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# Negotiating with a Noob M&A Target? Go Easy on Them, says Delaware Chancery

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Buy-side executives in an M&A deal negotiate with their sell-side counterparts for months, plying them for information, assessing the seller's weaknesses and pressure points, and even making informal entreaties when the parties' standstill agreement says they shouldn't —all to get the best deal for the acquirer. Under Delaware's contractarian corporate regime—that would seem to be a good thing.

Not necessarily so, says the June 30, 2023 post-trial decision in *In re Columbia Pipeline Group, Inc. Merger Negotiation*. If sell-side executives are "acting like a bunch of noobs [ *i.e.*, inexperienced "newbies"] who d[o]n't know how to play the game," the decision cautions buy-side actors ought to know they are breaching *their* fiduciary duties to *the target* and buy-side actors should not exploit the situation, on pain of liability for aiding and abetting the breach. In *Columbia Pipeline Group*, Vice Chancellor Laster found the acquirer aided such a breach, and was therefore jointly and severally liable for up to roughly $400 million in damages. The decision, intended to protect a seller's shareholders, may end up having the opposite effect, by chilling the vigorous auction behaviors integral to a robust M&A market. At the very least, bidders for Delaware companies will have to exercise extra caution in making aggressive moves, even when—or perhaps especially when—targets don't push back.

The target in *Columbia Pipeline Group* was a natural-gas pipeline and storage company bought by another energy company for $13 billion in 2016. The target's shareholders settled with the target's CEO/chair and CFO, for alleged breaches of their fiduciary duties, and then went to trial against the acquirer for aiding and abetting those breaches. Reviewing in detail the history of the negotiations between the acquirer and the target's executives, the court found the acquirer satisfied the elements of aiding and abetting: the acquirer *knew* the sell-side executives (and the board) breached their fiduciary duties to the target and the acquirer *exploited* that breach.

The acquirer knew there was a breach, said the court, because the target's executives, rather than playing their cards close to the vest, acted in a tellingly open and guileless fashion (in one meeting, the target's CFO, rather than reading his talking points, simply handed them to his counterpart), hinted they wanted a sale so they could cash out their equity and retire, and repeatedly failed to enforce a standstill provision in the NDA that forbade many of the acquirer's repeated approaches. The acquirer exploited the breach of duty, said the court, by, having cultivated the all-too-close relationship with the executives, lowering its bid from $26 per share to $25.50 and threatening that, unless the bid was accepted, it would publicly announce negotiations were over, a tactic the court found constituted a threat to breach the parties' NDA (because the $25.50 offer, not being "best and final," did not actually mark the end of the parties' negotiations and therefore Toronto Stock Exchange rules did not require such an announcement, contrary to the (Canadian) acquirer's argument).

The court stressed that the acquirer's "persistent and opportunistic violations of the Standstill"—basically, talking to target executives uninvited—were not "legitimate instances of aggressive bargaining," while the acquirer's "coercive threat" to go public with the breakdown of negotiations, in "violat[ion] [of] the NDA," was the conduct that crossed the line into "culpable participation." In other words: an acquirer cannot simply assume that a target who chooses to run its auction by not enforcing (or selectively enforcing) its rights under an NDA actually knows what it's doing. According to the court, this "provides a bidder . . . with a clear path to avoiding liability for aiding and abetting: Comply with contractual commitments and sale process rules."

But why shouldn't the parties be trusted to enforce their own rules? If the buyer chooses to break the rules, risking contractual liability, that's the buyer's prerogative; and if the seller chooses to not enforce the rules, that's the seller's prerogative. For all the buyer knows, the seller's non-enforcement is itself a strategic decision that is authorized by the seller's board (not a breach of the seller's duty to its shareholders), part of the seller's toolkit to achieve the highest price. The buyer in *Columbia Pipeline Group* couldn't see the whole auction process—it didn't know if there were other potential buyers, and it couldn't be sure *it* wasn't being played by the supposed "noobs" who very well might have been waiving the standstill in their talks with other bidders. To punish such a buyer for abetting a breach that it couldn't see—but, according to the court, it should have smelled—sends a message that bidders can't make independent judgment calls about their contractual obligations (including whether they want to breach those obligations and risk the *contractual* liability they bargained for) and thus can't negotiate an acquisition freely (lest they incur liability in *tort* they did not bargain for). Which in turn sends a signal to sellers that they don't have complete freedom to waive their own contractual rights and thus can't run an optimal auction. All of this may have the perverse effect of depressing the value a seller can obtain for its shareholders—precisely the opposite result intended by the Chancery Court's decision.

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