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The International Comparative Legal Guide to:

Mergers & Acquisitions 2013

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A practical cross-border insight into mergers and acquisitions

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EDITORIAL

Welcome to the seventh edition of *The International Comparative Legal Guide to: Mergers & Acquisitions*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of mergers and acquisitions.

It is divided into two main sections:

Five general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting mergers and acquisitions, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in mergers and acquisitions in 41 jurisdictions.

All chapters are written by leading mergers and acquisitions lawyers and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Michael Hatchard of Skadden, Arps, Slate, Meagher & Flom (UK) LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.co.uk

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Standstills in the Headlights

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Wachtell, Lipton, Rosen & Katz

Although they are among the most common agreements in corporate practice, confidentiality or non-disclosure agreements, and the "standstill" provisions they often include, have historically not had a starring role in mergers and acquisitions litigation. That changed in 2012.

Last July, the hard-fought takeover battle between Martin Marietta Materials and Vulcan Materials led to litigation in the Delaware courts in which it was clearly established that confidentiality and use restrictions can block unsolicited acquisitions even in the absence of an explicit standstill agreement.[1] More recently, a pair of bench rulings from the Delaware Court of Chancery shone the spotlight on standstill provisions in the context of announced transactions, specifically a popular formulation that prohibits potential bidders from even privately requesting that a target company in the process of being acquired waive the standstill to allow the requestor to make a takeover bid (which have cutely been nicknamed "Don't Ask, Don't Waive" provisions).

It is notable that in the case of both of these issues, the Delaware courts were "scooped" by Canadian courts, which had the opportunity to consider very similar fact patterns in recent years. However, the importance of Delaware as a corporate law jurisdiction was underscored by the fact that its case-flow is so strong that its judges were able to address the standstill issue twice in less than a month, with the first decision – which could have negatively impacted the market for control of public companies – being importantly qualified by the later decision.

A key upshot of all these cases – which should be comforting if not surprising – is that courts in both the US and Canada take contracts seriously and generally require parties voluntarily undertaking obligations to abide by them, even if that leads to results that some – including shareholders of potential target companies – may find suboptimal, at least *post hoc*. This means that would-be acquirors must pay close attention and understand what they are agreeing to when they sign confidentiality agreements, especially if they have express standstill provisions (which we discuss first) but even if they include only confidentiality and use restrictions.

"Don't Ask, Don't Waive" Standstills

A standstill agreement is a contractual undertaking by one party to refrain from taking any (or certain) steps to acquire, or otherwise exert influence over, another party for an agreed period of time. These provisions are negotiated in many contexts, including partnerships, joint ventures, commercial arrangements or explorations of potential transactions, whenever one company suspects that its cooperation with another may make it vulnerable to an unwanted takeover bid. Because the vulnerability often arises from the provision of material confidential information to the potential buyer, standstill provisions most often appear in confidentiality agreements, particularly those entered into in the early stages of consensual merger or acquisition discussions, which the target desires – as it usually will – to proceed only on a friendly basis. They can be mutual if both sides perceive the need for protection.

Standstill agreements are often drafted in a sweeping manner and proscribe a broad range of actions, including buying securities of the target company (sometimes above a specified threshold), making public announcements about a possible takeover, seeking to influence the composition or actions of its board of directors or management, or acting in concert with any other person with respect to the target. A properly drafted standstill will also include an anti-evasion clause that prohibits the potential bidder from requesting a waiver or taking actions that may make the bidder's interest in the target public. This has been the case since the late 1980s, when a party that had agreed to a standstill effected an end-run around its obligations by publicly requesting the target's board to waive the standstill so as to allow it to make a takeover bid, which of course put the target "in play" and effectively undermined the standstill. As soon as the news of a potential takeover bid goes public, there is a significant impact on the target company, including the destabilisation of its employees, shareholder base, customers and suppliers. Even private requests for a waiver have generally been prohibited by standstill agreements – the so-called "Don't Ask, Don't Waive" feature – because under certain circumstances, they can trigger a disclosure obligation on the part of the target, or simply leak, thus putting the target "in play". In a fully protective standstill agreement, therefore, the party agreeing to stand still promises to do just that: nothing, unless the target wants it to and initiates contact, for the agreed period. This is the M&A version of "don't call me, I'll call you (if I ever want to see you again)".[2]

