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Quarterly Corporate / M&A Decisions Update

Below is our Quarterly Corporate / M&A Decisions Update for decisions in Q1 2019 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 Q4 2018.*

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QUESTIONS OR COMMENTS?

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FrontFour Capital Grp., LLC v. Taube, C.A. No. 2019-0100-KSJM (Del. Ch. Mar. 22, 2019).

Why is it important

In *FrontFour Capital Grp., LLC v. Taube*, the Delaware Court of Chancery declined to order a curative shopping process despite finding that the sale process was tainted by conflicted insiders, failed to comply with the entire fairness test and involved unreasonably preclusive deal protection measures. In so holding, the Court reaffirmed that an injunction will not issue where it would strip an innocent third party (here, the buyer) of its contractual rights unless the third party aided and abetted the target's breach of fiduciary duty. To address the circumstances, however, the Court ordered corrective disclosures regarding the conflicted sale process and third-party expressions of interest that were omitted from the proxy, and enjoined the stockholder vote pending such corrective disclosures.

Summary

Stockholders of Medley Capital Corporation, a business development corporation, challenged a proposed three-way merger involving Medley Capital Corporation, Medley Management, Inc., and Sierra Income Corporation. The court found that the Medley Capital stockholders had proven that Medley Capital's board – which included co-founders and majority owners Brook and Seth Taube – breached its fiduciary duties by entering into the proposed transaction. In particular, the court found that the Taube brothers had orchestrated the transaction by, among other things, stacking the special committee with board members beholden to them, depriving the special committee of information regarding other indications of interest, forcing an aggressive timeline with no compelling business reason, and insulating the deal from a post-signing market check by including preclusive deal protections, including a no-shop provision. The court, however, declined to permanently enjoin the merger because plaintiffs failed to show that the proposed buyer aided and abetted those breaches. Instead, the court ordered additional disclosures to the Medley Capital stockholders, and enjoined the stockholder vote pending such disclosures. Since that injunction, a second shareholder filed suit challenging the merger, alleging, among other things, that defendants failed to make the requisite corrective disclosures. The Court of Chancery has consolidated the two actions and permitted them to proceed.

*Please click **HERE** for a more detailed discussion of this case.*

Vintage Rodeo Parent LLC v. Rent-A-Center Inc., C.A. No. 2018-0928-SG (Del. Ch. Mar. 14, 2019).

Why is it important

Parties in M&A transactions often include provisions requiring formal notice to extend closing dates. The Court of Chancery's recent ruling in *Vintage Rodeo Parent LLC v. Rent-A-Center Inc.* illustrates that, where an agreement permits termination after a specified "end date" unless the period for closing is extended, failure to technically comply with the formal extension procedure in the agreement may result in harsh consequences.

Summary

Vintage Capital Management LLC owns and operates a chain of "rent-to-own" stores. In 2018, it entered into a merger agreement to acquire another rent-to-own store owner, Rent-A-Center Inc. Under the parties' agreement, either side could terminate the merger unilaterally if the transaction did not close within six months of signing, unless one or both parties served a formal notice extending the closing period, and other conditions were met. Unless terminated, the agreement required both parties to use "commercially reasonable efforts" to obtain FTC approval for the transaction and to close.

Following the signing, Vintage Capital and Rent-A-Center worked together to achieve FTC approval for their planned merger, but did not obtain that approval within the six month closing period specified in the merger agreement. Rent-A-Center anticipated that Vintage Capital would exercise its right to unilaterally extend the closing period by sending an extension notice, but when Vintage Capital failed to do so, Rent-A-Center terminated the agreement. Vintage Capital sued, alleging that Rent-A-Center had waived Vintage Capital's obligation to send a formal notice extending the closing period by working together to continue to seek FTC approval for the merger. The Court rejected this argument, finding that Rent-A-Center's conduct in jointly seeking FTC approval was consistent with Rent-A-Center's obligation under the agreement to use commercially reasonable efforts to close, and was not a waiver of the contractual provisions entitling Rent-A-Center to terminate the agreement if no formal extension notice was issued. The Court found the agreement's termination and notice provisions clear and enforceable as written.

