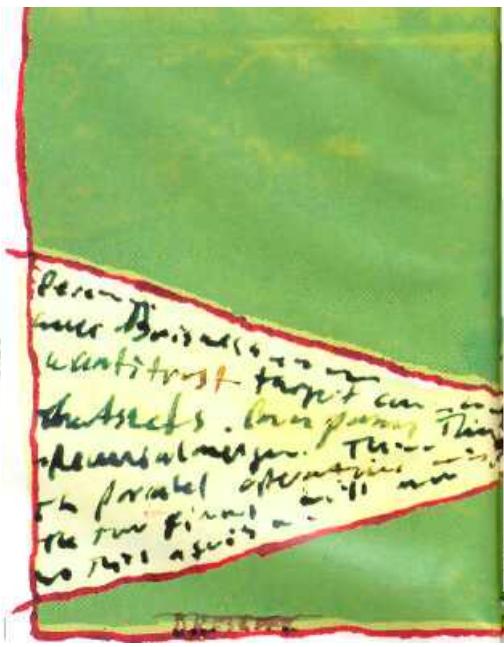
LET'S STILL MAKE A DEAL

Credit markets have yet to heal. The players are now more demanding. But M&A seems to be showing signs of life



By Jessica Silver-Greenberg

After months of heated negotiations, two lawsuits, and $5 billion in lost market value, the buyout of radio chain Clear Channel Communications appears to be on track to close by yearend—almost two years after it was announced in late 2006. Does this mean the roughly $100 billion worth of private equity deals that have clogged the markets for months, including Canadian telecom BCE, casino owner Penn National Gaming, and retailer Hugo Boss, will finally begin to flow?

The new terms hashed out for the Clear Channel buyout may offer a blueprint for dealmaking amid the credit crunch. For pending deals hammered out during headier times, like Clear Channel, the parties will either return to the negotiating table or back out, scenarios that are equally likely. On future deals, industry experts say, breakup fees will rise, buyers and sellers will push for more airtight contracts, and lenders will insist that future owners have more skin in the game, requiring additional equity and cash for purchases. "The fact that a bank threatened to walk away and then ultimately settled should give people some comfort," says Jill Fisch, a professor of corporate law at Fordham University School of Law.

The good news is that deals are getting done again—albeit at altered prices and terms. And there are other signs the markets are emerging from their darkest days. On May 20, Britain's largest home lender, HBOS, sold roughly $1 billion in highly rated mortgage-backed securities, while U.S. financing firm AmeriCredit had a successful offering of $750 million worth of bonds backed by risky auto loans. That doesn't mean the financial system won't suffer setbacks in the coming months if corporate defaults rise or the economy worsens. But the doom and gloom that once clouded the markets appears to be lifting.

