November 13, 2023

Delaware Court of Chancery Questions Enforceability of *Con Ed* Provisions

In *Crispo* v. *Musk*, the Delaware Court of Chancery, in an opinion by Chancellor McCormick, addressed the enforceability of merger agreement provisions related to the recovery of lost-premium damages by the target. Such "*Con Ed* provisions"—named after the Second Circuit's opinion in *Consolidated Edison, Inc.* v. *Northeast Utilities*—attempt to clarify that damages for lost merger premiums are recoverable from a wrongfully terminating buyer by the target or stockholders in certain circumstances. *Crispo* suggests that while Delaware courts will likely not permit the target to recover lost-premium damages for itself or on behalf of stockholders, target stockholders themselves would have that right in certain circumstances.

Background

In *Con Ed*, the Second Circuit applied a no-third-party-beneficiaries provision to hold that under New York law, stockholders could not enforce a merger agreement against a buyer who wrongfully terminated and seek damages for the lost merger premium. The holding threatened to shift the balance of negotiating leverage in mergers, allowing buyers to walk away with little consequence other than the payment of certain fees and expenses.

In response, parties began adopting provisions addressing the recovery of lost premiums. One variation of these so-called "*Con Ed* provisions" expressly provides stockholders with third-party-beneficiary status, but, as recognized by the *Crispo* court, this could lead to a proliferation of lawsuits and undermine the target's ability to control the litigation asset and achieve a favorable outcome for all stockholders. Another variation makes the target an agent for recovering damages on behalf of its stockholders, but again, as noted by the *Crispo* court, there is "no legal basis" for a contracting party unilaterally to appoint itself as an agent to control a non-party's rights. A third variation, which was at issue in *Crispo*, defines damages resulting from the wrongful breach to include lost premiums in an attempt to allow the target itself to recover the premiums.

Crispo

Crispo involved Elon Musk and his affiliated entities' acquisition of Twitter, Inc. After Musk purported to terminate the transaction, plaintiff brought claims alleging that buyers had breached the merger agreement. The buyers eventually had a change of heart and closed the transaction, and the plaintiff sought mootness fees for his claim's role in the merger's consummation.

In determining whether the plaintiff's breach claim was meritorious when filed—a key element of a mootness fee petition—the court discussed the enforceability of *Con Ed* provisions. According to the court, *Con Ed* provisions are unenforceable under Delaware law if they define lost-premium damages to be exclusive to the target. Recovery by the target would be an unlawful contractual penalty because merger consideration, including premiums, are paid directly to the stockholders, so the target itself has no expectation or right to lost-premium damages.

The court then interpreted the merger agreement's lost-premium damages definition and a seemingly contradictory no-third-party-beneficiaries provision to confer to the stockholders third-party-beneficiary status to seek lost-premium damages, but not while the company pursues a claim for specific performance. Another interpretation was that the stockholders did not have third-party-beneficiary status in any case, but that would render the lost-premium damages provision unenforceable and violate

© 2023 Paul, Weiss, Rifkind, Wharton & Garrison LLP. In some jurisdictions, this publication may be considered attorney advertising. Past representations are no guarantee of future outcomes.

a cardinal rule of contract construction that all contract provisions should be given effect. Under either interpretation, however, the plaintiff lacked standing to sue for lost-premium damages when he filed suit, and therefore, his mootness fee was denied.

Takeaways

Though the *Crispo* opinion is not a direct holding on the *Con Ed* and third-party-beneficiary provisions, it reflects the court's views on the merits of such provisions and that it will engage in detailed scrutiny of the parties' intent behind such provisions. It does alleviate practitioners' concerns that *Con Ed*, if followed in Delaware, would foreclose upon any party's ability to recover lost-premium damages, and confirms that with proper drafting, Delaware courts will permit stockholders themselves to recover such damages against a wrongfully terminating buyer under the merger agreement, at least where specific performance is not an available remedy.

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content.
Questions concerning issues addressed in this memorandum should be directed to:

Andre G. Bouchard
+1-302-655-4413
abouchard@paulweiss.com

Jaren Janghorbani
+1-212-373-3211
jjanghorbani@paulweiss.com

Robert A. Kindler
+1-212-373-3199
rkindler@paulweiss.com

Andrew D. Krause
+1-212-373-3161
akrause@paulweiss.com

Kyle T. Seifried
+1-212-373-3220
kseifried@paulweiss.com

Laura C. Turano
+1-212-373-3659
lturano@paulweiss.com

Counsel Frances F. Mi and Legal Consultant Cara G. Fay contributed to this memorandum.

Our M&A Group

The Paul, Weiss M&A Group consists of approximately 40 partners and 125 counsel and associates based in New York, Washington, D.C., Wilmington, London, San Francisco, Toronto, Tokyo, Hong Kong and Beijing. The firm's Corporate Department consists of more than 75 partners and roughly 300 counsel and associates.

Our M&A Partners

Matthew W. Abbott
Edward T. Ackerman
Scott A. Barshay
Angelo Bonvino
Ellen N. Ching
Ross A. Fieldston
Brian P. Finnegan
Adam M. Givertz
Neil Goldman
Ian M. Hazlett
Roger Johnson
Robert A. Kindler
Andrew D. Krause
David K. Lakhdhir
Brian C. Lavin
Xiaoyu Greg Liu
Jeffrey D. Marell
Judie Ng Shortell
Andreas Philipson
Austin S. Pollet
Ravi Purohit
Kenneth M. Schneider
Robert B. Schumer
Brian Scrivani
John M. Scott
Kyle T. Seifried
Cullen L. Sinclair
Megan Spelman
Sarah Stasny
Laura C. Turano
Krishna Veeraraghavan
Jeremy M. Veit
Michael Vogel
Samuel J. Welt
Steven J. Williams
Bosco Yiu
Kaye N. Yoshino
Tong Yu
Taurie M. Zeitzer