January 2014
Recap of Fourth Quarter 2013

The Ropes Recap

Mergers & Acquisition Law News

A quarterly recap of mergers and acquisition law news from the M&A team at Ropes & Gray LLP.

Contents

News from the Court

Guidance from Delaware Chancery Court for Notice Provisions and Survival Periods

In *ENI Holdings, LLC v. KBR Group Holdings, LLC*, the Delaware Court of Chancery (the "Court") provided important guidance with respect to the use of survival clauses to shorten by agreement the three-year statute of limitations for breach of contract claims, as well as procedural aspects of contractual indemnification.

In December 2010, ENI Holdings, LLC sold Roberts & Shafer Co. to KBR Group Holdings, LLC pursuant to a Stock Purchase Agreement. The seller filed suit against the buyer alleging breach of contract and the covenant of good faith and fair dealing with respect to the seller's request for a release of certain escrowed funds under the terms of the Stock Purchase Agreement. The buyer responded with counterclaims alleging fraud and breach of various representations, warranties and covenants. The seller moved to dismiss the counterclaims asserting that the buyer had not satisfied the contractual prerequisites for indemnification and that the buyer's counterclaims were time-barred.

Indemnification Procedures - Notice Deficiency and Lack of Good Faith. The Court found that absent clear contractual language to the contrary, an indemnified party's failure to provide a notice called for by the contract did not relieve the indemnifying party of any obligation except to the extent the indemnified party was prejudiced by such failure. The Court also found that the buyer satisfied the Stock Purchase Agreement's good faith negotiation requirement when it communicated with the seller prior to filing counterclaims, particularly in circumstances where the seller initially filed the complaint, thereby limiting the amount of good faith negotiation that could occur between the parties.

The Court's holding on this point emphasizes the need for contracting parties to make clear any contractual prerequisite for litigating an indemnification claim.

Survival Clause. The seller argued that the buyer's counterclaims relating to non-fundamental representations and warranties should be dismissed because the Stock Purchase Agreement's survival clause acted as a contractual statute of limitations (effectively shortening the otherwise applicable Delaware statute of limitations) and barred such counterclaims.

The survival clause stated that the representations and warranties of the seller would survive closing and "terminate on" the "Termination Date", except in the case of certain specified fundamental representations which had a different termination date (the "Survival Clause"). The buyer did not commence litigation before the Termination Date, but it argued that only notice to the seller was required. The seller asserted that failure to commence litigation before the Termination Date meant that the claims were time-barred under the Stock Purchase Agreement.

The Court found that "it is not a reasonable interpretation of the [Stock Purchase Agreement] that [the buyer] can preserve a lawsuit based on an expired representation or warranty merely by providing notice before the applicable Termination Date." Accordingly, the Court dismissed the counterclaims involving the non-fundamental reps as time-barred under the Stock Purchase Agreement's Survival Clause.

The Court's decision serves as a reminder that, absent language in the contract to the contrary, a contractual survival clause for indemnification will operate as a contractual statute of limitations under Delaware law and not merely as a "notice period."

Fraud Claims. The Court separately analyzed whether the buyer's fraud claims were subject to the Survival Clause. The Survival Clause was silent with respect to fraud claims, and other sections in the Stock Purchase Agreement (e.g., the exclusive remedy provision) specifically carved out fraud claims, resulting in what the Court determined was an ambiguous contract. As such, the Court denied the seller's motion to dismiss with respect to the fraud-based claims. However, the Court left unresolved whether fraud claims can be subject to a shortened contractual limitations period as a matter of public policy.

