

“Don’t Ask, Don’t Waive Standstills” Revisited (Rapidly)

By Trevor S. Norwitz, Igor Kirman and William Savitt January 9, 2013

In a second Chancery transcript ruling on the subject in recent weeks, Chancellor Leo E. Strine, Jr. has made clear that Delaware has no per se rule against “Don’t Ask, Don’t Waive” standstill provisions (which prohibit a party subject to a standstill, including a losing bidder in an auction, from requesting a waiver from its standstill obligations). The Chancellor also provided guidance for using such a provision as an “auction gavel” to secure the best price reasonably available to a target company involved in a sales process. Last week’s ruling in [In Re Ancestry.com](#) is a welcome clarification that will help maintain the vitality of auctions where a target wants to incentivize bidders to come forth with their highest bid.

While “Don’t Ask, Don’t Waive” standstills have become, in the Chancellor’s words, the surprise “emerging issue of December of 2012,” it is a testament to the nimbleness of the Delaware legal system that this important issue has been quickly revisited. A bench ruling three weeks ago in [In Re Complete Genomics, Inc. Shareholder Litigation](#) questioned the use of these provisions and held that directors have a duty at all times to be informed of all material facts, including whether a rejected bidder is willing to offer a higher price despite its contractual commitment not to do so. We wrote then that such a rule, if broadly adopted, could adversely impact the market for control of public companies, particularly in an auction context.

Chancellor Strine rejected any such per se rule in his Ancestry ruling. Properly deployed, “Don’t Ask, Don’t Waive” provisions can, among other things, lend credibility to the auction process and can force bidders to submit their best price in the process. Describing the potential benefits of such provisions, the Chancellor recognized that a waiver request (even when made privately) may constitute an end-run around the basic standstill restriction, potentially yielding lower overall results for shareholders. But the Court emphasized as well that no-waiver standstills are “potent []” medicine that will be subject to careful judicial review, including with respect to the granting of waivers. The Chancellor also noted that shareholders should be informed when their votes are sought that participants in the auction are not contractually permitted to overbid.

The [Ancestry](#) ruling reaffirms important principles of Delaware law. Contracts, including standstills, will be respected and enforced as written. And Delaware directors are accorded great flexibility to craft a value-maximizing sales process but at the same time must act on an informed and engaged basis to ensure that all aspects of an auction drive toward the goal of obtaining the best value reasonably obtainable. This week’s decision is surely not the last word on “Don’t Ask, Don’t Waive” standstills, and (as the Court noted) such bench opinions are not well suited for the adoption of new rules. Nevertheless, practitioners will be well-advised to take note of the Chancellor’s guidance.