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WHAT'S INSIDE

COMMENTARY

Delaware court imposes 4-month delay to hostile bidder's offer, proxy contest

Breaches of confidentiality agreements result in injunction

In the first of several commentaries by corporate law specialists on the impact of the Delaware Chancery Court's recent decision in *Martin Marietta Materials v. Vulcan Materials Co.* decision, Roland Hlawaty and David Schwartz of Milbank, Tweed, Hadley & McCloy say the ruling provides a cautionary tale about leaving any wiggle room in contract wording regarding intent.

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HOSTILE TAKEOVER

Free $5.3 billion bid for Vulcan, Martin Materials urges Delaware justices

In its fast-paced, high-profile appeal, Martin Marietta Materials will ask Delaware's Supreme Court at oral argument May 31 to overturn a four-month freeze on its proxy contest and $5.3 billion hostile bid for rival gravel maker Vulcan Materials Co.

Martin Marietta Materials Inc. v. Vulcan Materials Co., No. 254-2012, appellee's answering brief filed (Del. May 21, 2012).

The high court will then have less than 24 hours to rule on Martin Marietta's appeal before a key Vulcan shareholder meeting scheduled for June 1, at which Martin Marietta hoped to elect four new directors who would push Vulcan to let the investors consider its merger offer.

Chancellor Leo Strine of the Chancery Court ruled May 4 that Martin Marietta had violated a non-disclosure agreement with its larger rival and used confidential information in forming its bid and proxy fight, so he imposed the unusual four-month freeze as a punishment. *Martin Marietta Materials Inc. v. Vulcan Materials Co.*, No. 7102, 2012 WL 1605146 (Del. Ch. May 4, 2012).

If the justices overturn the lower court ruling, they could order the Chancery Court to postpone the Vulcan meeting until new proxy materials could be prepared, corporate law professor Larry Hamermesh said.

JUDICIAL TIME-OUT

If the state high court allows the Chancery Court ruling to stand, Vulcan's annual meeting — and the director election — will take place while Martin Marietta is in a judicial time-out, and a key window in the hostile-takeover contest will close before it can make its next merger move.

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Delaware court imposes 4-month delay to hostile bidder's offer, proxy contest

Breaches of confidentiality agreements result in injunction

By Roland Hlawaty, Esq., and David Schwartz, Esq.
Milbank, Tweed, Hadley & McCloy

In a lengthy, highly contextual analysis in *Martin Marietta Materials Inc. v. Vulcan Materials Co.*, No. 7102, 2012 WL 1605146 (Del. Ch. May 4, 2012), the Delaware Court of Chancery recently took the extraordinary steps of enjoining — for four months — Martin Marietta Materials from conducting a proxy contest, making an exchange or tender offer, or otherwise taking steps to acquire control of the shares or assets of Vulcan Materials Co. as a result of Martin Marietta's breaches of the non-disclosure agreement and the joint defense agreement that it entered into with Vulcan.

This decision highlights the extent to which Delaware courts will look to resolve contract disputes by applying the well-settled principles of contract interpretation, and if the contract's words are ambiguous, by then looking to the extrinsic evidence to determine the parties' intent.

BACKGROUND

Martin Marietta is the "second largest domestic participant in the aggregates industry," mining large rocks and similar materials and processing such materials for roads, buildings and other infrastructure. Vulcan is the largest domestic participant in the aggregates business.

In the early 2000s, Vulcan's CEO had reached out to Martin Marietta's management on several occasions to express an interest "in talking about a friendly merger." Each time, Martin Marietta's management "eventually balked, largely over the same issue, which was that a merger would raise questions about who would be CEO" of the combined company.

When Martin Marietta's CEO was replaced in 2010, Vulcan's CEO reached out again to Martin Marietta's management "after nearly a decade of empty flirtation" to gauge their interest in a friendly merger. This time, partly because of a "better professional relationship" between the two CEOs, a dialogue began in the spring of 2010 about a potential deal.

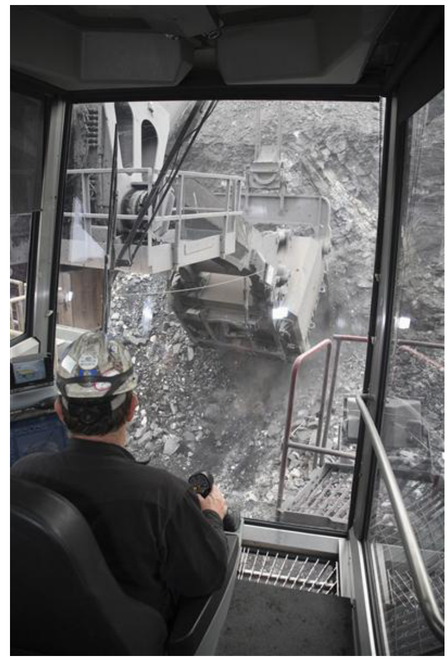
From the outset, Martin Marietta "emphasized the need for confidentiality" and both companies agreed upon "the need for a confidentiality agreement to cloak any merger discussions between the companies and any information exchanged." The companies, however, failed to discuss or explicitly require a standstill provision in any confidentiality agreement, which the court noted "likely flowed from both CEOs' evident desire for confidentiality and the shared premise that they were seeking to explore whether a friendly, consensual merger agreement could be reached."

From the outset, Martin Marietta "emphasized the need for confidentiality," and both companies agreed upon "the need for a confidentiality agreement to cloak any merger discussions.

THE NDA

On May 3, 2010, Martin Marietta and Vulcan entered into a non-disclosure agreement and, to facilitate an antitrust analysis, also entered into a joint defense agreement. Despite lacking a standstill provision that would have prevented each party from acquiring shares of the other or taking other "unfriendly" actions (such as a proxy contest), the non-disclosure agreement did contain common restrictions.

- Paragraph (2) restricted either party's use of the other's "evaluation material" solely for "the purpose of evaluating a 'business combination transaction'" that was "between the parties" and prohibited disclosure of "evaluation material" for purposes other than the evaluation of a transaction.
- Paragraph (3) restricted a party, subject to paragraph (4), from disclosing that the party had received evaluation material or that merger discussions had been or were taking place, unless such party was "legally required" to disclose such information.
- Paragraph (4) set forth what the court referred to as the "notice and vetting process" provisions that required a party to provide, after having received interrogatories or subpoenas or pursuant to other legal proceedings (each legal requirement referred to as an "external demand"), notice to the other party and a chance to seek an injunction to limit its disclosure to "the bare legal necessity."



REUTERS/Adam Tanner

Following execution of these two confidentiality agreements, the parties began to exchange nonpublic information. In particular, they shared information regarding key revenue drivers and the potential synergies that the companies could exploit based on "the companies' combined assets with one management team and from the elimination of duplication to perform functions such as human resources, financial management, and so forth, and other economies of scale."

The court focused in on a March 8, 2011, meeting between the parties. Following that meeting, an internal memo was circulated among Martin Marietta's management that essentially increased the potential synergies by $100 million more annually than previous internal mid-range estimates, which "meant potential cost savings of $1 billion over a ten-year term that had not yet been baked into Martin Marietta's deal analysis."

Once this analysis "quickly spread," the "very next day," Martin Marietta's bankers were instructed that there were "more synergies than realized" and that the "baseline synergy estimate should move up to $300 million."

MERGER ARDOR COOLS

Despite Martin Marietta's enhanced exuberance, by spring 2011, Vulcan's management began to cool to "the idea of a combination, in part because [Vulcan] was in a comparatively weaker condition than when the deal dance started." Vulcan was particularly hurt during the recent economic downturn as compared with Martin Marietta largely in part due to "Vulcan's concentration in markets affected by the burst housing bubble." As a result, Vulcan's management initially became "distant and uncommunicative" until late June 2011, when the two CEOs finally met in person, at which time Vulcan's CEO expressed a lack of interest in further pursuing a merger with Martin Marietta at that time.