ENI Holdings, LLC v. KBR Group Holdings, LLC, CA 8075-VCG (Del. Ch. Nov. 27, 2013)

Privileged Pre-Merger Attorney-Client Communications Belong to Surviving Corporation

A recent decision by the Delaware Court of Chancery highlights the need to explicitly address by contract which party or parties will control attorney-client privilege with respect to pre-closing communications in the context of a sale structured as a merger where legal counsel jointly represents both the seller(s) and the target company acquired in the merger. In this case, *Great Hill Equity Partners v. SIG Growth Equity Fund*, a single law firm had represented both the sellers and the target company in connection with the sale of Plimus, Inc. to a buyer group led by Great Hill Equity Partners. The deal was structured as a reverse triangular merger in which the target, Plimus, was the surviving corporation. Post-closing, the buyer filed suit in Delaware alleging fraudulent inducement by the selling shareholder group. During that lawsuit, a year after the merger closed, the buyer notified the seller that the Plimus computer system (which the buyer acquired in the merger) contained files with communications between the sellers and their legal counsel regarding the transaction. The merger agreement did not exclude attorney-client communications from the assets to be acquired, nor did it specify who would control privilege with respect to such communications. When notified that the buyer had found these communications, the sellers asserted attorney-client privilege. The buyer disputed that assertion and, in the alternative, argued that the sellers had waived any privilege that might otherwise apply.

Chancellor Strine ruled in in favor of the buyer, affirming that under the Delaware merger statute (DGCL Section 259), unless otherwise agreed, the surviving corporation in a merger succeeds to all rights and privileges (including attorney-client privileges) of the constituent corporations. The Delaware Chancery Court declined to adopt the approach of an earlier New York decision involving the merger of a Delaware corporation that had relied upon policy-based considerations to distinguish attorney-client communications related to general business operations of the target (which the NY court held did pass to the surviving corporation) from communications related to the sale transaction (which the NY court held did not pass to the surviving corporation). Chancellor Strine relied on the clear language of Section 259 to hold that "all privileges" pass to the surviving corporation absent specific agreement of the parties. The decision noted that parties are free to contract around that default rule by (for example) providing for the seller to retain the attorney-client privilege with respect to pre-merger attorney-client communications relating to the transaction.

The *Great Hill* decision demonstrates the importance of addressing issues of attorney-client privilege, confidentiality obligations, and waiver of conflicts in connection with the sale of a company, particularly in circumstances where a law firm represents both the sellers and the company with respect to pre-closing communications relating to the deal. It also suggests that sellers may want to consider taking steps to avoid turning over privileged material to the buyer, for example by taking action to scrub sensitive attorney-client communications that relate to the sale transaction from the target company computer systems prior to closing or at least including in the agreement specific language to address the ownership of such material in situations where the parties wish to contract around default rules.

Great Hill Equity Partners IV, L.P. et al. v. SIG Growth Equity Fund I, LLLP et al., C.A. No. 7906-CS, 2013 Del. Ch. LEXIS 280 (Del. Ch. Nov. 15, 2013)

Court of Chancery Relies on Deal Price to Assess Fair Value in Appraisal Action

In a recent appraisal action arising out of Apollo Global Management LLC's 2011 acquisition of CKx, Inc., the Delaware Court of Chancery found that the $5.50/share deal price was the best measure of CKx's fair value at the time of the transaction, a departure from the typical practice of relying on DCF valuations.

After the CKx transaction closed Huff Fund Investment Partnership, a 15% stockholder of CKx, sought appraisal for its shares. Both Huff and CKx submitted expert valuations regarding the fair value of CKx shares at the time of the transaction. Huff's expert claimed that CKx's shares were worth twice the deal price ($11.02), while CKx's expert argued that they were worth only $4.41 per share. Both of the valuation experts relied upon a set of CKx five-year management projections prepared in connection with the transaction, even though there was substantial evidence that those projections were "optimistic" and not the best estimate of CKx's future performance. More specifically, the management projections included a substantial assumption about whether CKx's primary asset – the television show *American Idol* – would receive a $20 million increase in licensing fees from 20th Century Fox in its next broadcasting contract.

Huff's expert also prepared comparable companies and comparable transactions valuations, which were based on a variety of inapposite companies and transactions.

