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Private Financing of Entrepreneurships: Sources of Private Financing; Guarantees (Required Personal or Otherwise); When to Go Public (Pros and Cons); Rights of Financing Parties; Defaults; Capital Formation for Entrepreneurial Ventures; Tax Considerations

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percent. Now, Warren Buffet has never done that and rarely has any investor that I know of. His background is a B.A. in Economics from Concordia University in Montreal, an M.B.A. in Finance from Wharton, and he is a certified financial analyst.

I hope Mr. Cohen will tell us something about how the local medical research establishment in Cleveland, which is so well known and primarily led by The Cleveland Clinic, contributes to his entrepreneurial activities in this field.

Mr. David Woolford is a closet Yank. He was born in the U.S. and ended up in Canada. He is a partner at Cassels, Brock & Blackwell LLP, a major Toronto firm and one of the sponsors of this organization, the Canada-U.S. Law Institute. He specializes in business law, corporate finance, e-business, privacy law, and securities law, and especially the development and financing of high tech companies, including many startups in Canada and abroad.

Indeed, David just returned from closing a deal in Germany between a Canadian technology company and a major German partner. He has published extensively on the subject of emerging developments in technology law. He is also an angel investor and a member of the Toronto Angel Group. So he puts his dollars where his legal advice is obviously, and he knows the entrepreneurial game from the inside out as well as just the legal aspect thereof. He is also Chairman and a director of Virox Technologies Inc., and holds various other private directorships and advisory board positions.

So without further ado, Morton, would you care to begin?

UNITED STATES SPEAKER

*Morton A. Cohen**

MR. COHEN: Good afternoon. I really cannot thank you enough for the opportunity to follow Mal Mixon. It is like following Warren Buffet. Let me just say it is just nice to be here.

I walked in here, and the first couple of words I heard were "disputes," and at lunch I heard "conflicts," and that reminded me of an old story about a lawyer who goes hunting in rural Tennessee. The lawyer is duck hunting, and sure enough he shoots a duck, and the duck falls in the farmer's field. The lawyer goes up over the fence to get the duck.

The farmer appears, and gets off his tractor and says, "this duck belongs to me; it is on my land." The lawyer is absolutely indignant and he says, "I am going to sue you. I am a very famous lawyer, and I will sue you and take everything you have." The farmer looks at him, says, "You know, we have a way of settling disputes in Tennessee. We have this three-step rule." The lawyer looks at him and thinks, "I can take on this old cogger." So the farmer then proceeds, and he takes his steel boot and rams it right into the lawyer's groin. And then he turns and rams his boot again into the lawyer's mid drift. The farmer kicks him in the rear and the lawyer falls into a bunch of cow pod. The lawyer is absolutely shocked, and he manages to stagger to his feet and wipes his face on his sleeve, and he says, "So now it is my turn," at which point the farmer says, "Yeah, but you can have the duck."

I want to give you a panorama of American financing that is emerging today. First of all, let me say that we have financed private companies, and we spent about ten years in financing startups and developing companies before we got into private placements. Let me just start with the banking system.

The first place you go if you are an entrepreneur is a banking institution. The banking system is different in the United States than in Canada. Canada has major banks that really control the environment, whereas the United States has multiple banks and has a variety of loans, and recently a lot of them have bad credits.

But banks are all the same: they want your right arm and sign. The one difference in Canada is, if you default, if you screw the bank, you do not get any more loans. In the United States, if you screw a bank, you can always move to Wyoming, Florida, or Southern California and start all over again.

So there is a difference in the way banks tend to treat entrepreneurial investors.

