KIRKLAND & ELLIS LLP

KIRKLAND **M&A UPDATE**

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Noble Prose: Sound Bites on Public M&A

All parties involved in a transaction should view transaction process, terms and disclosure as requiring a bespoke approach, specific to the circumstances that may arise; however, dealmakers can benefit from careful reading of the Delaware courts' approach to common issues in seeking to craft a path that minimizes risk.

Dealmakers working on public M&A transactions have recently seen increased focus on, and discussion of, what buyers and target boards "can" and "should" do in a sale context. Perhaps as a result of splashy headlines (such as the JCrew and Del Monte situations), market participants are more proactively asking what they need to be thinking about and doing in terms of process, terms and disclosure.

In a day of noteworthy production on September 30, VC Noble of the Delaware Chancery Court issued four significant opinions relating to M&A matters, three of which related to disputed public company transactions. Denying (1) a motion to dismiss post-closing shareholder claims in the *info*Group deal, (2) a motion for a preliminary injunction to block the OPENLANE transaction, and (3) a motion to expedite a preliminary injunction motion to block the AMAG acquisition of Allos, VC Noble offered broad-ranging insights into some of the key issues circulating in the market. While none of the views are necessarily groundbreaking and it is clear the decisions were largely driven by highly fact-specific elements, a quick review of some take-aways from these cases may prove useful as guidance for dealmakers.

Deal Structure/Protection

- Many have questioned the remaining lifespan of the controversial Delaware Supreme Court *Omnicare* decision that precludes a target board from agreeing to a merger agreement where a majority shareholder simultaneously signs a binding voting commitment and the board does not have a fiduciary termination right allowing them to accept a superior proposal (i.e., an airtight "lock-up," and therefore in the *Omnicare* court's view, an "impermissible *fait accompli*"). In the meantime, parties have tested a work-around that largely achieves the same outcome without running afoul of the strict boundaries of *Omnicare*. Specifically, they replace the binding voting commitment with the execution of a binding written consent to the merger by the holders of a majority of the shares immediately after the signing of the merger agreement, subject to a token right of the parties to terminate the deal if the written consent is not delivered within 24 hours of signing the merger agreement (in practice, it is delivered immediately). VC Noble distinguished this structure from *Omnicare* given the absence of a binding commitment to deliver the written consents, although he showed no naivety in understanding that all parties fully and justifiably expected that delivery to occur. For targets where written consent by shareholders is permitted, *Omnicare* may be dead in practice, even if not in law. (OPENLANE)
- Even where buyer shareholder approval is required for the issuance of shares to a target in a stock-for-stock deal, the acquirer board's decision to enter into the transaction is not subject to the heightened review standards applicable under *Revlon* given that the buyer is not selling itself. Additionally, the buyer's agreement to reciprocal "routine" deal protection measures "intended to protect the deal from intervention by others" is not subject to *Unocal* enhanced scrutiny as the terms were not undertaken while any external threat was being considered. (AMAG)
- An escrow arrangement that, as a deal term imposed without each shareholder's consent, holds back a portion of each shareholder's per-share consideration to fund certain potential indemnity claims by the buyer, although unusual in public transactions, is acceptable if fairly disclosed to shareholders. (OPENLANE)

Board Conflicts/Independence

- Even in a transaction where a director receives the same per share consideration as other shareholders and has no affiliation or arrangement with the buyer, the sheer magnitude of that director's payout combined with his or her need for liquidity can subject the director to a disabling conflict by virtue of deemed receipt of a "material benefit" different than other shareholders. Here the director in question, Vinod Gupta, was suffering a severe personal liquidity crunch, requiring an infusion of many millions of dollars – and he stood to receive

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approximately $100 million from the proposed transaction which he was accused of forcing through at the expense of the best interests of the other shareholders. (*info*Group)

- The acceleration in a transaction of stock options held by directors is not alone sufficient to thwart the disinterestedness of the board and the resulting deference, with the court deeming such acceleration "a routine aspect of merger agreements." (OPENLANE)
- The acceptance by a competent executive who serves as a target director of reasonable employment compensation to stay with the ongoing enterprise, particularly when such compensation is small in comparison to the consideration that person expects to receive for his or her shares in the deal, is not itself a disabling conflict. (OPENLANE)
- One or more directors may lose their status as independent if they are controlled or dominated by another conflicted party. While such an analysis is usually focused on financial or personal dependence or relationships, in the court's words, "domination can happen through force of will." Here, Gupta dominated the rest of the *info*Group board through a pattern of threats and unreasonable and erratic behavior. At one point, the directors even exchanged email correspondence to the effect that they wanted to "dump the company and run" due to the "pain, trauma and time and everything else." Gupta wore them down, and by doing so robbed them of their independence; as a result, the decision to sell the company made by a special committee of supposedly independent directors was not entitled to the typical deference and the board was susceptible to claims of breach of the duty of loyalty for an allegedly flawed sale process. (*info*Group)
- The fact (or mere possibility) that one board member is interested, where that board member does not dominate the others, is not alone sufficient to attack the disinterestedness of the full board. (OPENLANE)

Sale Process

- Where a board is very well informed, or as VC Noble said "one of those few boards that possess an impeccable knowledge of the company's business," the courts may give additional deference to its process and financial decisions. The court, while noting that "the Board's decision-making process was not a model to be followed", did not impugn the board's failure to engage a financial advisor to undertake an extensive market check or to provide a fairness opinion, pointing to the fact that the company was small and the board was "impeccably" knowledgeable. Additionally, the OPENLANE board's decision not to seek financial buyers and to favor strategic buyers was respected by the court because the board members were not only smart about the company but about the private equity world as well – two board members were affiliated with private equity firms and therefore had insight into what would be attractive to financial acquirers. (OPENLANE)
- Where a board is subject to questions about conflicts and independence, its decision to apparently favor one bidder over another, particularly where both bidders are financial buyers, will be subject to heightened scrutiny. (*info*Group)

Disclosure

- Banker "pitch books" containing valuation analyses do not necessarily constitute financial advice that is required to be disclosed by the target to its shareholders in the proxy or tender document. As the court said, a bank's "self-marketing efforts…cannot be expected to be a thorough, impartial analysis." (OPENLANE)

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Given the Delaware courts' oft-repeated principle that there is no one path for a board to satisfy its duties in selling a company, it is not surprising that guidance, rather than a specific roadmap, is what can be gathered from the courts' M&A decisions. Notwithstanding the fact-specific nature of each case, dealmakers can benefit from careful reading of the judges' approach to common issues in seeking to craft a path that minimizes both litigation and execution risk. All parties involved in a transaction should view transaction process, terms and disclosure as requiring a bespoke approach, specific to the circumstances that may arise.

If you have any questions about the matters addressed in this *M&A Update*, please contact the following Kirkland authors or your regular Kirkland contact.

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