Following a three-day trial, Vice Chancellor Glasscock concluded that none of the expert valuations were accurate assessments of CKx's fair value. He concluded that because CKx is a holding company that includes an assortment of otherwise unrelated entertainment properties (including *American Idol*, as well as rights to the name and likeness of Muhammad Ali and Elvis Presley), the companies and transactions identified in Huff's expert's comparables valuation were not appropriate comparables. He also found that both experts' DCF valuations were flawed because they relied on the flawed management projections. Given those findings, and the fact that CKx was sold after a "full market canvas and auction", Vice Chancellor Glasscock found that the deal price was a "reliable indicator of value" and used it to determine CKx's fair value. In so doing, Vice Chancellor Glasscock stated that in most other legal contexts market value is the best evidence of actual value, and after-the-fact valuations are merely "educated guesses as to what price could be achieved" in a sale.

Vice Chancellor Glasscock's adoption of the deal price as the appropriate measure of fair value runs contrary to the Court's traditional emphasis on DCF valuations and recent opinions from the Delaware Supreme Court and the Court in *Golden Telecom* and *Merion Capital* that have expressly declined to adopt deal price as an appropriate measure of fair value. However, unless there are additional cases in Delaware that follow CKx, the unique assets at issue may limit the influence of the case.

Huff Fund Inv. P'Ship v. CKx, Inc., C.A. No. 6844-VCG (Del. Ch. Nov. 1, 2013)

Delaware Court Declines to Issue Anti-Suit Injunction Despite Forum Selection Clause in Certificate of Incorporation

In a transcript ruling, Vice Chancellor Laster of the Delaware Court of Chancery refused to issue an anti-suit injunction barring a Louisiana state stockholder litigation challenging Sumitomo Corporation of America's acquisition of Edgen Group, Inc., despite the fact that Edgen has a Delaware forum selection clause in its certificate of incorporation. On October 16, 2013, Edgen announced that it would be sold to Sumitomo for $12 per share, which was a 55% premium over its undisturbed market price.

Stockholder plaintiffs ignored Edgen's forum selection clause and filed suit in Louisiana, where Edgen is headquartered, to enjoin the transaction. Another plaintiff filed a parallel Delaware action, but voluntarily dismissed it shortly thereafter. Edgen moved to dismiss the Louisiana action based on the forum selection clause, but the Louisiana Court set the hearing date for this motion shortly before the transaction was scheduled to close. Edgen responded by suing the lead plaintiff in Delaware, seeking to prevent further pursuit of the Louisiana case (*i.e.*, an anti-suit injunction). Vice Chancellor Laster denied this motion, even though he found that Edgen had shown a probability of success on the merits and irreparable harm. In so doing, Vice Chancellor Laster disparaged the strength of the stockholder plaintiff's claims, stating that they "would likely not survive a motion to dismiss", and decried the existence of multi-forum M&A cases, stating that "[t]his case really exemplifies the inter-forum dynamics that have allowed plaintiffs' counsel to extract settlements in M&A litigation and that have generated truly absurdly high rates of litigation challenging transactions."

However, Vice Chancellor Laster refused to issue the anti-suit injunction, stating that it was "preferable" for the Edgen defendants to first seek dismissal of the Louisiana action based on the forum selection clause, as that approach would maximize judicial comity. Vice Chancellor Laster noted his reluctance to issue an anti-suit injunction based on a corporate governance document (as opposed to a bilateral contract), stating that "it's not at all clear to me that forum selection provisions are as yet sufficiently understood and accepted such that the Delaware Supreme Court would want the same approach taken for a forum selection clause that appears in the charter and bylaws."

