CLEARY GOTTLIEB

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Preparing for "Proxy Access" Shareholder Proposals

While the SEC's proxy access rule has been judicially vacated, the related Rule 14a-8 amendments permitting shareholders to make their own proxy access proposals are now in effect. Steps that companies should consider if they receive such a proposal and, indeed, in preparing for the 2012 proxy season are presented.

A New Wrinkle in the Interpretation of Anti-Assignment Clauses

A closer look at anti-assignment provisions may be warranted in light of The Delaware Chancery Court's recent decision in *Meso Scale Diagnostics, LLC et al. v. Roche Diagnostics GmbH et al.*

Considering the Consequential Damages Waiver

When considering the allocation of risk in a private transaction, a party is advised to think carefully about the potential ramifications of the waiver of consequential damages.

CLEARY GOTTLIEB IN THE NEWS

CG represented **Bank of America** in its sale of shares of **China Construction Bank** for an aggregate sale price of approximately $8.3 billion. CG previously represented Bank of America in its 2005 acquisition of an interest in CCB, which was the single largest foreign investment ever in a Chinese company.

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CG represented **Stanley Black & Decker** in its $1.2 billion acquisition of **Niscayah**.

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CG represented **Alpha Natural Resources** in its $8.5 billion merger with **Massey Energy Company**.

Preparing for "Proxy Access" Shareholder Proposals

BY VICTOR LEWKOW, JANET FISHER AND ESTHER FARKAS

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Following the SEC's decision not to seek a rehearing of the decision by the U.S. Court of Appeals for the District of Columbia Circuit vacating its "proxy access" rule (Rule 14a-11 under the Securities Exchange Act of 1934), the stay on the companion "private ordering" amendments to Rule 14a-8 was lifted and those amendments are now in effect. Companies can no longer exclude otherwise-qualifying shareholder proposals seeking to establish a procedure in a company's governing documents to permit shareholder nominees to be included in the company's future proxy statements. As with other shareholder proposals, in order to make an access proposal a shareholder need only own $2,000 of company stock and have held it continuously for one year.

While some companies may receive proxy access proposals because of their size or notoriety, or seemingly at random, others will receive them because of shareholder dissatisfaction with the company's performance, strategic direction, compensation policies or general governance profile. We expect that larger institutional investors will focus their attention on a very small number of issuers where a relatively high level of dissatisfaction exists. Of course, the most important steps a company can take to reduce the risk of receiving a proxy access proposal (or, if one is received, it obtaining substantial support or even being approved) are the same ones that apply to other potential activism: knowing who the company's major shareholders are and staying in touch with them, understanding their views and concerns, and considering what steps can be taken to address those concerns well before any proposal is received. Even if a company does not expect to be a target of a proposal in the near future, understanding the views of key shareholders on this important subject should be part of the agenda for any meetings it is planning with shareholders in anticipation of the 2012 proxy season.

Several factors are relevant in deciding how to respond to a proxy access proposal, including:

- Who made the proposal and why, and what is the proponent's background and credibility to other investors and to proxy advisory firms? Engaging with the proponent to understand the reasons for the proposal may suggest other ways to address the proponent's concerns and lead to the withdrawal of its proposal.
- Is the proposal precatory or does it seek the approval of a binding by-law amendment?
- What are the specifics of the proposal, particularly as to the percentage ownership (and definition of beneficial ownership) and holding period requirements? The specifics (including how they compare with the 3%, three-year requirements of invalidated Rule 14a-11) may affect the reactions of other shareholders and proxy advisory firms and thus the likelihood that the proposal would be approved.
- What is the company's shareholder makeup?
- How do major shareholders view the company's performance, strategy, compensation policies and governance?

ISS and Glass Lewis have both stated that they will make their recommendations on a case-by-case basis. ISS has stated that it will take into account the proposed ownership threshold and "the proponent's rationale…in terms of board and director conduct."

Discussed briefly below are steps companies should consider taking in response to a proxy access proposal and, indeed, may wish to consider now as part of their preparation for the 2012 proxy season.

