

Creeping Takeovers and Fiduciary Duties – A Recap

In *In re Sirius XM Shareholder Litigation*,¹ Delaware Chancellor Strine dismissed a complaint that the Sirius board had breached its fiduciary duties by adhering to the provisions of an investment agreement with Liberty Media that precluded the Sirius board from blocking Liberty Media's acquisition of majority control of Sirius through open-market purchases made by Liberty Media following a three-year standstill period. By holding the complaint to be time-barred under the equitable doctrine of laches the Delaware court did not address the merits of whether the Sirius board breached its fiduciary duties. However, *In re Sirius* still offers the opportunity to recap the guidance on "creeping takeovers" that can be derived from existing Delaware case law:

- *In re Sirius* confirms that there are no particular actions that a board must take to prevent creeping takeovers through open-market purchases. The board's conduct will be reviewed in its entirety, and it is unlikely that Delaware courts will find a breach of fiduciary duties when there is a valid reason for the board's decision not to adopt defensive actions.
- In determining whether there is a valid reason not to take defensive actions, Delaware courts will likely take into account the existence of contractual impediments that were not challenged by stockholders when they were entered into.
- Although there is no per se duty to employ a poison pill or adopt other takeover defenses against a creeping takeover, a board's failure to take such actions in the face of an obvious threat to the corporation and minority stockholders, when coupled with "other suspect conduct," may support an inference, at least at the motion to dismiss stage, that the board breached its duty of loyalty in permitting the creeping takeover.²
- Delaware courts will not find that a *de facto* controlling stockholder owes a duty of fairness to negotiate with the board of directors in obtaining a majority of the company's stock through open-market purchases, especially when the parties specifically negotiated a contractual right to engage in such open-market purchases.
- Even absent a contract, it is unlikely that Delaware courts will find a fiduciary breach by a controlling stockholder in the context of such stockholder buying shares in the open market, unless it is determined that such stockholder has abused its control (for example, by making such purchases while in possession of material nonpublic information). If a majority stockholder causes the company to enter into self-dealing transactions, a going private transaction in which the rest of the stockholders would be squeezed out, or other similar transactions, the majority stockholder would still be subject to accountability as a controlling stockholder and potentially face scrutiny under the entire fairness doctrine.

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for 10 straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

¹ C.A. No. 7800-CS (Del. Ch. Sept. 27, 2013).

² See *Louisiana Municipal Police Employees' Retirement Syst. v. Fertitta*, No. 4339-VCL, 2009 WL 2263406 (Del. Ch. July 28, 2009).

Creeping Takeovers and Fiduciary Duties – A Recap

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.