Edgen Group, Inc. v. Genoud, C.A. No. 9055-VCL (Del. Ch. Nov. 5, 2013)

Weak Fairness Opinion not an Independent Violation of Revlon Duties

The Delaware Court of Chancery's recent decision in *In Re Bioclinica* made clear that a target board's reliance on a "weak" fairness opinion is not an independent violation of a board's *Revlon* duties and will not be evaluated by the Delaware courts in isolation from the sale process generally. In his ruling earlier this year in *Koehler v. NetSpend*, in the context of a single-bidder sale process, Vice Chancellor Glasscock found that the NetSpend board's reliance on a "weak" fairness opinion was insufficient to show that the NetSpend board fulfilled its fiduciary duties to be knowledgeable about NetSpend's value. Citing *NetSpend*, the plaintiffs in *Bioclinica* alleged that the Bioclinica board violated its fiduciary duties in the Bioclinica sale by relying on a fairness opinion alleged to be weak because it was based on allegedly inflated capital expenditure estimates. Vice Chancellor Glasscock granted the defendants' motion to dismiss, finding that the Bioclinica sale process, taken as a whole, was entirely reasonable because of the following:

- the bankers conducted a thorough market check;
- the sale process was administered by an independent committee and was backed up by a fairness opinion;
- the directors were informed of their fiduciary duties;
- the sale process resulted in a 25% premium over the stock price;
- 88% of stockholders tendered their shares to the winning bidder;

- there was no evidence that the board had left itself in the dark about potential bidders by unnecessarily failing to waive "don't ask don't waive" standstills;
- there were no well-pled facts indicating that management controlled the board;
- there were no well-pled facts indicating that the board favored the winning bidder; and
- the deal-protection devices put in place (for example, a poison pill) are ones that the Court has regularly upheld.

In distinguishing *NetSpend*, Vice Chancellor Glasscock noted that the *NetSpend* defendant directors were found to have conducted an insufficient single-bidder process while relying on a fairness opinion analysis in which the DCF analysis implied values much higher than the sales price. Vice Chancellor Glasscock clarified in *Bioclinica* that a board's reliance on a "weak" fairness opinion is relevant where the fairness opinion provides the only equivalent of a market check, as was the case in *NetSpend*, but not in *Bioclinica*.

In re Bioclinica, Inc. S'holders Litig., C.A. No. 8272-VCG (Del. Ch. Oct. 16, 2013)

Delaware's Closed-Door Arbitration Program Enjoined

The Third Circuit has upheld a federal district court ruling enjoining Delaware's closed-door arbitration program on the grounds that the program was inconsistent with the First Amendment right of public access to judicial proceedings. Delaware's program allowed litigants to elect to proceed in a binding arbitration closed to the public, with a Delaware judge acting as arbitrator. The program was only available if the amount in controversy was one million dollars or more and if one of the parties was a Delaware business entity. The cost of the proceedings to the parties was six thousand dollars per day. Proponents of the program highlighted several advantages that the program would have offered commercial litigants, including expert adjudication by a Delaware judge well-versed in business law acting as the arbitrator, swift and efficient case management, and secrecy. The Third Circuit found that proceedings that, like the Delaware arbitrations, have much in common with civil trials have been traditionally conducted in an open forum, and that the benefits to shareholders and the public of allowing access to such proceedings outweigh the disadvantages to the litigants. Unless the U.S. Supreme Court agrees to hear the case or the Third Circuit grants an en banc rehearing, this decision will end Delaware's private arbitration proceedings.

Delaware Coalition for Open Government, Inc. v. Strine et al., No. 12-3859 (3rd Cir. Oct. 23, 2013)

