

Delaware Court Confirms High Bar To Escape Deal

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Two recent Delaware Chancery Court opinions, issued on October 25 and November 9, 2013, illustrate the high bar that buyers and sellers must clear to escape an unfavorable deal or obtain a court order requiring a deal to close.

Background

In June 2013, Apollo Tyres agreed to acquire Cooper Tire & Rubber Co. for \$35 per share in a \$2.5 billion transaction. Within weeks, commentators have suggested, buyer's remorse set in. In July, Apollo's own shareholders asked the company to reconsider its bid. Then striking workers at the Cooper Tire facilities in China barred Cooper officers from obtaining access to certain business and financial records. Meanwhile, in the US, the United Steelworkers union claimed that the merger agreement violated its collective bargaining pact, and an arbitrator found that the merger could not proceed unless Apollo negotiated a new agreement with the union.

After Apollo tried to renegotiate the price down, Cooper filed suit seeking to compel Apollo to use "reasonable best efforts" to negotiate a new labor agreement and proceed to close the deal. Apollo, perhaps seeing a potential exit from a deteriorating situation, shot back in a pre-trial motion, arguing that Cooper did not satisfy the "reasonable access" provision of the merger agreement by not providing any access to its China facility or records. As a result, Apollo claimed not only did it not have to use its efforts to work with the unions, but that it could walk away from the deal because Cooper had not lived up to its covenant promise on access to its facilities, including the China facility, and breach of that provision was not qualified by material adverse effect.

Decision

The court denied Apollo's motion for judgment before trial, finding that Cooper's obligation to provide "reasonable access" was only triggered upon a request for that information by Apollo. There was no evidence that Apollo ever made that request. And, the court noted, whether Cooper's failure to provide "reasonable access" to facilities in the face of labor unrest excused Apollo's performance presented factual issues that could not be resolved until trial.

On Cooper's claim, the court refused to order that Apollo consummate the merger because, it found, Apollo acted appropriately in attempting to negotiate a new labor pact. The court noted that Apollo had until the December 31 merger agreement end date to reach a new agreement with the union. On November 12, Cooper sought expedited review from the Delaware Supreme Court of the Chancery Court's refusal to order Apollo to consummate the deal.

Takeaways

The decisions confirm that Delaware courts will continue to hold both buyers and sellers to their contractual bargain and erect a high bar for a party seeking either to jettison the deal or compel specific performance. Deal context and contract specificity are critical.

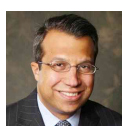
For buyers, the *Cooper* decisions demonstrate:

1. Facts that suggest a buyer is simply having a change of heart will jeopardize its chances of exiting the transaction.
2. There must be a clear path under the merger agreement to terminate the deal *and* the buyer must have lived up to all of its contractual obligations.
3. Buyers are not likely to be successful in avoiding an agreement by relying on clauses in the merger agreement that are not typically intended to operate as termination rights. For example, reasonable access and cooperation provisions are not typically negotiated as exit rights from a deal.

For sellers, the Court's opinions illustrate:

1. Sellers will have a difficult task obtaining court orders requiring a buyer to close if the buyer is able to prove that it has complied with the agreement and ample time remains for the transaction to play out before the agreement's end date occurs. Sellers will also need to show that they have otherwise satisfied all conditions to close.
2. Termination rights or conditions that are not tied to a specific standard (*i.e.*, willful or material breaches, a MAC, *etc.*) can create execution risk and potentially provide a buyer with an unintended escape hatch to terminate or retrade the deal.
3. Imposing mandatory requirements on parties to perform some aspect of the deal (like access to Cooper's facilities) should be reserved for situations that the parties can anticipate in advance are potential deal-killers.

Please feel free to contact the following attorneys, if you have any questions about this memo.



Jason M. Halper
Partner – New York
Litigation
+1 212 504 6605
jason.halper@cwt.com



William P. Mills
Corporate
Partner – New York
+1 212 504 6436
william.mills@cwt.com



Martin L. Seidel
Partner – New York
Litigation
+1 212 504 5643
martin.seidel@cwt.com