Consider Whether to Submit a No-Action Request to Exclude the Proposal

As with any shareholder proposal, a company should consider whether there are grounds to seek an SEC staff no-action letter permitting exclusion of the proposal.[1] Among the possible bases for exclusion are a lack of timeliness of the proposal; the failure of the proponent to adequately establish continuous ownership of $2,000 of shares for one year; that the proposal would, if adopted, violate state law; or that the proposal or the supporting statement is materially false or misleading (including by being so vague that it is misleading).[2]

Consider Whether to Include the Proposal and the Board's Recommendation

If the Board of Directors believes the proposal is in the best interests of the company, it can either support the proposal or submit it as its own. If the Board is generally supportive of the concept of proxy access but disagrees with some of the specifics of the particular shareholder proposal, it can seek to negotiate revisions with the proponent or, as discussed below, submit its own proposal to shareholders. Although we believe most Boards will want to take a clear position on a proxy access proposal, there may be circumstances where a neutral position would be a viable option.

If the Board believes the proposal is inadvisable, the company should include in its proxy statement a well-reasoned and clear explanation of the reasons for its recommendation and should consider other steps to communicate its position and rationale. These could include meetings with shareholders and proxy advisory firms, the use of additional soliciting materials and vigorous solicitation by the company and its proxy soliciting firm.

Consider Whether to Propose or Adopt an Alternative Proxy Access By-Law

A company may instead wish to propose its own proxy access provision. This approach permits shareholders to vote on what the Board believes to be a carefully drafted provision that makes sense for the company in light of its particular governance framework and shareholder profile. This approach also permits the company to seek exclusion of the shareholder proposal on the grounds that it would conflict with the company's own proposal. Based on recent no-action precedents regarding other types of governance proposals, there appears to be a good chance that the SEC staff would permit exclusion of a shareholder proposal in such circumstances. However, the staff attitude towards conflicting management proposals could evolve, either generally or in this new context, and the conclusion in a particular situation may depend on whether the staff views the specifics of the two proposals as creating a "direct conflict."

Submission of the company's own proposal may be particularly worthy of consideration if the shareholder has proposed a binding by-law amendment containing provisions that the Board believes are inappropriate (*e.g.*, an unreasonably low ownership threshold or holding period, or a definition of "beneficial ownership" that fails to take into account economic short-positions), but that might be approved in the absence of an alternative. In view of the limited time a company may have to respond if it receives a proxy access proposal, it may want to prepare a potential access by-law amendment in advance that could be fine-tuned and considered by the Board quickly.

A company could go one step further and adopt an amendment to its by-laws providing for proxy access. This approach potentially could forestall a shareholder proposal or provide a basis for excluding a shareholder proposal on the grounds that it has been "substantially implemented." Experience in other governance contexts, however, has shown that shareholders will not be deterred by a company's proactive changes if they disagree with the approach taken, and recent no-action correspondence suggests that the SEC has narrowed its view of what constitutes "substantial implementation." Given the highly charged context in which the Rule 14a-8 amendments have become effective, as well as the SEC staff's support of proxy access generally, it would not be surprising if the staff refused to grant no-action relief where there was a meaningful divergence between key elements of the company's by-law amendment and the shareholder proposal, notably the ownership threshold and holding period. The Board's adoption of an access by-law could nevertheless provide it with greater flexibility, both from an investor relations perspective and conceivably under corporate law in some states, to amend, or even repeal, the access by-law if later warranted by the company's circumstances or by the experience of other companies generally with shareholder access.

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1 The company can also decide to exclude a proposal without obtaining (or even seeking) no-action relief, and either bring a declaratory judgment action against the proponent or prepare to defend an action brought by the proponent. This approach to exclusion could be predicated on the belief that a basis for exclusion exists under Rule 14a-8 or that the amendments to Rule 14a-8 were not validly adopted by the SEC. Conversely, even if the company seeks and obtains no-action relief permitting exclusion of a proposal, the proponent shareholder can appeal to the courts.

2 The proposal also cannot seek to (i) disqualify a nominee standing for election, (ii) remove a director from office before his or her term expired, (iii) question the competence, business judgment, or character of one or more nominees or directors, (iv) include a specific individual in the company's proxy material for election to the board of directors, or (v) affect the outcome of the election of directors at the same annual meeting.

A New Wrinkle in the Interpretation of Anti-Assignment Clauses

BY BENET O'REILLY AND CASEY DAVISON

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A recent decision of the Delaware Court of Chancery puts a wrinkle into the interpretation of anti-assignment covenants, suggesting that where a contract of a target contains language limiting assignment of an agreement "*by operation of law,*" such covenant may be breached in a reverse triangular merger ("RTM") and perhaps, in some circumstances, by a stock purchase. Closer focus of anti-assignment provisions may therefore be warranted in acquisitions, particularly if the operations of the target company are expected to be radically altered following the acquisition.

