Delaware Continues To Influence US M&A

Law360, New York (February 21, 2014, 3:02 PM ET) -- A number of recent Delaware judicial and legislative developments will have important implications for parties engaging in or advising on mergers and acquisitions transactions in 2014 and beyond.

Controlling Stockholder Transactions

We anticipate a decision from the Delaware Supreme Court in early 2014 regarding In re MFW Shareholders Litigation, which was argued on an appeal on Dec. 18, 2013. If upheld on appeal, MFW will provide an important roadmap for those planning controlling stockholder going-private transactions.

In MFW, the Delaware Court of Chancery held in 2013 that the deferential business judgment rule — not the more rigorous entire fairness standard — is properly invoked in controlling stockholder going-private transactions if:

- the controller conditions the transaction on approval by both a special committee and a majority of the minority stockholders;
- the special committee is independent;
- the special committee is empowered to freely select its own advisers and to say no definitively;
- the special committee meets its duty of care;
- the vote of the minority is informed; and
- the minority is not coerced.

Prior decisions stated that entire fairness was the exclusive standard of review applicable to controlling stockholder going-private transactions. As a result, litigation challenging such transactions was difficult to defeat before trial. The MFW court explained that providing a path for review under the business judgment rule would improve the "benefit-to-cost ratio of litigation" because suits challenging transactions structured with the elements the court identified would no longer have settlement value "simply because there is no feasible way for defendants to get them dismissed on the pleadings."

Exclusive-Forum Provisions

We expect the 2013 Court of Chancery decision in Boilermakers Local 154 Retirement Fund v. Chevron Corp. and IClub Investment Partnership v. FedEx Corp. to have a significant impact on stockholder litigation in the coming year.

In Boilermakers, the Court of Chancery addressed the validity of "exclusive-forum provisions" as a matter of Delaware law. (An exclusive-forum provision is a charter or bylaw provision specifying a particular venue as the exclusive jurisdiction in which stockholder derivative suits, fiduciary duty claims and other intracorporate actions must be brought, unless the company otherwise consents.)

Increasingly, public companies are using exclusive-forum provisions to reduce the risk of burdensome and costly multijurisdictional stockholder litigation.

The Boilermakers court held that director-adopted bylaws containing an exclusive-forum provision are valid and enforceable as a matter of Delaware law. The court explained that:

> The [Delaware General Corporation Law] allows the corporation, through the certificate of incorporation, to grant the directors the power to adopt and amend the bylaws unilaterally. The certificates of incorporation of Chevron and FedEx authorize their boards to amend the bylaws. … In other words, an essential part of the contract stockholders assent to when they buy stock in Chevron and FedEx is one that presupposes the board's authority to adopt binding bylaws consistent with 8 Del. C. § 109. … Therefore, this court will enforce the forum selection bylaws in the same way it enforces any other forum selection clause … .

Boilermakers is an important step forward for boards of directors considering the adoption of an exclusive-forum provision. As-applied challenges to exclusive-forum provisions already have begun in courts in and outside of Delaware; we expect more in 2014.

Other Important M&A Developments

"Don't Ask, Don't Waive"

In 2013, the Delaware courts provided guidance on a wide range of topics important to transaction planners. For example, in a series of decisions, the Court of Chancery considered the impact of so-called "don't ask, don't waive" standstill provisions sometimes used in connection with change-of-control transactions. The decisions indicate that while these clauses can have value in certain circumstances, boards must consider their use carefully, and in light of the overall sale process.

Good-Faith Negotiations

In Siga Technologies Inc. v. Pharmathene Inc., the Delaware Supreme Court explained that a breach of the obligation to negotiate the terms of certain preliminary term sheets in good faith may permit a plaintiff to recover expectation damages, under certain circumstances. The Supreme Court affirmed the Court of Chancery's finding that two parties to such a term sheet would have reached a definitive agreement but for one party's bad-faith negotiations.

New Legislation

Also in 2013, Delaware Gov. Jack Markell signed into law legislation amending the Delaware General Corporation Law in a number of important ways. For example, the DGCL has been amended to add Section 251(h), which, in certain circumstances, permits consummation of a short-form merger, which does not require a stockholder vote, following a tender or exchange offer for a majority of a corporation's outstanding

shares.

We expect Section 251(h) to have a significant impact on mergers and acquisitions structures in 2014 (see "US M&A: Looking Back at 2013 and Forward to a Brighter 2014"). The DGCL also has been amended to add new Sections 204 and 205, which define corporate and judicial procedures for ratifying defective corporate acts.

Judicial Changing of the Guard

2013 marked the retirement of Chief Justice Myron T. Steele of the Delaware Supreme Court. During his lengthy judicial career, Steele was an influential figure in the world of corporate governance. Chancellor Leo E. Strine Jr. of the Delaware Court of Chancery was recently confirmed as the next chief justice.

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