Bidders will often demand "fall-away" provisions which specify that the obligation to stand still will cease upon the occurrence of certain events, such as the target's agreement to sell itself to someone else, a decision to put itself up for sale, or (less often) the receipt of an unsolicited bid. Sometimes sellers are also willing to agree to "most favoured nations" clauses, most typically with respect to the standstill term, to ensure that no third party will secure an advantage over the bidder because of the standstill.

In addition to their use in protecting a company against an unwanted takeover bid, standstill agreements are also important tools used by companies that are engaged in the process of selling themselves by auction. If the board of directors of a company believes that the best way to maximise shareholder value is by

conducting an auction process, the standstill agreement allows the auction to be structured so that bidders participating in the process must make their best bids in the auction, because that will – or at least may – be their last opportunity to bid for the target.

While unexpected takeover bids are highly disruptive and destabilising for the target company, the impact of a proposal is of course quite different if the target is already subject to an agreement to be sold. In that case, since the company's shareholders, employees, customers and other constituencies already know of an impending change in control, the main impact of the unsolicited bid is to threaten the pending or proposed transaction. However in this case, if (and that's an important if) the new bid is *bona fide* and capable of consummation, it is generally considered favourable for shareholders as it is likely to be at a higher price. It is a well-established principle of Delaware fiduciary law (known as the "Revlon rule"[3]) that the target board's obligation when it is selling the company is to secure the best price reasonably attainable. Situations in which a party that is bound by a standstill agreement desires to make a bid for a company that is seeking to sell itself, or that has agreed to a sale, can raise interesting questions for a court of equity, including whether and in what situations the target's board might be compelled to waive the standstill, and whether entering into a "Don't Ask, Don't Waive" standstill is consistent with directors' fiduciary duties.

On November 27, 2012, Vice Chancellor Travis Laster of the Delaware Chancery Court faced just such a situation and enjoined a target company from enforcing a "Don't Ask, Don't Waive" provision in *In re Complete Genomics, Inc. Shareholder Litigation*. The Vice Chancellor did not object to the bidder being prohibited from publicly requesting a waiver (which he understood would clearly eviscerate the standstill the bidders had agreed to), but held that directors have a continuing duty to be informed of all material facts, including whether a rejected bidder is willing to offer a higher price. He suggested that "Don't Ask, Don't Waive" provisions are analogous to "no-talk" provisions in a merger agreement, which the Delaware Chancery Court has held to be invalid.[4] Just as a board that has agreed to sell the company may not close its ears to the possibility of higher bids, he stated, "a Don't Ask, Don't Waive Standstill is impermissible because it has the same disabling effect as the no-talk clause, although on a bidder-specific basis".

When a target company is soliciting shareholder approval for a negotiated transaction and is under an obligation to disclose all material information, it can be difficult to sustain a meaningful distinction between a private and a public request for a waiver. Taken to its logical extreme, the Vice Chancellor's judicial pronouncement threatened to weaken standstill agreements, at least in cases where a company is seeking to sell itself in a multi-bidder process or has agreed to a sale, and perhaps more broadly. Companies would be more reticent to allow access to their confidential information if they felt that the standstill agreement preventing their counterparty from taking advantage of that information and launching a hostile takeover bid could easily be circumvented. And a board's inability to call an end to an auction process would reduce the efficacy and perhaps popularity of auctions as a favoured way to sell companies. Although *Genomics* was just a bench ruling, the case prompted a chorus of concern from the corporate bar (including the writers of this chapter).

