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Delaware Court Refuses to Stay Stockholder Challenge to Topps Buyout, Notwithstanding Identical Suit Previously Filed in New York

In a May 9, 2007 decision authored by Vice Chancellor Strine in *In re: The Topps Company Shareholders Litigation*,[1] the Delaware Court of Chancery explained that the recent wave of going-private transactions, involving private equity buyers who intend to retain a target's existing management, has given rise to important and novel issues under Delaware corporate law that are best determined by Delaware courts. Consequently, in *Topps*, the Court ruled that a purported stockholder class action pending in Delaware challenging such a merger should not be dismissed or stayed in favor of identical, previously filed litigation pending in another state.

Facts

On March 6, 2007, two private equity firms announced that they had entered into a preliminary agreement to purchase The Topps Company Inc. ("Topps") — the well-known seller of lollipops, bubble gum and trading cards — by way of a merger. After announcement of the proposed merger, several stockholders of Topps filed virtually identical purported class action lawsuits challenging the proposed merger. Four such actions were filed in the Supreme Court of the State of New York, where Topps is headquartered, and five were filed in the Court of Chancery for the State of Delaware, where Topps is incorporated. The first of the actions was brought in New York by an Ohio plaintiff. The first Delaware-based action was filed the next day. The Delaware proceedings were consolidated (the "Delaware Action") prior to the consolidation of the New York proceedings (the "New York Action"). Plaintiffs in both the New York and Delaware Actions sought to enjoin preliminarily the proposed merger.

[1] Cons. C.A. No. 2786-VCS.

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This update was prepared for our clients and friends by **Robert K. Payson** (302-984-6003 or rpayson@potteranderson.com) and **Bradley W. Voss** (302-984-6023 or bvoss@potteranderson.com). For more information on this case or other recent developments in Delaware law, please contact any member of our **Corporate Counseling** or **Corporate Litigation** Groups.

1313 North Market Street

P.O. Box 951

Wilmington, DE 19899-0951

(302) 984-6000

www.potteranderson.com

Citing the "first-filed rule" and *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*,[2] Topps argued that the Delaware Action should be dismissed or, in the alternative, stayed in favor of the New York Action. Because the actions involved the same parties, issues and facts, and because the New York court previously indicated that it intended to proceed with the New York Action, Topps argued that litigating in both Delaware and New York simultaneously would result in unnecessary expense and would risk inconsistent rulings on the same issues.

Decision

The Court rejected Topps' motion to dismiss or stay. The Court opined that "[a]lthough our courts have deferred to clearly first-filed actions in corporation cases involving settled questions of law, such as derivative actions raising claims of self-dealing, our courts have long been chary about doing so when a case involves important questions of our law in an emerging area." The Court believed that the Topps merger presented just such a case, saying it was "part of a newly emerging wave of going private transactions involving private equity buyers who intend to retain current management. This wave raises new and subtle issues of director responsibility that have only begun to be considered by our state courts. This factor bears importantly on the question of where this case should be heard. When new issues arise, the state of incorporation has a particularly strong interest in addressing them, and providing guidance."

Topps relied in part on another recent decision by the Court of Chancery, *Ryan v. Gifford*.[3] In *Ryan*, Chancellor Chandler refused to stay an action for breach of fiduciary duty based on alleged options backdating. Because Delaware had "an overwhelming interest in resolving questions of first impression under Delaware law," *Ryan* held that the Delaware action would proceed notwithstanding similar litigation previously filed and pending in California.

Among many other factors cited in support of its decision in *Topps*, the Court wrote:

- In a representative action such as this one, the desire of an individual plaintiff to litigate in a forum other than the state of incorporation has no legal or equitable force, particularly when the plaintiff is not even a resident of the state in which he seeks to litigate."

- "The paramount interest is ensuring that the interests of the stockholders in the fair and consistent enforcement of their rights under the law governing the corporation are protected. In a situation like this one, when all the actions are filed essentially

[2] 263 A.2d 281 (Del. 1970). *McWane* and its progeny require the Court to take into account considerations of comity in exercising its discretion whether to grant a stay.

[3] 918 A.2d 341 (Del. Ch. 2007).

simultaneously on the heels of the announcement of a transaction, the mere fact that one plaintiff won the filing Olympics by beating his competitors to court by a day also has no logical bearing on where the case should proceed."

- "Instead, well-settled principles of public policy and comity — as recognized by the United States Supreme Court and the New York Court of Appeals — point toward … the long-understood notion that when a corporation forms under the laws of a particular state, the rights of its stockholders are determined by that state's law and that the chartering state has a powerful interest in ensuring the uniform interpretation and enforcement of its corporation law, so as to facilitate economic growth and efficiency."

- "Corporations are chartered by states, and the managers and investors who form them are free to choose from among a variety of laws to govern their relationships. Their contractual expectations deserve respect."

While the Court rejected the application of the first-filed rule in the situation presented, it noted that "[t]his is not to say that the consideration of which action is first filed cannot play a useful tie-breaking role when all other considerations are equal." And as to Topps' concern about being "whipsawed" by litigating the same claim in two different courts simultaneously, the Court suggested that the New York court should stay the New York Action, writing that "[i]n view of the comity traditionally shown by New York in these situations to the courts of the chartering state … I therefore have confidence that the result the defendants fear will not come to pass."

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