While prior case law existed on the interaction of anti-assignment clauses and forward subsidiary mergers (which generally are viewed as triggering a provision restricting assignment "by operation of law") and stock purchases (which generally were not seen to trigger anti-assignment clauses), few prior courts have considered the question of whether a RTM triggers anti-assignment clauses in the contracts of the target entity.

In *Meso Scale Diagnostics, LLC et al.* ("MSD") *v. Roche Diagnostics GmbH et al*. ("Roche")[1], Vice Chancellor Parsons considered a question of first impression in the Delaware Court of Chancery. The background of *Meso Scale Diagnostics* is a complicated one, with Roche facing, several times, the imminent loss of its licenses for use of electrochemiluminescense ("ECL") technology due to alleged breaches of field of use restrictions, and subsequently preserving its rights by purchasing the entity that held the relevant licenses and patents. To preserve its license rights in 2003, after a jury found Roche had violated the license's field of use, Roche entered into a set of complex transactions, purchasing the predecessor corporation to BioVeris Corporation ("BioVeris"), and entering into a number of agreements related to licensing with MSD and BioVeris (formed at the time of such transactions), including the Global Consent and Agreement at issue in *Meso Scale Diagnostics*. MSD and BioVeris each held licenses and intellectual property relating to the ECL technologies and had rights to ECL technology in a number of fields, excluding the field in which Roche held rights.

In 2007, Roche held a non-exclusive license for a specified, relatively narrow field of use from BioVeris, obtained in the 2003 transactions. BioVeris brought suit against Roche for further alleged violations of the field of use restrictions. Rather than agreeing to arbitration as it had in 2003, and risking the loss of its non-exclusive license, Roche offered to purchase BioVeris. The parties ultimately agreed to a cash deal, structured as a RTM, in which the public stockholders of BioVeris received cash for their stock, and a subsidiary of Roche was merged with and into BioVeris, with BioVeris as the surviving entity following the merger.

In December 2010, three years after the purchase of BioVeris by Roche, MSD brought a suit in the Delaware Court of Chancery alleging that the Global Consent and Agreement was improperly assigned by virtue of the 2007 transaction, and requesting that the court unwind the transaction. Roche moved to dismiss the case.

The anti-assignment language in the Global Consent and Agreement is a standard provision, providing that, "Neither [the Global Consent and Agreement] nor any of the rights, interests or obligations under [it] shall be assigned, in whole or in part, by operation of law or otherwise by any of the parties without the prior written consent of the other parties…."

Roche argued that the RTM was most similar to a stock purchase, in that the only change to BioVeris was a change in the ownership of that entity and BioVeris continued to own its assets, contracts, and rights. Roche noted that courts have found in the past that a stock purchase will not trigger an anti-assignment clause, because of this continuity of ownership, and that a RTM should be afforded similar treatment.

In its response, MSD argued, first, that even if the transaction most resembled a stock transaction, courts have found that a "mere change of ownership, *without more,* [does] not constitute an assignment as a matter of law" when discussing stock purchases. MSD alleged that more than a "mere change of ownership" had occurred as, following the merger, BioVeris was gutted, its employees laid off, its product lines discontinued, and its physical space vacated, leaving intellectual property as the sole remaining asset of BioVeris. The Delaware court agreed that the facts, as alleged by MSD, could require an interpretation that more than a change of ownership of BioVeris had taken place.

MSD also argued that the stock purchase cases put forth by Roche should not control, as the structure of the transaction was simply different. The court agreed, finding that the stock purchase cases do not, as a matter of law, establish that the term "by operation of law" does not include a RTM transaction. MSD argued instead that all merger transactions, regardless of form, constitute an assignment by operation of law, analogizing to those decisions that found forward triangular mergers to trigger anti-assignment clauses. The court found, however, that, like stock purchases, forward triangular mergers are sufficiently different from RTMs that those cases are not controlling.

MSD's second argument relied on the unpublished—but frequently noted—California decision, *SQL Solutions Inc. v. Oracle Corp.*[2], which held that an assignment of an intellectual property license occurred pursuant to a RTM. While the situation is analogous, the Vice Chancellor determined that *SQL Solutions* does not control (as it was an unpublished case from another jurisdiction), and mentioned that he considered the reasoning in *SQL Solutions* "open to question."

