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# **RECENT LEGAL DEVELOPMENTS AND TRENDS IN M&A**

**2024 JEGI CLARITY Media and Technology Conference**

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# These Guys Again?!?



V.



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# Enforceability of *ConEd* Provisions Under Delaware Law

- A 2005 2nd Circuit decision referred to as “*ConEd*”<sup>\*</sup> held that under New York law, stockholders could not seek damages in the form of a lost merger premium from a buyer who wrongfully walked away from a deal.
- In response, M&A practitioners began including “*ConEd*” provisions in merger agreements, providing that target companies could seek to recover lost merger premia from such buyers.
- There was a logic to this approach:
  - Nobody really wanted the mayhem that would come with millions of individual stockholders suing buyers who wrongfully walked away from deals.
  - Under classic economic theory, any recovery by a target company would increase its value, and that increase would be shared *pro rata* by the stockholders.

<sup>\*</sup>*Consolidated Edison, Inc. v. Northeast Utilities*, 426 F.3d 524 (2d Cir. 2005).

# Enforceability of *ConEd* Provisions Under Delaware Law (cont'd)

- For almost 20 years, practitioners assumed that these provisions were enforceable, especially in Delaware.
- However, in *Crispo v. Musk*,\* perhaps the last case arising from the Musk/Twitter saga, a Delaware Chancery Court decision held that at least one variation of these provisions – the “damage definition” version – was unenforceable.
- The procedural posture of the case was odd – because the merger closed, the stockholder’s claim became moot, and as a result the ruling is arguably dicta.
- However, at the very least it signals a judicial unwillingness to enforce provisions that many have assumed for years would be enforced as written.
- Potential solutions?
  - Better drafting? Probably not.
  - Charter provisions? Maybe.
  - Legislative action? Maybe.

\* *Crispo v. Musk*, C.A. No. 2022 – 0666 – KSJM (Del. Ch. Oct. 31, 2023).

# Enforceability of Stockholder Agreements

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# Enforceability of Stockholder Agreements

- In *West Palm Beach Firefighters' Pension v. Moelis & Co.*,\* the Delaware Court of Chancery held invalid all but three Stockholder Agreement provisions giving firm founder Ken Moelis an approval right over matters traditionally reserved to the Board of Directors.
- The agreement was an example of what the court called a “new wave” of stockholder agreements, not involving stockholders contracting among themselves as to how they will exercise their stockholder-level rights, but rather containing extensive veto rights and other restrictions on corporate action.
- One of the most fundamental principles of Delaware corporate law is set out in DGCL Section 141(a):

*The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of the board of directors, except as may otherwise be provided in this chapter or in its certificate of incorporation.*

\*Court of Chancery of the State of Delaware, Case No. 2023-0309.

# Enforceability of Stockholder Agreements (cont'd)

- In the course of a 133-page opinion, the court invalidated a provision requiring the founder's prior approval before taking 18 types of actions that "encompass virtually everything the board can do".
- The court also invalidated various provisions giving the founder certain rights with respect to board and committee composition.
- Be wary of "new wave" stockholder agreements and drafting creep!
- Questions:
  - Would a lesser combination of rights be sustainable?
  - Would the analysis apply to agreements settling disputes with activists?
  - Could some or all of these rights be provided via a "golden share" of preferred stock?



# Corporate Transparency Act



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# Corporate Transparency Act

- Went into effect January 1, 2024.
- Requires entities formed by filings with Secretaries of State (e.g., corporations, limited liability companies) to submit beneficial ownership information to the Department of Treasury's Financial Crimes Enforcement Network (Fin CEN).
- Companies formed on or since January 1, 2024 have 90 days to comply.
- Civil and criminal penalties for failure to comply.
- Information to be filed for Beneficial Owners includes full name, date of birth, address and a unique identifying number.
- Exemptions apply to 23 types of entities, including Securities Reporting Issuers (e.g., US-listed companies), "Large Operating Companies", certain investment companies and advisors, and subsidiaries of the foregoing.

# Corporate Transparency Act (cont'd)

- But many exemptions are far from straightforward in their drafting and application.
- Many large companies should be able to confirm that they meet one or more exemptions, and then apply that exemption to all wholly owned and controlled subsidiaries.
- However, the CTA requirements need to be carefully considered by all parties with respect to each investment, joint venture, acquisition of less than 100% of a target and other transactions.
- Historical compliance by target companies must also be considered in an acquisition of those companies.

# THANK YOU

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