February 28, 2013

Delaware Court of Chancery Finds Claims Relating to Poison Pill As Deal Protection Device Not Colorable

In *In re Bioclinica, Inc. Shareholder Litigation*, the Court of Chancery found that the combination of a rights plan ("poison pill") and standstill provisions in non-disclosure agreements did not operate to preclude potential topping bids. In ruling that the claims were not even colorable, the court has all but dismissed the case.

Bioclinica engaged in an eight-month process to sell itself, culminating in a two-step acquisition agreement with JLL Partners. The plaintiffs attacked as improper deal protection devices the combination of standstill provisions in related non-disclosure agreements and the existence of a poison pill. Under the nondisclosure agreements, potential bidders had to commence a tender offer in order to make a topping bid. The plaintiffs claimed that announcing a tender offer would trigger the poison pill (from which only JLL Partners had been exempted) and therefore the one path purportedly open to a topping bidder was actually closed by the poison pill, making the combination preclusive of higher bids.

The Court of Chancery found the plaintiffs' characterization of the poison pill to be inaccurate because the dilutive effect of Bioclinica's poison pill was only triggered when a person actually acquired 20% of the company's stock and not upon the mere announcement of a tender offer. The commencement or announcement of a tender offer would cause the rights under the rights plan to become exercisable, but the real dilutive effect occurred only if a tender offeror actually came to own 20% of the stock. Further, if the alternative offer was superior, the Bioclinica board could (and presumably would) exercise its fiduciary-out right and recommend that stockholders tender into the topping offer. Thus, these provisions did not impermissibly lock-up the initial transaction. The court noted, however, that if the poison pill had actually been triggered upon the announcement or commencement of a tender offer, it may present problems insofar as the poison pill operated with standstill provisions to preclude a topping bid for practical purposes.

The court also concluded that the plaintiffs' disclosure claims lacked merit. The plaintiffs claimed that management projections must be disclosed, but they failed to provide evidence that any such projections existed that could be disclosed (and defendants represented that none had ever been created). The court also held that there was no affirmative obligation to disclose that no such projections had been provided to the company's financial advisor. In addition, the court held that the company was not obligated to disclose the excessively granular reasons for a recent change in the company's capital expenditure budget. Finding that none of the claims were even colorable, the court declined to expedite the litigation.

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