However, because "Martin Marietta's stock price had risen in comparison to Vulcan's," which "gave Martin Marietta more power in its dealings with its suitor, Vulcan," the "once-reluctant dance date became more enamored." "Rather than worrying about receiving a premium from Vulcan to merge, Martin Marietta began contemplating being the dominant partner itself by using its own now relatively more valuable currency — its own stock — to buy Vulcan at a premium."

In analyzing this potential structure, however, "the increased synergy estimates coming out of the March 8, 2011, meeting were critical, because they provided a basis to conclude that Martin Marietta could offer Vulcan stockholders a premium in a stock-for-stock exchange, and still justify the deal to Martin Marietta's stockholders as one that would not reduce earnings per share and that would produce powerful long-term benefits in the form of higher profits per share."

NO LONGER FRIENDLY

Eventually, on Dec. 12, Martin Marietta launched an unsolicited exchange offer to purchase all of Vulcan's outstanding shares, and to "create a Vulcan board more receptive of its offer, Martin Marietta also launched a proxy contest" to elect four new members to Vulcan's classified board at Vulcan's upcoming annual meeting scheduled for June 1. The exchange offer was conditioned on, among other things, Vulcan entering into a definitive merger agreement with Martin Marietta — a condition that was waivable by Martin Marietta.

> On Dec. 12, Martin Marietta launched an unsolicited exchange offer to purchase all of Vulcan's outstanding shares and to "create a Vulcan board more receptive of its offer."

That same day, Martin Marietta also filed a registration statement on Form S-4, that "included a host of details that constitute evaluation material under the confidentiality agreements," and it brought suit to obtain a declaratory judgment that its exchange offer and proxy contest did not violate the provisions of the confidentiality agreements.

As the court noted, "the road to true love seldom runs smooth, even for companies that make paving materials."

LEGAL ANALYSIS: CLAIMS

Vulcan alleged that neither the exchange offer nor proxy contest qualified as "a transaction" under the non-disclosure agreement or "the Transaction" under the joint defense agreement. In the NDA, the term "transaction" is defined as "a possible *business combination transaction between* [Martin Marietta] and [Vulcan] or one of their respective subsidiaries" (emphasis added)."

In the JDA, a slightly different definition is used to define "the transaction": "a potential transaction *being discussed by* Vulcan and Martin Marietta or one or more of their divisions, subsidiaries, or related companies, involving the combination or acquisition of all or certain of their assets or stock" (emphasis added).

Based on the foregoing, Vulcan alleged that Martin Marietta was excluded from conducting either the exchange offer or the proxy contest because "(i) neither is a 'business combination transaction' that is 'between' Martin Marietta and Vulcan for purposes of the NDA in the sense that the sitting board of Vulcan has not contracted to consummate the transaction; and (ii) the only transaction 'being discussed' by the parties was a consensual, contractual merger of equals and thus the exchange offer and proxy contest are not 'the transaction' referred to throughout the JDA."

Accordingly, based on the following interpretations, Vulcan alleged that Martin Marietta breached the confidentiality agreements:

- The confidentiality agreements limited use of evaluation material solely to use relating to a business combination transaction between Vulcan and Martin Marietta — in other words, a "voluntary contractual decision between the governing boards of the companies, and not … to engage in an unsolicited exchange or tender offer to the other party's stockholders."
- The confidentiality agreements prohibited disclosure of evaluation material or the fact that the companies were in merger discussions. A party's ability to make disclosure of any of the foregoing because it was "legally required" was limited, in Vulcan's view, only to respond to external demands, rather than any voluntarily imposed requirements to comply with disclosure requirements under the securities laws governing Martin Marietta's exchange offer or proxy contest.

- Even if Martin Marietta was "legally required" to make disclosures in response to securities laws relating to its exchange offer and proxy contest, Martin Marietta "went well beyond any legal requirement" and instead disclosed information that "was tactically advantageous to itself rather than upon the contractual standard" in the NDA, "which limited disclosures to the bare legal necessity."
- Martin Marietta's various soliciting materials (*e.g.*, investor calls) that were in addition to the Form S-4 and proxy statement were not "legally required."

Martin Marietta countered with two key arguments that its exchange offer and proxy contest constituted a "business combination transaction" for purposes of the NDA: "(i) they are transactions that qualify as a 'business combination' under usages of that term in certain legal contexts, like the securities regulation context; or, (ii) in the alternative, they are related transactions designed to give Martin Marietta the power to ultimately cause an integration of Vulcan and Martin Marietta."

In other words, the exchange offer and the proxy contest are "business combination transactions 'between' Martin Marietta and Vulcan in the sense that an ultimate combination of the businesses will be 'between' the two companies."

With respect to the JDA, Martin Marietta also countered with two arguments: Martin Marietta, as an evidentiary matter, disputed that the "only transaction 'being discussed' was a friendly one," and the NDA definition should prevail because "the JDA includes a provision providing that the terms of the JDA shall not 'affect or limit' the NDA."

COURT'S ANALYSIS

Noting that this was "a purely contractual case" not to be "confused with cases where a board has faced a claim that its fiduciary duties require it to waive contractual rights so as to further the best interests of the company's stockholders," the court applied the well-settled principles of contract interpretation in an effort to enforce the plain and unambiguous terms of the confidentiality agreements "as the binding expression of the parties' intent", and where the words of the confidentiality agreement were ambiguous, the court looked to "extrinsic evidence to determine the parties' intent."

In particular, the court said "the drafting history of the NDA, Martin Marietta's own conduct, and the interpretative gloss provided by the JDA bear on the interpretative question."

Beginning with the JDA, the court concluded, without resorting to extrinsic evidence, that the terms of the JDA were unambiguous on their face and that there was "no question that the one transaction being discussed by the parties when they entered into the JDA was a negotiated one."

> "The last thing that Martin Marietta would have wanted to allow would be a gunpoint transaction entered into after an unsolicited exchange offer and proxy contest."

Turning to the court's contractual interpretation of the NDA, Chancellor Leo Strine determined that both "Vulcan and Martin Marietta's interpretations of the phrase 'business combination transaction between' Vulcan and Martin Marietta [were] reasonable." The court noted that "one cannot confidently say that the term business combination transaction has a single, clear meaning. The usages in analogous contexts are too varied … to conclude that the term as used in the NDA means one thing and one thing only."

OUTSIDE THE CONTRACT

As a result, the court turned to the extrinsic evidence to resolve the dispute, finding that "Vulcan has the better of the argument here" and that neither the exchange offer nor the proxy contest was a business combination transaction "between" Vulcan and Martin Marietta because "neither was a step taken as a component part of a contractual, transactional agreement between Martin Marietta and Vulcan to effect a business combination."

In the court's view, the "record is replete with evidence of [Martin Marietta's] expressed desire to make sure that nothing that Martin Marietta shared with Vulcan, including the very fact of discussing a merger, could be revealed publicly, because that might facilitate an unsolicited bid by an interloper."

At the time the confidentiality agreements were entered into, Martin Marietta strongly emphasized the need to maintain confidentiality with respect to the parties' discussions or sharing of information as support for an understanding that any "business combination transaction that was between the parties would be a transaction signed up by the sitting boards of Martin Marietta and Vulcan. The last thing that Martin Marietta would have wanted to allow would be a gunpoint transaction entered into after an unsolicited exchange offer and proxy contest."

