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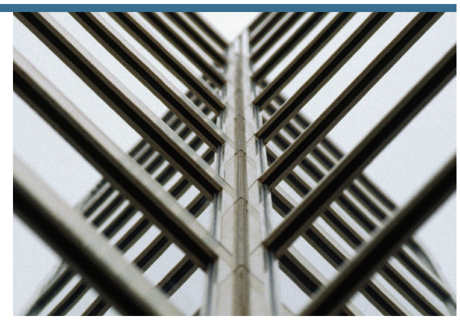

Recent Practical Effects of "Just Saying No"

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In the past few months, we have seen an increasing number of hostile or unsolicited M&A bids where boards of directors of target companies have resisted bidders' advances. Traditionally, the board-friendly Delaware approach, epitomized by its "just say no" jurisprudence, has made hostile bids both risky and uncertain. Nevertheless, hostile and unsolicited mergers and acquisitions so far this year have been at their highest levels worldwide since 2007, according to *Thomson Reuters* data. Including withdrawn deals like Pfizer's US$118 billion bid for AstraZeneca, unsolicited deals comprised approximately 20 percent of worldwide M&A so far this year, which is the highest percentage in eight years.

Responsibilities of the board of directors of a company incorporated in Delaware and most other US jurisdictions are measured primarily by the business judgment rule, a fundamental corporate principle that essentially defers to the decision-making process of the directors themselves and that, absent special circumstances such as personal gain, presumes the propriety of the directors' actions. The business judgment rule generally applies to the board's consideration of an unsolicited or hostile offer, including the decision to engage in discussions with bidders, negotiate terms and, ultimately, accept or reject the unsolicited or hostile offer. The board of directors, as a general rule, has no fiduciary duty to negotiate |with third parties, or to sell the corporation, simply because a premium price is offered, if the board makes a good faith, informed decision that its actions are in the corporation's best interests.

In order to meet this duty of care, directors must act in a fully informed manner and with the requisite level of care dictated by the particular circumstances. Directors typically ensure they are fully informed by carefully considering the various financial, legal, regulatory and other aspects of a potential transaction and by engaging experts such as financial advisors and legal counsel in order to receive appropriate advice. It is important that any analysis of a hostile or unsolicited offer be analyzed in the context of any existing strategic plans for the corporation that has been developed by the board, including its prospects as a standalone company.

Delaware has the most developed body of reported judicial decisions on corporation law, and other US jurisdictions typically view Delaware law as highly persuasive. In Delaware, a special *Revlon* duty for directors to seek the highest price reasonable available for its stockholders arises only if the board has put the company up for sale or is proposing a transaction that would clearly break up the company. Absent a *Revlon* situation, it is settled, at least in Delaware, that a target board has the prerogative to resist a third party's unsolicited acquisition proposal or offer—in other words, to "just say no."

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This principle was most recently and clearly reaffirmed in the *Airgas* case in Delaware, where the *Airgas* board rejected a series of increasing tender offers from a bidder on the grounds that the price was inadequate in light of *Airgas*'*s* long-term plans. Boards of directors will typically consider the use of various defensive measures in response to hostile or unsolicited offers. Most commonly, this includes the board considering implementing a "poison pill" to thwart the unwarranted offer, and the *Airgas* board did in fact have a "poison pill" in place to deter the hostile bid. Delaware courts evaluate directors' decisions involving the use of a defensive measure in response to unsolicited or hostile offers using the so-called *Unocal* standard, which requires defensive measures to be non-coercive and within a range of reasonable responses to the perceived threat of an inadequate offer. Applying such a standard in the *Airgas* case, the Delaware Chancery Court decided in favor of the board.