Board's Duties to an Individual Shareholder

In a recent case involving a proxy fight between a dissident hedge fund shareholder and management, the Delaware Court of Chancery clarified that boards owe a duty of disclosure to the corporation's shareholders in general but not to any individual shareholder. Red Oak Fund, a hedge fund with a six percent stake in Digirad Corporation, decided to run its own slate of director candidates against Digirad's slate. During the proxy fight, a Digirad employee accidentally voted some of Digirad's treasury stock in favor of management's slate of directors. The treasury stock votes were eventually caught and not counted in the final election results, but were reflected in preliminary proxy reports that went to both Red Oak and management, making it appear to both sides that management would win the vote comfortably. When management learned that the treasury stock had been voted, it did not disclose this to Red Oak. Ruling on Red Oak's suit to invalidate the election, Vice Chancellor Noble found that Digirad had no duty to disclose the voting of the treasury stock to Red Oak because the contents of the preliminary proxy reports would not be material to shareholders in general. The Court explained that the duty to disclose material information relating to contested elections is owed to the shareholders as a group, where materiality is assessed according to what a reasonable shareholder would want to know to inform its vote. The Court's decision illustrates that, absent bad faith, there is no general duty of disclosure to a dissident shareholder, even if the information would be material to that shareholder.

Red Oak Fund, L.P. v. Digirad Corp. et al., C.A. No. 8559-VCN (Del. Ch. Oct. 23, 2013)

Earn-Out Obligations and Defense Costs

In upholding a decision by the Delaware Court of Chancery, the Delaware Supreme Court ruled that, without provisions in an agreement specifying the actions that a buyer must take to maximize earn-out payments, the implied covenant of good faith and fair dealing does not require a buyer to run their business, in this case to renegotiate a distribution agreement with a third party, in order to maximize earn-out payments to the sellers. The Supreme Court also rejected an argument that the sellers were required to pay the legal defense costs of the buyer for certain third-party lawsuits independently of any obligation by the sellers to indemnify the buyer for the underlying claims. The Supreme Court reiterated that an obligation to advance defense costs is distinct from an obligation to indemnify, and if the parties intended for the sellers to undertake both obligations, it should have been explicitly stated in the agreement.

Winshall v. Viacom Int'l, Inc., No. 39, 2013 (Del. Oct. 8, 2013)

Delaware Supreme Court Unanimously Reverses Chancery Court Decision, Allowing Vivendi-Activision Repurchase to Proceed

The Delaware Supreme Court unanimously reversed Vice Chancellor J. Travis Laster's decision to halt Activision Blizzard, Inc's plan to buy back its own shares from majority owner Vivendi. The Court's decision centered around whether the proposed repurchase constituted a "merger, business combination, or similar transaction" under Activision's Certificate of Incorporation, which provided that any transaction rising to the level of a "business combination" would require a majority vote of its minority shareholders. The Chancery Court had issued an injunction against the proposed repurchase, as it was a “business combination” and such a vote had not taken place. The Delaware Supreme Court reversed the Chancery Court’s decision, allowing the repurchase to proceed.

The Delaware Supreme Court held that although the proposed repurchase reduced Vivendi’s stake from 61% to 12%, and involved Activision agreeing to pay Vivendi $5.83 billion, this was insufficient to elevate it to the level of a “business combination.” According to the Court, the proposed repurchase did not “involve any combination or intermingling” of Vivendi’s and Activision’s businesses, and instead involved the two companies “separating their business connection, leaving Vivendi as a minority stockholder without voting or board control over Activision.”

Going forward, the Court suggests that the plain language of “business combination or similar transaction” does not necessarily include transactions that involve “a large transfer of funds or other assets,” but rather should encompass situations where a company ends up “having a greater connection with and/or control” over another’s business.

Activision Blizzard, Inc. v. Hayes, No. 497, 2013 (Del. Nov. 15, 2013)

Notable Deals

Allstream Acquisition Rejected by Canadian Minister of Industry for National Security Reasons