When you get to angel investors – and when I say this, I want you to know that I have the benefit of being in finance on both sides of the border, probably equal time in my business career – this country has a tremendous benefit. Perhaps one of the reasons why it is more entrepreneurial is because the angel investors have larger pools of capital,[1] they are high net worth

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[*] Mort Cohen joined Clarion in 1981 as chairman of Clarion Capital Corporation, which was then a closed-end mutual fund investing in public and privately-held small companies through private placements. After becoming CEO and assuming sole management of the fund in 1982, he had the distinction of taking the only Small Business Investment Company out of bankruptcy in the history of the Program. Clarion Capital today is an active Small Business Investment Company specializing in private placements in public companies. Mr. Cohen purchased the fund in 1987 and took it private in a leveraged buyout in 1989. In 1994, Mr. Cohen started Clarion Management Ltd., which managed Clarion Partners, L.P., a domestic hedge fund, Clarion Offshore Fund Ltd., an offshore hedge fund, and Dynamic Equity Hedge Fund, a Canadian-based hedge fund. In 2006, Mr. Cohen liquidated Clarion Partners, L.P. and discontinued managing Dynamic Equity Hedge Fund. He continues to manage Clarion Offshore Fund, Ltd. The three hedge funds had approximately $140 million in assets at their peak and generated an approximate 15% return since their inception. Between 1983 and 1989, Mr. Cohen also managed First City Technology Ventures, a venture fund investing in small public companies through private placements, for which he achieved an approximate annual

investors,[2] and the angel investing area is more pronounced and has more experience.[3] This country has a legacy of speculation. Canada does not have

investment rate of return of 25 percent. Additionally, as chairman and CEO, Mr. Cohen took Childers Products, a specialty manufacturing company, from $2 million in losses to $5 million in profits and industry dominance before selling it in 1989 to a New York-based leveraged buyout group. Prior to joining Clarion, Mr. Cohen operated MAC Management, a Canadian-based mergers and acquisitions consulting practice. Among his clients were large Canadian companies, such as Reitman's, Ltd., Hiram Walker, Ivaco Industries, and First City Financial, Ltd. (the Belzberg Family) for which he researched major U.S. acquisition candidates. Earlier, Mr. Cohen was president of Yorkton Securities, then an institutional boutique, which is today one of Canada's leading securities firms. As such, he was responsible for the firm's research department and creation of an institutional research unit. During this time, he was named to the Canadian Institutional Investor All-Star List in Distilling two years running. Before that, Mr. Cohen managed research departments and serviced institutional brokerage clients for a number of Canadian securities firms including: Kippen & Co., which has since been acquired by Nesbitt Burns and is now the largest Canadian securities firm; Baker Weeks, for which he was vice president and the premier U.S. institutional salesman; and Merrill Lynch, for which he was the top performing salesperson in Canada. Mr. Cohen is currently a member of the board of directors of Cohesant Technologies, Inc. Formerly, he was governor of the Montreal Stock Exchange (1972-73), a member of the board of governors of the National Association of Small Business Investment Companies (1990-92), and a member of the boards of directors of Sanyo-Canada, Adac Laboratories, Abaxis Co., Alexander Energy, DHB Industries, Inc., and Zemex Corporation. He also served on a Senate committee that rewrote the legislation for the Small Business Investment Company Program. Mr. Cohen was a member of the Visiting Committee of the Weatherhead Business School of Case Western Reserve University in Cleveland, Ohio and a Trustee of The Jewish Federation of Cleveland. He has also been a major contributor to various Cleveland institutions and the Miriam Home Foundation of Montreal. Mr. Cohen is Chairman of the Investment Committee of the Jewish Community Federation of Cleveland, which has over $500 million in investment assets. A Chartered Financial Analyst, Mr. Cohen holds an MBA in Finance from the Wharton School at the University of Pennsylvania and a BA in Economics from Concordia University in Montreal. Mr. Cohen has an extensive background in Healthcare and Life Sciences investments having focused the portfolio of Clarion Capital in these areas over the past eight years. Among his present and past investments are Conceptus, Genelabs, NexMed, Inc., Johnson & Johnson, ARIAD Pharmaceuticals, Cepheid, Intuitive Surgical, Abaxis, ADAC Laboratories, Maxim Pharmaceuticals, and a large number of other investments spanning the Healthcare field. During the past five years, Mr. Cohen's portfolio investments in this sector have generated an internal rate of return of over 200%. He is also the author of a number of financial articles and has been published and quoted over the years in *Barron's*, *Fortune*, *Business Week*, *The Canadian Financial Post*, *The Wall Street Journal*, *Crain's Cleveland Business*, and *The Cleveland Plain Dealer*.