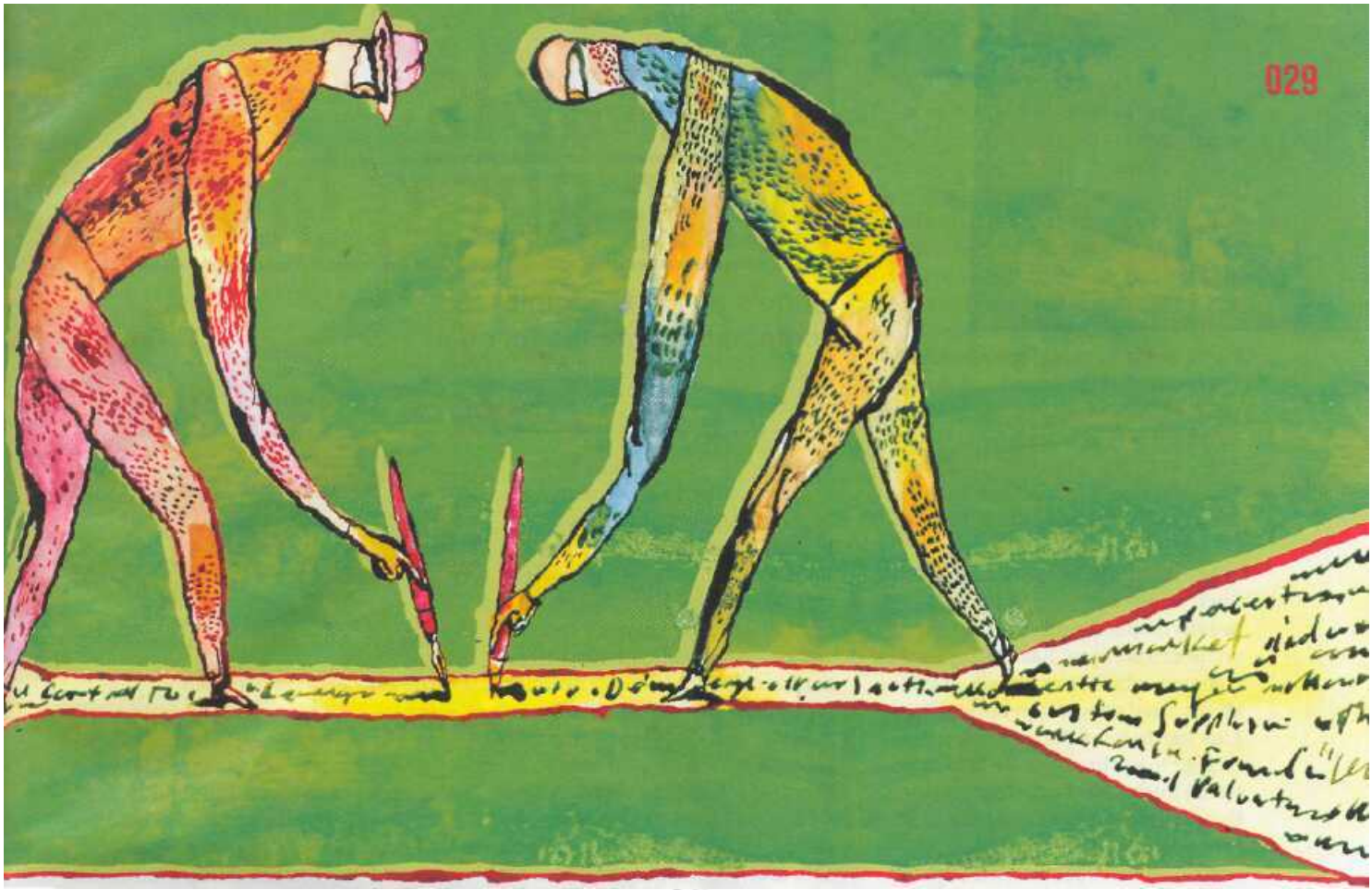
In the case of Clear Channel, all sides begrudgingly found a middle ground. The board agreed on May 13 to a new $25.8 billion price tag, 8% lower than the original one, and a higher interest rate on the company's debt. But if the buyout isn't completed in the next few months, the private equity buyers, Bain Capital and THL Partners, will have to pony up more money to shareholders. And the buyers and lenders, a consortium of six Wall Street banks, must immediately set aside cash and other assets to cover the full amount of the deal while regulators mull it over. "Without the certainty associated with 'cash on demand,' [the deal] simply

IN THE WINGS

Around $100 billion worth of buyouts are still waiting to close. Here are some of the largest:

BUYOUT TARGET	SIZE (billions)	DATE ANNOUNCED
BCE	$46.8	June, 2007
Clear Channel	25.8	November, 2006
Penn National Gaming	8.7	June, 2007
Actavis Group	6.4	May, 2007
Hugo Boss	4.2	June, 2007

Data: Thomson Reuters



would never have gotten done," Clear Channel's chief legal officer Andrew Levin wrote in an e-mail to his team the day after the new terms were decided. "While some stories seem focused on what we gave up... we believe that what we got in return for our shareholders was far more valuable: cash on the barrelhead for one of the biggest LBOs in history."