On October 7, 2013, the Canadian Minister of Industry rejected, due to unspecified national security concerns, the acquisition of Allstream, which operates a fiber optic network throughout Canada, by Accelero Capital Holdings, which is owned primarily by Naguib Sawiris, an Egyptian telecom magnate. This was the first known rejection of a transaction under the Investment Canada Act's national security review regime, which was introduced in 2009. The Investment Canada Act requires the Minister to approve the acquisition of Canadian businesses by non-Canadians after reviewing such transactions under the national security provisions of the Act. The scope of the national security review is quite broad and can apply to any transaction in which the buyer is controlled outside of Canada. Additionally the criteria for evaluating a particular transaction are ambiguous, since the government can block a pending transaction if it has "reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security." In rejecting the acquisition by Accelero, the Minister stated only that Allstream's fiber optic network "provided critical telecommunications services to business and governments, including the Government of Canada," leaving both the parties to the transaction and observers to speculate about the Minister's rationale for rejecting the deal. This event highlights the need for non-Canadian companies to carefully evaluate the potential national security aspects of a transaction involving the acquisition of a business with significant assets or operations in Canada in the course of diligence.

Rival Clothing Retailers Jos A. Bank and Men's Wearhouse Launch Competing Merger Proposals and Defensive Maneuvers

In October 2013, Jos. A. Bank Clothiers, Inc. made an unsolicited $2.3 billion offer to acquire The Men's Wearhouse, Inc. which precipitated a flurry of competing acquisition offers and takeover defenses by the competing clothing retailers. Men's Wearhouse ultimately rejected Jos. A. Bank's offer as undervaluing Men's Wearhouse, and instituted a shareholder rights plan with a 10% trigger. On November 15, 2013, Jos. A. Bank formally withdrew its offer to acquire Men's Wearhouse. After Jos. A. Bank withdrew its offer, Men's Wearhouse's largest stockholder, Eminence Capital, stated publicly that it was in favor of a transaction between the two companies, and that it would seek to vote out certain incumbent Men's Wearhouse directors if no deal occurred. Shortly after Jos. A. Bank withdrew its offer, Men's Wearhouse dusted off the so-called Pac-Man defense, which was a popular takeover defense tactic in the 1980s that had fallen into disuse, and offered to acquire Jos. A. Bank for $1.5 billion, or $55 per share. Mirroring Men's Wearhouse's prior response, Jos. A. Bank rejected that offer as insufficient and lowered the trigger on its shareholder rights plan from 20% to 10%. Men's Wearhouse subsequently raised its unsolicited offer to $57.50, and commenced a hostile tender offer for Jos.

A. Bank shares at that price, with the tender offer set to expire on March 28, 2014. Eminence Capital has publicly supported Men's Wearhouse's renewed offer, and has stated its intention to nominate two directors to the Jos. A. Bank's board. As of this writing, Jos. A. Bank's board is considering this new proposal and has requested that its stockholders not participate in the hostile offer until the board determines how to proceed.

Cooper Terminates Apollo Deal

Cooper Tire & Rubber Company terminated its merger agreement with affiliates of Apollo Tyres Ltd. on December 30, 2013, one day prior to the agreement's "drop dead" date, after it became clear that Apollo's financing sources would not renew their commitments past December 31st. The merger agreement, signed June 12, 2013, provided that Apollo, an India-based tire manufacturer, would acquire Cooper for $35 per share in cash. The announcement of the deal met with negative market reactions, as well as, serious labor disputes. In September, an arbitrator ruled that the merger could not close unless Apollo reached a new collective bargaining agreement with the United Steelworkers ("USW"). When Apollo did not reach an agreement with USW in the several weeks following the arbitrator's decision, Cooper sued in the Delaware Court of Chancery, arguing that, based on the terms of the merger agreement, the Court should order Apollo to make an agreement with USW "in the most expeditious manner possible." Vice Chancellor Glasscock disagreed, ruling that Apollo's obligation to negotiate with USW was governed by a "reasonable best efforts" standard, and that Apollo had met this standard.

Following the termination, the parties are expected to continue litigating the issue of damages, in addition to whether the circumstances of the termination entitle one party to receive a termination or reverse termination fee.