[1] *See generally* David Rose, *Current Trends in Angel Investing*, AMERICANVENTUREMAGAIZNE.COM, http://americanventuremagazine.com/articles/223 (last visited Oct. 19, 2007) ("Angel investments for the first half of 2005 alone totaled over $11 billion" in the United States).

[2] *See generally id.* ("[T]he number of accredited investors who are entering the angel world is increasing each year by double-digit percentages.").

[3] *See generally* R.K. Honeyman, *The Benefits of Utilizing Automation for Efficient Deal Flow And Capital Procurement*, NUQUEST CAPITAL 3 (2007), http://www.nuquestinc.com/UserDyn/NuQuest/white%20paper%20_3.pdf ("The angel

the same legacy of speculation. This is a country of the J. Goulds, the Fisks, the Mellons and the Carnegies.

Angel investing is changing. Groups are becoming more sophisticated. You have family offices. You have, to some degree, even ethnic partnerships that are emerging. For instance, in California, there is a strong ethnic partnership among ex-Indians - I don't mean Native Indians, I mean Indians who have immigrated - who tend to finance other Indians.

So you have the emergence of a professional angel class here, whereas in Canada, I am not sure if it exists, other than Calgary and the far west, where you have a large number of oil people who deal with finance companies.

In the United States we have less Government intervention that sustains entrepreneurship than in Canada,[4] but we do have something called the Small Business Association ("SBA"), which guarantees bank loans.[5]

The SBA provides guaranteed loans to corporations,[6] the government carries the banks 85 percent or 50 percent,[7] the latter being the norm because there is too much red tape to try to get the 85 percent loan. But the SBA program has been very good in terms of financing small entrepreneurs.[8]

How did the venture capital start in the United States? It started with the Small Business Investment Company ("SBIC") program in 1958.[9] It nurtured

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investor marketplace is robust, with substantial amounts of capital looking to find homes for worthy ventures.").

[4] *See generally* Sound too Good To Be True? It Is!!, Fort Worth Business Assistance Center, http://www.fwbac.com/index.asp?content=325 (last visited Oct. 25, 2007) (describing that opportunities for federal assistance in small business is limited).

[5] *See* Loan Fact Sheet, United States Small Business Administration, http://www.sba.gov/idc/groups/public/documents/wa_seattle/sea2007loanfactsheetmar22.pdf (last visited Oct. 14, 2007) (explaining the process of Small Business Administration's guarantee loan program).

[6] *See* SBA and EX-IM Bank Co-Guarantee Program, United States Small Business Association, http://www.sba.gov/idc/groups/public/documents/sba_program_office/oit_sba_im_desc.pdf (last visited Oct. 14, 2007) ("Any sole proprietorship, partnership or corporation, which operates as a going concern and meets SBA's definition of an eligible small business concern," can receive guaranteed loans).

[7] SBA's Role: Guaranty Percents, United States Small Business Administration, http://www.sba.gov/services/financialassistance/basics/sbarole/serv_7a_guarantyperc.html (last visited Nov. 3, 2007).

[8] *See* Will Kester, *SBA-backed loans: Good for entrepreneurs?*, HELIUM, http://www.helium.com/tm/466307/small-business-assoc-backed (last visited Oct. 22, 2007) ("The idea of SBA backed loans is a great concept in a country that encourages entrepreneurs, and it has allowed many start-up ventures that would have never had the chance to succeed without it").