In April of this year, Pfizer publicly announced that in January it made a proposal to acquire pharmaceutical rival AstraZeneca, a UK company, for approximately US$100 billion in a cash and stock deal that would be structured as an "inversion" transaction to allow Pfizer to achieve a favorable tax re-domiciliation to the UK. Pfizer also made public that it attempted to renew discussions with AstraZeneca but was rebuffed. The AstraZeneca board responded by announcing that it concluded that the proposal "very significantly undervalued AstraZeneca and its prospects." AstraZeneca was quick to reject each of Pfizer's subsequent bids and publicly declared that there would be more value to shareholders in remaining independent and continuing with its strategic plans. Although there were a number of shareholders who publicly came out in support of engaging in discussions with Pfizer, it was insufficient to sway the AstraZeneca board. Notably, in choosing to reject Pfizer, AstraZeneca left a 30 percent premium on the table from where it was trading. The UK generally follows a shareholder primacy model in contrast to the director primacy model largely followed in the United States and, despite changes to UK takeover law in recent years meant to curb frustrating actions that directors can take in response to takeover offers, the AstraZeneca board continued to "just say no" to Pfizer. In doing so, the AstraZeneca board presumably carefully considered each of the aspects of the Pfizer proposals with advice from its financial advisors that supported its "just say no" strategy and aided its position that the company would be better suited from a long-term valuation perspective to continue with its independent plans vis-à-vis the Pfizer offer.

Valeant Pharmaceuticals has teamed up with Bill Ackman's Pershing Square Capital Management to try to purchase Allergan Inc. The two companies went public with their takeover attempt in April and have increased their original bid of nearly US$45.6 billion several times, resulting in an offer carrying a premium of approximately 46 percent over Allergan's unaffected stock price. Utilizing a "just say no" strategy, Allergan has repeatedly rejected those offers as underpriced and risky, prompting Pershing and Valeant to take its hostile bid directly to shareholders by recently launching a tender offer for Allergan. Allergan is using its poison pill to fight the Valeant tender offer and consummation of that offer, which is currently scheduled to expire on August 15, 2014, is conditioned on the Allergan board redeeming the poison pill. If Valeant and Pershing are successful in getting a sufficient number of shareholders to tender into the offer, there will be incredible pressure on the Allergan board to acquiesce and redeem its poison pill. There is already pending shareholder litigation in Delaware relating to the proposed transaction, and the failure of the Allergan board to redeem its poison pill in response to what would otherwise be a successful tender offer would certainly be argued by Valeant and Pershing as a breach of fiduciary duty under the *Unocal* standard discussed above.

In June, Ireland's Shire plc confirmed it had received and rejected a series of proposals from AbbVie Inc., culminating in an increased offer for AbbVie that values Shire's stock at more than US$53 billion, a 48 percent premium to Shire's unaffected stock price. Like Pfizer, AbbVie is also seeking to redomicile for tax purposes to the UK. Shire responded to the initial offers by saying that the terms carried "execution risks" and that the financial terms were too low. AbbVie then met with a number of Shire shareholders to garner support for the transaction. This led to an increased AbbVie offer price and ultimately resulted in the Shire board abandoning its "just say no" strategy and having discussions with AbbVie regarding the terms upon which it would support a transaction. The Shire board has indicated to AbbVie that it would now be willing to recommend an offer at the current offer price subject to satisfactory resolution of the other terms of the offer, and the companies are now in detailed discussions in relation to these terms.

Another recent notable example of unsolicited bids successfully leading to a board's decision to abandon its strategic plans in favor of the bidder is Hillshire Brands. In May, Hillshire agreed to buy Pinnacle Foods for approximately US$4.5 billion. Subsequently, Pilgrim's Pride Corp. and Tyson Foods made competing bids to acquire Hillshire, with such bids conditioned on Hillshire abandoning its deal to acquire Pinnacle. Hillshire initially began a "just say no" strategy and rebuffed both Tyson and Pilgrim's Pride offers in favor of continuing to remain independent and to support its pending transaction with Pinnacle Foods. However, once the Tyson and Pilgrim's Pride offers for Hillshire reached close to US$6.7 billion, Hillshire agreed to enter into talks with both bidders and conduct an auction process. The Hillshire board could have determined under the business judgment rule after conducting the auction to proceed with the Pinnacle deal and continue to "just say no" to Tyson and Pilgrim's Pride. However, the combination of a substantial premium and shareholder pressure to sell led to a board determination to abandon its "just say no" strategy. As a result, Tyson was the prevailing bidder in the auction and will pay approximately US$7.7 billion for Hillshire, a price that is nearly US$1 billion more than Pilgrim's Pride's last offer and a roughly 70 percent premium to Hillshire's closing stock price before the bidding began.

These recent transactions demonstrate that, absent sufficient shareholder pressure to sell or, at the least, to engage in discussions with a hostile bidder, "just saying no" continues to be a powerful defense to unwarranted offers.

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