Less than a month later, however, Chancellor Leo E. Strine held in *In re Ancestry.com Inc. Shareholder Litigation* that there is no *per se* rule against "Don't Ask, Don't Waive" standstill provisions, although he did note that they are "potent" provisions that must be used with caution. This quick reexamination of an issue with important practical implications for dealmakers is a testament to the nimbleness of the Delaware legal system and to the seriousness with which the State takes its role as a preferred forum for corporate transactions and dispute resolution.

In the auction context, the issue presented is whether a company that is selling itself is permitted to set the rules of the auction to insist that bidders participating in the process only get "one bite at the apple" (that is, that they commit up front that that if they are not the winning bidder, they will stand down and not rebid). The "Don't Ask, Don't Waive" standstill agreement is, to use Chancellor Strine's apt metaphor, the "gavel" that enables the Board of Directors of the target company to control the auction and declare a winner, ensuring that all participants understand – and respond accordingly – that the auction is final and they should proffer their highest bid, or have the company sold to whomever is the highest bidder. In the absence of such a provision, the only gavel is the shareholder vote and losing bidders can continue to rebid right up until the time the target shareholders have approved a transaction. It could be argued that such a down-to-the-wire auction is appropriate, especially in light of the board's "Revlon duty" to secure the best price reasonably attainable. However the practical problem is that if bidders know that "winning" the formal auction really provides no assurance of securing the target, but merely entails being declared the public stalking-horse and locking in a modest break-up fee, they will have a markedly reduced incentive to put their best bid on the table. Indeed, if they expect they may be the strongest bidder and know that they will always have another opportunity to bid, they actually have an affirmative incentive not to put in a high bid, as they may just be negotiating against themselves. The logical course of action for such a bidder may be to submit a "low-ball" bid or perhaps even decline to bid at all on the auction timeline and see if the auction is a failure. If the target is sold at a low price, the bidder can "top" the deal and pay the break-up fee. If the target is not sold and its comes back to a bidder, then it is clear who has the negotiating leverage. The fear of a failed auction often leads sellers to avoid an auction process in favour of a one-on-one negotiation, which offers a higher degree of certainty of closing once an agreement is announced. Although auctions are generally preferred by premium-seeking shareholders (and by judges) because one-on-one negotiations are not market-tested in advance but only after a deal is announced, one-on-one negotiations do not typically result in any would-be bidders being contractually restricted from topping an announced transaction, since the non-auction will not have been accompanied by the provision of confidential information, or the receipt of standstills, from any would-be acquirors. A judicial policy that outlawed "Don't Ask, Don't Waive" standstills would discourage auctions.

Chancellor Strine clearly appreciated these dynamics in upholding the use of the "Don't Ask, Don't Waive" standstill agreement in *Ancestry.com*. In doing so, he stayed loyal to another well-established Delaware doctrine: that there is no single blueprint for the sale of a company but that it is within the discretion of the board of directors, acting in good faith and on a well-advised basis, to determine the optimal manner to pursue the best price that is reasonably attainable.[5]

As we describe below, however, the Chancellor's guidance in *Ancestry.com* does raise the bar for the use of "Don't Ask, Don't Waive" standstill provisions and suggests that boards of directors – and their advisors – will have to pay much closer attention to their use, and provide more disclosure to the market about them, than has historically been considered necessary or appropriate.

Although the *Ancestry.com* bench ruling provides the clearest guidance on "Don't Ask, Don't Waive" standstills, it was not the first time these issues had been considered in Delaware, and the Delaware courts were not the first courts to address standstill issues in the auction context.

