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What's Market? Update: Delaware Corporate and M&A

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Fee Shifting and Forum Selection Clauses

Much attention has been paid to Delaware legislative developments regarding fee shifting and forum selection clauses. On June 24, 2015, Delaware Governor Jack Markell signed into law amendments to the Delaware General Corporation Law. Generally effective on August 1, 2015 these amendments: (i) prohibit the adoption of any provision that would make a stockholder responsible for the attorneys' fees or other expenses of the corporation arising out of an unsuccessful "internal corporate claim;" and (ii) allow Delaware corporations to adopt by-law provisions designating Delaware courts as the sole forum for certain intra-corporate claims. (As a related point, in February we published a client advisory looking at an Oregon state court decision refusing to enforce a Delaware forum selection bylaw provision adopted in connection with a shareholder merger challenge).

Director Breaches of Fiduciary Duty; Charter Exculpation Provisions

Delaware corporate charter provisions adopted pursuant to Section 102(b)(7) of the Delaware General Corporation Law, protecting directors from monetary damages for breaches of their duty of care (as opposed to duty of loyalty) are usually upheld by courts. However, it has not been entirely clear how far a court will permit shareholder litigation to proceed when the exculpation provision will clearly be invoked, at some point and eventually, by director defendants. An important and recent decision by the Delaware Supreme Court, *In re Cornerstone Therapeutics Inc. Stockholder Litigation*, Nos. 564, 2014 & 706, 2014 (Del. May 14, 2015), reversed two prior Delaware Court of Chancery opinions and confirmed the ability of independent directors to avoid fiduciary duty litigation during its initial stages, by invoking duty of care exculpation charter provisions, even where the business judgment rule has been rebutted.

Right of Non-Member Assignee to Dissolve LLC

In *In re Carlisle Etcetera LLC*, C.A. 10280-VCL (April 30, 2015), the Delaware Court of Chancery ruled that an assignee of a membership interest in a Delaware limited liability company has standing to bring an ***equitable dissolution claim*** even though only a member or manager has standing to bring a claim for statutory dissolution under Section 18-802 of the Delaware LLC Act and the assignee had no such right under the LLC Agreement (and therefore had no right to bring a statutory claim for dissolution).

Indemnification and Advancement Rights

Delaware corporate charters and by-laws typically provide officers and directors broad indemnification and fee advancement rights from the corporation, in part to attract qualified people who would otherwise be concerned about potential personal financial exposure arising from their service as an officer or director. A recent Delaware decision re-affirms the important policies behind these provisions and underscores that the best time to set forth the parameters of such rights is at the time of grant, and after the fact efforts at limitation will not be viewed favorably. *See Blankenship v. Alpha Appalachia Holdings f/k/a Massey Energy*, C.A. No. 10610-CB (Del. Ch. May 28, 2015).

Requirement of Director to Sign Confidentiality Agreement

In *Partners Healthcare Solutions Holdings, L.P. v. Universal American Corp.,* C.A. No. 9593-VCG (Del. Ch. June 17, 2015), the Delaware Court of Chancery held that where a large stockholder had the contractual right to designate a director of the company, the company could require the director (who was represented by opposing litigation counsel) to execute a confidentiality agreement before he could be seated, even though the agreement did not provide for such a restriction.

Adjudication of Working Capital Accounting Methodology

The Delaware Court of Chancery ruled that, in the context of a stock purchase agreement requiring working capital adjustments to be determined by an arbitrator (as opposed to a court) a dispute over the specific accounting methodology also to be heard by an independent accounting firm. In *Alliant Techsystems Inc. v. MidOcean Bushnell Holdings LP*, C.A. No. 9813-CB (Del Ch. Apr. 24, 2015, rev. Apr. 27, 2015), the court ruled that the SPA's indemnity-related exclusive remedy provisions did not require the parties to submit their working capital accounting methodology dispute to a court for resolution, even where that dispute might also give rise to a claim under the SPA's indemnification provisions. As is common in our M&A practice, the SPA at issue had two remedies provisions - - one for working capital and related purchase price adjustments and one for indemnification claims. Often the former is governed by arbitration (such as independent accountants) and the latter by the courts.

Earn-Outs

In *Lazard Technology Partners, LLC v. Qinetiq North America Operations LLC*, No. 464, 2014 (C.A. No. 6815-VCL) (Del. Apr. 23, 2015), the Delaware Supreme Court upheld the Chancery Court's determination that a purchaser did not violate its express agreement not to take actions " with the intent of reducing or limiting" a post-closing earnout payment, nor did it violate the implied covenant of good faith and fair dealing, where: (i) with respect to the express covenant, requisite

intent on the part of the purchaser was not shown, even if had knowledge that its conduct might negatively impact the earn-out; and (ii) with respect to the implied covenant (of good faith and fair dealing), in the course of merger agreement negotiations the sellers had unsuccessfully sought purchaser agreements with respect to the earn-out in addition to the intent-based covenant agreed.