part of the seller. In lieu of a forfeitable deposit, the parties may agree that, in the event of a termination of the acquisition agreement pursuant to the right of a party (often the buyer), the terminating party will reimburse the other party (often the seller) if not in default for some or all of the expenses it has incurred in the transaction, such as a costs for environmental studies, the HSR filing fee or fees of special consultants and counsel.