DELAWARE BUSINESS COURT INSIDER

January 21, 2014 An ALM Website

Top Five M&A Lessons From Delaware Courts in 2013

Robert B. Little and Caitlin Calloway

In the last 12 months, Delaware courts have tackled a wide range of important issues in the mergers and acquisitions arena. This article selects five of 2013's most important Delaware M&A developments and provides a brief overview of the takeaways practitioners of corporate law should carry with them into the new year.

• Judicial scrutiny of "weak" fairness opinions will depend on context.

A May 2013 Delaware Chancery Court opinion, Koehler v. NetSpend Holdings, C.A. No. No. 8373-VCG (Del. Ch. May 21, 2013), provided potential fodder for plaintiffs alleging breach of fiduciary duty in connection with the sale of a company when it cited NetSpend directors' reliance on a "weak" fairness opinion as one among a number of factors supporting a breach of fiduciary duty claim. To the relief of Delaware corporate boards and investment bankers alike, the court clarified its NetSpend statements in In re BioClinica Shareholder Litigation, C.A. No. 8272-VCG (Del. Ch. Oct. 16, 2013).

In BioClinica, the court noted that its scrutiny of the NetSpend fairness opinion was driven by context. Specifically, the NetSpend acquisition involved a single bidder, making the fairness opinion particularly important because it was the "only mechanism through which the board [could] demonstrate that, had a market check been conducted, no superior offer would have emerged." In contrast, the BioClinica board had presided over an eight-month auction with 21 solicited bidders, making the fairness opinion significantly less important.

In the end, BioClinica re-emphasizes that analyzing a target board's breach of fiduciary duties is a highly contextual inquiry in which the robustness of fairness opinions remains one relevant factor but "does not create a new basis to challenge every sales process."

• If economic value of a stock was actually zero, the board is not liable to common stockholders who received no value, despite a conflicted process.

In August, the Delaware Chancery Court held in In re Trados Shareholder Litigation, Consol. C.A. No. 1512-VCL (Del. Ch. August 16, 2013), that the sale of a company was entirely fair even though common stockholders received nothing in the sale. Trados received venture capital funding in exchange for preferred stock and representatives on the company's board of directors. When Trados struggled, the board adopted a plan to incentivize management to find a buyer. Upon the subsequent sale of the company, management received $7.8 million and preferred stockholders received $52.2 million, but common stockholders received nothing. The plaintiffs alleged that the board had violated its fiduciary duties by failing to continue business operations for the benefit of the common stockholders.

Because the plaintiffs showed that six of the seven directors were not "disinterested and independent" due to their affiliations with the preferred stockholders, the entire fairness standard of review applied. Moreover, the court determined that the board had not satisfied the "fair process" element of the standard because the defendant directors "did not adopt any protective provisions, failed to consider the common stockholders, and sought to exit without recognizing the conflicts of interest." Nevertheless, the court concluded that the board had satisfied the "fair price" element of the standard because the defendants had demonstrated that the common stock had no value. The court emphasized that if "Trados' common stock had no economic value before the merger, then the common stockholders received the substantial equivalent of what they had before, and the merger satisfies the test of fairness."

• Buyout transactions by controlling stockholders structured as negotiated mergers with procedural safeguards can be subject to the business judgment rule.

In a May decision in In re MFW Shareholders Litigation, C.A. No. 6566-CS (Del. Ch. May 29, 2013), the Delaware Chancery Court held that controlling stockholder mergers can be given the deference of the business judgment rule when the transaction, "from the time of the [controlling shareholder's] first overture, has been subject to (1) negotiation and approval by a special committee of independent directors fully empowered to say no, and (2) approval by an uncoerced, fully informed vote of a majority of the minority investors."

This decision, which follows a similar procedural approach for unilateral tender offers set forth in In re Pure Resources Shareholders Litigation, 808 A.2d 421, 445 (Del. Ch. 2002), permits shareholder suits to be dismissed at the pleadings or evidentiary hearing stage of litigation prior to an onerous and expensive trial. Nevertheless, this approach requires that the controlling stockholder agree to these procedural safeguards in its initial proposal, which may limit its applicability. This decision is currently on appeal with the Delaware Supreme Court.

• Strategic decisions made by an independent and knowledgeable board during negotiations with a single bidder will not be second-guessed.

In In re Plains Exploration & Production Stockholder Litigation, C.A. No. 8090-VCN (May 9, 2013), the Chancery Court refused to grant a preliminary injunction enjoining a merger between Plains Exploration & Production Co. and Freeport-McMoRan Copper & Gold despite the Plains board's decision not to shop the company, seek a go-shop period or conduct a market check.

The court rejected the plaintiffs' argument that the Plains directors violated their Revlon fiduciary duties, finding that the directors had extensive industry experience and were able to judge a fair price despite the single-bidder process. The court noted that the five months following signing of the deal were sufficient to allow competing bidders to emerge. It also determined that the merger agreement's deal protection measures, which included a 3 percent termination fee and a no-shop clause with a fiduciary out, were not burdensome enough to prevent competing offers. The court also determined that it was reasonable for the board to permit the CEO, who knew he would be employed by the combined company, to lead negotiations, because the board was heavily involved in the process.

• Reverse triangular mergers do not result in assignment by operation of law.

In Meso Scale Diagnostics v. Roche Diagnostics GmbH, the Chancery Court confirmed the traditional view that a reverse triangular merger does not result in an assignment by operation of law that would trigger a requirement to obtain third-party consents due to a transfer of the acquired corporation's contracts or other assets.

As the court admitted, no prior Delaware case had addressed the issue directly. This case removes an uncertainty previously confronted in the acquisition process.

Robert B. Little is a corporate partner at Gibson, Dunn & Crutcher. Resident in the Dallas office, he focuses on corporate transactions, including mergers and acquisitions, securities offerings, joint ventures, investments in public and private entities, and commercial transactions.

Caitlin Calloway is a corporate associate in the firm's Dallas office.