BlackBerry Case Sends Long-Distance Message: Use Restrictions in NDAs Can Limit a Bidder's Freedom to Roam

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We M&A lawyers love our BlackBerrys, even if the news they bring us these days is an unremitting lament of stalled deals and frozen credit markets. However, as sellers realign their expectations and buyers start to get more comfortable that the bottom is in sight, we might see a pickup in opportunistic acquisition activity in the coming months. And with valuations in the doldrums and takeover defenses in tatters after years of activist pressures, hostile bids may be an increasingly viable option for hungry acquirers. For this reason, potential bid-

ders and targets alike should take note of one more tale their BlackBerrys have to tell.

Certicom and RIM Cross Wires

A recent case hailing from Canada's Ontario Superior Court of Justice offers a timely reminder of the importance of attention to detail from the very start of the deal-making process. The decision in *Certicom Corp. vs. Research In Motion*[1] highlights the need for care in the execution of the confidentiality agreements that parties enter into as they begin to explore the possibility of a transaction. Specifically, the case underscores the risk that, even in the absence of a standstill provision or after a negotiated standstill period has ended, a confidentiality or non-disclosure agreement can torpedo an acquisition bid (even if this is not what the parties intended).

The suit brought by target Certicom against bidder Research In Motion ("RIM") stemmed from a friendly northern pursuit gone south. RIM is, of course, the wireless solutions innovator behind the BlackBerry. Certicom is a Canadian company that makes the cryptography that enables BlackBerry users with vital security needs (like President Obama and M&A lawyers) to use the device. The two companies, which have long had a business relationship, began discussions about a possible acquisition in 2007. They signed a confidentiality agreement (the "2007 NDA") that limited for five years RIM's use of confidential information to fulfilling "the Purpose" of the interchange, which was defined in pertinent part as the evaluation of "some form of business combination between the Parties." The 2007 NDA governed information provided within six months of its execution and included a twelve-month standstill provision, restricting RIM from "going hostile" if the friendly discussions did not lead anywhere. Certicom delivered confidential information to RIM under the 2007 NDA, but subsequently put the talks on hold. In 2008, RIM and Certicom signed another non-disclosure agreement (the "2008 NDA")—this time, not in regard to a possible acquisition, but in the ordinary course of their business relationship. The 2008 NDA did not include a standstill provision and defined the purpose of the information exchange as the analysis of "a business or contractual relationship between the Parties" and "to the extent this Agreement is incorporated by reference into any other agreement between the Parties, achieving the objective of that agreement." In due course, acquisition talks recommenced and further information changed hands. Later (and, notably, after the expiration of the 2007 standstill), discussions broke down again. RIM took its bid directly to Certicom's shareholders and Certicom took its case directly to court.

In its recently released opinion, the Ontario court held that in using confidential information covered by the 2007 and 2008 NDAs to evaluate its unsolicited bid, RIM breached both agreements. The analysis turned on the court's determination that, while an unsolicited offer to the shareholders could qualify as a "business combination" under the 2007 NDA, it was not one "between the Parties [Certicom and RIM]" because the Certicom board did not consent to the proposed transaction. RIM's argument emphasized the intentions of the parties, as evidenced by the fact that the 2007 NDA had included a standstill, while the 2008 version had not. Where an NDA includes a standstill, RIM suggested, the confidentiality provisions should not be interpreted so as to effectively prolong the standstill restrictions beyond their intended term. The Ontario court rejected this argument and instead chose to analyze the standstill and confidentiality provisions as two independent sources of restriction on a bidder's actions (the latter providing longer-term, but less complete protection). Moving on to the 2008 NDA, RIM again focused on the *purpose* for which the information was provided by the target to the bidder as the critical determination. As such, RIM argued that it was permitted to use confidential information pursuant to the 2008 NDA for the purpose of evaluating and pursuing a business combination between the parties, even in the form of a direct offer to the target's shareholders, because that broader purpose was incorporated into the 2008 NDA by the "any other agreement" language in the purpose definition. That, RIM argued, was the intention of the parties and their own understanding, given that the 2007 NDA included a specific standstill clause that had expired. But the court would have none of it. In short, the court concluded that "[a] nondisclosure agreement can…prohibit the use of confidential information to make a hostile bid and in this case does."