[9] *See Venture Capital Policy Review: United States* 3, (Organization for Economic Co-operation and Development, Working Paper No. 12, 2003) *available at* http://www.olis.oecd.org/olis/2003doc.nsf/809a2d78518a8277c125685d005300b2/c1a8e0ab81412decc1256d89004fd86f/$FILE/JT00148189.PDF ("The US government played a

venture capital, and produced the original venture capitalists. Today SBIC has made approximately 3,674 investments and has raised approximately $2,797 billion in equity and debt capital investments.[10]

SBICs either pay interest to the Government,[11] or alternatively, the SBICs partner with the Government.[12] I was involved in writing the legislation for it. Up until this legislation, 44 percent of all the SBICs failed.

The Government supports entrepreneurship, but entrepreneurship does not necessarily ensure success. Venture capitalism in this country has a stellar, but varied record. If you go back to 2000, there were 7,812 venture capital deals and these deals raised approximately $104,379 billion.[13] This number is staggering.

The year 2000 was absolutely a stellar year. Since then, we have had a decline, but recently, there has been a turn around. In 2004, we had approximately 3,072 venture capital deals with the average deal amounting to $7 million.[14] The total amount of investment was short of the record set in the year 2000, but it is growing recently. The number of venture capital deals in existence has grown.[15] Currently, you have approximately 915 venture capital firms, [16] the number of first-time venture capital funds is

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significant role in the development of the venture capital market, starting in 1958 to encourage the private disbursement of large amounts of capital through the *Small Business Investment Company* (SBIC) program and various technology development schemes").

[10] *See generally* An Introduction to the U.S. Small Business Administration (SBA), Office of Entrepreneurial Development, *available tat* http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_abt_overview_english.doc (last visited Oct. 14, 2007) ("In Fiscal Year 2006, the SBIC Program produced $2.9 billion in equity and debt capital investments during the year. The program's licensed SBICs made approximately 4,000 investments in approximately 2,121 different small businesses").

[11] *See generally* Finding Money! Small Business Investment Corporations, Abc's of Small Business, http://www.abcsmallbiz.com/bizbasics/moneymatters/finding_money.html (last visited Oct. 14, 2007) (explaining the differences between SBICs and local banks are that local banks do not have the government investing with them).

[12] *See generally* The U.S. Small Business Investment Company Program: History and Current Highlights, National Association of Small Business Investment Companies, http://www.nasbic.org/about/sbic_history_highlights.cfm (last visited Oct. 15, 2007) ("The SBIC program is a unique partnership between the public and private sectors").

[13] *See* Eric Pakurar, *The New Next: Proceed With Caution*, MEDIADAILYNEWS, April 17, 2007, http://blogs.mediapost.com/mdn_commentary/?p=937 (comparing venture capitalism in 2000 and 2006).

[14] *See* Industry Statistics, National Venture Capital Association, (2007), http://www.nvca.org/ffax.html (depicting venture capital statistics for years 2004 to 2007).

[15] *See* Pakurar, *supra* note 13 ("According to the National Venture Capital Association, some $26 billion was invested in 2006 through VC channels; more deals were done than in any year since 2001").

[16] *See* MONEYTREE SURVEY, NATIONAL VENTURE CAPITAL ASSOCIATION, PRICEWATERHOUSECOOPERS AND THOMSON FINANCIAL, Q2 2007 US RESULTS 1 (2007), https://www.pwcmoneytree.com/MTPublic/ns/moneytree/filesource/exhibits/2Q07MoneyTree

approximately 40,[17] and capital assets under management is approximately $285 billion.[18] So we raised a lot of money. You can see 2000 was one heck of a vintage year.

And because of what happened, because so much money went in to venture capital, the rates of return went down. So as a consequence, we had a number of years where it just took the industry a long time to build up.

Consequently, early stage investing has diminished dramatically, and alternatively, expansion development and later stage investment has become more popular.[19] It has become harder to raise early stage money, even in the technology sector.[20] It has become more onerous. On the whole, venture capitalists are seen as more professional than angels, as we said here before, and to some extent angels are regarded as dumb money and venture capitalists as smart money. Venture capitalists, as we all know, tend to want more corporate governance and control in certain cases.[21] There are always constraints, but nevertheless, the venture capital industry has expanded over the years.

