

M&A Survey Practice Pointers

May 19, 2016 | **CORPORATE**

This year's *Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions*, published by the ABA's Business Law Section, contains a number of judicial developments and guidance for practitioners in the context of M&A transactions. Upon a review of the cases in the survey, the following holdings are of particular note:

The Importance of Specificity in Indemnification Claim Notices (*Gore v. Al Jazeera America Holdings I, Inc.* (Del. Ch. Aug. 13, 2015)).

- In *Gore v. Al Jazeera America Holdings I, Inc.*, the court presided over the seller's objection to the buyer retaining escrowed monies based on the buyer's failure to give proper notice of claims. The primary issue in the case was whether claim certificates delivered by the buyer were adequate to allow the buyer to hold back certain amounts from the escrow as indemnity under the terms of the purchase agreement. In particular, the court found one certificate to be facially invalid based on the purchase agreement requirement that the party seeking indemnification deliver a notice that it "has incurred or reasonably believes it will incur or pay damages." The notice merely stated that the buyer "may incur" damages (as opposed to "will"). The holding in this case shows the importance of tracking the wording of the purchase agreement in formulating your claim for indemnification lest you lose the opportunity to present a legitimate claim because of a defect in the notice.

Limits on Enforceability of Indemnities and Other Requirements Against Stockholders who are not a Party to the Purchase Agreement (*Cigna Health and Life Insurance Co. v Audax Health Solutions, Inc.* (Del. Ch. Nov. 26, 2014))

- *Cigna Health & Life Insurance Co. v. Audax Health Solutions* deals with an attempt to add a target's stockholders who did not sign the merger agreement to the indemnification (which was unlimited in amount and duration) provisions contained in the agreement and effect a release of the acquirer through a letter of transmittal. Cigna, a non-signatory stockholder, demanded its portion of the consideration but refused to sign the letter of transmittal. The Delaware court held that the release contained in the letter of transmittal imposed an additional obligation on the non-signatory stockholders not supported by consideration and therefore was not enforceable. The court further held that Cigna should be able to receive its consideration without being bound by those indemnification obligations that were not subject to a monetary cap or a time limit, citing Section 251(b) of the Delaware General Corporation Law which provides that the purchase agreement shall state the cash, property, rights or securities the stockholders are entitled to receive. The court held that the unlimited indemnification amounted to a perpetual purchase price adjustment. In all, the case highlights that practitioners should be careful when attempting to impose further commitments through letters of transmittal without additional consideration as those obligations may not be enforceable.

Interpreting Option Plan Language to Determine Shareholders' Participation in Escrow (*Fox v. CDX Holdings, Inc.* (Del. Ch. July 28, 2015))

- *Fox v. CDX Holdings, Inc.* involves a claim concerning whether option holders cashed out in the context of a merger transaction received sufficient value for their options. The option plan of the target company required

payment of fair market value (as determined by the company's board of directors in good faith) less the exercise price. In *Fox v. CDX Holdings, Inc.*, the court held that the governing contract determining the amount to which the option holders were entitled was the option plan rather than the merger agreement. Therefore, the target company could not require its option holders to contribute to the escrow holdback under the merger agreement as it breached the target company's contractual commitments under its option plan. This case demonstrates the importance of following the procedural requirements of the option plan with respect to valuation issues.

Notice of Contingent ERISA Withdrawal Liability Satisfies Successor Liability Notice Requirement (*Tsareff v. Manweb Services Inc.* (7th Cir. July 27, 2015)).

- *Tsareff v. Manweb Services Inc.* considers the limits of successor liability in the context of liability for withdrawal from a multiemployer pension plan. Under the facts of the case, the acquirer was made aware of the target's obligations as a union employer during the due diligence phase of the acquisition. Based on its diligence investigation, the acquirer expressly excluded any liabilities or obligations arising out of, or related to, union related activities, including any pension obligations of the target in the asset purchase agreement. The target ceased operations after closing and the acquirer made no contributions to the multiemployer plan. The plan then notified the target of its withdrawal liability under ERISA and filed an action against the target as well as the acquirer on a successor liability theory. The district court ruled in favor of the acquirer that successor liability would not apply in this context. However, on appeal, the Seventh Circuit, applying federal common law (which extends liability beyond the limits of state common law), which requires that (i) the successor have notice of the claim (before the acquisition) and (ii) that there be substantial continuity in the operations of the business before and after the sale, found that the requirement that the successor have notice of the claim was met by a showing that the successor was put on notice of a contingent withdrawal liability in the diligence phase. This case shows the reach of successor liability and demonstrates the importance of accounting for contingent risks in indemnity and pricing negotiations.

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