Out of Context — Delaware Clarifies on "Weak" Fairness Opinions

Delaware courts are showing an increased sensitivity to the risks of their fact-specific decisions being misread and exploited by plaintiffs that seek to extract general principles of liability outside of the contextual confines of precedent decisions.

A footnote in a recent Delaware decision should relieve some of the anxiety felt in the investment banking community that the courts were inviting plaintiffs to allege fiduciary duty breaches by a target board in any sale where the fairness opinion analysis could be perceived as "weak".

In the never-ending quest to construct claims to attack virtually every announced public M&A transaction, plaintiff attorneys continuously seek to exploit new angles that appear to gain any amount of traction with the Delaware courts. In a May 2013 decision in *Netspend*, the court found that the plaintiffs had shown a likelihood of success on the merits of a *Revlon* claim arising out of a single-bidder sale process. Among the factors cited by VC Glasscock as giving rise to the likely breach of fiduciary duties was the board's reliance on what he termed a "weak" fairness opinion. The court noted that the deal price of $16 was well below the valuation range implied by the financial adviser's discounted cash flow (DCF) analysis ($19.22 to $25.52), although within the range of values implied by the other two primary methodologies (comparable companies and comparable transactions, both of which the court discounted because of the lack of similarities to the precedents cited).

In the aftermath of the *Netspend* decision, there was (justifiable) concern that plaintiffs would seize on this decision and assert breach of fiduciary duties by a target board any time any of the key valuation methodologies in the financial adviser's analysis produced a fairness range above the deal price (a not uncommon occurrence). Sure enough, in a recent case involving the sale of BioClinica to JLL, the plaintiffs cited to the *Netspend* decision to assert that the board breached its fiduciary duties by relying on a "weak" fairness opinion. In a decision in this case last week, the court decisively rejected this attempt to exploit the *Netspend* decision and easily distinguished the two cases. In *Netspend*, there was a single-bidder process, no market check and standstills that included "don't ask, don't waive" provisions. By contrast, in *BioClinica*, there was a full pre-signing market canvas and no "don't ask, don't waive" standstills. VC Glasscock emphasized that his criticism in *Netspend* of the board's process, including the "weak" fairness opinion, was contextual. In the absence of any market-based indication that the offer price is adequate, the reliance on a "weak" fairness opinion is a relevant factor in evaluating the whole of the board process when that opinion "provides the only equivalent of a market check". In a key footnote (#65 on p. 19), the court spoke directly to the issue of plaintiffs seeking to extrapolate general automatic liability-generating principles from a circumstance-specific decision:

> "In drafting [*Netspend*], I was conscious of the possibility that taking note that the fairness opinion was "weak" might induce some opportunistic plaintiffs to champion "weak fairness opinions" as the breach-of-fiduciary-duty claim du jour. I (apparently unsuccessfully) attempted to convey in [*Netspend*] that the weakness of the fairness opinion was contextual. That is, in the absence of a market check, I was left to view the board's decision-making and sales process in the context of the DCF's indication that the company could have been worth more. Directors of Delaware corporations have a right to rely on experts under 8 Del. C. § 141(e). That the fairness opinion in [*Netspend*] provided context for my analysis of the board's decision-making process does not create a new basis to challenge every sales process."

Another example of this Delaware phenomenon came on the heels of two decisions in 2011 (*infoUSA*) and 2012 (*Answers*) where plaintiffs successfully alleged that target boards breached their fiduciary duties by allowing "controlling" shareholders to favor their own self-interests in forcing a rushed sale to a third party buyer at an inopportune moment. In any subsequent sale transaction where the target had a large stockholder, the plaintiffs reflexively would allege that this stockholder was "controlling" and that its support of a sale was automatic evidence of a breach of fiduciary duties. Helpfully, the Delaware courts quickly pushed back on this line of attack (in a string of cases including *Synthes*, *Morton's* and *Ancestry.com*), distinguishing the two earlier cases as involving egregious facts and noting that not every large stockholder was "controlling" and that, more often than not, a large stockholder's interests were aligned perfectly with those of the rest of the target's stockholders in seeking to maximize the deal price.

Delaware courts are showing an increased sensitivity to the risks of their fact-specific decisions being misread and exploited by plaintiffs that seek to extract general principles of liability outside of the contextual confines of precedent decisions. VC Glasscock's clear rejection of this tactic in *BioClinica* should allay some of the concerns that plaintiffs will have an easy path asserting fiduciary duty breaches simply because the deal price falls outside the implied value range on one or two valuation methodologies on the banker's "football field" included in its fairness analysis. Nevertheless, financial advisers should remain aware and alert that plaintiffs and courts are more carefully scrutinizing the details of the fairness analyses both as to substance and as to the adequacy of the public disclosure, and should, along with the target board, view the evolution of their financial analyses from outset of the process to final opinion as a dynamic process of refinement.

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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