The court's remedy was to permanently enjoin RIM from taking any actions to pursue the hostile bid that it had previously launched against Certicom. The court did allow that RIM was free to make a friendly bid or (despite expressing consider-

able skepticism regarding the possibility) "should it manage to craft a manner of launching a subsequent hostile bid without breaching the non-disclosure agreements, as Certicom submits it is possible to do [through use of a "firewall" between the acquisition team and the team with confidential information], [to make] another hostile bid."

Readers worrying whether the encryption on their BlackBerrys is in jeopardy, fear not: the decision did not quash RIM's ardor to acquire Certicom, and after significant maneuvering, the parties reached a "friendly" deal in early February. In this particular case, the result was a much better deal for Certicom's shareholders (although, of course, as former Delaware Chief Justice E. Norman Veasey stated in his dissenting opinion in *Omnicare*[2], jurisprudence should not turn "on such ex post felicitous results").

BlackBerry's "Pearls" of Wisdom for Buyers

It is not a shocking or even novel revelation that where one party receives confidential information from another party and agrees to limit its use of that information to specified purposes, the agreement can be a binding contract capable of being specifically enforced by a court. Nevertheless, this case—although not controlling in the United States—serves as a useful reminder with important implications for domestic acquirers and sellers alike.

For potential acquirers, the most fundamental takeaway from *Certicom* is that they must focus a keen eye on use restrictions and related purpose definitions in the confidentiality agreements they sign up with prospective targets. As the case warns, these provisions can have long-lasting and far-reaching impacts. Both parties contemplating an NDA often fix their attention on the standstill provision, negotiating intensely over the time period, fall-away events and perhaps a "most favored nations" clause, while merely glazing over the first few "standard boilerplate" paragraphs of the letter. There is also a tendency on the part of bidders marking up NDAs to be as accommodating as possible, so as to avoid appearing too aggressive at such an early stage of the relationship. This sensitivity is understandable and often appropriate, but acquirers wanting to keep their options open must nonetheless be vigilant and resist purpose definitions that limit the use of information to "friendly" or "negotiated" transactions (and, in light of *Certicom*, try to avoid the phraseology of a transaction "between the Parties," which a court might interpret equivalently). A contractual provision limiting the use of information obtained to pursuing a "negotiated transaction" could operate as a "backstop standstill" after the negotiated standstill period has expired. It is true that striking the word "negotiated" or "friendly" from a target's draft NDA may lead to an awkward conversation early on in the process, but a legitimate response is that any standstill implications should be addressed directly in the standstill provision, itself, and not bootstrapped through a use restriction.

Even if such concerns seem remote during the information-exchange phase because initial discussions are friendly or limited in scope, a buyer should consider whether any circumstances might exist in which it may want or need to take its offer directly to the target's shareholders. It should also consider the potential timing of any such course of action in relation to the duration of the NDA restrictions. While the buyer may be satisfied that it would not take any hostile action within the term of the negotiated standstill period, it would be remiss to overlook the reality that confidentiality and use provisions tend to be of longer (sometimes even indefinite) duration.

Quite often parties enter into confidentiality agreements at an early stage of business discussions without the benefit of M&A counsel, or in some cases, without any legal counsel at all. This may be appropriate for reasons of efficiency or manageability (especially for smaller deals), but in such circumstances, the business development professionals on the front lines executing confidentially and standstill agreements should be trained to appreciate the sensitivity of the aforementioned issues. Needless to say, an acquirer can benefit significantly from proffering its own "standard" form of NDA, which provides appropriate confidentiality protections (and even standstill provisions, if desired), but which avoids the hidden traps that may be buried in seller drafts. Very often, however, this will not be an option, as the seller (especially if it is working with legal and investment advisors in conducting a sale process) will insist on starting with its own form of confidentiality agreement.

