Delaware Court Provides Further Guidance on Enforceability of "Don't Ask, Don't Waive" Standstills

On November 27, 2012, a bench ruling by Vice Chancellor J. Travis Laster of the Delaware Court of Chancery in *In re Complete Genomics, Inc. Shareholder Litigation*[1] enjoined the enforcement of a "Don't Ask, Don't Waive" standstill forbidding a potential acquirer from asking the target company privately or publicly for a waiver of the standstill in order to make a competing offer. Following *In re Complete Genomics*, it can be expected that limitations on non-public requests for waivers will likely be viewed by Delaware Courts as violating a board's fiduciary duties in contexts where *Revlon*[2] applies.

In *In re Complete Genomics, Inc.*, the Delaware Court viewed "Don't Ask, Don't Waive" agreements as resembling no-talk clauses, which were found to be in breach of a board's fiduciary duties in *Phelps Dodge Corporation v. Cyprus Amax*[3] and subsequent cases. In that case, the Court suggested the no-talk clause created "the legal equivalent of willful blindness, a blindness that may constitute a breach of a board's duty of care," since even "the decision not to negotiate…must be an informed one."

According to the Delaware Court, similar to no-talk clauses, "Don't Ask, Don't Waive" covenants interfere with a board's ability to determine whether to change its merger recommendation, because they absolutely preclude the flow of incoming information to the board. By agreeing to this provision, a board would impermissibly limit its ongoing statutory and fiduciary obligations to properly evaluate a competing offer, disclose material information, and make a meaningful merger recommendation to its stockholders. As the Delaware Court phrased it, a "Don't Ask, Don't Waive" provision represents "a promise by a fiduciary to violate its fiduciary duty, or represents a promise that tends to induce such a violation."

In addition to the *In re Complete Genomics, Inc.* ruling, on December 17, 2012, Chancellor Strine issued a bench ruling in *In re Ancestry.com Inc. Shareholder Litigation*[4] requiring additional proxy disclosure relating to "Don't Ask, Don't Waive" standstill provisions. In that context, while declining to find these provisions *per se* illegal and acknowledging that such provisions may be used for value-maximizing purposes in an auction context, Chancellor Strine recognized that "Don't Ask, Don't Waive" provisions can be problematic if used inconsistently with a board's *Revlon* duties.

In re Complete Genomics, Inc. further develops a position that the Delaware Courts had begun articulating in previous pronouncements on "Don't Ask, Don't Waive" provisions. In a settlement hearing in *In re RehabCare Group, Inc. Shareholders Litigation,*[5] the Delaware Court of Chancery showed skepticism as to whether "Don't Ask, Don't Waive" standstills would hold up if actually litigated. In *In re Celera Corporation Shareholder Litigation*,[6] in the context of reviewing a class action settlement and without ruling on the merits of the matter, the Delaware Court of Chancery suggested that "Don't Ask, Don't Waive" standstills and the merger agreement's no-solicitation provision, when taken together, could be problematic in so far as they increase the risk that a board would lack adequate information regarding the interest of other potential acquirers, and thus undermine the protections of a fiduciary out.

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[1] *In re Complete Genomics, Inc. Shareholder Litigation*, C.A. No. 7888-VCL (Del. Ch. Nov. 9, 2012) (transcript ruling); C.A. No. 7888-VCL (Del. Ch. Nov. 27, 2012) (transcript ruling).

[2] *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

[3] C.A. No. 17398 (Del. Ch. 1999).

[4] C.A. No. 7988-CS (Del. Ch. Dec. 17, 2012) (transcript ruling).

[5] C.A. No. 6197-VCL (Del. Ch. 2011).

[6] C.A. No. 6304-VCP (Del. Ch. 2012).

Although it appears that Delaware Courts continue to recognize potential benefits in an auction context of encouraging bidders to put forward their best bid by including "Don't Ask, Don't Waive" provisions in non-disclosure agreements, in light of *In re Complete Genomics*, practitioners should be wary of requesting "Don't Ask, Don't Waive" provisions that prevent a potential bidder from privately requesting a waiver of the standstill following the target company's execution of an agreement triggering the board's *Revlon* duties. Until further guidance is provided, it appears from the ruling in *In re Complete Genomics* that a standstill agreement that prevents the counterparty from publicly requesting that the target company waive any of its terms is likely still enforceable. In addition, practitioners should consider the use of provisions that fall away upon the announcement of a sale.

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