A New Wave of Shareholder Activism

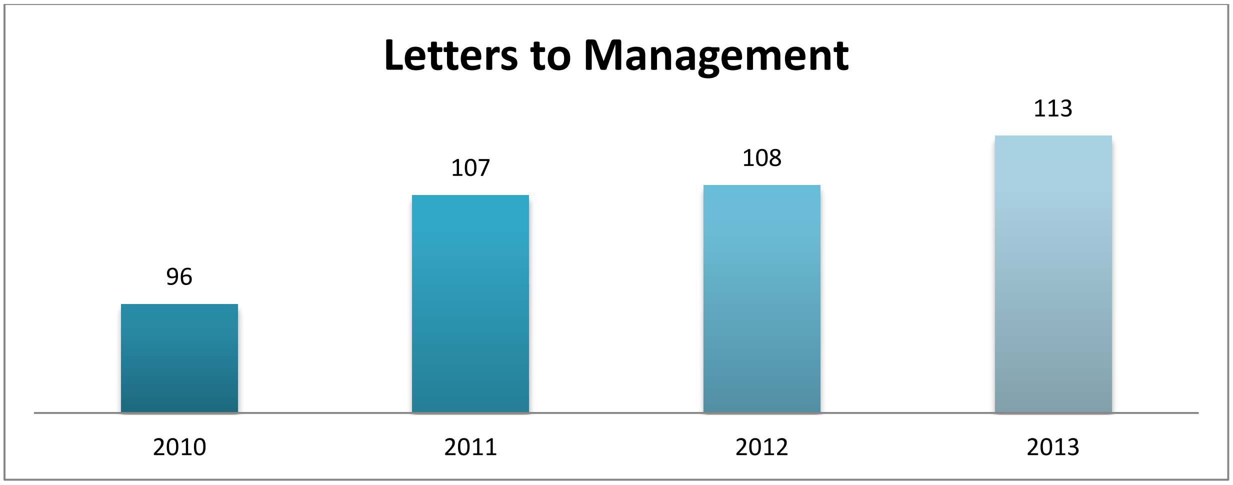
There has been a significant uptick in shareholder activism in 2013. While once thought of as solely for brave-hearted activist hedge funds, the activist shareholder space experienced a wide variety of developments this past year. The types of actors are becoming more diverse and the means of shareholder engagement range from more frequent letters from key shareholders, to campaigns to derail transactions or threaten wide-scale appraisal, to full-on proxy battles and hostile takeovers.

Wider Range of Actors

One of the biggest trends in shareholder activism is the greater variety of players. Rather than being limited to a few well-known activists, more institutional investors are joining the fray – particularly pension funds, mutual funds, sovereign wealth funds and others. In addition to increasing investments in hedge funds known for activism, many institutional investors have also increased support for activist campaigns. Even corporations themselves have started making waves, such as when Jos. A. Bank offered to purchase Men's Wearhouse earlier this year, which was subsequently rejected by Men's Wearhouse. Men's Wearhouse then responded with a Pac-Man defense (as described in more detail above) of going after Jos. A. Bank with a hostile bid which, as of the date of this publication, is currently still in play.

Various Means of Engagement

While the term "shareholder activism" is often associated with heated proxy wars, there are many other ways that shareholders can effectively communicate concerns and suggestions to a company's management team. A common approach is sending a letter, which for significant investors, if filed pursuant to the securities rules, becomes publicly available to all shareholders and the market at large. For example, Engaged Capital LLC, led by Glenn Welling, opted for this approach in a nine-page letter sent to Abercrombie & Fitch Co. calling for a change in leadership and a sale to private equity investors. Since 2010, publicly filed letters to management from activist shareholders have increased by almost 18%.



Other times, investors opt to share their concerns through a private dialogue of personal meetings, calls and private letters. While some investors air their concerns publicly from the outset, others may choose to go public only if management is not responsive to private overtures. The goal behind all of these communications is to engage in a dialogue with the company and persuade management to address the investors' concerns.