CASH, ONCE **AGAIN, IS KING**

It's not clear how many other pending buyouts are destined for such a happy ending. Just as Clear Channel was coming together in mid-May, the $1.3 billion management-led buyout of Cumulus Media, the No. 2 radio operator, fell apart. Meanwhile, Ontario Teachers' Pension Plan, Madison Dearborn Partners, and Providence Equity Partners were negotiating as of press time to see if they could find more acceptable terms for their $46.8 billion buyout of the Canadian telecom BCE, announced almost a year ago. "With a shift in the credit markets, we are witnessing banks and buyers who are not willing to go along with the former terms of the deal," says Bruce Rafael, a partner at Boston-based law firm Edwards Angell Palmer & Dodge.

With many private equity firms battling it out, corporate buyers may have the upper hand during this period of M&A. The prices of many potential targets have dropped, allowing those with cash at hand to swoop in. And strategic players have plenty of that: The companies in the Standard & Poor's 50O-stock index have a total of $1.3 trillion in cash reserves, 56% more than at the peak of the last wave of M&A activity in 2000, according to the research firm Boston Consulting Group. "We are seeing major advantages for strategic buyers," says Marilyn Sonnie, a partner with law firm Jones Day who advised electronics maker Harmon International Industries on its failed buyout by Kohlberg Kravis Roberts. "These are buyers who can come to the table and give a firm commitment."

Of course, companies have to be willing to spend their money. And so far many cash-rich players seem content to sit on the sidelines, especially in a weak economy. Still, there are a few who are willing to flex their newfound muscle. For example, Mars Inc. recently agreed to buy rival candymaker Wm. Wrigley Jr. Co. for $23 billion in cash.

For companies that make deals in the coming months, the agreements are likely to leave no room for interpreta-

LINKS

Private Equity: Defoliated?
Another casualty of the credit crunch: green buyouts. An Apr. 14 report from industry research firm New Energy Finance found that the amount of private equity money going into wind, solar, and other clean energy projects totaled $878 million in the first quarter of 2008, down from $2.5 billion in the same period last year. Venture capital investments, though, rose from $668 million to $1 billion during that time.

tion. Take the so-called MAC—or material adverse change— clauses, a key part of contracts that gives a buyer the right to walk away from a deal without having to pay a breakup fee if the financial position of its target deteriorates significantly. Now that the era of easy money has ended, buyers will likely want those clauses to be as broad as possible, giving them a way to wriggle out of deals. At the same time, sellers will try to push for a host of exceptions that narrow the escape hatch. "Sellers don't want to be left at the altar," says Dennis J. Block, an M&A attorney with Cadwalader, Wickersham& Taft.

TOUGHENED-UP TERMS

Such terms have been weighing heavily on pending deals since the credit crisis began. Back in September, Genesco, which runs a chain of shoe stores, sued prospective suitor Finish Line Inc. to force the sports apparel retailer to go through with an acquisition. Finish Line wanted out, arguing that Genesco's earnings had headed south, thereby triggering the MAC clause. But a judge ruled the deal had to go forward, saying the entire industry, including Finish Line, had suffered a financial hit—an exclusion under the original contract. Genesco and Finish Line did not return calls for comment.

It looks like other terms will start to change as well. While breakup fees have historically run around *2%* to 3% of the total value of the deal, they could go up to 7% to 8%. Debt is also pricier, with lenders likely demanding interest rates that run several percentage points higher than at the peak of the buyout boom in 2007.

Banks also want to make that debt easier to sell to investors, which has been a problem of late. To accomplish that, they may choose to issue the loans or bonds at 98$ on the dollar right off the bat. Borrowers get less financing, but investors buy the debt at an automatic discount, making it more attractive. "The lenders want to know they have enough flexibility," says Scott J. Troeller, a partner at Veronis Suhler Stevenson, a private equity firm that specializes in media. Says M&A attorney Sonnie: "It's a reaction to the uncertainty of the times." BW

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