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M&A Alert

Delaware Chancery Court Rules That Merger Agreement Termination Fee Not Exclusive Remedy Where Seller Accepts Superior Offer in Violation of No-Shop

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In a decision of great interest in the M&A world, the Delaware Chancery Court recently ruled that a termination fee is not the exclusive remedy for a seller that accepts a higher offer in breach of a no-shop provision. *Genuine Parts Company v. Essendant, Inc.* 2019 WL 4257160 (Del. Ch. Sept. 9, 2019).

The case involves the proposed merger of two office supply companies, target Essendant and buyer Genuine Parts Co. The two entities entered into a merger agreement that included a standard no-shop provision and a $12 million termination fee that the agreement recited would be the sole and exclusive remedy in the event Essendant accepted a better offer.

No-shop provisions prohibit sellers from shopping the company or soliciting further offers after the merger agreement is signed but before the deal closes. While a selling company may agree not to solicit further bids, so-called "fiduciary out" principles allow the selling company to consider and accept unsolicited superior offers subject to payment of specific dollar termination fee.

After entering into the merger agreement, Essendant received a better offer from Staples and its private equity owner Sycamore Partners. Essendant accepted the offer, terminated the merger agreement and paid the $12 million termination fee.

Genuine Parts, the would-be buyer, sued in Delaware Chancery Court alleging that Essendant's liability was not limited to the $12 million termination fee. Genuine Parts argued this was so because Essendant (allegedly) breached the no-shop provision by actively meeting with Staples/Sycamore before signing the merger agreement, not disclosing Staples' interest representing in the agreement that there were no other suitors, and encouraging or facilitating the competing Staples' proposal after signing the merger agreement.

Essendant moved to dismiss the claim by pointing to the merger agreement's language that the termination fee would be the "sole and exclusive remedy" for Essendant's acceptance of a superior offer. Vice Chancellor Joseph Slights, writing for the Chancery Court, held that the termination fee is not the sole and exclusive remedy if the seller in fact breached the no-shop provision as alleged. The court reasoned that, when read together with other sections of the agreement outlining Essendant's rights to accept a superior proposal, the "sole and exclusive remedy" language only applied when Essendant accepted a competing proposal that did not arise from breach of the no-shop provision.

The lesson of the *Genuine Parts Company v. Essendant* case is clear. Parties should take great care when drafting termination fee provisions to specify in precisely which circumstances such a fee will be the exclusive remedy, particularly in the case of a breach of the no-shop provision of the merger agreement. Using the words "sole and exclusive remedy" will not be sufficient when other provisions act to limit the operation of that section.

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