*Please click **HERE** for a more detailed discussion of this case.*

Agiliance, Inc. v. Resolver SOAR, LLC, No. 2018-0389-TMR (Del. Ch. Jan. 25, 2019).

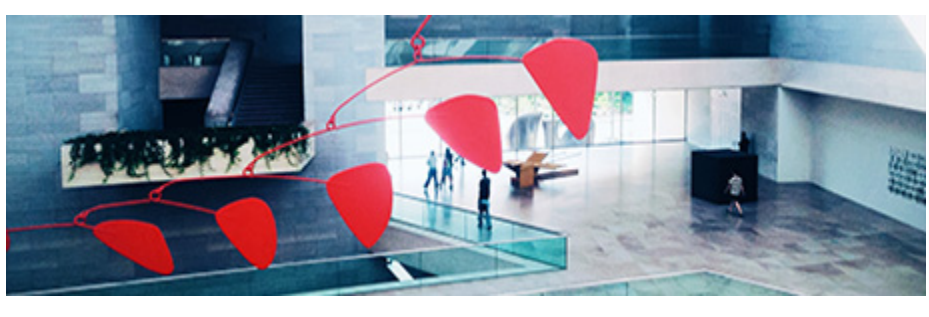
Why is it important

The Court of Chancery's decision in *Agiliance, Inc. v. Resolver SOAR, LLC* further expounds Delaware law addressing the distinction between appointing an expert or an arbitrator to resolve disputes arising under a merger agreement. This decision follows another recent case on this topic – *Penton Business Media Holdings LLC v. Informa PLC,* Del. Ch., C.A. No. 2017-0487-VCL (Del. Ch. July 9, 2018) – featured in our Q3 2018 publication. Along with *Penton*, the *Agiliance* decision shines a light on the importance of carefully drafting dispute resolution procedures to clearly articulate the parties' intent regarding whether claims are subject to arbitration.

Summary

In a post-merger dispute concerning the calculation of the final net working capital amount, the court addressed whether the dispute resolution provision in the parties' purchase agreement called for an arbitration or an expert determination. In addressing the issue on the seller's motion for summary judgment, the court stated that the determination hinges on the parties' intent, the best evidence of which is reflected in the agreement. After reviewing the relevant provision in the purchase agreement, which made several references to arbitration, including that any net working capital dispute "shall be submitted for arbitration," the court concluded that the language in the agreement evidenced the parties' intent to arbitrate the dispute.

*Please click **HERE** for a more detailed discussion of this case.*



Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC, 202 A.3d 482 (Del. 2019).

Why is it important

The Delaware Supreme Court's decision in *Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC* reaffirms the Court's reluctance to vary the plain language of sophisticated parties' bargains. In particular, the Supreme Court noted that a party could not rely on the implied covenant of good faith and fair dealing to force an exit transaction where the LLC agreement did not provide for such relief.

Summary

In 2007, Crestview Partners, L.P. and Load Line LLC (the "Minority Members") invested in Oxbow. Oxbow's governing LLC Agreement afforded its members a "Put Right" following the seventh anniversary of their investment. If the put failed, that member could trigger an "Exit Sale" of all of Oxbow's assets. The Exit Sale was conditioned on a so-called "1.5x Clause," which permitted the Exit Sale only if all Oxbow members would receive at least 1.5 times their initial capital contribution to the LLC.

Several years later, the Minority Members sought to exercise their Put Right and trigger an Exit Sale. However, the valuation of the sale was less than required for certain subsequently admitted members (the "Small Holders") to receive 1.5 times their capital contribution. The Small Holders therefore sought a declaratory judgment blocking the Exit Sale.

Although the contract required that sale proceeds be allocated *pro rata* to the members, the Court of Chancery applied the implied covenant of good faith and fair dealing to read a "Top-Off" provision into the LLC Agreement so that the Small Holders could not block the transaction. The Supreme Court of Delaware reversed, emphasizing that the implied covenant is an exceedingly rare remedy unavailable to alter the parties' bargain as to foreseeable circumstances.

*Please click **HERE** for a more detailed discussion of this case.*