The court also noted that, based on the extrinsic evidence, Martin Marietta "would never have agreed to exchange confidential information if [it] thought that one of the parties to the NDA was free to launch an unsolicited exchange or tender offer or a proxy contest under the terms of the agreement."

In short, the court noted that Martin Marietta's actions at the onset of discussions back in the spring of 2010 when the confidentiality agreements were entered into are "squarely at odds with the one Martin Marietta adopts in this litigation."

The court then parsed through the key provisions of the NDA and its drafting history to determine how best to reflect the parties' intent. The court concluded that "Vulcan's reading of the NDA is one that harmonizes all the relevant provisions of the agreement by coming up with a single, workable scheme." The court was persuaded by Vulcan's reading because it ensured that both the evaluation material itself and the fact that such material was made available and that merger discussions were ongoing would all be subject to the notice and vetting process.

Under Martin Marietta's reading, however, there would be two independent regimes under the NDA: one "triggered by an external demand" requiring a party to "satisfy the notice and vetting process" before making any disclosure, and one where a party that does not face an external demand can take "unilateral action that it concludes triggers a legal requirement to disclose."

CONFIDENTIALITY CONCERNS

Based on the extrinsic evidence, the court stated that the "notion that [Martin Marietta's] obsessive concern with confidentiality did not extend to a situation when Vulcan itself would decide to launch a hostile bid, impose on itself an arguable legal requirement to disclose, and use that as a blank check to dump in the public domain the broad classes of information that Martin Marietta had itself asked to be treated as confidential under the NDA is one that a rational, disinterested mind could not accept as plausible."

Accordingly, the court held that Martin Marietta breached the NDA by:

- Having the Form S-4 spill "ten single-spaced pages worth of the parties' negotiating history that was clearly information covered by" Paragraph (3) of the NDA" and not filed in response to an external demand.
- Failing to adhere to the notice and vetting process with respect to the information contained in the Form S-4.
- Broadly disclosing information in the Form S-4, the proxy statement and in its communications with investors and the press without adhering to the notice and vetting process (the court concurred with Vulcan's assertions that Martin Marietta could have complied with Securities and Exchange Commission's requirements "with far more limited disclosure … with a much simpler recitation of the facts" instead of using the Form S-4 as "an opportunity to work with its public relations flacks on a propaganda piece in aid of the exchange offer").

Finally, in response to Martin Marietta's assertion that if enjoined, "a chill on M&A activity will result, harming stockholders and lowering share values", the court noted that if it were to agree with Martin Marietta and send a message "that the confidentiality and other agreements that control the downside risks" of engagements "will not be respected, then one can rationally expect such competitors not to be as prone to considering such transactions."

The court continued, noting that U.S. M&A markets are among the most vibrant globally because of "the freedom given to corporations to use contracts to limit the very real business risks attendant to exploring M&A transactions. By respecting contract rights … courts give parties in commerce the confidence that they can rely upon the contracts they execute to reduce risks and transaction costs."

INJUNCTIVE RELIEF GRANTED

To obtain injunctive relief, the court noted that Vulcan had to not only prove "'actual success on the merits', but also 'irreparable harm' and that 'the harm resulting from a failure to issue an injunction outweighs the harm to [Martin Marietta] if the court issues the injunction.'"

While noting that the "distraction to pushing forward with its day-to-day business plans when its employees cannot help but be preoccupied by Martin Marietta's exchange offer and proxy contest and its contractually improper selective revelation of nonpublic Vulcan information" was "hard to measure," the court did assert that such harm would be "difficult for any objective mind to deny as real."

Moreover, the court noted that "[i]f the cost of sharing information is to be at the mercy of the other party, who is usually an industry rival with an everyday incentive to eat your lunch, you will, if you are a typical CEO, tend not to risk sharing. The overall cost to investors if the law does not enforce confidentiality agreements might turn out to be quite large in terms of transactions that are not done."

In view of these realities, the court held that the "equities favor enforcing the confidentiality agreements as written and vindicating Vulcan's reasonable expectations." The court viewed Vulcan's request for a four-month injunction as "measured" and a "responsible" period that would preclude Martin Marietta from running its slate of directors for election at Vulcan's upcoming annual meeting. In the court's view, "an argument can be made that a longer injunction would be justified by the pervasiveness of Martin Marietta's breaches."

The court closed in noting that any delay caused to Martin Marietta's plans is "one that is the result of its own conduct." The court further justified its extraordinary actions by noting that "Martin Marietta is not being held to any promise it did not make. Rather, it is being held to exactly the bargain it successfully sought to impose on Vulcan as a condition to sharing information and having merger talks" in the first place.

CONCLUSION

The *Vulcan* decision is a direct reminder that Delaware courts will look to resolve contract disputes by applying the well-settled principles of contract interpretation, and if the contract's words are ambiguous, by looking to the extrinsic evidence to determine the parties' intent. Accordingly, deal makers should take care to ensure that contractual provisions specifically address the desired results.

In this context, for example, despite some commentators' views that a prohibition on using evaluation material could be interpreted as tantamount to a "back-door standstill," Vulcan could have insisted on an explicit and express standstill provision in the NDA to ensure that its intent was unambiguously reflected in the contract itself, rather than subjecting itself to the court's examination of the extrinsic evidence. WJ

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Shoe firm tells high court $568,000 legal fee award doesn't fit

A Delaware Chancery Court judge wrongly awarded a shoe company's ex-CEO $568,000 for his legal expenses in a suit over actions he took *after* he resigned, Fitracks Inc.'s new owner argues in an appeal to the state Supreme Court.

***Fitracks Inc. v. Danenberg*, No. 170-2012, appellant's opening brief filed (Del. May 14, 2012).**

Delaware-chartered companies like Fitracks agree to pay their officers' and directors' expenses for litigation involving actions they took as company officials, but Fitracks' new owner, Aetrex Worldwide, claims on appeal it only sued former Fitracks CEO Noam Danenberg over a "virtual shoe store" he opened after he was forced out of the company.

IN FITRACKS' SHOES

Vice Chancellor J. Travis Laster ruled that because Aetrex also sued Danenberg for plans he allegedly hatched *before* the 2008 merger that resulted in his ouster, it had the responsibility to pay his legal bills because it stood in Fitracks' shoes. *Danenberg v. Fitracks Inc.*, No. 6454, 2012 WL 707277 (Del. Ch. Mar. 5, 2012).

In its opening brief Aetrex said the judge mistook what it supplied as background and confused that with its actual charges in the underlying suit, which, it says, only concerns what Danenberg did *after* he resigned following the merger.

Moreover, since Fitracks changed its bylaws right after Danenberg left to eliminate indemnification for former officers, Aetrex owes no duty to pay his legal expenses, the opening brief said.

NEW PARENT STEPS IN

In this suit for advancement of defense costs, Danenberg charged that just before Aetrex acquired Fitracks in 2008, he developed a 3D scanning machine that measures customers' feet and determines what orthopedic shoe or insert they need for a proper fit.

As part of the merger, Danenberg left and became an officer of a newly created division called Just4Fit.

That company would be the exclusive marketer of a chain of "virtual stores" that served customers by matching their scanned measurements to Just4Fit's inventory of orthopedic shoes and inserts.

As part of the merger, Fitracks shareholders were to receive income from a 10-year earn-out agreement based on a set number of scanning machines Just4Fit was to put into service, according to Danenberg's suit.

But according to court documents, differences arose over the interpretation of the earn-out agreement, and Aetrex, Fitracks and Just4Fit exchanged charges in a breach-of-contract suit in federal court in Delaware in 2010.

In that suit, Aetrex subsequently added charges that Danenberg defrauded the company during the merger negotiations, as a Fitracks officer and later as a Just4Fit officer, by falsely asserting that Just4Fit had opened the required number of "virtual stores" called for in the earn-out pact.

