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Delaware Court of Chancery's Injunction of "Extreme" Poison Pill Unlikely to Affect Typical Market Practice

In *The Williams Companies Stockholder Litigation*, the Delaware Court of Chancery enjoined a shareholder rights plan adopted by The Williams Companies at the outset of the COVID-19 pandemic. This "poison pill" had a package of novel features, including a 5% trigger (albeit with a passive investor carve-out) and an "acting in concert" provision that extended to "parallel conduct" between different investors, which together constituted "a more extreme combination of features than any pill previously evaluated" in Delaware. The court, in an opinion by Vice Chancellor McCormick, found that two of the board's three objectives in approving the rights plan—namely, to prevent shareholder activism and protect against potential "short-termism" generally without any specific threat—were not legally permissible rationales to adopt a rights plan. The board's third objective—preventing rapid and undisclosed accumulation of shares by activists—was assumed to be permissible under Delaware law, but was found not to justify the highly unusual features included in this particular pill. All that said, the court was clear that the concerns boards typically identify when adopting an activist defense pill—the potential for creeping control from share accumulations and the potential for negative control from an activist hedge fund having a level of share ownership that could give it outsized influence over the company's decision-making—remain legitimate justifications for adopting a pill, especially when faced with evidence of accumulation. While it is very rare for Delaware courts to enjoin a rights plan, this decision is likely to have very little, if any, effect on market practice or on the ability of Delaware companies to use rights plans to protect themselves from inappropriate and excessive accumulations of shares by activist hedge funds. For more, click here.

Court of Chancery Allows Aiding and Abetting Claims to Proceed in Pair of Decisions

While noting the high barriers to alleging an aiding and abetting claim, two Court of Chancery decisions denied motions to dismiss where the court found clear evidence of active and knowing misconduct. In the first, *Firefighters' Pension Sys. of the City of Kansas City, Missouri Trust* v. *Presidio, Inc.*, the plaintiff alleged that the company's financial advisor tipped off the third-party acquirer, BC Partners L.P. ("BCP"), regarding a competing bid by Clayton, Dubilier & Rice, LLC ("CD&R"), thereby enabling BCP to bid only slightly higher and to put time pressure on CD&R's response. CD&R indicated that it could make a superior offer for the company, but not a binding one on the tight timeframe, and for that reason, among other concerns, the Presidio board accepted BCP's lesser offer. The court, in an opinion by Vice Chancellor Laster, found that the aiding and abetting claims against both BCP and the financial advisor should survive the motion to dismiss. The advisor's failure to inform the board of its tip to BCP created an informational vacuum that led the board to breach its duty of care. With respect to the claims against BCP, although viable aiding and abetting claims against a third-party bidder are unusual, the court noted that BCP knew the tip was wrong. The court also held that the plaintiff adequately alleged that the Presidio CEO was self-interested in the transaction and that he "steered the sale process" toward BCP because it promised to retain current company management with a potentially lucrative compensation package, while CD&R did not. Moreover, plaintiff sufficiently alleged that the CEO knew and failed to disclose to stockholders that the financial advisor tipped BCP. For the *Presidio* opinion, click here.

The second decision, *In re Columbia Pipeline Group, Inc. Merger Litigation*, involved the sale of Columbia Pipeline to TransCanada Corporation. Similar to *Presidio*, the plaintiffs alleged that the Columbia Pipeline CEO and CFO steered the sale process toward TransCanada and away from other bidders because the CEO and CFO desired to retire in the near-term and they believed that TransCanada would pay cash for the company, while the other bidders would not. Applying heightened scrutiny under *Revlon*, the Court of Chancery, in an opinion by Vice Chancellor Laster, held that it was reasonably conceivable that the CEO and CFO breached their fiduciary duties by steering the sale process for personal reasons toward TransCanada, including by ignoring TransCanada's multiple alleged breaches of its standstill agreement, providing confidential information to TransCanada, telling TransCanada it was unlikely to face competition, providing the board with materially incomplete and inaccurate information about the company's value, delaying the carrying out of board directives, downplaying the interests of other bidders to the board and making a "moral" commitment to TransCanada to only consider fully financed offers from other bidders. According to the court, these fiduciary duty breaches prevented the sale price from reaching its potential value. In addition, the court held that the complaint adequately pled a claim against TransCanada for aiding and abetting the breaches of fiduciary duty by the CEO and CFO. The plaintiffs' allegations, taken as true at this stage in the litigation, suggested that TransCanada knew that the CEO and CFO were breaching their fiduciary duties "and sought to take advantage of the situation." Vice Chancellor Laster observed that there was a "constellation of allegations" supporting the claim, including, to take just one example, the CFO's "extreme behavior" that involved the CFO literally handing a TransCanada executive, who was also a friend of the CFO, the company's negotiating talking points and explaining (contrary to the company's obvious interests and the advice of its professional advisors) that TransCanada's bid was unlikely to face competition. These and other allegations, "taken together," supported an inference of knowing participation and allowed the aiding and abetting claim to survive a motion to dismiss. For the opinion, click here.

Delaware Court of Chancery dismisses *Caremark* Claims Where Directors' Actions Did Not Amount to Bad Faith

In *Richardson* v. *Clark*, the Delaware Court of Chancery, in an opinion by Vice Chancellor Glasscock, dismissed claims alleging that the directors of Moneygram International, Inc. breached their duties of oversight (so-called "*Caremark* duties") by ignoring alleged red flags relating to the company's anti-money-laundering controls. Moneygram, which provides money transfer services, entered into a settlement agreement with federal authorities relating to its alleged noncompliance with anti-money laundering requirements and charges that it aided and abetted wire fraud. The settlement required the company to make a large restitutions payment to injured customers and take other actions to prevent future wire fraud and money laundering. For several years the company complied with the settlement, but ultimately failed, and was eventually forced to extend the settlement agreement and pay an additional sum in restitution. The plaintiff brought *Caremark* claims alleging that the board ignored red flags to ensure that the company complied with the settlement agreement. The court dismissed the claims based on plaintiff's failure to make a demand on the board, holding that while the directors "may be plausibly accused of feckless oversight and lack of vigor" and "may have been wistless or overly reliant on management" based on the alleged facts, their actions did not amount to bad faith such that they would face a substantial likelihood of liability for unexculpated breaches of the duty of loyalty. For the opinion, click here.

Delaware Directors Cannot be Targets of Derivative Breach of Contract Suit Premised on Alleged Charter Breach

In *Lacey* v. *Larrea*, the Delaware Court of Chancery, in an opinion by Vice Chancellor Glasscock, dismissed a derivative breach of contract claim brought against the directors of Southern Copper Corporation that was premised on an alleged breach of the company's charter. While Delaware law recognizes charters as a contractual arrangement between stockholders and the company that sometimes binds fiduciaries, it was the company itself, acting through the board, that allegedly breached the charter, and therefore the company (on whose behalf the derivative claim was brought) did not have a breach of contract claim against the directors. The court explained that the relationship between directors and their corporation is typically fiduciary, rather than contractual, and if any derivative claim is created by a failure on the part of the directors to comply with the entity's formative documents, it is a claim for breach of fiduciary duty. For the opinion, click here.

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M&A Markets

The following issues of *M&A at a Glance*, our monthly newsletter on trends in the M&A marketplace and the structural and legal issues that arise in M&A transactions, were published this quarter. Each issue can be accessed by clicking on the date of each publication below.

- January 2021
- February 2021
- March 2021

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