Facing a similar question a few years ago, in *Ventas v. Sunrise REIT*,[6] the Ontario courts held that a selling board has discretion to bind bidders to firm standstill agreements if the directors believe that is the best way to maximise shareholder value. In late 2006, Sunrise REIT, a publicly traded Canadian real estate investment fund, began a strategic sale process, and HCP, Inc. and Ventas, Inc. emerged as the leading bidders. HCP dropped out of the bidding late in the process, ostensibly because (unlike Ventas) it did not reach a side-agreement with the seller's third-party property manager, which was a condition for a transaction, but perhaps also because it preferred that Ventas "show its hand" first. Ventas won the auction with its final bid of $15. HCP subsequently made a public offer of $18 – a 20% premium to the price Ventas had agreed to pay – even though the confidentiality agreement it had signed with Sunrise REIT included a standstill that prohibited it, for a period of 18 months, from publicly disclosing or making any offer outside of the auction process.[7] Ventas' merger agreement with Sunrise REIT required Sunrise REIT to enforce standstill agreements like that applicable to HCP. Sunrise REIT went to court for a determination of whether its directors could consider the higher HCP bid or were obligated to enforce the standstill and keep HCP out of the fray. Both the Ontario Superior Court and the Court of Appeals sided with Ventas, finding that the standstill provisions that were a part of the auction process were commercially reasonable as they encouraged bidders to submit their highest proposals and thus enabled the trustees of Sunrise REIT to comply with their fiduciary obligations by designing an auction process to procure the best offers.[8]

Corporate lawyers in the United States took note of the Ontario decision, and some believed that Delaware might come out differently and not allow a standstill agreement to deny shareholders a substantial premium. This view gained some credence when the Delaware Chancery Court had the opportunity to address standstill agreements.

In *In re The Topps Company Shareholders Litigation*,[9] the Chancery Court held that the directors of Topps likely breached their fiduciary duties when they approved a merger agreement with a favoured acquirer without providing a good faith assessment of a competing offer by a less favoured bidder, which they held to a standstill agreement. Topps, which produces baseball cards and Bazooka bubblegum, entered into bilateral negotiations with a group of private equity buyers led by former Disney CEO Michael Eisner, rather than risk a failed auction. The merger agreement with Eisner provided for a 40-day "go-shop" period for Topps to test the market by soliciting competing bids, with a standard fiduciary out including a match right and a customary break-up fee payable if a higher bid emerged. During the go-shop process, the Upper Deck Company, Topps' primary competitor, signed a confidentiality agreement with Topps (containing a standstill provision) and later made an offer to acquire Topps at a price exceeding that proposed by Eisner's group. Topps declined to consider the Upper Deck bid, citing regulatory concerns among other things. When Topps' shareholders sued in the Delaware Chancery Court, they alleged *inter alia* that Topps was abusing the standstill agreement to deny the shareholders access to a superior bid. The Chancery Court refused to enforce the standstill agreement, but held that the Topps board was in violation of its Revlon duties because it had used the standstill agreement with Upper Deck as a protective fence to avoid giving serious consideration to the offer from its main competitor, rather than for its proper function of maximising shareholder value.

The Court reasoned that when the "directors have made the decision to sell the company, any favoritism they display toward particular bidders must be justified solely by reference to the objective of maximizing the price the stockholders receive for their shares. When directors bias the process against one bidder and toward another not in a reasoned effort to maximise advantage for the stockholders, but to tilt the process toward the bidder more likely to continue current management, they commit a breach of fiduciary duty". The Court did, however, explain that standstill agreements do serve legitimate purposes in an auction when they are used to "establish the rules of the game that promote an orderly auction and to give the corporation leverage to extract concessions from the parties who seek to make a bid".[10] Of course, the Topps situation differed critically from a circumstance in which a losing bidder in an auction subsequently seeks to have a higher bid entertained by the target, but rather involved a case where the intervening bidder had not been permitted to join in the bidding.