SHOED AWAY?

Danenberg claims in this advancement action that when he sought reimbursement for his defense costs, Fitracks, now under the control of Aetrex, illegally refused his request.

Aetrex denied that it had any duty to pay for Danenberg's bills because all its claims in the federal action concerned actions he took after the merger.

But Vice Chancellor Laster said that isn't the case. The purported scheme that Aetrex complains of — Danenberg's allegedly cheating the company with skewed results for the virtual shoe stores — had its origins before the merger, when Danenberg was still an officer, and is all part of the same alleged misconduct. Therefore it must be indemnified, the judge said.

Aetrex's appeal brief claims that the vice chancellor "incorrectly applied the advancement provisions of prior, pre-merger Fitracks bylaws that had been superseded months and years before the facts constituting the subject of the federal actions occurred."

Former Fitracks CEO Noam Danenberg claims in this advancement action that when he sought reimbursement for his defense costs, Fitracks, now under the control of Aetrex, illegally refused his request.

Moreover, the brief says, even if the pre-merger indemnification agreement governed this action, the claims in the underlying suit would not qualify for indemnification because they only involve what Danenberg actually *did* after the merger. WJ

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Appellee: Edmond Johnson, Pepper Hamilton LLP, Wilmington

Hostile takeover

CONTINUED FROM PAGE 1

According to corporate law experts, the high court might take the unusual step of ordering an injunction to halt the meeting.

If the justices overturn the lower court ruling, they could order Chancellor Strine to postpone the Vulcan meeting until new proxy materials could be prepared, Larry Hamermesh, a professor at Widener University School of Law in Wilmington, Del., told Reuters.

Hamermesh and other legal scholars said this is a novel situation reminiscent of the hectic, high-stakes takeover battles that whirled through the Delaware state courts in the late 1980s.

"I'm not sure how it would play out if they announced a reversal on that afternoon [of the oral argument]. It could be quite a fire drill," Hamermesh said.

HOW CONFIDENTIAL?

Martin Marietta made an unsolicited, stock-swap bid for Vulcan in December 2011 to create the world's largest producer of sand, gravel and other building materials.

Vulcan rejected that bid and charged that its rival had violated confidentiality agreements in preparing the deal.

The two companies went to the Chancery Court to get a ruling on that charge, and Vulcan then asked Chancellor Strine to enjoin Martin Marietta for at least four months.

Although Vulcan is incorporated in New Jersey and Martin Marietta is chartered in North Carolina, they agreed that disputes over the contract would be settled in Delaware.

The confidentiality agreements were signed during the time Vulcan and Martin Marietta were in serious deal talks in April 2010 and had exchanged sensitive information.

Vulcan walked away in mid-2011, however, citing concerns about regulatory hurdles and whether Martin Marietta was inflating the $250 million cost savings estimate that the merger would produce, according to court records.

BEYOND THE CONTRACT?

Martin Marietta appealed Chancellor Strine's ruling and won an expedited schedule that compressed all briefing and oral argument into less than three weeks because of the approaching June 1 shareholder meeting.

In its opening brief, Martin Marietta argues that the judge erred by "looking beyond the plain, unambiguous language of the relevant contract" and "violating fundamental principles of contract interpretation."

Chancellor Strine "invented and then added material terms to the agreement" to support his misinterpretation regarding what the parties were barred from doing after they received nonpublic information about each other's business, the brief says.

No one but the judge thought that the confidentiality agreement required a "standstill" that barred the two companies from using publicly available information to mount a proxy campaign or an unsolicited offer, Martin Marietta argues in the brief.

"Left undisturbed, the trial court's precedent would inject manifest uncertainty into contractual relationships and interpretation," the brief says.

LONG ROAD TO REVERSAL

In an answering brief, Vulcan says Chancellor Strine rightly found Martin Marietta breached the confidentiality agreement in several different ways — any one of which would have justified his injunction.

Vulcan argues that in order for the justices to reverse the Chancery Court ruling, Martin Marietta would have to prove that the chancellor found each of those alleged breaches in error because the contract language actually allowed it to disclose the information.

But Vulcan says the ruling should stand because Marietta cannot prove that:

- Vulcan's interpretation of the words "business combination transaction between Martin and Vulcan," referring to a friendly deal between the two, is unreasonable as a matter of law.
- Chancellor Strine erred in finding that the agreement's definition of "transaction being discussed" cannot be read to include a hostile transaction.
- Vulcan's interpretation of the term "legally required" regarding what sensitive business information can be disclosed is wrong.
- All of Martin Marietta's "gratuitous" disclosures of Vulcan's sensitive information were required by law in the course of launching a proxy contest and hostile bid.
- Vulcan was wrong in arguing that Martin Marietta cannot excuse its breach of the agreement by inventing legal requirements that allegedly forced Martin Marietta to disclose information.

The oral argument was originally scheduled to be heard by a panel of judges May 25 in Wilmington, but was rescheduled to be heard by the full court May 31 in Dover. WJ

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Judge approves $13 million 'bird in the hand' pact for Canadian bank shareholders

A Delaware judge has used a novel tactic to deal with objectors to the proposed $13.25 million settlement of a long-running shareholder suit over the underperforming co-investment fund Canadian Imperial Bank of Commerce set up for its executives.

Forsythe et al. v. ESC Fund Management Co. (U.S.) Inc., No. 1091-VCL, 2012 WL 1655538 (Del. Ch. May 9, 2012).

In a ruling that conditionally approves the challenged settlement, Vice Chancellor J. Travis Laster said $13.25 million is a low but reasonable amount to resolve claims that CIBC shareholders made more than seven years ago over the failure of the fund.

He said, however, that since a large group of shareholders have made a strong objection that the settlement is a pittance compared with what they could win if they pressed what they contend are well-supported claims, he would give them a chance to try to get more.

Vice Chancellor Laster approved the settlement as final, unless the objectors agree to take over the case and post a bond to cover the full amount of the offered settlement to guarantee that they will win more than $13.25 million.

If the objectors fail to win more than the bond, the judge said, the rest of the plaintiffs will not lose out on the amount the defendants have offered for an immediate settlement.

If the objectors decline the offer or fail to post the bond, the settlement funds will be distributed without delay, the vice chancellor said in a May 9 opinion.

SEEKING FUNDS FOR THE FUND

The litigation, which the judge said had already generated six written opinions, arose from CIBC's decision to form the CIBC Employee Private Equity Fund (U.S.) I LP in 1999 so that senior bank employees could co-invest with the bank in various opportunities.

According to Vice Chancellor Laster's recent opinion, the fund's opportunities for investment were always limited and it performed "disastrously" in its first two years.

REUTERS/Chris Wattie

> The judge gave the objectors 60 days to make their decision and post the bond; otherwise, he said, he would approve the settlement and the distribution of the recovery

The fund never produced returns comparable to other similar equity funds, and the employee shareholders for whom it was created later sued the fund, its general partner and its directors for breach of fiduciary duty, according to the opinion.

Two derivative plaintiffs, James Forsythe and Alan Tesche, were named on behalf of the fund and all its shareholders.

PROPONENTS BECOME OBJECTORS

One week before the scheduled start of trial in March 2011, the parties reached a tentative $13.25 million settlement, but a group of plaintiffs had second thoughts and hired their own attorney to contest the pact.

Forsythe and Tesche, who had initially supported the settlement, later joined the objectors, the opinion says.

In considering a motion to approve the settlement over the objections of the dissenters, Vice Chancellor Laster said the $13.25 million settlement amount "falls within a range of fairness, albeit at the low end."

He noted that if the objectors are correct and there is much more money to be won on the suit's claims, "then the settlement consideration drops below the range of fairness" and should not be approved.

