

M&A Update

Delaware Court of Chancery Strictly Interprets Merger Agreement in Finding That Rent-A-Center, Inc. Properly Terminated Its Proposed Merger with Vintage Rodeo

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In *Vintage Rodeo Parent, LLC v. Rent-A-Center, Inc.*, C.A. No. 2018-0928-SG (Del. Ch. Mar. 14, 2019), Vice Chancellor Glasscock of the Delaware Court of Chancery found that Rent-A-Center, Inc. (“Rent-A-Center”) properly terminated its merger agreement with Vintage Capital Management LLC (“Vintage”) after Vintage failed to submit a notice to extend the drop-dead date for its pending \$1.37 billion buyout of Rent-A-Center. In doing so, the Court strictly interpreted the express language of the merger agreement and permitted Rent-A-Center to terminate the merger unilaterally by delivering a termination notice only hours after the extension deadline passed.

Background

The merger agreement between Vintage and Rent-A-Center provided that each party had the unilateral right to extend the end date of December 17, 2018 to March 17, 2019, by giving the other party written notice of its election to extend on or before December 17, 2018. If neither party elected to extend the end date, the parties would still be bound by the merger agreement, but either party could terminate the merger agreement by delivering a written notice to the other party. Moreover, the merger agreement provided that, upon termination, Vintage would be obligated to pay to Rent-A-Center a reverse breakup fee equal to 15.75% of the transaction’s equity value.

In light of the prolonged, ongoing Federal Trade Commission approval process for the merger, it was clear to each party that the merger would not be completed by the initially scheduled end date. Shortly before the deadline, the Rent-A-Center board determined that it would not unilaterally extend the end date, and that, if Vintage did not extend, Rent-A-Center would elect to terminate the merger agreement. While Rent-A-Center anticipated that Vintage would elect to extend, to Rent-A-Center’s surprise, Vintage did not extend the end date by the prescribed deadline. On the morning of December 18, 2018 (only a few hours after the deadline had passed), Rent-A-Center delivered a termination notice to Vintage and demanded that Vintage pay the breakup fee. Despite Vintage’s arguments that an extension notice was constructively delivered or waived, the Court came to the “startling conclusion” that Vintage “simply forgot” to deliver the extension notice. Seeking a declaratory judgment, Vintage filed suit against Rent-A-Center, seeking to invalidate

Rent-A-Center's termination notice on the basis that the extension deadline had been extended by the conduct of the parties and that Rent-A-Center breached its implied covenant of good faith and fair dealing. Rent-A-Center asserted a counterclaim for breach of contract, seeking payment of the breakup fee.

Following a two-day trial, the Court found that Rent-A-Center's termination was valid and effective. In so finding, the Court rejected Vintage's arguments that (1) its failure to provide written notice to extend the end date was obviated by the parties' conduct; (2) Rent-A-Center breached its obligation to use commercially reasonable efforts to close the transaction by failing to remind Vintage of its obligation to deliver an extension notice or inform Vintage of its intention to terminate if Vintage failed to deliver an extension notice; and (3) Rent-A-Center fraudulently induced Vintage to believe that Rent-A-Center still wanted to consummate the merger.

Takeaways

The *Vintage Rodeo v. Rent-A-Center* decision provides key insights for M&A practitioners and litigators into how the Court will interpret express contractual agreements between merger parties.

1. The Court Will Not Second Guess Unambiguous Drafting. The Court observed that the terms of the notice provision at issue in this case are "clear and unambiguous." However, Vintage argued that, notwithstanding such clarity, the actions of the parties satisfied the "purpose" of the notice provision, and as such, constituted substantial compliance that amounted to delivery of an extension notice. According to Vintage, the joint timing agreement entered into among Vintage, Rent-A-Center and the FTC, which contemplated a closing date after the end date, served as an extension of the end date or waiver to the requirement that a written extension notice be delivered. Vintage further argued that a financial model prepared by Rent-A-Center listing a closing date that was after the end date amounted to an extension of the end date. The Court strongly rejected these "after-the-fact rationalizations," stating that these "contractually-required expenditures of time and effort" did not equate to a notice to extend the end date. The Court emphasized that, when the terms of a contract are clear and unambiguous, judicial review of such terms generally stops, unless a party "justif[ies] its deviation, by, for instance, showing that it has acted reasonably, in light of the circumstances, to substantially comply in a way that preserves the benefits of the contract to the counterparty." The Court found that the facts of this case did not warrant such an exception. Instead, the Court held that the end date and the extension thereof were "matters of importance" and were "heavily negotiated," and as such, the parties are "bound to their contractual bargain." This case serves as a reminder that the Court generally will strictly enforce the clear and unambiguous terms of a merger agreement.
2. Commercially Reasonable Efforts Do Not Require Reminding a Counterparty of Its Contractual Rights. As is typical, the merger agreement provided that the parties would

