

In re BioClinica, Inc. Shareholder Litigation

By Enrico Granata

In *In re BioClinica, Inc. Shareholder Litigation*,¹ the Delaware Court of Chancery in a memorandum opinion on a motion to expedite examined the cumulative effect of deal protection devices to determine whether they should have been deemed preclusive under *Omnicare*.²

The plaintiffs in *BioClinica* argued that the impact of a combination of (i) a standstill provision in the confidentiality agreement signed by a potential alternative bidder, which prevented that bidder from acquiring BioClinica other than through a tender offer, and (ii) a rights plan constituted an impermissible lock-up, because the announcement of a tender offer would trigger BioClinica's poison pill.

After reviewing BioClinica's rights plan and determining that the plaintiffs, while technically correct, had erroneously interpreted the actual impact of triggering BioClinica's poison pill (since the dilutive effect of the poison pill would not have been triggered by the mere announcement of a tender offer, as plaintiff had indicated, but only by the actual acquisition of 20% of BioClinica stock), the Delaware court found the combination of the deal protection devices not preclusive. In doing so, the Delaware court noted that there was nothing in the deal protection devices attacked by plaintiffs that distinguished them from those that were upheld in *In re Orchid Cellmark Inc. Shareholder Litigation*,³ where Vice Chancellor Noble refused to preliminarily enjoin a merger that was protected by a no-shop clause, top-up option, matching rights, a termination fee and a poison pill, finding that the deterrent effects of a poison pill on any serious competing bidder would be minimal.

BioClinica confirms that Delaware courts will not adhere to strict parameters, but will look at the actual impact of deal protection devices to determine whether they result in an impermissible lock-up.

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Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.

¹ C.A. No. 8272-VCG (Del. Ch. Feb. 25, 2013).

² *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 938 (Del. 2003).

³ 2011 WL 1938253, at *6-8 (Del. Ch. May 12, 2011).