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Rules of the Road: 2011 Edition

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A Renewed Judicial Focus on Pills

- A Staggered Board's Response to an Inadequate Bid (Airgas)
 - “Just say no” or “Just say not now”?
 - Inadequate vs. Unfair
- To Fend Off Potential Acquisition of Control (Barnes & Noble)
 - Is a proxy contest still possible? Is control realistically attainable?
- To Defend NOLs (Selectica)
 - Protecting a significant corporate asset without impairing proxy contests
 - Staggered board and pill are not per se preclusive



When Does Revlon Apply?

- Traditional Formulation – Revlon applies:
 - Corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company”
 - Corporation abandons long-term strategy and pursues breakup transaction in response to an offer by a bidder
 - To a transaction that results in a sale or change of control
- If control remains in a large, fluid market of disaggregate stockholders after a transaction, no change of control occurs and Revlon is not implicated



When Does Revlon Apply? (cont'd)

- Mixed Consideration - 50% cash - 50% stock results in a sale or change of control. (Smurfit-Stone Container)
- Cash/Stock Election – Revlon?
- “End-Stage” Transactions?
 - Revlon or a similar form of enhanced scrutiny judicial review may apply if transaction places interests of stockholders in the “end stage” (Occam Networks)
 - In “Elephant-Flea” deal, does negotiation of exchange ratio determine share of future control premium to which the target corporation’s stockholders will be entitled?



Guidelines for a Sales Process

- Directors are required to conduct a reasonable sales process, not a perfect one. “No single blueprint”
- Courts tend to defer to well-informed, good faith business judgments of unconflicted directors with respect to the conduct of a sales process, strategic decisions along the way, and reliance on advisors
 - Scope and nature of market check
 - Evaluation of feasibility and value of potential alternatives and risks of pursuing them vs. certainty of existing bid/deal
 - Receipt of fairness opinion
 - Reliance on financial advisor valuation methodologies and selection of reasonable projections



Are there Judicial Remedies for a Compromised M&A Process?

- Court has generally refused to enjoin M&A transactions
- Typical Revlon claims about price or deal protections have little chance of success
 - Section 102(b)(7)
 - Bad faith is extremely difficult to prove
- Exceptions to refusal to issue injunctions
 - Inadequate disclosure
 - Existence of a competing bid
- Del Monte remains the exception to the rule
- Impact of lack of injunction threat on deal makers



Conflict Transactions: Lessons from Southern Peru

- An ineffective special committee will preclude burden shift
- Close judicial examination of committee decision-making and effectiveness
 - Mandate?
 - Alternatives considered?
 - Leverage opportunities?
 - Dissection of investment banker's valuation work
 - Committee failed to request fairness opinion bring down and failed to revisit its recommendation
- Controller's burden to show fair – even where ineffectiveness of the special committee may not be transparent



Financial Advisors: Engagement Issues after Del Monte

- Will the recent flurry of judicial criticism and disclosure injunctions change behavior?
- Expectation of broader disclosure – by bankers to their clients and by companies to their stockholders
 - Amount and contingent nature of fees (Atheros)
 - Actual/potential conflicts from fees, matters or contacts
- Impact on engagement letters
 - Establishing disclosure expectations
 - Conditions for buy side financing?
 - Best practices?



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