JW | Corporate & Securities e-Alert

An important corporate & securities law update from the law firm of Jackson Walker.

February 26, 2010

Resources

JW Corporate & Securities Practice Area

JW Corporate & Securities Attorneys

JW Corporate & Securities Publications

Contact JW

www.jw.com

Offices

Austin
100 Congress Avenue
Suite 1100
Austin, TX 78701

Dallas
901 Main Street
Suite 6000
Dallas, TX 75202

Fort Worth
301 Commerce Street
Suite 2400
Fort Worth, TX 76102

Houston
1401 McKinney Street
Suite 1900
Houston, TX 77010

San Angelo
301 W. Beauregard Avenue
Suite 200
San Angelo, TX 76903

San Antonio
112 E. Pecan Street
Suite 2400
San Antonio, TX 78205

With Increasing Merger and Acquisition Activity, Be Sure to Consider Some Recent Cases that Could Impact the Transaction

Although many economists disagree about what they see when they look into their crystal balls, most agree that M&A activity in 2010 will increase over 2009 in both total volume and dollar value of transactions. This increased activity is expected in part due to an increased availability of debt, forced sales of distressed assets, pent-up demand for liquidity, strategic players taking advantage of bargain opportunities, and valuations becoming more stable. Additionally, many executives are focusing on realignment of their companies' businesses, whether through acquisitions to further diversify or divestitures of non-core operations.

As M&A activity increases, both buyers and sellers should carefully consider recent case law developments in fiduciary responsibilities of directors and officers. Jackson Walker partner **Byron Egan** recently presented a survey of important recent fiduciary duty cases at the University of Texas School of Law 32nd Annual Conference on Securities Regulation and Business Law in Dallas on February 12, 2010, and his paper is available by clicking on the following link: "*Recent Fiduciary Duty Cases Affecting Advice to Directors and Officers of Delaware and Texas Corporations*". The following recent cases have particular relevance to the recent evolution of director and officer fiduciary duties and corporate governance matters in the M&A context (with references to the more expanded discussion available in Mr. Egan's paper):

- *In re Trados Incorporated Shareholder Litigation* (pp 41-44), which held that a board breached its fiduciary duty of loyalty by improperly favoring interest of preferred stock in approving a merger.

- *In re the Dow Chemical Company Derivative Litigation* (note 429 on p. 137), which addressed the business judgment rule as applied to director approval of the corporation entering a merger agreement that unconditionally obligated it to consummate a "bet-the-company" merger without a financing condition.

- *John Q. Hammons* (pp. 141-142), which examined the entire fairness standard as applicable to a merger of a corporation that had a controlling shareholder even though the controlling shareholder was not on both sides of the transaction, and held that the business judgment rule was not applicable unless the transaction was approved by (i) an independent special committee and (ii) a non-waivable vote of all minority shareholders.

- *Lyondell Chemical Company v. Ryan* and its progeny (pp. 163-176), in which the Delaware Supreme Court rejected post-merger stockholder class action claims that independent

directors failed to act in good faith in selling the company after only a week of negotiations with a single bidder. This result was even after accepting plaintiff's allegations that the directors did nothing to prepare for an offer which might be expected from a recent purchaser of an 8% block and did not even consider conducting a market check before entering into a merger agreement (at a "blow-out" premium price) containing a no-shop provision (with a fiduciary out) and a 3% break-up fee. In so holding, the Court explained that duties under *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* (pp. 139-140) to seek the highest value reasonably attainable (i) do not arise until the company embarks on a transaction that will result in a change in control and (ii) there is no single blueprint that a board must follow to fulfill its *Revlon* duties.

- *Global Asset Capital, LLC vs. Rubicon US REIT, Inc.* (note 740 on p. 207), which held that no-shop and exclusivity provisions in letters of intent should be specifically enforced, concluding that contracts do not have inherent fiduciary outs and should be construed literally. As a result, parties should bargain for fiduciary outs or face exposure to contract damages and contract remedies at the same time they may potentially be exposed to other claims.

- *NACCO Industries, Inc.* (pp. 32-33 and 217-219), which held that (i) the Delaware fiduciary duty of candor applies to disclosures in SEC Schedule 13D/G filings and (ii) a target must conform to merger agreement deal protection provisions.

- In addition, the Delaware Chancery Court recently issued an opinion in *Kurz v. Holbrook* (C.A. No. 5019-VCL) (opinion issued on February 9, 2009), which addressed the solicitation of stockholder consents in a contest for control of the company. The opinion set forth significant new parameters: (i) brokers and dealers shown as the beneficial owners of stock on the participant list made available by Cede & Co. are deemed to be "record" owners of the shares and the breakdown of those shares made available to issuers is part of the issuer's "stock ledger," and (ii) while vote buying is suspect in Delaware, a sale of a future right to restricted stock combined with a present transfer of voting rights by an informed seller is permissible and does not violate the prohibition against transfers of stock in a restricted stock agreement because it does not prohibit taking the action at a future date.

If you have any questions concerning how these cases impact your business or a proposed transaction, please contact **Byron Egan** at 214-953-5727 or **began@jw.com** or any of the following attorneys:

Austin
Tara Allen – 512.236.2241 – **tallen@jw.com**
Ann L. Benolken – 512.236.2260 – **abenolken@jw.com**
Elise F. Green – 512.236.2228 – **egreen@jw.com**
Brandon C. Janes – 512.236.2095 – **bjanes@jw.com**
Michael F. Meskill – 512.236.2253 – **mmeskill@jw.com**

Dallas
Richard F. Dahlson – 214.953.5896 – **rdahlson@jw.com**
Alex Frutos – 214.953.6012 – **afrutos@jw.com**
David C. Rex – 214.953.5802 – **drex@jw.com**
James S. Ryan – 214.953.5801 – **jryan@jw.com**
Jeffrey M. Sone – 214.953.6107 – **jsone@jw.com**
Michael E. Taten – 214.953.5931 – **mtaten@jw.com**

Houston
David B. Deaton – 713.752.4508 – **ddeaton@jw.com**
Mark L. Jones – 713.752.4224 – **mljones@jw.com**
Sabrina A. McTopy – 713.752.4265 – **smctopy@jw.com**
Richard S. Roth – 713.752.4209 – **rroth@jw.com**

San Antonio

Stephanie L. Chandler – 210.978.7704 – **schandler@jw.com**
Steven R. Jacobs – 210.978.7727 – **sjacobs@jw.com**
Marcello E. Tamez – 210.978.7753 – **mtamez@jw.com**
Patrick B. Tobin – 210.978.7785 – **ptobin@jw.com**

---

*If you wish to be added to this e-Alert listing, please **SIGN UP HERE**. If you wish to follow the JW Corporate group on Twitter, please **CLICK HERE**.*

JW | JACKSON WALKER L.L.P.