The number of dollars going into various segments of the industry has not changed significantly. In 2005, computer software was invested in significantly,[22] while biotechnology received a reasonable amount of

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_Report.pdf (stating that venture capitalists have invested $7.1 billion dollars in 977 deals).

[17] *See generally* Emily Mendell, Matthew Toole & Sandy Anglin, *Venture Capital Fundraising Activity Slows in 3Q 2007*, NATIONAL VENTURE CAPITAL ASSOCIATION, THOMSON FINANCIAL 2 (2007) http://www.nvca.org/pdf/Q307VCFundraisingFINAL.pdf (showing the number of new funds in 2007 is 40).

[18] *See* Scott Evans, Executive Vice President TIAA-CREF, Saving Investors Money: Reducing Excessive SEC Fees, Testimony before the Subcommittee on Capital Markets, House Financial Services Committee 1 (Mar. 7, 2001), *available at* http://financialservices.house.gov/media/pdf/030701ev.pdf ("$285 billion in assets under management").

[19] *See generally* Bill Snyder, *Venture Capital Firm Swarming to Late-Stage Investment*, THESTREET.COM (2004), http://www.thestreet.com/tech/billsnyder/10149100.html (explaining that many venture capital firms are preferring to invest in last-stage investment opportunities).

[20] *See generally* John Cook, *Venture Capital: Angel Investors Guarding Money*, SEATTLEPI.COM, March 8, 2002, http://seattlepi.nwsource.com/venture/61378_vc08.shtml (stating that companies are unable "to attract financing from early-stage angel investors and lacking the customers and revenues necessary to bring in venture capitalists.").

[21] *See generally* Franklin Allen & Wei-ling Song, *Venture Capital and Corporate Governance*, WHARTON 18 (2002), http://fic.wharton.upenn.edu/fic/papers/03/0305.pdf ("It appears that governance matters for the level of venture capital activities across countries.").

[22] *See* Lawrence M. Rausch, *Venture Capital Investment Trends in the United States and Europe*, NATIONAL SCIENCE FOUNDATION (1998), http://www.nsf.gov/statistics/issuebrf/sib99303.htm (stating that in 1995 and 1996, "software was far and away the most favored technology area for venture capital investments."); *see generally* ALLEN & SONG *supra* note 21, at 18 ("In the US venture capital is primarily associated with high technology industries.").

investment,[23] energy received a modest amount of investment,[24] and communications received the most investment.[25] One of the things that you have to understand about the venture capital industry is that as an entrepreneur your chances of raising money if you live in northern California are better than if you live in Cleveland. If you look at the percentage of money, 35.7 percent of all the venture capital deals were done in northern California.[26] That is a staggering amount.

The northeast followed closely, with approximately 27 percent.[27] The reason why the venture capital industry matured in California was due to Stanford University in the south and Berkeley University in the north. These two great learning institutions fed into the venture capital industry.

While you had the biotechnology industry emerging on the West Coast because of these great educational institutions, the same thing was happening in the northeast. The Boston area, needless to say, has a large number of major learning institutions. In order to engender venture capital, there needs to be a cooperation of learning institutions. This is where ideas and science are born.

The number of venture capital exits has changed dramatically. As a private entrepreneur, when you have taken venture capital money, you may wonder how you will exit. One way is to raise additional money the traditional way, with an initial public offering ("IPO"). This has changed dramatically because the merger and acquisition route has become the major route. As a result, the number of IPOs has not gone up; it has gone down.

And you are going to find out why. There is something that is going on in the United States that does not get much publicity; there is very little written in the press. Entrepreneurs basically do not really understand when they raise money what the exits are, and that the exits are changing dramatically.

We have a limited number of small IPOs in this country because the method of changing and financing small companies is changing dramatically. It is amazing that so few people have picked up on these changes. Companies

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23 *See generally* Rausch, *supra* note 22 ("Medical/health-care-related companies have also attracted large amounts of venture capital.").