In short, acquirers, especially serial acquirers, must keep in mind that confidentiality agreements are not simply boilerplate forms to be summarily signed before they can access due diligence informa-

tion, but are binding contracts that often establish the rules of engagement for the length of a deal process. Thoughtful review and negotiation of these important agreements can avoid numerous pitfalls and undesirable consequences. (Of course, one lesson of the BlackBerry case is that, even with the most careful planning and drafting, a threatened target company can be expected to raise any defense it may have available, and there can be no perfect prediction of how a court will interpret a confidentiality agreement.)

Finally from the bidder's perspective, when there is any doubt as to whether a confidentiality agreement permits use of the target's information in making a bid, it may be helpful—if feasible—to erect a "firewall" separating those who may have received confidential information under the NDA from those who make decisions with regard to a potential deal. This procedure may help buyers to sterilize a transaction from the potential taint of an earlier NDA.

Targets: Stay Ahead of the "Curve"

From the standpoint of potential target companies, the BlackBerry case offers similar reminders. A company sharing its confidential information must face the reality that it could be the target of a hostile bid from the recipient of that information, even if the initial approach and negotiations are friendly or information is changing hands in the ordinary course of business. Before giving a bidder (or a party that may eventually become a bidder) sensitive due diligence information, a target company can structure its non-disclosure arrangements so as to guard against misuse of that information in a hostile context, most directly by negotiating for a standstill agreement.

Certicom reminds us, however, that even if a counterparty to an NDA refuses to sign a standstill agreement, the target may still be able to claim certain protections against unsolicited bids through the use and purpose clauses of the confidentiality agreement. Indeed, in the case of a clear violation of an agreement between the target and a hostile bidder—as the Canadian court found in this case—the breach may amount to a "show-stopper" defense, an event that prevents the bidder from proceeding with its bid. Although use restrictions and confidentiality provisions can extend beyond a typical standstill period (depending on the materiality and "shelf-life" of the information provided), any protection they provide is obviously not as clear or specific as that of a standstill clause, and may entail a heavier burden of proof (*e.g.*, with regard to whether the information was in fact confidential and whether the seller misused it).

It goes without saying that, ideally, the use restrictions in an NDA should specifically address the parties' intentions and be as clear as possible. From the target's perspective, a narrower use provision and purpose definition are generally more protective. The decision of whether to address head-on in drafting and/or negotiations the contingency of a hostile bid is a tactical one for the target, and may vary from situation to situation. As noted above, the target generally has the benefit of being able to start with its own form (and in a "sell-the-company" scenario, counsel typically will have been involved in preparation of that form). Defining the purpose of the information exchange to include only a "negotiated" or "friendly" transaction might be one way to "smoke out" whether the party receiving information is considering an unsolicited bid, and might stimulate a conversation on the subject. That being said, once the topic is broached, it is likely to be resolved definitively one way or the other. Indeed, both parties to a confidentiality agreement negotiation would do well to remember that, under the recently invigorated "forthright negotiator principle," a court could decide to hold a party who knows or should know about the "objectively manifested" intention of the other party regarding an ambiguous provision to that subjective understanding.[3]

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A bidder that has received material non-public information about a target must also consider insider trading restrictions under the federal securities laws. In the oft-cited *General Portland* case,[4] an unwilling target successfully availed itself of the Williams Act disclosure rules in order to prevent the hostile bidder from advancing its tender offer. General Portland convinced the court that the federal law governing tender offers would require the acquirer to disclose confidential information it relied upon in making a valuation determination, and that such disclosure, in turn, would violate the confidentiality agreement between the parties. Accordingly, the court enjoined the acquirer "from making a tender offer as long as the confidential information remains material or competitively sensitive." Essentially, the hostile bid-

der was trapped in a "Catch-22" position: it was unable to buy shares unless it made the material nonpublic information it had public, but it was unable to make that information public because it was subject to an NDA requiring it to keep the information confidential. Bidders must be careful not to find themselves in this uncomfortable position.