It was against this backdrop that Vice Chancellor Laster's bench ruling in *Genomics* suggesting that Delaware might recognise a blanket rule against "Don't Ask, Don't Waive" standstills prompted widespread concern. That concern has been alleviated by Chancellor Strine's holding in *Ancestry.com* that there is no *per se* rule against the device, and his recognition of the valuable function that "Don't Ask, Don't Waive" standstill agreements can play in the process of selling a company as the "auction gavel" encouraging bidders to put their best offers on the table.

But the Chancellor also emphasised that he views "Don't Ask, Don't Waive" standstills as "potent" medicine that will be subject to careful judicial review, including with respect to the granting of waivers. In *Ancestry.com*, he expressed the view that the directors of the selling company should be fully informed of the use and implications of the "Don't Ask, Don't Waive" standstill provision. He also stated that shareholders whose votes are sought for the transaction should be informed if bidders that participated in the auction are contractually prohibited from offering a topping bid.

"Don't Ask, Don't Waive" provisions have been part of standard-form standstill agreements for many years, and while it has been understood that these provisions should not be misused to favour one bidder over another, the level of disclosure to boards and shareholders has varied. At the board level, in relevant circumstances, board presentations may have included discussions of whether losing bidders were permitted to rebid, but in most cases the details of the standstill agreements signed by bidders – or even their existence – would not have risen to the level of board discussion. Instead, boards conducting auctions have generally assumed that when bidders were asked to provide their "best-and-final" proposals, they could be taken at their word and the offers they made could indeed be regarded as their best and final. The same is true for shareholder disclosure. Background sections in merger proxy statements have typically described the offers made by other bidders (who are generally not identified because of confidentiality restrictions but referred generically to as "Company A" and "Company B"). In some cases they would have disclosed that bidders signed standstill commitments, but the disclosure seldom provided details about whether or not losing bidders were permitted to rebid. In light of the Chancellor's guidance, more focus will have to be given to disclosure of these matters, both at the board and shareholder levels, and auctioneers and auction participants will have to make crisp decisions about whether an auction will come to a close in a controlled manner under the supervision of the board of directors, seeking in good faith to obtain the highest price possible for the benefit of shareholders,[11] or whether participating bidders will be allowed to retain the flexibility to overbid up to the time when shareholders approve a transaction.

While the latter possibility is superficially appealing, it may not produce better outcomes *ex ante*, and raises the very real spectre of companies and shareholders being put in the position of choosing

between a lower value "bird in the hand", and the risk and uncertainty of entering into further negotiations with an over-bidder that will generally result in delay and increased risk, as well as requiring the payment of a break-fee, perhaps immediately. As noted above, if the would-be over-bidder knows that it retains that flexibility to lie in wait until another party has stepped forward as the initial winner, it may have an incentive not to participate in an auction, or not to put its best foot forward at the formal bid deadline, and the winning bidder in the auction may initially prevail at a lower price. This will in any event introduce the cost of paying a break fee into the equation, which will ultimately be borne by the selling shareholders, and likely also timing delays in closing (and the associated uncertainty and risk).[12]

There are important implications from these judicial pronouncements for both bidders and targets. Bidders need to be aware that courts take contracts seriously and if they sign a standstill agreement, even one with a "Don't Ask, Don't Waive" feature, they should expect that they will be held to it. If they participate in an auction and sign such an agreement, they should be willing to submit their best offer in the auction. Selling companies can take comfort that "Don't Ask, Don't Waive" standstills may still be used in auctions to conduct an orderly process designed to maximise shareholder value, but are on notice that courts will scrutinise these provisions and their use closely so that directors should be aware of their use and their purpose. Running an auction – deciding which bidders to call when and what to say – is an art and not a science, but ensuring that the board is aware of whether or not losing bidders are permitted to rebid may sharpen the focus on the value-maximising process. Disclosure of the existence of "Don't Ask, Don't Waive" standstills to shareholders may also be a new requirement in Delaware mergers, although companies will have to ensure that their disclosures are consistent with their obligations under the agreements they have signed not to solicit or encourage other bids. In general, in crafting merger agreements, M&A lawyers will have to be pay close attention to the obligations target companies undertake to enforce standstill agreements, and to the "fiduciary out" provisions specifying the conditions under which the board of the target may waive standstills.

