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QUESTIONS OR COMMENTS?

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Quarterly Corporate / M&A Decisions Update

Below is our Quarterly Corporate / M&A Decisions Update for decisions in Q2 2018 and selected others. This update is designed to highlight selected important M&A, corporate and commercial court decisions on a quarterly basis. Brief summaries of each decision appear below with links to more robust discussions. Please contact us with any questions.

Please click [HERE](#) for discussion of key decisions from Q1 2018.

[CBS Corporation v. National Amusements, Inc.](#)

C.A. No. 2018-0342-AGB (Del. Ch. May 17, 2018)

Why is it important

In a highly publicized decision in *CBS Corporation v. National Amusements, Inc.*, the Delaware Court of Chancery rejected a motion for a temporary restraining order to preclude CBS's controlling stockholder – National Amusements, Inc. ("NAI"), an entity controlled by Sumner Redstone and his daughter, Shari Redstone – from taking preemptive actions to protect its voting power. The case involved steps taken by CBS in an effort to negate NAI's (and the Sumner's) control, and an aggressive response by NAI to preserve its control. As characterized by the court, the "real issue" presented by the case was "who – a controller or a board of directors – should have 'first-mover' advantage to take action and define the contours of a fight between them." Based on the facts before it, the court denied CBS's request for a temporary restraining order, suggesting that a "truly extraordinary set of circumstances would be necessary to grant such a request." The court further stated that the clearest Delaware precedent regarding this "point of tension" between controller rights and the rights of independent directors to protect a corporation from exploitation by a controlling stockholder appeared to endorse a controller's right to make the first move preemptively to protect its control interest.

Summary

Following the split of CBS and Viacom in 2005, the controlling stockholder of CBS – NAI – pursued a merger of the two companies. A special committee tasked with evaluating the potential merger concluded that it was not in the best interests of CBS stockholders other than NAI. Tensions increased between NAI and the Sumner's and CBS's independent directors, culminating in a request by CBS and the independent directors for a temporary restraining order to prevent NAI from opposing a dividend proposal that would have substantially decreased NAI's voting power from approximately 80 percent to 17 percent and rendered it a non-controlling interest. After CBS's temporary restraining order application had been filed, and, in fact, approximately 1 hour before the hearing on the application was scheduled to begin, NAI responded by amending CBS's bylaws by written consent to, among other things, require 90 percent board approval to declare a dividend, which, in effect, gave NAI a blocking right.

Despite finding that CBS's allegations were sufficient to state a colorable claim for breach of fiduciary duty against the defendants, the court ultimately denied the request for a TRO. The court found that although Delaware law recognizes the right of a board to respond to a threat posed by a controlling stockholder, relevant Delaware precedent also supports the right of a controlling stockholder to act preemptively to protect itself.

Please click [HERE](#) for a more detailed discussion of this case.

[Eagle Force Holdings, LLC v. Campbell](#)

187 A.3d1209 (Del. 20)

Why is it important

In *Eagle Force Holdings, LLC v. Campbell*, the Delaware Supreme Court clarified the test for determining whether parties intended to be bound by the terms of a contract. To determine whether parties possess the requisite intent to be bound, the court adopted an objective standard, which evaluates all circumstances surrounding the contract negotiation. In addition, for the first time, the Delaware Supreme Court articulated a precise test for determining whether a contract's terms are sufficiently definite. Despite the clarifications of these prerequisites to a binding contract, the *Eagle Force Holdings* decision demonstrates that the enforcement of a contract containing missing terms is fact-specific and not subject to bright line rules. This decision also has received attention because the Delaware Supreme Court, in *dicta*, raised questions regarding whether Delaware is a "pro-sandbagging" state.

Summary

In *Eagle Force Holdings*, two parties had executed a Contribution Agreement and LLC Agreement, both marked "DRAFT." Later, after litigation had been filed, the parties took different positions as to whether the terms of the agreements were binding. The Delaware Supreme Court's decision centered on whether a Delaware court could exercise personal jurisdiction over the defendant based on the provisions of the agreements. If a contract had been formed, the Delaware courts could exercise jurisdiction based on a forum selection clause. If, on the other hand, no contract had been formed, the court lacked personal jurisdiction. In order to resolve this issue, the court identified the elements of contract formation under Delaware law, explaining that a valid contract exists only where the parties (i) intend that the contract will bind them, (ii) the terms are sufficiently definite, and (iii) the parties exchange legal consideration. With respect to the first requirement, the Delaware Supreme Court clarified that the appropriate test for determining intent is an objective one, under which the court must examine all surrounding circumstances. With respect to the second requirement, the Delaware Supreme Court clarified that terms are "sufficiently definite" when the court can "ascertain what the parties agreed to do." Reviewing the Court of Chancery's decision dismissing the action for lack of personal jurisdiction, the Delaware Supreme Court found that the Court of Chancery conflated the question of the parties' intent with the question of whether the contract contained sufficiently definite terms. Accordingly, while it found that the terms of the agreements at issue were sufficiently definite, the Delaware Supreme Court remanded the case for further consideration of the parties' intent to be bound.

Please click [HERE](#) for a more detailed discussion of this case.

