January 17, 2018

Activist-Driven Dealmaking Falls Flat

Stockholder plaintiffs recently entered into a $290 million settlement in connection with federal securities litigation arising out of Valeant Pharmaceuticals' failed attempt to acquire Allergan. Activist hedge fund Pershing Square agreed to pay $193.75 million of the settlement in connection with its scheme to deliver Allergan into Valeant's hands. In 2014, Valeant informed Pershing Square of its intention to make a tender offer for Allergan. Armed with this knowledge, Pershing Square acquired a substantial position in Allergan. Valeant then went public with its offer and Allergan's share price predictably spiked. Pershing Square made over a billion dollars on the trade and Valeant "warehoused" a large prearranged block of support for its hostile bid.

Pershing Square trumpeted its scheme as a new template for activist-driven dealmaking—allegedly immunized by loopholes in the federal securities laws. Calling itself a "co-offering person," Pershing Square insisted that it was permitted to accumulate shares pre-offer even though it had material nonpublic information. Valeant, for its part, claimed it had not taken the "substantial steps" toward a tender offer necessary to trigger the relevant provisions of the securities laws, because the preparatory actions it had taken to facilitate its bid—including lining up financing—were consistent with a negotiated merger as well as a hostile tender offer.

The ensuing litigation raised the question whether this arrangement was legal under the Williams Act. In the midst of the takeover fight, Allergan sued in federal district court and obtained a preliminary injunction. The court found that Valeant may well have taken "substantial steps" to commence a tender offer. The court also preliminarily credited Allergan's claim that Pershing Square should have abstained from trading once it came into nonpublic information of Valeant's impending offer. In the aftermath of the injunction order, Actavis made a successful topping bid for Allergan, depriving Valeant of its takeover prize.

Building on that preliminary ruling, stockholder plaintiffs maintained a damages action against Pershing Square and Valeant. In a tentative ruling this past December (which the court yesterday indicated would be finalized and published), the court concluded that Pershing Square had unlawfully accumulated Allergan shares while knowingly in possession of material nonpublic information and was therefore a "primary violator[] of Rule 14e-3." Rather than continue to defend their conduct, Pershing Square and Valeant decided to pay almost $300 million to settle the claims. The litigation confirms that the Pershing Square/Valeant gambit is not a sustainable blueprint for dealmaking and is subject to attack as insider trading.

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