Targets, on the other hand, should not become too complacent with the outcome of *General Portland*, as there are at least two potential ways out of the bidder's conundrum: a court may decide that the bidder can disclose the relevant information in its tender offer documents, or it may decide that the information in question need not be disclosed at all. Cases subsequent to *General Portland* have added such contours that do not necessarily flow in the target's favor. In *Resource Exploration v. Yankee Oil & Gas, Inc.*,[5] for example, the court denied the target an injunction in part based on a distinction between the "hard" information that *General Portland* protected (*e.g.*, cost data by plant) and the "soft" information at issue in that case (such as "predictions and analysis relating to future production and revenues"), the disclosure of which, according to the court, was not mandated by the Williams Act.[6] In another case, the court resolved the Catch-22 by allowing the tender offer to proceed upon the hostile bidder's issuance of "curative disclosures" of "the conclusions based upon and pertinent parts of the inside information relied upon" that do not cause injury to the target.[7] This case law underscores that in drafting and negotiating confidentiality agreements, potential target companies providing information to bidders should take care that the customary exception permitting the bidder to disclose information if required by law does not unintentionally extend to disclosure required under the securities laws to allow a tender offer to proceed.

The *Certicom* scenario—where initially friendly discussions turn hostile and the target raises the confidentiality agreement as a defense—is one paradigm in which a confidentiality agreement (with or without a standstill) can be central to takeover litigation. As is often the case in the kaleidoscopic world of M&A, however, this issue also arises on the other side—that is, *after* a hostile bid has been launched and the parties desire to exchange information and enter into friendly (or at least professionally courteous) discussions. In this context, the target has typically already conceded that a sale of the company might yield the best result for its shareholders and is exploring various strategic alternatives, including a sale of the company to, or other transaction with, a range of possible counterparties, including the hostile bidder. Potential "white knights" will often have no problem signing on to a standstill agreement and to tight use restrictions since they understand that their strategic advantage is to be perceived as the "friendly" alternative.

Plus, they may have no intention of going hostile in any event. The original hostile bidder, however, is often understandably reluctant to agree to a standstill or other restrictions, which could leave it stranded on the sidelines after it had put the target "in play." A standoff of this sort can continue for weeks as the bidder complains that the target directors are trying to freeze it out of the process, while the target insists that the hostile bidder play by the same "rules" as every one else. While the standstill provision is usually the focus of these discussions, the confidentiality and use restrictions discussed above also come into play. In a recent encounter, after Pilgrim's Pride made a hostile bid for Gold Kist, the parties clashed over confidentiality agreement negotiations, which broke down when Gold Kist refused to permit Pilgrim's Pride to disclose information it would be required to disclose in connection with a tender offer or proxy solicitation. Pilgrim's Pride accused its target of attempting to create a "'backdoor' standstill provision."[8]

In general, the law is deferential to the role of an independent board of directors acting in good faith as gatekeeper to a company's confidential information in the face of a hostile bid. In a significant 1995 case, the Delaware Court of Chancery allowed target Bally Gaming to condition provision of confidential information to hostile bidder Alliance Gaming on the latter's signing of a confidentiality agreement including a standstill provision.[9] In the court's words, "the target corporation's board of directors is clearly empowered—and in some cases may have a duty—to condition access to [due diligence] information, as a reasonable exercise of its power to oversee the process by which corporate control is transferred, in order to safeguard against the misuse of that information." In no less certain terms, the court continued that "[t]he practice of requiring a bidder to sign a confidentiality and standstill agreement as a condition to allowing

'due diligence' access to confidential information, is well recognized and accepted."

Back to Your Coverage Area

The issues that the Canadian *Certicom* case brings to the fore have been brushed up against, but not squarely addressed, in U.S. federal and state courts. In a 2003 skirmish, for example, target Dana Corporation sued hostile bidder ArvinMeritor, alleging that it had provided confidential information to ArvinMeritor during prior joint venture discussions pursuant to a confidentiality agreement that provided that the information would be used "solely for the purpose of analyzing the feasibility and desirability of entering into the proposed business relationship [*i.e.*, the joint venture]." According to Dana, ArvinMeritor misused the confidential information in evaluating its hostile offer in breach of contract and/or fiduciary duty. The court never decided the case, however, as ArvinMeritor withdrew its bid and Dana dropped the suit.[10]

Uncertainty remains, as the U.S. courts have not definitively answered all questions in this area and the Canadian case is not binding on American courts. Nevertheless, the BlackBerry case provides a timely wake-up call for buyers and sellers alike and an important reminder that paying attention to the drafting details of confidentiality agreements up front can help them to avoid a "storm" of litigation in the future.