Vice Chancellor Parsons, accordingly, did not consider any case law to be controlling on the subject, and found sufficient ambiguity in the term "by operation of law" to deny Roche's motion to dismiss. Parsons indicated that while Roche's interpretation of the clause to permit a RTM was reasonable, it was not the only reasonable interpretation. Further, the Vice Chancellor denied Roche's motion to dismiss the complaint to the extent it sought rescission of the merger, saying that it was a remote chance, but that it was too early to rule out the possibility of that remedy.

The *Meso Scale Diagnostics* decision means that, for now, whether consent is required to transfer a non-assignable contract in the context of a RTM is open to interpretation. Unless and until a decision is made that definitively determines whether a RTM is an assignment "by operation of law," courts may look to the intent of the parties in drafting the original anti-assignment language, as well as considering whether the transfer creates unreasonable risk for the other parties to the contract and whether performance by the original party is a material condition. Moreover, the focus on the intent of the original parties to the agreement and on potential harm to a third party may mean that a motion to dismiss cannot succeed, as the record will not yet be sufficiently developed to analyze the issues.

After this decision, it is even more important to carefully analyze anti-assignment language appearing in contracts, both when drafting as well as when reviewing the provisions in the context of an acquisition. For targets, it may be prudent in some cases to consider including a disclaimer in the disclosure schedules relating to any "no-conflict" or "consents" representation. In private transactions, consideration also should be given to structuring transactions as stock purchases even where a RTM might seem simpler. However, Vice Chancellor Parson's suggestion that a stock purchase could potentially trigger anti-assignment language if the business is not conducted following a sale as it was conducted prior to the sale indicates that even the relatively safe approach of a stock purchase may still be open to challenge.

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1 *Meso Scale Diagnostics, LLC et al. v. Roche Diagnostics GmbH, et al.*, C.A. No. 5589-VCP (Del. Ch. Apr 8, 2011).

2 *SQL Sol'ns Inc. v. Oracle Corp.*, 1991 WL 626458 (N.D. Cal. Dec. 18, 1991).

Considering the Consequential Damages Waiver

BY DAVID LEINWAND

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Private acquisition agreements typically include a waiver of the ability to recover consequential and special damages for breach. By contrast to other risk allocation mechanisms, such as representations and indemnities to which many billable hours and much angst usually are devoted, the waiver of consequential and special damages often is dismissed by parties as boilerplate and given little attention. Ironically though, a party subsequently faced with a counterparty breach may discover that this seemingly innocuous waiver has substantially undermined the other, carefully considered risk allocation provisions and left it with far less protection than it assumed it had obtained through negotiation.

The Waiver

The damages waiver typically provides that a party cannot be held liable for several categories of damages arising out of its breach of the acquisition agreement. The prohibited categories usually include punitive, exemplary, incidental, consequential and special damages. Sometimes the waiver also will explicitly preclude liability for losses of revenue, income or profits or loss of value damages calculated as a multiple of earnings or other performance metrics.[1] The purpose of the waiver is to provide each party a measure of comfort that its liability for breach will be reasonably limited.

The waivers of punitive, exemplary and incidental damages are relatively straightforward and generally do not present significant issues for parties to private M&A agreements. Punitive and exemplary damages are concepts in tort rather than contract and are meant to punish the breaching party in the event of some sort of wrongdoing by requiring the payment of increased damages. In the rare instance that such damages are applicable to a breach of contract dispute, they result in the payment of damages beyond what is necessary to compensate the aggrieved party for its losses. Most parties to an acquisition agreement, therefore, will not get fussed over waiving the ability to recover punitive and exemplary damages and generally are happy not to have to worry about being sued for such damages. Similarly, the waiver of incidental damages usually does not raise significant concerns. Incidental damages are a concept pertaining to costs arising from the rejection of goods under the Uniform Commercial Code, and their inclusion in an M&A damages waiver generally will be innocuous.

A Consequential Ambiguity

On the other hand, waivers of consequential damages and special damages—generally treated by the courts as synonymous concepts—present significant issues when considering potential breaches by a counterparty. Issues arise because, despite their frequent use in private acquisition agreements, the concepts of consequential and special damages have not been defined with any precision by the courts in the M&A context and are surprisingly ambiguous. It is usually assumed that consequential damages are those damages arising from a breach that do not result from the direct relationship of the contracting parties. But in the case of a breach of an M&A agreement, what actually constitutes consequential and special damages, as opposed to direct damages, and how far the concepts of consequential and special damages extend, is far from clear.[2]

In many cases, the potential impact of the waiver is simply misunderstood by the parties. In negotiations in which the waiver does come up, the argument often is made that it is necessary to ensure that a party will not be held liable for remote or speculative damages. It is an appealing argument as parties generally do not expect to recover, and certainly do not want to be held liable for, such damages, and lawyers invariably can come up with a parade of hypothetical horribles to convince the parties the waiver is necessary. But it is clear under the case law that in the event of a breach of contract, the non-breaching party is entitled to recover only those damages that are reasonably foreseeable and that flow naturally from the breach. The consequential damages waiver, therefore, is not necessary to eliminate liability for speculative damages, remote damages or damages the parties could not reasonably foresee at the time the contract was made.

