

Delaware Corporate Law Update

Thursday, November 2, 2023

Court of Chancery Addresses Enforceability of “ConEd Provisions” Under Delaware Law

In what may be the last opinion from the Delaware Court of Chancery relating to Elon Musk’s acquisition of the company formerly known as Twitter, *Crispo v. Musk*, C.A. No. 2022-0666-KSJM (Del. Ch. Oct. 31, 2023), the Court rejected a mootness fee petition brought by a former Twitter stockholder. The former stockholder, who brought suit against Musk and his affiliates seeking specific performance and damages after they attempted to terminate a merger agreement with Twitter, sought the fee award based on the assertion that the former stockholder’s claims contributed to Musk’s decision to change course and close the deal. After reviewing the terms of the merger agreement, the Court rejected the mootness fee petition on the basis that the stockholder’s claims were “not meritorious,” ruling that either the stockholder lacked third-party beneficiary status or the stockholder’s ability to exercise its rights as a third-party beneficiary, if any, never vested.

The decision expands upon the Court’s prior discussion of the enforceability of “ConEd provisions” in M&A agreements under Delaware law. *ConEd* provisions, which were developed by M&A practitioners after (and owe their name to) the Second Circuit Court of Appeals’ decision in *Consolidated Edison, Inc. v. Northeast Utilities*, 426 F.3d 524 (2d Cir. 2005), are intended to provide expressly that an acquiror’s liability for damages if a transaction is not consummated due to the acquiror’s breach of the agreement can include the premium lost by the target’s stockholders. While the Court recognized that M&A agreements may confer third-party beneficiary status on stockholders allowing them to seek damages for any lost premium, it suggested that Delaware law aligns with *ConEd* and raised questions as to the enforceability of provisions purporting to vest in a target company the exclusive right to recover damages for the premium lost by its stockholders. Noting that the target would not be entitled to receive the amount of any stockholder premium if the acquiror performed its obligations under the agreement, the Court suggested that the payment of a lost premium to a target company could constitute an unlawful penalty—and therefore would not be recoverable as damages. At the same time, the Court recognized the efficiencies associated with vesting the right to pursue lost premium damages (and focusing the resulting negotiating leverage) in a target company rather than a dispersed group of its stockholders. Nevertheless, the Court cited commentary questioning whether a target company would be permitted to unilaterally appoint itself as the agent of its stockholders for purposes of pursuing a lost premium.