[Steinberg v. Bearden](#)

C.A. No. 2017-0286-AGB (Del. Ch. May 30, 2018)

Why is it important

This decision demonstrates that a shareholder derivative action asserting breach of fiduciary duty claims premised on the board of directors' alleged involvement or complicity in false or misleading statements may be susceptible to early stage dismissal provided a majority of the company's board of directors was not personally involved in the alleged misstatements and there is no basis to infer that the directors intentionally disregarded the falsity of the alleged misstatements or acted in bad faith. In such circumstances, the company's Section 102(b)(7) exculpatory provision precludes a finding that a majority of the directors face a substantial likelihood of liability and thus the absence of a pre-suit demand on the board of directors provides a basis for dismissal.

Summary

Plaintiff, an individual stockholder in Hortonworks, Inc., brought a derivative action on behalf of the company alleging that the Hortonworks board of directors breached its fiduciary duties by making four false and misleading statements about the company's cash position. The plaintiff also asserted related claims for contribution and indemnity and for unjust enrichment. The defendants moved to dismiss for failure to make a pre-suit demand on the board. The Court of Chancery granted the motion and dismissed all claims after finding that the plaintiff had not adequately asserted that a pre-suit demand was excused because a majority of the board members were facing a substantial threat of personal liability. The court explained that the plaintiff failed to plead particularized facts sufficient to demonstrate that such a threat existed because she failed to adequately allege that the board members were personally involved in making the allegedly false or misleading statements or that they acted with knowledge or constructive knowledge that the statements were false and misleading.

Please click [HERE](#) for a more detailed discussion of this case.

[In re Hansen Medical, Inc. Stockholders Litigation](#)

C.A. No. 12316-VCMR (Del. Ch. June 18, 2018)

Why is it important

This decision demonstrates that, under Delaware's reasonable conceivability pleading standard, allegations regarding a long history of investment coordination and cooperation among defendants may be sufficient to support an inference that the defendants acted as a control group for the purposes of a motion to dismiss, even in circumstances where the defendants proffer reasonable (if not more compelling) explanations contrary to the contention that they functioned as a control group. As a consequence, where the plaintiff also adequately pleads that the control group received a non-ratable benefit in a transaction (such as the opportunity to "roll over" their stock, as was the case here), the entire fairness standard is applicable and likely precludes dismissal on a motion to dismiss.

Summary

This decision demonstrates claims brought by minority shareholders challenging the squeeze out merger of Hansen Medical, Inc. into Auris Surgical Robotics, Inc. The plaintiffs, representing a purported class of minority stockholders, alleged that certain defendants who together controlled more than 50 percent of Hansen's stock (the "Controller Defendants") used their control to negotiate a beneficial deal for themselves at the expense of the minority stockholders. The plaintiffs also brought a claim against Auris for aiding and abetting the other defendants' breaches of fiduciary duties. The Court of Chancery denied the Controller Defendants' motion to dismiss, finding that the plaintiffs' allegations regarding a "twenty-one year coordinated investing history" in at least seven different companies were sufficient to support an inference that a control group existed and that the Controller Defendants received a non-ratable benefit – namely, the opportunity to "roll over" their Hansen stock into preferred stock in Auris. Accordingly, the court applied the entire fairness standard of review, and denied the Controller Defendants' motion to dismiss. The court granted Auris's motion to dismiss the aiding and abetting claim, however, finding that the complaint only showed that Auris "negotiated a not-uncommon agreement to reduce its cash outlay by having the majority investors in Hansen rollover their stock."

Please click [HERE](#) for a more detailed discussion of this case.

[US Ecology, Inc. v. Allstate Power Vac, Inc.](#)

C.A. No. 2017-0437-AGB (Del. Ch. June 18, 2018)

Why is it important

In *US Ecology, Inc. v. Allstate Power Vac, Inc.*, the Delaware Court of Chancery held that a seller could not maintain post-closing claims for breach of contract and unjust enrichment against a divested subsidiary and buyer for failing to purchase intercompany insurance payments that were not covered by the purchase agreement or other contract. The court based its decision on the principle that sophisticated parties should be held to their negotiated bargain and should not be able to demand additional payments where the parties' agreement did not require them, regardless of whether the payments would have been consistent with past practices or conferred a potentially unintended benefit upon the buyer. The court also found that the standard release in the parties' agreement barred the seller's claim for unjust enrichment. The case serves as an important reminder to seller-side deal teams of the importance of documenting intercompany obligations, and of the interplay between obligations and release provisions within purchase agreements.

Summary

US Ecology and its subsidiary, EQ Industrial, brought claims for breach of contract and unjust enrichment against a former subsidiary, Allstate, seeking to recover for Allstate's share of insurance payments US Ecology had made for Allstate's benefit. Plaintiffs alleged that Allstate had historically reimbursed them for the share of insurance payments that benefitted Allstate under occurrence-based umbrella policies covering the plaintiffs and Allstate, and that Allstate was required under the parties' stock purchase agreement to continue to reimburse its former corporate parents because the reimbursement obligation was an assumed liability, and because Allstate would otherwise be unjustly enriched.

The Court of Chancery rejected these arguments, finding that while Allstate had made intercompany reimbursements during the pre-closing period, it had no contractual obligation to do so, and under the purchase agreement there was no obligation to continue to make the payments. The court further found that the release in the purchase agreement – which contained broad language releasing any and all claims, known or unknown, which had accrued prior to closing, or which would accrue post-closing on the basis of pre-closing events – barred the sellers' claims for unjust enrichment. The court accordingly dismissed the complaint, holding that there was no evidence of a reimbursement obligation in the first instance, and that even if this obligation existed, US Ecology's post-closing payments arose from Allstate's pre-closing activities under the occurrence-based policies and, accordingly, had been released.

Please click [HERE](#) for a more detailed discussion of this case.

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