24 *See United States Top Target for VC Firms Worldwide*, DELOITTE & TOUCH LLP AND NATIONAL VENTURE CAPITAL ASSN. 4 (2005), http://www.nvca.org/pdf/VC%20Survey%20PR%20FINAL%206-22-05.pdf ("Twelve (12) percent of all VCs surveyed said they are currently focusing on investments in energy/environment.").

25 *See* Rausch, *supra* note 22 (stating that the telecommunications companies have "attracted large amounts of venture capital").

26 *See* MONEYTREE SURVEY, *supra* note 16, at 6 ("Silicon Valley continued to garner the bulk of venture capital dollars, capturing more than 35 percent of the $7.1 billion distributed to US based companies.").

27 *See id.* ("[The] New England Region continued to show a robust market for venture activity.").

are now doing private placements.[28] These private placements were marketing institutions,[29] and so this market is growing.[30]

You have had an increase in 2005 of something like 39 percent. This market raised $27.83 billion, and that is small compared to the venture capital industry, but that is up from $20 billion the year before. This market was almost nonexistent. There were many small companies founded by entrepreneurs who needed exits, and who were not doing the traditional IPO.[31] Rather, they do private investment in public entities or PIPE financing.[32]

These small venture capital backed companies are going one step further and doing reverse merges. Investment bankers in the United States are very creative. These bankers took these venture capital backed companies, and instead of going public through an IPO, found a shell and backed the existing company into it.[33] When these companies go up, you have raised PIPE money.

These new exit strategies for venture capital backed entrepreneurs have caused a huge bonanza for the legal profession. Companies like Shulte Roth have emerged as major players in the legal business. There are also major angel players who are literally unknown, like Feldman, Weinstein, Ballard and Spawn. These companies – Schulte Roth did 60 deals worth $26 billion. As a result, many legal firms are receiving great legal fees. It also has become a new enterprising field for the legal profession.

By the same token, there are some small venture capital groups that are specialized in businesses. For example, a firm like Iroquois Capital did 117

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[28] *See* Darrell Zahorsky, *Financing Your Business by Private Placement*, ABOUT.COM, http://sbinformation.about.com/cs/creditloans/a/prplacemt.htm (last visited Oct. 14, 2007) ("Private placements are an attractive alternative for growing companies.").

[29] *See id.* (explaining that private placements offer a private market for "business financing without the constraints of taking a company public and conceding control.").

[30] See Zahorsky, *supra* note 28 (stating that private placements are an "attractive alternative").

[31] *See generally* Jennifer Nasri, *Weekly Corporate Growth Report, Firms are Turning to Private Placements over IPOs for Funding*, THE WALL ST. J., May 22, 2000, *available at* http://findarticles.com/p/articles/mi_qa3755/is_200005/ai_n8879800 (explaining that firms are turning to private placements over IPOs for funding).

[32] *See generally Equity Financing Strategies for Micro-Cap and Small-Cap Publicly Traded Companies*, Friedland Capital Inc., 2 (2006), *available at* http://www.friedlandcapital.com/PDFs/Equity%20Financing%20Strategies%20for%20Micro-%20and%20Small-Cap%20%20Companies.pdf (explaining that private investment in public equities, or "PIPE" programs, is one strategy for private placement financing).

[33] *See generally* Stocks-Reverse Mergers, The Investment FAQ (2002), http://invest-faq.com/articles/stock-reverse-merger.html (describing how reverse mergers generally function).

deals last year worth $1 million.[34] This has become a tremendous method of financing, and the rates of return have been substantial.

We have done a lot of medical deals, which do better in the public market, not through the local banks. These medical deals have had substantial rates of return because we were buying later stage companies at cheaper multiples than the venture capitalists further along the technological curve. For example, in Intuitive Surgical, which is a robotic method of surgery, our stock went from $2 to $120. These companies could not get financing in the conventional sense. In the beginning this path to financing was not crowded, so the rates of return were substantial. This has changed because there are new players. This is no longer a niche business. Mutual and venture funds are becoming involved.