"Because of these incentives, counsel may favor (consciously or not) a bird-in-the-hand settlement over the continuing and costly quest for an uncertain outcome," the judge said.

As a solution to the quandary, the judge gave the objectors the option of taking over the case, but only if they post a bond in the full amount of the offered settlement.

"If they later lose or obtain less than the full settlement amount, the fund [in whose name the plaintiffs are suing] will be able to draw on the security and be made whole," the judge said. "If the objectors achieve a greater recovery, then both they and the fund will benefit."

Vice Chancellor Laster gave the objectors 60 days to make their decision and post the bond; otherwise, he said, he would approve the settlement and the distribution of the money. WJ

Attorneys:
Plaintiffs: Seth Rigrodsky, Rigrodsky & Long, Wilmington, Del.

Defendants: Stephen Norman, Potter, Anderson & Corroon, Wilmington

Objectors: Richard Renck, Ashby & Geddes, Wilmington

Related Court Documents:
Opinion: 2012 WL 1655538

Brief in support of settlement: 2012 WL 910288

Brief in opposition to settlement: 2012 WL 244042

See Document Section A (P. 21) for the brief in support of settlement.

Investors got $6 million too much for prison health care firm, court says

In an appraisal action with unusual twists, a Delaware judge has determined that shareholders challenging the fairness of GEO Care Inc.'s $40 million acquisition of private prison health care provider Just Care Inc. actually deserve $6 million *less* than the merger price.

Gearreald et al. v. Just Care Inc., No. 5233, 2012 WL 1569818 (Del. Ch. Apr. 30, 2012).

Notably, some of the shareholders are members of Just Care's founding family who voted for the deal as directors.

Appraisal actions are usually filed by investors who are certain their stock is worth more than the amount that shareholders were forced to accept in a buyout or merger with a controlling shareholder or acquirer.

When they have little choice but to sell and no other viable legal means of challenging a transaction, shareholders who believe they have been cheated out of the fair value of their stock may ask a court to determine objectively the firm's true worth and appraise the shares.

The court usually, but not always, finds the shares are worth more than offered and forces the buyer to pay the petitioning shareholders the difference.

REUTERS/Lou Dematteis

Defendant Just Care operated a specialized private health care facility in South Carolina for detainees and prisoners with major illnesses.

WORTH $55 MILLION?

In this case, Vice Chancellor Donald Parsons of the Delaware Chancery Court examined the shareholders' claims that Just Care was worth about $55 million at the time of the merger and found the valuation methods of their expert were unreliable. He said the true value of the company actually was $34 million.

Just Care, incorporated in Delaware, operated a specialized private health care facility in South Carolina for detainees and prisoners with major illnesses.

The Just Care board voted to accept a merger offer of $40 million in cash from Florida-based GEO Care in August 2009. A majority of Just Care's shareholders, including the company's founder and former CEO Tull Gearreald, approved it the next month.

In January 2010 Gearreald and other shareholders who voted for the deal filed an appraisal action in the Chancery Court. In a battle of experts, Just Care's new owner claimed its true value was about $34 million at the time of the merger.

Ultimately, the judge found the valuation methods of the defendant's expert were better grounded. He said the difference between the competing valuations stemmed mainly from whether cash-flow projections for planned new facilities should be included in the valuations and whether the appropriate merger premium should be applied to the company's cost of equity.

APPRAISAL ESCROW

Vice Chancellor Parsons noted the deal included a provision reserving $6 million in escrow for two years from the merger date. The money was set aside to cover post-merger costs, including successful appraisal challenges.

In effect, the escrow provision meant that the Just Care shareholders were guaranteed $34 million with the possibility of receiving another $6 million if the price was not challenged by the end of September 2011, he said.

The petitioning shareholders strenuously criticized the escrow provision, but the court found it "immaterial to the determination of fair value in this appraisal action."

"Dissenting shareholders still must prove that the value of the company was greater than $40 million at the time of the merger in order to receive additional consideration from the escrow account," the vice chancellor said.

Just Care investors who accepted the $40 million bid will keep the money they got at a price based on that offer, but the challengers will get a lower price based on the court's $34 million appraisal.

Vice Chancellor Parsons left it to the parties to determine the challengers' exact share price, ordering them to "cooperate" in setting an appropriate interest rate compounded for the duration of the appraisal litigation. WJ

Attorneys:

Petitioners: Arthur Dent, Potter, Anderson & Corroon, Wilmington, Del.

Respondent: Raymond DiCamillo, Richards, Layton & Finger, Wilmington

Related Court Document:

Opinion: 2012 WL 1569818

Bid to take Books-a-Million private for $48.8 million gets bad reviews

Several Books-A-Million shareholder suits have asked a Delaware Chancery Court judge to shelve patriarch Clyde Anderson's $48.8 million going-private offer and force his "beholden" directors to search for a better price for the book discounter.

Mills v. Books-A-Million Inc. et al., No. 7521, complaint filed (Del. Ch. May 11, 2012).

Tonya Mills and three other shareholders have filed separate class actions and derivative suits complaining that the founder and his family are misusing their 53 percent control of the company to ram through a deal on terms that are "vastly preferential" to them and detrimental to other investors.

The suits ask the court to enjoin the transaction and direct the board members to solicit alternative bids.

Anderson, who is the chairman of the board and majority shareholder, announced April 30 that he and his family would force a buyout and take the Birmingham, Ala.-based business private just as it is poised to take advantage of the bankruptcy of rival Borders, once the nation's second-largest bookstore chain.

REUTERS/Mike Blake

Books-A-Million chairman Clyde Anderson announced that he and his family would force a buyout and take the company private just as it is poised to take advantage of the bankruptcy of rival bookstore chain Borders.

In that announcement, Anderson said his $3.05-a-share offer was a 20 percent premium over the current Books-A-Million stock price, but the lawsuits say the move was opportunistic because the company's value will soon rise as it takes over many of the prime shopping mall locations that Borders occupied.

Books-A-Million has not commented on the litigation, but in a May 7 press release, it said it "has formed a special committee of independent directors consisting of Albert C. Johnson and J. Barry Mason to, among other things, evaluate and make a recommendation regarding the company's response to the proposal."

The press release said the special committee has hired independent counsel to advise it in considering the going-private offer.

The suits filed by Mills and the others claim that the directors, because of their close business and social relationships with the Andersons that have left them "beholden" to the controlling family, breached their duty to maximize shareholder value in a-change-of-control situation such as this.

The plaintiffs want the court to enjoin the transaction and direct the board members to solicit alternative bids.

The suits ask the court to hold the directors and officers individually liable for whatever financial harm the company suffers as a result of their failure to comply with their fiduciary duty in regard to the proposed buyout.

The four cases have been assigned to Vice Chancellor Donald Parsons. WJ

Attorney:
Plaintiff (Mills): Carmella P. Keener, Rosenthal, Monhait & Goddess, Wilmington, Del.

DIRECTOR ELECTION

Allscripts sued by shareholder, seeks proxy fight

May 21 (Reuters) – One of Allscripts Healthcare Solutions Inc.'s largest shareholders has sued the company to be allowed to launch a proxy fight after its chief executive refused demands to resign.

HealthCor Management LP et al. v. Allscripts Healthcare Solutions Inc. et al., No. 7557, complaint filed (Del. Ch. May 21, 2012).

HealthCor Management LP, which owns about 5 percent of Allscripts' outstanding shares, filed a lawsuit in Delaware's Court of Chancery seeking to strike a company bylaw that requires board nominees be proposed in January.

Allscripts spokeswoman Ariania Nikitas said the company was reviewing the lawsuit and does not discuss pending litigation.