expend commercially reasonable efforts to consummate the transaction. Vintage argued that Rent-A-Center, by affirmatively concealing its intent to terminate the merger if Vintage elected not to extend the end date, failed to use commercially reasonable efforts to consummate the merger, and therefore, breached the agreement, rendering its termination of the transaction invalid. In support of its argument, Vintage compared its situation to that of *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*, 965 A.2d 715 (Del. Ch. 2008) (“Hexion”), where the court found that termination of a merger agreement was wrongful because the *Hexion* defendants “were aware of a ‘problem,’” which was the impending failure to satisfy a condition precedent, and chose not to make the effort to alert and work with its counterparty to satisfy the condition. The Court distinguished this case from *Hexion* in finding that Rent-A-Center did not sabotage satisfaction of a condition precedent and that Vintage simply lacked an understanding of its explicit rights under the merger agreement. In so holding, the Court acknowledged that, under Delaware law, “parties are assumed to have knowledge of their own contractual rights,” and that to analogize this situation to that of *Hexion*, Rent-A-Center would have had to have been aware of Vintage’s misunderstanding of its contractual rights. Because there was no such evidence, the Court found that Rent-A-Center’s failure to remind Vintage of its notice obligations did not result in a breach of the merger agreement.

3. Counterparties Have No Duty to Warn of an Impending Termination. Vintage also argued that Rent-A-Center’s obligation to use commercially reasonable efforts to consummate the merger required Rent-A-Center to provide Vintage with advance notice that Rent-A-Center did not intend to extend the end date and planned to terminate the transaction if Vintage also elected not to extend. The Court found that such obligation would be inconsistent with the express terms of the merger agreement, and that if the parties in fact had agreed to include an advance notice provision in the merger agreement, they would have done so expressly. Rent-A-Center had no duty to remind Vintage of its contractual rights, and thus was entitled to conceal its intention not to extend the end date and to terminate the merger.
4. Rent-A-Center’s Right to Terminate Was Not Limited by the Implied Covenant of Good Faith and Fair Dealing, Estoppel or Quasi-Estoppel. Vintage argued that the implied covenant of good faith and fair dealing should be applied to prevent Rent-A-Center’s termination. The Court rejected this argument, stating that the implied covenant of good faith and fair dealing serves as a “gap filler” that applies only when parties expressly failed to include terms that are “so obvious.” The Court stated that not only did Vintage fail to claim that Rent-A-Center committed fraud by terminating the merger agreement, but that there was no “gap to fill,” as the parties “vigorously negotiated” the circumstances under which a party had the right to extend the end date. Similarly, the Court found that Rent-A-Center’s right to terminate was not barred by the principles of equitable estoppel or quasi-estoppel. With respect to Vintage’s estoppel argument, the Court found that Rent-A-Center’s conduct did not lead

Vintage to “change [its] position to [its] detriment” because, in fact, Vintage did not *change* its position not to send a notice of election to extend the end date based on Rent-A-Center’s “business as usual” conduct following the Rent-A-Center board meetings; Vintage “simply forgot” to send its notice. Lastly, the Court found that the commercially reasonable efforts Rent-A-Center expended prior to the extension of the expected closing were not *inconsistent* with its exercising its contractual right to terminate the merger, and therefore, the principle of quasi-estoppel was not applicable.

5. The Court Left Open the Possibility That the Breakup Fee is Not Payable Based upon the Implied Covenant of Good Faith and Fair Dealing. Interestingly, the Court left open the question of whether Vintage should be responsible to pay to Rent-A-Center the breakup fee in light of the implied covenant of good faith and fair dealing. Here, the Court questioned whether the parties intended for the breakup fee to apply in a situation where the buyer is ready and willing to close, but inadvertently failed to notify the other party of its election to extend. As such, the Court requested supplemental briefing on the applicability of the implied covenant to payment of the breakup fee before rendering a decision on whether the breakup fee must be paid.

Please click [here](#) for the full opinion.

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