Ancestry.com will not be the last word on "Don't Ask, Don't Waive" standstills. Now that the issue has been identified and addressed in bench rulings, which (as the Chancellor noted) are not well-suited for the adoption of new rules, it is likely that there will be further exploration and judicial elucidation.

Confidentiality and Use Restrictions

The takeover battle between Martin Marietta Materials and Vulcan Materials was one of the most high profile and contentious of 2012. It did not involve standstill agreements because, although the parties had entered into confidentiality agreements, these did not include standstills. At issue in that case was the extent to which nondisclosure and use restrictions in confidentiality agreements can have a "showstopper" effect on a takeover bid similar to that of a standstill.

Confidentiality or nondisclosure restrictions are among the most ubiquitous provisions in business, arising in the context of commercial transactions, partnerships, and of course potential business combination transactions like mergers and acquisitions, whenever a party is disclosing nonpublic information about itself or its business to another. In the M&A context in particular, confidentiality agreements enable and safeguard the exchange of information to allow companies to evaluate each other in determining whether to pursue potential transactions. In addition to the requirement that information provided be kept confidential, it is typical for these agreements also to restrict the use of the information provided for the purpose of evaluating and negotiating a transaction (sometimes a specifically contemplated transaction) between the parties. Some confidentiality agreements include standstill provisions, while others do not. There are many possible reasons parties might not include a standstill, including because the potential target was open to a takeover offer or did not perceive a threat of one, because the bidder was unwilling to agree to be restricted, or just because the parties did not think of it. In some cases, the use restriction will expressly state that the information provided may only be used for purposes of a "friendly" or "negotiated" transaction, which is generally considered to be a soft form of "back-door" standstill that may provide some protection against a hostile bid, even if the confidentiality agreement does not actually contain a standstill, or that may survive beyond the negotiated term of the agreed standstill.

Although one would expect nondisclosure and use restrictions to be independently enforceable under basic contract law principles, it has been uncertain whether these would have the force to block a premium takeover bid, and practitioners have historically taken much more comfort from explicit standstill agreements.

The issue was directly confronted a few years ago by the Ontario Superior Court of Justice in *Certicom Corp. v. Research in Motion*.[13] Certicom Corp. and Research in Motion ("RIM"), the maker of Blackberry communication devices, had a long-standing commercial business relationship. In 2007, when they entered into negotiations regarding a possible acquisition by RIM, they signed a non-disclosure agreement that included a standstill provision precluding RIM from making a hostile bid for Certicom for one year, and limiting RIM for five years to using the information provided only to fulfill "the Purpose" of the exchange, which was defined as a "business combination between the Parties". No transaction was agreed upon, and the parties then entered into a second confidentiality agreement in the ordinary course of business that included customary use restrictions but no standstill provision. In 2008, after RIM's standstill obligations had expired but with the confidentiality and use restrictions under both agreements still in place, RIM launched a hostile takeover bid for Certicom. Certicom sued to block the takeover based on misuse of its confidential information.

The Ontario Court held that in using confidential information covered by both nondisclosure agreements to evaluate its unsolicited bid, RIM breached the agreements. Justice Alexandra Hoy determined that, while an unsolicited offer to the shareholders could qualify as a "business combination" under the 2007 agreement, it was not one "between" the parties, because the Certicom board did not consent to the proposed transaction. RIM argued that, because the 2007 agreement had included a standstill (which had expired) and the 2008 version had none, it was clear that the parties had not intended RIM to be precluded from making an offer, and for the court to enjoin the offer would effectively prolong the standstill restrictions beyond their intended term. The Ontario court rejected this argument and instead chose to analyse 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: after the expiration of the standstill provision, RIM could pursue a bid, but only if it did not use confidential information in planning the takeover.