Healthcor's lawsuit criticized Allscripts' board for proposing nominees to fill two of the vacant board positions at the company's annual meeting while not allowing shareholders to make their own nominations.

HealthCor also asked the court to postpone the June 15 annual meeting to give it time to pursue its plan to propose a slate of three nominees.

HealthCor also asked the court to postpone the June 15 annual meeting to give it time to pursue its plan to propose a slate of three nominees.

Allscripts, a provider of health care information technology services, terminated the contract of its former chairman in April. Three directors on its then nine-member board also resigned, along with the chief financial officer.

The company's shares plummeted as much as 40 percent following the resignations, and days later CEO Glen Tullman rebuffed HealthCor's demands that he resign.

HealthCor said in its lawsuit that the leadership dispute was made worse because it "purged" from the board the entire leadership team that came to Allscripts as part of its merger with Eclipsys.

"These now-departed directors were those most able to protect critical product lines which Eclipsys brought to Allscripts from the continuing failures of execution by Tullman," the complaint said.

Billionaire investor Carl Icahn scored a victory with a similar lawsuit in April in his push to have Amylin Pharmaceuticals put up for sale. Icahn sued the company in the same Delaware court, arguing Amylin's similar advance notice bylaws should not be enforced.

After the court agreed to fast-track Icahn's lawsuit, Amylin's CEO and Icahn entered talks and the lawsuit was dropped.

Both Amylin and Chicago-based Allscripts are incorporated in Delaware. WJ

(Reporting by Tom Hals in Wilmington, Del.; editing by Matthew Lewis)

Related Court Document:
Complaint: 2012 WL 1825269

Collective Brands' $2 billion shoe sale no bargain for investors, suit says

Five shareholder suits are asking Delaware's Chancery Court to halt the sale of Collective Brands Inc. for a "woefully inadequate" $2 billion to a group of investment firms that plan to divvy up its Payless, Keds and Sperry Top-Sider shoe brands.

Son v. Collective Brands Inc. et al., No. 7542, complaint filed (Del. Ch. May 17, 2012).

Maya Son filed one of three class-action suits seeking an injunction on the $21.75-per-share sale of Collective Brands, which will allegedly cut the shareholders out of future profits from the footwear retailer's recently reviving revenues.

Collective Brands is based in Topeka, Kan., but is incorporated in Delaware, giving shareholders standing to sue there.

The three recent lawsuits allege a breach of duty by the company officers and directors who agreed to the May 1 sale to Wolverine World Wide Inc., Golden State Capital Opportunity Fund LP and Blum Strategic Partners IV LP.

"Lawsuits like these are common in these transactions," a Collective Brands spokeswoman said in an email. "While we take all lawsuits seriously, we firmly believe these actions are without merit, and we will aggressively defend the transaction and the process leading up to it."

In a May 1 statement on the company's website CEO Michael Massey said, "Over the course of many months, the Collective Brands' board of directors, working together with management and our financial and legal advisers, evaluated a number of alternatives to further enhance shareholder value.

"The transaction we are announcing today, which was unanimously approved by our board of directors, delivers substantial, immediate value to our shareholders and is a clear reflection of the quality of our businesses," Massey said in the statement.

Son's suit says that after tough times in 2011 and the closing of hundreds of Payless shoe stores, Collective Brands has been on a road to rapid recovery this year with rising revenues and a 50 percent stock price increase, so the directors' decision to sell now is "curious at best."

The merger announcement claims the $21.75-per-share price represents a 104 percent premium over the 30-day stock average, but Son's suit says Collective Brands' stock sold for more than $21 each within the past month, so there is virtually no premium offered.

The suit seeks class-action status and an order that would halt the sale, invalidate the deal-protection measures and force the directors to shop for a better offer.

Worse still, Son says, the Collective Brands board agreed to a list of deal-protection provisions that will make the possibility of competing bids negligible. The plaintiff claims the provisions include:

- A $44 million termination fee that any other acquirer would have to pay on behalf of Collective Brands.
- A no-solicitation clause that restricts the company from talking to other prospective bidders.
- A matching-rights measure that entitles the acquiring trio to match or top any bid.

Son's suit seeks class-action status and an order that would halt the sale, invalidate the deal-protection measures and force the directors to shop for a better offer.

Four of the suits were filed by attorney Seth Rigrodsky of Rigrodsky & Long in Wilmington, Del., between May 4 and May 17, including *Walker v. Collective Brands Inc. et al.,* No. 7523, *complaint filed* (Del. Ch. May 11, 2012). WJ

Attorney:
Plaintiff: Seth Rigrodsky, Rigrodsky & Long, Wilmington, Del.

Related Court Document:
Walker complaint: 2012 WL 1669831

The suit says that after tough times in 2011 and the closing of hundreds of Payless shoe stores, Collective Brands has been on a road to rapid recovery this year, so the directors' decision to sell now is "curious at best."

Suit against Google directors doesn't clear Delaware law hurdle

Google shareholders lack the specifics needed under Delaware law to press their suit seeking to force the directors to pay the Internet search giant's $500 million fine for advertising unauthorized Canadian prescription drugs, according to a federal judge in San Francisco.

In re Google Inc. Shareholder Derivative Litigation, No. 11-04248, 2012 WL 1611064 (N.D. Cal. May 8, 2012).

U.S. District Judge Phyllis J. Hamilton of the Northern District of California dismissed the consolidated suit after finding it failed to clear a key threshold test required for suits brought in the name of Delaware-chartered companies such as Google Inc.

Delaware and states that follow its lead on corporate law matters require derivative plaintiffs to first give their directors an opportunity to review the prospective claims to decide whether the prospective suit is in the company's best interests.

If they fail to do that — as the plaintiffs did here — their suit can only survive a board's motion to dismiss if they can show the majority of the directors lacked the independence and objectivity needed to give the claims a fair hearing.

The suit stems from a settlement between Google and the U.S. Department of Justice over the company's use of pop-up advertisements for Canadian prescription drugs in violation of the federal Food, Drug and Cosmetic Act.

The non-prosecution agreement that Mountain View, Calif.-based Google signed included a $500 million fine for allowing Canadian pharmaceutical companies to unlawfully place ads on its search engine for six years, according to Judge Hamilton's order.

The company disclosed the arrangement Aug. 24, 2011, and the first shareholder complaint that became part of this consolidated action was filed five days later, the order says.

OBJECTIVITY

The defendant directors moved for dismissal on behalf of Google, arguing the complaint was deficient because it failed to make any demand prior to filing suit.

Judge Hamilton explained that because the complaint was a derivative suit, and the plaintiffs did not make a pre-suit demand, she initially evaluated the claims to determine whether the complaint adequately alleged a majority of the directors were not independent and objective.

As to objectivity, the judge said, the question was whether the plaintiffs made specific allegations that at least five of the eight directors had divided loyalties or stood to receive benefits from the transaction that shareholders would not enjoy.

Alleging the possibility that board members might be found liable for breaching their duty of loyalty by failing to take action on the alleged illegal ads is not sufficient under Delaware law to show the directors were not objective for pre-suit-demand purposes, the judge said.

The suit claimed then-CEO Eric Schmidt knew about the ads at the time, but there are "no particularized allegations stating which [other] particular director or directors had knowledge of the unlawful advertising," the judge's order says.

The complaint contended Schmidt would have had a duty to share that information with the directors, but it does not cite any law that would require him to do so, the judge said.

INDEPENDENCE

The plaintiffs came closest to showing that a majority of the board was deficient in the area of independence, Judge Hamilton said, but they fell short by one director.

The plaintiffs were only able to show that four of the eight board members had business ties with other directors that might compromise their independence, she said in the order.

