HUNTON & WILLIAMS

# Client Alert

**December 2011**

## Delaware Court Awards $2.4M Fee Award for "Loosening" Deal Protections

On December 9, 2011, in *In re Compellent Technologies, Inc. S'holder Litig.*, the Delaware Court of Chancery granted a $2.4 million fee award to plaintiffs' attorneys who negotiated a settlement arising out of stockholder litigation challenging a merger. The settlement called for several amendments to the merger agreement to relax its deal protection provisions. The settlement also required the target corporation to rescind a rights plan that was adopted specifically in connection with the announcement of the merger. The court's decision is likely to encourage additional challenges to no-shop provisions, matching rights, and similar provisions.

### Background

The litigation arose out of Dell Inc.'s February 2011 acquisition of Compellent Technologies, Inc. The merger agreement contained numerous "deal protection" provisions, including (i) a "no-shop" clause that prohibited the target from actively soliciting third-party proposals; (ii) notice provisions requiring the target to provide the acquiror with (a) two business days' prior notice before negotiating with a topping bidder and (b) 24 hours' prior notice before sharing information with any topping bidder; and (iii) a requirement that any topping bidder enter into a 275-day standstill agreement. The merger agreement also imposed liability on the target for any breach of the no-shop provisions by any of the target's representatives, regardless of whether the breach was material or was connected to a particular superior proposal. Lastly, the merger agreement required the target to adopt a stockholder rights plan (or "poison pill") in connection with the announcement of the merger to prevent any third party from accumulating a significant portion of the target's shares. As the court noted, this last feature is novel in connection with a negotiated merger agreement.

After the transaction was announced, several stockholders brought suit alleging, among other things, that the target's board of directors had breached its fiduciary duties in agreeing to the deal protection provisions. Prior to the stockholder meeting to consider and vote on the merger agreement, the parties entered into a settlement with the plaintiffs in which the target agreed to rescind the rights plan and amend certain of the deal protection provisions. Among other things, the amendments to the deal protection provisions:

- revised the standard under which the target board could negotiate with a topping bidder[1];
- removed the requirement that a topping bidder enter into a 275-day standstill agreement;

[1] Under the original merger agreement, the board was permitted to negotiate with a third party who had submitted a proposal that "constitutes or is reasonably likely to result in a Superior Offer." Under the settlement, the merger agreement was amended to permit negotiations regarding a proposal that "constitutes, or could (after review by such Person of confidential information and after negotiations between such Person and the Company) reasonably be expected to lead to, a Superior Offer."

 

- reduced the notice period that was required before the target could negotiate or share information with a third party[2];
- reduced the termination fee payable to the acquiror from 3.85% to 3.23%; and
- deleted a termination fee that would have been payable if the target's board failed to reaffirm its recommendation after being requested to do so by the acquiror.

In addition to certain other changes, the amendments also limited the target's liability for breaches of the no-shop provisions by representatives other than its directors, officers, and financial advisors. Finally, as part of the settlement, Compellent delayed its stockholder meeting by at least 21 days.

Because the parties had entered into the settlement agreement, the sole issue before the court was the plaintiffs' attorneys' fee application. For that reason, the Court of Chancery was careful to note that it was not passing judgment on the merits of the plaintiffs' claims. Rather, the court's role was to award attorneys' fees based on the "benefit" conferred by the settlement. Nevertheless, the court characterized the deal protections as "aggressive" and "convey[ing] a clear message that any interloper would be resisted vigorously and should stay away." The court awarded $2.4 million based on the "benefit" produced by shifting the "protective array [of deal protections] from the aggressive end of the spectrum towards the middle."[3] The court reasoned that "loosening a no-shop clause, weakening information rights or matching rights, and ameliorating restrictions on a board changing its recommendation should, all else equal, increase the chance of a topping bid," even though no such topping bid materialized.

**Implications**

The *Compellent* decision offers helpful guidance on many intricate and heavily negotiated deal protection provisions in which the devil is often in the details. It also may foster concern among buyers. As the court noted, "[d]eal protections provide a degree of transaction certainty for merging parties." Here, there were several important deal protections, but ultimately the target corporation had the ability to negotiate with credible topping bidders. In addition, the acquiror in *Compellent* had recently lost a heated bidding war for a similar company and, therefore, presumably had a heightened interest in knowing its bid for Compellent would not be used as a stalking horse. In light of these factors, we think it is important to emphasize that the *Compellent* court acknowledged it was not evaluating the deal protection provisions as if it were considering whether to issue a preliminary injunction or a temporary restraining order. Nor was the court determining whether the target board had breached its fiduciary duties in agreeing to the deal protections.

The court's decision is likely to encourage stockholder-plaintiffs to challenge deal protection provisions more vigorously. In recent years, stockholder litigation challenging M&A transactions has become an assumed cost of doing business, with many claims being resolved through a settlement based on supplemental disclosures made to stockholders and the payment of often nominal attorney's fees. Plaintiffs also sometimes try to negotiate lower termination fees or matching right periods. Following *Compellent*, plaintiffs can be expected to increase their focus on the deal protections in the hope that such settlement terms will lead to greater attorneys' fee awards than those typically granted for supplemental disclosures.

[2] Specifically, the merger agreement was amended to require "prior notice" rather than two business days' notice before negotiating and 24 hours' notice before sharing information with a third party.

[3] The plaintiffs applied for a fee of $6 million, while the defendants argued for a fee not in excess of $1.25 million.

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