We do a number of cross border energy deals. We look for Canadian companies that have expertise in the mining and energy fields and who also have U.S. properties. Using an SBIC, we are limited to companies that are either U.S. or have the majority of their assets in the United States. As a result, we back a number of Canadian companies. These small Canadian companies have a lot of expertise in either the mining or energy fields that you do not find in the United States. We were involved in 13 private placements of public companies last year, and we did two private groups.

Investment bankers have developed another method of financing, called Specialized Acquisition Companies ("SPAC").[35] SPACs benefit the entrepreneur in numerous ways. SPACs are blank check companies, which the investment community has invented.[36] SPACs have three layers of promoters: the investment banking business; the directors and super managers who raise the money, sit on the board and guide the strategic

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[34] *See generally* Press Release, Sagient Research Systems, PlacementTracker Publishes Q3 2005 PIPE Market League Tables (Oct. 25, 2005) *available at* http://www.sagientresearch.com/pt/News/PR10.25.05PTPublishesQ32005League1.htm ("Iroquois Capital, L.P. topped the list of most active institutional investors during the third quarter of 2005.").

[35] *See generally* Kit Roane, *Business Buffet*, U.S. NEWS & WORLD REPORT, Jan. 22, 2006, *available at* http://www.usnews.com/usnews/biztech/articles/060130/30spacs.htm (describing special purpose acquisition company); *see generally* Mike Bernstein, Geller & Company, *SPACs and Reverse Merger Offer Alternatives to Traditional IPOs*, FINANCE AND ACCOUNTING VIEW 1 (2006), http://fandaview.com/archives/pdf/06Winter_CapitalTrends.pdf ("[With] the market for smaller initial public offerings relatively quiet in recent years, some companies are turning to alternatives such as Specified Purpose Acquisition Corporations (SPACs).").

[36] *See generally* Richard Siklos, *Former Media Executives Give New Life to 'Blank Check' Corporations*, THE NEW YORK TIMES, April 13, 2007, at 1, *available at* http://www.nytimes.com/2007/04/23/business/media/23blank.html?_r=2&oref=slogin&oref=slogin (describing that special purpose acquisition companies have a catch, where "investors do not actually know what their money is going to be spent on when they buy shares – hence the 'blank check' designation given by the Securities and Exchange Commission.").

management of the company; and then there is the actual company that will be taken over, which is generally a small entrepreneurial company that wants to get a higher multiple for their stock.[37]

In 2005, SPACs raised $1.2 billion in financing.[38] The prospectuses of these companies, like Cincore and Merrill Lynch, will likely double or probably triple this year. One of these deals went for $276 million.[39]

Another trend in financing entrepreneurs is private equity. I am not sure what private equity really means, and I am not sure what the difference between private equity and leverage buyout is, but anyway, private equity raised $160 billion in financing in 2005,[40] and $190 billion in 2006.[41] The numbers are so staggering it is hard to believe. There are also leveraged buyout funds. They have raised $197.6 billion in financing.[42] I am not sure what the crossover is. This is venture economics, and Money Tree combines these statistics, so the crossover is reasonably close.

How does private equity help entrepreneurs who want to exit? Well, the company is taken private, it is re-circulated, and it is sold back to the public at a higher price. [43] Hertz is an example.[44] Sooner or later this method of

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37 *See generally* Karen Richardson & Peter Lattman, *SPAC Investors are Asked to Buy In – on Faith*, THE WALL ST. J., Feb. 1, 2007, *available at* http://www.post-gazette.com/pg/07032/758636-28.stm (describing generally how special purpose acquisition companies function).

38 *See generally* BLANK CHECK COMPANIES – AN EMERGING INVESTMENT VEHICLE, MAXIM GROUP http://files.irwebpage.com/shipping/articles/BLANK_CHECK_COMPANIES.pdf (last visited Oct. 14, 2007) ("2006 was the year in which the blank check market flourished, with over $2.9 billion in 37 transactions raised, a 50% increase from 2005 with $1.9 billion raised in 28 transactions.").