A "naked assertion" of a previous business relationship is not sufficient to overcome the presumption of a director's independence, but here, the plaintiffs made specific allegations that various directors have ties to Google founder and CEO Larry Page through Stanford University, the judge said.

The plaintiffs were only able to show that four of the eight board members had business ties with other directors that might compromise their independence, the judge said.

The allegations only involved four of the eight directors, however, so the plaintiffs failed to disqualify a majority of the board members, she said.

Moreover, the plaintiffs failed to supply enough specifics to state a valid claim against the directors for breach of duty or unjust enrichment, the order said.

Judge Hamilton allowed the plaintiffs 30 days to cure the defects in the suit and file an amended complaint. WJ

Attorneys:

Plaintiffs: Benny Copeline Goodman III, Robbins Geller Rudman & Dowd, San Diego

Defendant: Boris Feldman, Wilson Sonsini Goodrich & Rosati, Palo Alto, Calif.

Related Court Document:
Order: 2012 WL 1611064

In securities suits, is D&O coverage pot of gold — or brick wall?

By Alison Frankel

In an ideal world, the value of a shareholder securities claim rests entirely on its merits. And now that you've stopped snickering, let's talk about the real world, where two disputed settlements test the de facto assumption that securities claims are worth what a company's directors-and-officers insurance carriers are willing to pay to resolve them.

In Bank of America's Corp.'s proposed $20 million settlement in Manhattan federal court of a derivative suit based on its 2008 acquisition of Merrill Lynch, a group of plaintiffs' firms with a parallel case in the Delaware Chancery Court argue that the settlement is insufficient because $20 million is only a tiny fraction of BofA's $500 million in D&O coverage.

On May 9 Chancellor Leo Strine refused to enjoin the New York deal, leaving it up to U.S. District Judge P. Kevin Castel to decide whether the derivative shareholders are getting enough money. That's a sensible result — Judge Castel, after all, is overseeing consolidated Merrill-related securities litigation against BofA, so he'll evaluate the proposed derivative settlement with the understanding that there are lots of other claimants waiting in line for a chunk of that $500 million in D&O insurance, even as it's whittled down by defense fees.

Meanwhile, Judge Castel's Manhattan federal court colleague, U.S. District Judge Lewis Kaplan, expressed reservations about a $90 million settlement of securities class-action claims against Lehman's former officers and directors, including former CEO Richard Fuld. Judge Kaplan said in a May 3 order that he understood $90 million was all that remained of Lehman's $250 million D&O policy, but wanted to satisfy himself that shareholders wouldn't be better off if their counsel at Bernstein Litowitz Berger & Grossmann pressed on and obtained judgments against individual defendants. To that end, he ordered five former Lehman officers to turn over to him the financial records they'd already produced to a settlement magistrate, retired U.S. District Judge John Martin.

Kevin LaCroix, who writes the indispensable D&O Diary blog in connection with his day job as executive vice president at OakBridge Insurance, said it's all too often the case that securities settlements have more to do with coverage limits than the merits of a claim.

"There's an adage in the insurance business: Limits drive losses," LaCroix said. "One of the things that gets talked about is, 'If we buy significant insurance, will it invite claims?' There's not a single right answer to that question."

LaCroix told me policy limits ought to be one of the considerations in settlement negotiations, but shouldn't dictate the ultimate settlement amount. But Steven Toll of Cohen Milstein Sellers & Toll said coverage limits not only drive negotiations, but insurance representatives, who typically square off against shareholder lawyers at mediation sessions, have enormous leverage to determine settlement terms.

The problem, Toll told me, is that over the last decade, insurers have splintered D&O coverage into multiple layers. So instead of negotiating with one insurer who wrote a $50 million policy, plaintiffs' lawyers find themselves across the table from 10 insurers, each controlling $5 million layers of coverage.

Often, Toll said, junior layers don't even show up at mediations, sending a clear signal that their money is not in play because all of the higher tranches won't commit to exhausting policy limits. "At every step, each carrier puts up a road block," he said. "That dramatically affects the resolution of these cases. In almost every one, it's the same fight."

Toll said that even when the first couple of layers of insurance (which know their coverage will be exhausted through a settlement or litigation costs) agree to a settlement, there isn't a deal if the next layers don't sign on. A refusal by any one layer to pay its entire policy can preclude a settlement.

By way of example, Toll pointed to a 2005 case, the Globalstar Securities Litigation, in which Cohen Milstein ended up in a trial against Globalstar CEO Bernard Schwartz when his D&O insurers balked. Schwartz ultimately agreed to put up $20 million of his own money to settle the case, then turned around and sued his primary and three excess insurance carriers to recover his contribution. Toll was a witness at Schwartz's bench trial against the two insurers that refused to settle with him. (They were found liable.)

"D&O insurance is a huge, huge deal in this business," Toll said. "It's a real, practical dilemma, and plaintiffs' lawyers have to confront it every day." WJ

Alison Frankel's blog, **On the Case**, is featured on Thomson Reuters News & Insight (http://newsandinsight.thomsonreuters.com/Legal/). A founding editor of the Litigation Daily, Frankel has covered big-ticket litigation for more than 20 years. Her work has appeared in The New York Times, Newsday, The American Lawyer and several other national publications. She is also the author of "Double Eagle: The Epic Story of the World's Most Valuable Coin." In 2011 she was named Reuters Journalist of the Year for Commentary.

Court refuses to delay BofA, Merrill settlement case

May 14 (Reuters) – A federal judge in New York has refused to delay the approval process for a controversial $20 million settlement between Bank of America Corp. directors and shareholders who accused the bank of overpaying for Merrill Lynch & Co.

In re Bank of America Corp. Securities, Derivative & Employee Retirement Income Security Act (ERISA) Litigation, No. 09-md-02058, 2012 WL 1674299 (S.D.N.Y. May 14, 2012).

U.S. District Judge Kevin Castel rejected as premature a request by another shareholder group, pursuing a similar lawsuit against Bank of America directors, to intervene in the New York case.

The second group of shareholders, who have taken action in the Delaware Chancery Court, say the New York settlement is too low and could erase its claims.

Bank of America agreed to buy Merrill Sept. 15, 2008, at the height of the financial crisis. Merrill's losses were a factor in the bank being forced to obtain a second federal bailout and contributed to a 93 percent drop in its share price over six months. The takeover closed in January 2009.

REUTERS/Jason Miczek

The second shareholder group has complained that the New York settlement was the result of a "collusive scheme" between directors trying to avoid a big payout and lawyers hoping to win a big fee award.

They also said the payout is too low in light of the damages suffered and $500 million of insurance coverage available to the directors.

"Such arguments are best raised in the settlement approval process," Judge Castel wrote. "At this point the parties here have executed only a memorandum of understanding. … A review of the merits of any settlement is premature."

Michael Schwartz, a lawyer for the Delaware plaintiffs, did not immediately respond to requests for comment. Bank of America spokesman Lawrence Grayson declined to comment.

The New York settlement would resolve claims that Bank of America directors breached their duties for having misled shareholders about Merrill's soaring losses and hidden how Merrill was paying $3.6 billion of bonuses despite those losses.

REUTERS/Shannon Stapleton

Among the defendants is Kenneth Lewis, the onetime Bank of America chief executive who engineered the takeover.

> The second group of shareholders, who have taken action in the Delaware Chancery Court, say the New York settlement is too low and could erase its claims.

In early May, Delaware Chancery Court Chancellor Leo Strine put the case before him on hold, as he denied a request by shareholders in that case to block Judge Castel from reviewing the settlement. *In re Bank of Am. Corp. Stockholder Derivative Litigation,* No. 4307, *order issued* (Del. Ch. May 9, 2012).