Again it was unclear whether American, and particularly Delaware, business courts would follow the Canadian lead in a case where doing so would deny shareholders of a target company a premium transaction. This question was answered in the affirmative in *Martin Marietta Materials v. Vulcan Materials*.[14]

In 2010, Martin Marietta and Vulcan had engaged in discussions regarding a potential merger. Although two confidentiality agreements were signed to facilitate negotiations, they did not include standstill provisions. The record showed, however, that Martin Marietta, which was the smaller of the two companies at that time, stressed in the negotiations that it was "not interested in being purchased by anyone, including Vulcan, and that the discussion had to be for the purpose of a consensual deal only". The confidentiality agreements limited the use of the exchanged information to the purpose of evaluating the proposed transaction and required the parties to keep all information confidential unless disclosure was required by law. As market dynamics changed, Vulcan's stock fell in value and by 2011 Martin Marietta saw Vulcan as an attractive target and commenced a $5.5 billion unsolicited takeover bid. Martin Marietta sent Vulcan a "bear hug" letter, launched a tender offer, initiated a proxy contest to replace Vulcan's board members and commenced litigation in Delaware. In its counter-suit, Vulcan alleged that Martin violated the confidentiality agreements by using its information (including the history of the parties' negotiations) in a manner not permitted and by disclosing confidential information in its public documents.

The Delaware Chancery Court's May 2012 decision, which was affirmed by the Supreme Court in July, determined that Martin Marietta breached both the use and disclosure restrictions in the confidentiality agreements. Although Chancellor Strine, after an exhaustive interpretive analysis of the language of the agreements and parsing of whether a business combination "between" the parties applies to a hostile takeover, found the wording to be ambiguous, he concluded that the parties – especially Martin Marietta – intended the agreement to preclude use of the information exchanged in a hostile transaction. He also held that Martin Marietta had willfully breached its nondisclosure commitments by disclosing details of the parties' confidential negotiations in its tender and other materials, without complying with the required formalities under the agreements. He left open the question of whether a party can rely on a "legally required" exception when it voluntarily undertakes actions that trigger the legal disclosure requirement. Consequently the Court enjoined Martin Marietta's bid for four months, which precluded it from electing a third of Vulcan's staggered board and effectively delayed the possibility of victory for (at least) a year.

The take-away from both the *Certicom* and *Vulcan* cases is that courts in the United States and Canada will uphold contracts as written, and confidentiality and use restrictions are independent obligations that have teeth. Practitioners representing potential buyers and merger partners (and investment bankers and corporate development professionals who often sign confidentiality agreements without seeking legal counsel) must be cautious when signing on to obligations early in a deal process, and make sure their clients understand the restrictions they are undertaking. The cases also suggest that bidders that are bound by nondisclosure and use restrictions should make vigorous attempts to comply with the letter and spirit of the confidentiality agreement, and to create of record of that compliance, including where practicable through use of "clean teams" and "firewalls" and by thoughtful public disclosure, rather than cavalierly breaching those agreements (as Martin Marietta did) and hoping that courts will permit the offer to proceed for the benefit of target shareholders.

If "Don't Ask, Don't Waive" standstills were, in the inimitable words of Chancellor Strine, the "surprise emerging issue of December of 2012" then it seems fair to declare 2012 the "Year of the NDA". The joy of M&A practice is that it is full of surprises and we look forward to seeing what 2013 will bring.

Endnotes

1 Wachtell, Lipton, Rosen & Katz represented Vulcan Materials Company in this matter, as well as Ventas, Inc. and Ancestry.com Inc. in the cases mentioned later in this chapter.

2 Would-be buyers sometimes suspect that the real message is more like Jimmy Buffett's "If the phone don't ring, you'll know it's me", and that the standstill is sought and obtained merely to end the possibility of a perhaps-unwanted dialogue.