39 *See generally* Richardson & Lattman, *supra* note 37 ("[In] November, fruit-juice seller Jamba Juice Inc. went public on the Amex after it was purchased by Services Acquisition Corp., another SPAC, for $265 million.").

40 *See* MONEYTREE SURVEY, NATIONAL VENTURE CAPITAL ASSOCIATION, PRICEWATERHOUSECOOPERS AND THOMSON FINANCIAL, PRIVATE EQUITY GOING PUBLIC 13 (2006), https://www.pwcmoneytree.com/MTPublic/ns/moneytree/filesource/exhibits/Global_PE_2006.pdf ("[The private equity f]unds raised soared during 2005 to US$ 160.5 billion").

41 *See* Brian Gormley, *Venture Capital Investment Surges In 2006 To $25.7B*, THE WALL ST. J., Jan. 22, 2007, *available at* http://www.atvcapital.com/news.php?id=460 ("[P]rivate equity funds of all types – venture capital, buyout, mezzanine, distressed debt, secondary funds, and funds of funds – raised a record total of $215 billion in 2006, according to the Private Equity Analyst, a newsletter published by Dow Jones. Of that total, $25 billion went into venture capital funds, the newsletter reported this month.").

42 *See* Shane McDaniel, *2006: Truly a Year for the Record Books*, PIPER JAFFRAY (2007), http://www.piperjaffray.com/pdf/monitor031407.pdf ("Accommodating debt markets were not the only factor driving LBO activity to record levels. Buyout shops raised more than $197.6 billion in capital.").

43 *See generally* Grace Wong, *IPOs: Don't fear 'The Flip'*, CNN MONEY, May 16, 2006, http://money.cnn.com/2006/05/15/markets/ipo/private_equity/index.htm ("Private equity firms generally use their own money and borrowed funds to turnaround distressed companies. When

exiting will end, because the multiple is high. The rule generally is that, since the leverage is about five-and-a-half times to six, [45] you have to find the difference by some other financing. Currently, $250 million deals are going for a domestic buyout purchase price multiple of 7.5, so the leverage is somewhat smaller.[46]

Entrepreneurs today can raise financing in many places. This is a seller's market. So, if you have a great company, you are golden. We have not seen this trend in a long time. There are liquidity opportunities out there. The problem sometimes is that can be extreme in either direction, so we have got to sit and hope this economy continues and that credit problems will be resolved.

CANADIAN SPEAKER

David Woolford[*]

MR. WOOLFORD: Good afternoon, ladies and gentlemen. I listened with interest as my friend Mr. Morton told the story about the lawyer and the farmer. I do a lot public speaking, and I normally try to dispel the widely held notion of the countless number of lawyer jokes that people always bring up. It is not true. There are only two. The rest are all true stories.

I have the benefit of not only being a lawyer but also being an investor, and I would like to approach my remarks today from that perspective. I will

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a firm has been overhauled, it's common for the investors to either sell the company to a corporate buyer or take it public.").

[44] *See generally* Ford Completes Sale of The Hertz Corporation to Private Equity Group, PRNewswire, http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/12-21-2005/0004237949&EDATE= (last visited on Oct. 21, 2007) (stating that Ford completed a sale of Hertz to a private equity group).

[45] *See generally* Mitchell Presser, *Private Equity & Leveraged Buyouts*, 25th Annual Institute on Federal Securities (Feb. 7-9, 2007) 12-13, www.westlegalworks.com/presentations/fedsec/presserprivate.pps (showing average debt multiples and equity contributions spanning from 1996 to 2006).

[46] *See generally id.* at 13 (showing that up to $250 million-dollar deals in 2006 had 7.6 domestic buy out purchase price multiple).

[*] A partner in Cassels Brock's Business Law and Entrepreneurial Business groups, Mr. Woolford specialized in business law, corporate finance, e-business, privacy law, and securities law and has published extensively on the subject of emerging developments in technology law. In addition to his busy law practice, Mr. Woolford is an active angel investor (member of the Toronto Angel Group), is Chairman and director of Virox Technologies Inc., and holds various other private directorships and advisory board positions.