NOTES

1. *Certicom Corp. v. Research In Motion Ltd. and Research In Motion Acquisition Corp.*, 2009 CanLII 1651 (ON S.C.).
2. *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914 (Del. 2003) (Veasey, C.J. dissenting).
3. *United Rentals v. RAM Holdings, Inc.*, 937 A.2d 810 (Del. Ch. 2007).
4. *General Portland, Inc. v. LaFarge Coppee S.A., et al.*, 1981 WL 1408 (N.D. Tex.).
5. 566 F. Supp. 54 (N.D. Ohio 1983).
6. At least one commentator believes that the "hard/soft" information distinction is breaking down as disclosure of soft information is "becoming routine." Lou R. Kling & Eileen T. Nugent, *Negotiated Acquisitions of Companies, Subsidiaries and Divisions*, Volume 1, §9.05. 9-17 n.7 (2008).
7. *A. Copeland Enterprises, Inc., et al. v. William J. Guste, et al*, CCH Trade Cases ¶68,713 (E.D. La. 1988).
8. *Pilgrim's Pride Issues Open Letter to Gold Kist Stockholders*, press release dated October 23, 2006 (Gold Kist subsequently pursued an antitrust defense to block Pilgrim's hostile efforts, but the parties ultimately completed a transaction in January 2007).
9. *Alliance Gaming Corp. v. Bally Gaming Int'l, Inc.*, 1995 WL 523543 (Del. Ch. 1995). *See also Golden Cycle, LLC v. Allan*, 1998 WL 892631 (Del. Ch. 1998) (directors of a selling company may choose the sale process best suited for the situation; as such, the Board may treat a bidder who refuses to sign a confidentiality agreement differently from one who does execute such an agreement).
10. Courts have also addressed a variety of cases with slightly different party and/or factual configurations. For example, the court in a 1997 New York case refused to dismiss ADT's claim that Chase breached a confidentiality agreement by using information received thereunder to evaluate whether or not to finance a hostile bid against ADT by another Chase client. *ADT Operations, Inc. v. Chase Manhattan Bank, N.A.*, 662 N.Y.S.2d 190 (N.Y. Sup. Ct. 1997). And in another similar situation in 2004, a Connecticut court found that the target's former CFO violated the confidentiality provision of his employment agreement by using inside information to plan a hostile bid against the company. The court accordingly enjoined the CFO from further use or disclosure of the company's confidential information. *Lydall v. Ruschmeyer*, 2004 WL 3220270 (Conn. Super.). *See also Armstrong World Industries, Inc. v Allibert, S.A.*, 1997 WL 793041 (E.D. Pa.) (court declines to enjoin transaction between plaintiff's two competitors based on alleged breach of confidentiality agreement by one of them, because plaintiff fails to show irreparable harm from *potential* for misuse or disclosure of confidential information; however, if plaintiff can show that defendant *previously* misused confidential information, plaintiff may recover damages at trial); *but see Den-Tal-Ez, Inc. v. Siemens Capital Corp.*, 566 A.2d 1214 (Pa. Super. Ct. 1989) (upholding three-year injunction preventing appellant's acquisition of appellee's competitor, based in part on fact that appellee relied on appellant's misrepresentations in revealing confidential information to it and on substantial threat that appellant would reveal confidential information to competitor if acquisition was allowed to proceed). Another related issue that

potential acquirers making plays for joint venture partners must consider is whether the law of the relevant state (or other jurisdiction) places duties on joint venturers to maintain certain confidences as fiduciaries. *See, e.g., Essex Chemical Corp. v. Gurit-Heberlein AG,* No. 88-2478, 1988 U.S. Dist. LEXIS 19515 (D.N.J. 1988) (court finds that Swiss law, not New Jersey law, must determine this question of fiduciary duty, as parties chose Swiss law to govern joint venture).