3 *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

4 *Phelps Dodge Corp. v. Cyprus Amax Minerals Co.*, 1999 Del. Ch. LEXIS 202 (Del. Ch. Sept. 27, 1999).

5 See e.g., *In re Toys "R" Us, Inc. Shareholder Litigation*, Cons. C.A. 1212-N (Del. Ch. Jun. 24, 2005).

6 *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205 (CanLII).

7 HCP's offer was also conditioned on the same third-party consent which it had previously been unable to obtain, raising not only the issue of a breach of its standstill, but also the possibility that the HCP bid was of the "Potemkin" variety, designed only to spoil the Ventas deal or require Ventas to raise its price in order to obtain market support.

8 The events that followed the outcome of the Canadian case are interesting and instructive. Because of HCP's premium bid, Ventas was ultimately forced to increase its offer by approximately $100 million to secure shareholder approval. Ventas later successfully sued HCP (in the Western District of Kentucky) for tortious interference with its prospective business advantage and won a substantial jury award. Tortious interference cases are fact-intensive and require evidence of improper behaviour, and based on the jury's findings, Ventas later pursued punitive damages before settling for a substantial payment from HCP.

9 *In re The Topps Company Shareholders Litigation, C.A. Nos. 2786-VCS & C.A. No. 2998-VCS (*Del. Ch. June 14, 2007*)*.

10 More recently in *In re Celera Corporation Shareholder Litigation, Consol. C.A. No. 6304-VCP* (Del. Ch. March 23, 2012) (a case in which the "Don't Ask, Don't Waive" standstill was eliminated as part of a settlement), Delaware Vice Chancellor Parsons noted that, while both "Don't Ask, Don't Waive" standstills and no-shop covenants are legitimate deal-protection devices on their own, the combined effect of these two in a single transaction is "more problematic". A "Don't Ask, Don't Waive" standstill, the Vice Chancellor observed, prevents a particular potential bidder from informing the target of its interest, and, when coupled with a no-shop provision which prevents the board from inquiring about the same, these provisions can place the board in an "informational vacuum", ignorant of possible superior offers.

11 Remedies in situations where a court determines that a board failed to act responsibly, either itself, or in failing to take reasonable steps to ensure that management, bankers or other agents carried out their responsibilities appropriately and for the benefit of shareholders in the change-in-control context are an entirely different topic, and may be equally relevant in cases where standstills, of any variety, are obtained or not. Part of the teaching of *Ancestry.com* and the larger body of Delaware case law is that Revlon duties can be properly – or improperly – fulfilled in both circumstances.

12 It is worth noting that there is much academic theory and real-world practice in the realm of auction theory and in designing auctions – whether for radio frequency or Google ads, to take two well-known examples of highly structured auction sale contexts in which some of these ideas have been tested and improved – in a way that maximises revenue and

minimises strategic behaviour, collusion, frictional costs and other negatives. The sale of a company in an "auction" may be inherently messier and more complex than certain other transactions effected by auction. However, whether it is via judicial scrutiny and review of auction procedures, including standstill arrangements, or by adoption of more radical departures from current corporate practices – such as the use of a class or modified form of Vickrey auction – boards, practitioners and courts all agree that the goal of any auction sale of a company is to maximise shareholder value. Although not always discussed in such terms, that should be considered on an expected-value basis, taking into account both uncertainty (such as in financing arrangements or the possibility and timing of regulatory clearance) and also *ex ante* versus *ex post* analysis of the process and the outcome.

13 2009 CanLII 1651 (ON SC).

14 *Martin Marietta Materials, Inc. v. Vulcan Materials Co.,* C.A. 7102-CS (Del. Ch. May 4, 2012), affirmed by the Delaware Supreme Court in *Martin Marietta Materials, Inc. v. Vulcan Materials Co*., 2012 WL 2783101 (Del. July 12, 2012).

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