

Delaware Law Weekly

February 4, 2009

• Volume 12, Number 5

An incisivemedia publication

Where Do We Go From Here? Trends in the Law in 2009

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Special to the DLW

In the first several weeks of 2009, it is useful to look back at what happened in 2008, to see where we might end up. The last year brought historic turmoil to the financial markets, the likes of which had not been seen for generations. In this limited space, it would be impossible to discuss all of the relevant cases from the past year or predict all the types of cases that are coming in 2009, so this article will briefly discuss some of the trends that emerged over the past year, whether they will continue and whether any new trends will emerge as the country's financial markets attempt to recover.

DEAL TERMINATION CASES

The most obvious trend in Delaware over the last year tied to the collapse of the financial markets was the deal termination case. The trend actually began in late December 2007 with Chancellor William Chandler's decision in *United Rentals Inc. v. RAM Holdings Inc.* in which United Rentals sought (unsuccessfully) to compel its putative merger partner, RAM Holdings, to consummate their proposed merger. The trend continued with some cases that went away quickly (see Blackstone's proposed acquisition of Alliance Data Systems) ultimately culminating in Vice Chancellor Stephen Lamb's opinion in *Hexion v. Huntsman*, in which the vice chancellor found that Hexion had

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knowingly and intentionally breached the parties' merger agreement and ordered Hexion to specifically perform its obligations under the parties' merger agreement except for the obligation to consummate the merger.

While these cases have been important ones for negotiators and advisers, it is unclear whether we will see any more deal termination cases in 2009. The key event, however, will be application of the principles from *United Rentals*, *Hexion* and the other deal termination cases to the new deals that are negotiated once funds become available. If, as many predict, deal flow will be more of a waterfall than a trickle once it begins, it may be difficult for negotiators in 2009 eager to get back in the game to heed the lessons of the deal termination cases in 2008, thereby leading to more transaction-driven litigation.

OPPORTUNISTIC RECAPITALIZATIONS

The drop in the market value of securities as a result of the financial crisis is not always a bad thing. Certain companies might be able to use the drop in the market price of their publicly traded debt to recapitalize the company at a significant discount. Whether the company is permitted to do so by its debt instruments is the key question. A recent example of this type of case is *Bank of New York Mellon v. Realogy Corp.* In *Realogy*, the company proposed to refinance certain junior debt by exchanging it for new secured debt but with a much smaller face value. Holders of the company's more senior debt challenged the transaction as a violation of the various covenants applicable to the company, and the court agreed. As a result, *Realogy* terminated the proposed transaction and, despite whatever the financial merits of the transaction may have been, must now

look for other ways to recapitalize the company.

Whether this type of litigation proliferates remains to be seen. What is unlikely to abate, however, is the desire of corporations to take advantage of the opportunity to recapitalize their corporate structures at steep discounts. The motivation to achieve this otherwise proper goal can lead to the creation of transactions pushing the limits of permissible conduct under existing indentures and other debt instruments; whether the economics of the transaction press debt holders into litigation will determine how fertile an area of litigation this is in the future, but it is certainly an area to watch.

INDEMNIFICATION AND ADVANCEMENT

Finally, the area of indemnification and advancement saw a number of key decisions in 2008. This area will continue to be fertile in 2009 as officers and directors are targeted by stockholders and prosecutors for their conduct and then turn to their current or former employers for advancement and indemnification. Some key decisions from 2008 will affect how companies deal with advancement in 2009.

In *Schoon v. Troy Corp.*, the court held that the right to advancement is not "vested" until the right to advancement is actually triggered by the occurrence of a proceeding subject to advancement. Thus, if no case has been filed, a corporation arguably may amend its bylaws to eliminate the right of former directors to receive mandatory advancement. In *Underbrink v. Warrior Energy Services Corp.*, the court reaffirmed the notion that adoption of a reasonable bylaw provision requiring mandatory advancement is not subject to entire fairness review, even when adopted under

threat of imminent litigation. Finally, in *Zaman v. Amedeo Holdings Inc.*, the court held that despite prior caselaw indicating that courts always awarded advancement for compulsory counterclaims, the better approach was to award advancement only

for compulsory counterclaims that would defeat the affirmative claim against the director.

All of these trends and developments from 2008, as well as the continued turmoil in the financial markets, promise to

make 2009 just as interesting, and important, in the Chancery Court.

Bayard P.A. served as counsel in some of the litigation described above. The views expressed herein are the author's own, and not those of Bayard P.A. or its clients. •