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Illinois Court Approves Single-Bidder Sale Strategy

Posted by Kobi Kastiel, Co-editor, HLS Forum on Corporate Governance and Financial Regulation, on Wednesday October 8, 2014

Editor's Note: The following post comes to us from William Savitt, partner in the Litigation Department of Wachtell, Lipton, Rosen & Katz, and is based on a Wachtell Lipton firm memorandum by Mr. Savitt, David C. Karp, and Adam S. Hobson. This post is part of the Delaware law series, which is cosponsored by the Forum and Corporation Service Company; links to other posts in the series are available here.

The Circuit Court of Cook County, Illinois yesterday [October 2, 2014] confirmed that a Delaware board may employ a single-bidder process in a cash sale governed by the *Revlon* standard. *Keating v. Motorola Mobility Holdings, Inc.*, No. 11-CH-28854 (Ill. Cir. Ct. Ch. Div. Oct. 2, 2014).

The case arose from the 2011 transaction in which Google acquired Motorola Mobility for $40 per share in cash. The transaction elicited the now-conventional multiforum litigation in both Delaware (Motorola Mobility's place of incorporation) and Illinois (its principal place of business). But the stockholder plaintiffs in Delaware dismissed their case and so only the Illinois action proceeded. Even though the merger price represented a 63% premium for Motorola Mobility's shares and over 99% of the Motorola Mobility shares voting approved the merger, these plaintiffs attacked the deal, principally on the ground that the Motorola Mobility board should have conducted a broad auction rather than confidentially negotiate the deal with Google.

The court disagreed. Holding that "the decision of whether it is wise for a disinterested board to take a public approach to selling a company versus a more discreet approach is the sort of business strategy question courts ordinarily do not answer," the court found no basis in the pleaded facts to disturb the board's business judgment and thus granted defendants' motion to dismiss. The court observed that the board's "financial advisors indicated that Google was the company most likely to acquire" Motorola Mobility. Moreover, the fact that the directors "negotiated the price of the offer from $30 to $40 per share suggests that the Board was properly focused on fulfilling its *Revlon* duties." Finally, the court held that the stockholder vote approving the merger provided an independent basis for dismissal, affirming the principle that a fully-

informed stockholder vote in favor of a third-party merger triggers application of the deferential Delaware business judgment rule.

This well-reasoned decision adds to a growing body of cases, including last year's Court of Chancery decision in *In re Plains Exploration & Production Co. Stockholder Litigation*, C.A. No. 8090-VCN (Del. Ch. May 9, 2013), refusing to second-guess an independent board's decision to negotiate exclusively with a single bidder instead of conducting a broader sale process. The business judgment rule thus continues to protect disinterested boards when they determine, on an appropriate record and with careful advice, that a confidential negotiation is the right way to maximize value.