The use of proxy solicitations and shareholder votes is another mechanism through which shareholder activists seek to effect change. Earlier this year, shareholder OTK Associates successfully gained control of the Morgans Hotel Group Co. board after lengthy disputes over management and the direction of the company. Since that time, another shareholder, Kerrisdale Capital Management, has come out urging Morgans Hotel to sell itself. Yucaipa Cos. then proposed an unsolicited offer to acquire the company. The activism of shareholders in Morgans Hotel is just one example of increased activity, particularly in the hospitality space.

Another hospitality industry target was Chatham Lodging Trust, which received a takeover bid from investor BlueMountain Capital Management LLC in November, though the bid was ultimately rejected by the Chatham Lodging Trust board.

Unsuccessful activist campaigns included the over two-year old dispute between Cracker Barrel Old Country Store, Inc. and Biglari Capital Group. The dispute came to a head this past November when shareholders overwhelmingly voted against Biglari's dissident director candidates and a $20 dividend proposed by Biglari. In December, in an attempt to stave off a proxy fight from a group of hedge funds led by well known activist Carl Icahn, Hologic, Inc. (maker of cancer screening tools) entered into an agreement giving the Icahn-lead group two board seats in exchange for an agreement by the group to not solicit any proxies or further increase their ownership in the company.

Shareholder activism has been active in the transactional space as well, where shareholders have attempted to thwart a company's plan to sell. For example, this year Carl Icahn used lawsuits, proxy solicitations, and even Twitter in an attempt to overhaul Dell, Inc.'s board composition and stop its sale in a going private transaction to the private equity group Silver Lake. While eventually withdrawing his lawsuit (after an unsuccessful hearing in the Delaware Court of Chancery) and withdrawing his appraisal rights, Carl Icahn was a factor in Dell's increase in the offered purchase price and agreement to allow for a special dividend to its shareholders.

Consequences for Corporate Company Clients

With these matters being played out on the public stage, the stakes are high and a company's response should be tailored and reflect the company's short-term and long-term objectives. This wave of shareholder activism requires new thinking by corporate boards. The increased recent pressure applied by shareholder activists underscores the importance for corporate boards in keeping open lines of communication with their shareholders. That does not, however, mean that a board should bend to the will of a challenging shareholder. The fiduciary duties of the directors to manage the company in the best interests of the company remain paramount.

Companies should be vigilant in order to prepare for a possible activist campaign. In addition to maintaining active investor communication programs, companies may want to consider regularly reviewing their strategic options, even before an activist shareholder begins to raise criticisms. Companies should also fully understand the local law of their jurisdiction of incorporation as it relates to possible defenses against matters being brought before a shareholder vote. In a jurisdiction like Minnesota, which is particularly deferential to boards, ValueVision Media, Inc. was able to look to provisions in the Minnesota Business Corporation Act (the "MBCA") to at least raise an argument that minority investment holder The Clinton Group had not appropriately called a special meeting because the MBCA calls for a 25% voter threshold to call a special meeting concerning a potential business combination. The company argued that a potential $25 million investment would satisfy the definition of business combination for the purposes of this threshold, which includes any purchase or sale of 5% of the company's shares.

Companies also need to be on their guard in order to prepare for a possible activist campaign in connection with M&A transactions. Such preparation includes proactively engaging with corporate governance solutions providers like ISS early to recommend the transaction. More aggressive strategies go as far as to force the target to adopt a "poison pill" (thereby capping the toe-hold position an activist investor can obtain and preventing activists from working together in "groups"), such as what was done when Apollo looked to purchase Great Wolf last year.

Regardless of a company's past level of experience with shareholder activism, this increased activity in the shareholder activist space demonstrates the importance of company preparedness for the possibility of shareholder involvement. This recent activity suggests that shareholder contests are no longer limited to the largest of companies and that anticipation and defense against unwelcome activism by a multitude of players may likely become a more commonplace aspect of a company's general corporate governance considerations.

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