Judge Castel also oversees nationwide shareholder litigation against Charlotte, N.C.-based Bank of America itself over the Merrill purchase, where damages could be much larger.

Lead plaintiffs in the New York case are the Hollywood Police Officers' Retirement System in Florida and the Louisiana Municipal Police Employees Retirement System.

Both cases are derivative lawsuits brought on behalf of Bank of America. Payouts would go to the bank, not to shareholders. WJ

(Reporting by Jonathan Stempel in New York; editing by Gary Hill and Michael Perry)

3rd Circuit OKs assignment of Federal-Mogul's insurance rights to trust

A bankruptcy reorganization plan lawfully assigned Federal-Mogul Global's rights under insurance policies to a trust created to handle asbestos claims, the 3rd U.S. Circuit Court of Appeals has affirmed.

In re Federal-Mogul Global Inc. et al., Nos. 09-2230 and 09-2231, 2012 WL 1511773 (3d Cir. May 1, 2012).

Objecting insurance companies contended that anti-assignment provisions in the policies barred the assignment of rights to the trust.

Federal-Mogul Global, a maker of automotive parts, filed for relief under Chapter 11 of the Bankruptcy Code in 2001, citing a heavy load of asbestos-related personal injury suits.

U.S. Bankruptcy Judge Judith K. Fitzgerald overruled insurers' objection to the plan, and the U.S. District Court for the District of Delaware affirmed her ruling.

On appeal to the 3rd Circuit, certain insurance companies that had general liability policies with Federal-Mogul said they should not have to provide assets to the trust.

They argued that clauses in the insurance policies barred Federal-Mogul from transferring its insurance rights without their consent.

Bankruptcy Code Section 1123(a)(5)(B)

Notwithstanding any otherwise applicable non-bankruptcy law, a plan shall ... provide adequate means for the plan's implementation, such as transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan.

Among the insurers joining in the appeal were Hartford Accident & Indemnity Co., Allianz Global Corporate & Specialty AG, Columbia Casualty Co., Fireman's Fund Insurance Co. and Certain Underwriters at Lloyd's, London.

The appeals court rejected their argument. The panel said the Bankruptcy Code preempts the anti-assignment provisions in the policies.

The court cited 11 U.S.C. § 1123(a)(5)(B), which addresses the provision of adequate means for implementing reorganization plans, including transferring a debtor's property.

The panel added that the creation of trusts under Section 524(g) of the Bankruptcy Code is "the only national statutory scheme extant to resolve asbestos litigation through a quasi-administrative process."

The Federal-Mogul plan is insurance-neutral, the court noted.

It grants insurers "the right to assert against the trust any defense to coverage already available under the policies, excepting only the defense that the transfer of the trust violated the policies' anti-assignment provisions," the panel said. WJ

Related Court Document:
Opinion: 2012 WL 1511773

FULL DELAWARE HIGH COURT TO HEAR ETHICS CASE

The Delaware Supreme Court has canceled a hearing about a Wilmington attorney's ethics fine that was to take place before a panel of three justices. The court issued an order May 16, the originally scheduled hearing date, saying the whole court would hear argument on a date to be announced. A trial judge fined Thomas Crumplar, of Jacobs & Crumplar, $25,000 for filing what she said were "misleading" briefs. The case involves two briefs Crumplar submitted in the New Castle County Superior Court on behalf of plaintiffs opposing summary judgment motions filed by defendants in two asbestos-related personal injury suits. In one brief, Crumplar allegedly wrongly described the outcome of a summary judgment motion in another case. In the second brief, the judge said, he failed to respond to cases cited by the other side that contradicted his argument.

***Crumplar v. Delaware Superior Court*, Nos. 643-2011 and 644-2011, order issued (Del. May 16, 2012).**

BARTON STILL CONTROLS TRUSTEE SUITS, 3RD CIRCUIT SAYS

The 3rd U.S. Circuit Court of Appeals has joined a half-dozen sister circuit courts by ruling that the *Barton* doctrine continues to require that a party seeking to sue a court-appointed trustee for acts taken in his or her official capacity must first obtain leave of the appointing court. The Pennsylvania-based federal appeals court rejected the suggestion that Congress intended to abrogate the doctrine when it enacted the comprehensive Bankruptcy Code in 1978. The decision means a purchaser of land from a Chapter 7 debtor may proceed with state court litigation that accuses the debtor's court-appointed trustee of harming the purchaser's interest in the property through an allegedly unlawful sale of adjacent parcels. Having found that leave of court is required before a trustee may be sued, the 3rd Circuit then agreed with the Bankruptcy Court that the purchaser's claims were not without foundation.

***In re VistaCare Group LLC*, No. 11-2695, 2012 WL 1563924 (3d Cir. May 4, 2012).**

Related Court Document:
Opinion: 2012 WL 1563924

SUNOCO'S BUYER GOT TOO BIG A BARGAIN, SUIT SAYS

Shareholders will get less than half the merger premium they should receive for their stock because Sunoco's directors hurriedly agreed to sell the venerable oil company for $5.3 billion, a state court suit in Philadelphia says. Plaintiff shareholder Daniel Himmel has asked the Philadelphia County Court of Common Pleas to enjoin the merger, in which century-old oil explorer, refiner and distributor Sunoco Inc. will become a subsidiary of Energy Transfer Partners LP in a cash-and-stock deal valued at $50.13 a share. Himmel's derivative suit complains that in mergers in the past year, the average oil company shareholder has received a 48 percent premium over the value of his shares as an incentive to sell to an acquirer, but Sunoco's directors disloyally accepted a premium of only 23 percent. The suit says the directors breached their fiduciary duty to get the best price for the company.

***Himmel v. MacDonald et al.*, No. 120403894, complaint filed (Pa. Ct. Com. Pl., Phila. County May 2, 2012).**

Related Court Document:
Complaint: 2012 WL 1534872

CHANCERY COURT CASES FILED

CAPTION	CASE NO.	NATURE OF ACTION	DATE	ATTORNEY
1. Haverhill Ret. Sys. v. Catalyst	7506	Breach of duty	May 8, 2012	Seth Rigrodsky
2. Vance v. Anderson	7507	Breach of duty	May 8, 2012	Seth Rigrodsky
3. Coyne v. Kensey Nash	7508	Breach of duty	May 9, 2012	Jessica Zeldin
4. Augenbaum v. Rubel	7509	Breach of duty	May 9, 2012	Carmella Keener
5. Alewijnse v. Innovative Gas	7511	Books & records	May 10, 2012	Joanne Pinckney
6. Singley Capital v. Convera	7512	Stock rights	May 10, 2012	Jeremy Anderson
7. Leach v. Pfeiffer	7513	Breach of duty	May 10, 2012	Seth Rigrodsky
8. Pope v. Hong	7514	Breach of duty	May 10, 2012	Blake Bennett
9. Collins v. Anderson	7518	Breach of duty	May 11, 2012	Carmella Keener
10. Allen v. El Paso	7520	Breach of duty	May 11, 2012	Jessica Zeldin
11. Mills v. Books-A-Million	7521	Breach of duty	May 11, 2012	Carmella Keener
12. Gusinsky v. Std. Microsystems	7522	Breach of duty	May 11, 2012	Seth Rigrodsky
13. Walker v. Collective Brands	7523	Breach of duty	May 11, 2012	Seth Rigrodsky
14. Cronin v. Kaufman	7527	Breach of duty	May 14, 2012	Seth Rigrodsky
15. Klein v. Brown	7528	Breach of duty	May 14, 2012	Seth Rigrodsky
16. Brookstone v. Tanus	7533	Breach of duty	May 15, 2012	Kevin Shannon
17. LMPERS v. Kaufman	7534	Breach of duty	May 15, 2012	Blake Bennett
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