In fact, because of the ambiguity of the underlying concepts, the waiver of consequential and special damages may preclude recovery of certain actual and foreseeable damages that the parties otherwise may have assumed were recoverable. For instance, one possible construction of the waiver is that it precludes recovery of damages that arise from "special circumstances" applicable to the non-breaching party regardless of whether those circumstances were known by the breaching party at the time of contracting. In other words, the argument may be made by the breaching party that the waiver shields it from any liability resulting from circumstances applicable to the non-breaching party that would not have been applicable to a hypothetical "typical" party to a "similar" contract.

As an illustration, imagine a case in which, prior to an acquisition transaction, a target company in a highly regulated industry was operated in breach of the compliance with law representations in the acquisition agreement. After closing, regulators discover the violations of law and threaten to impose sanctions and limitations on the combined company including highly specialized, related businesses that the acquiror and its affiliates were operating prior to the deal. Given the ambiguity of the waiver and the lack of guidance in the case law, an argument may be made by the breaching party that the acquiror's losses in connection with its pre-deal businesses arose from the acquiror's "special circumstances," and that, as a result, such damages are "special damages" barred by the waiver. In such instance, the buyer may be surprised to discover it is unable to recover all of the damage it actually has sustained, regardless of whether such damages were reasonably foreseeable by the breaching party at the time the contract was made.

Another possible construction of the consequential damages waiver is that it precludes recovery of damages that arise out of relationships with third parties. For example, if a seller is in breach of its representation in the acquisition agreement that certain contracts are enforceable, and the facts giving rise to such breach allow the counterparty to a highly lucrative customer contract to terminate that contract, the seller may argue that damages resulting from the actions of the third party in terminating the contract—including any lost profits—constitute consequential damages. In such case, a buyer that has agreed to a consequential damages waiver may find itself barred from full recovery for the breach even if such contract was material to the buyer's valuation of the target.

Issues arising out of the waiver may be exacerbated when the parties add language precluding recovery for lost profits or revenue or losses of value based on multiples of earnings or other metrics. In the normal course, both buyers and sellers may expect to be able to recover such damages and may later regret agreeing to such language. A buyer may expect to recover profits lost as a result of the seller's breach—recall the contract example above—or if the seller's breach results in a long-term diminution in the value of the purchased business, a buyer may expect to recover damages based on the best method for valuing the business which may be as a multiple of some performance metric. Similarly, a seller left at the altar may experience a long-term loss in value and may wish to argue that the best way to measure its damage is by profits lost or by measuring lost value based on a multiple of earnings. In addition, although the language is an attempt at precision, it may in fact inject further ambiguity into a dispute as the parties and the court attempt to apply the terms used and determine whether the damage sustained constitutes lost profit or revenue or can be construed as some other type of loss. In any event, even if not explicitly mentioned in the waiver, because of the ambiguity of the underlying concepts, the breaching party very well may argue that losses of profit and damages measured as a multiple of earnings or some other metric constitute consequential or special damages.

Of course, all this ambiguity may prove beneficial to a breaching party seeking to minimize liability. But in the course of considering the allocation of risk in a private acquisition agreement, a party is well-advised to think carefully about the potential ramifications of the waiver of consequential and special damages on its ability to obtain recovery in the event of a counterparty breach. It may very well be the case that after such analysis the party will conclude it is better to attempt to negotiate for the elimination of the waiver of consequential and special damages or for an alternative, more precise limitation on liability.

* * *

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1 The following is an example of a damages waiver from a private acquisition agreement:

> The parties hereto expressly acknowledge and agree that no party to this agreement shall have any liability under any provision of this agreement for any punitive, exemplary, incidental, consequential or

special damages, or for any loss of future revenue, profits or income, or for any loss of value damages measured as a multiple of earnings, revenue or any other performance metric, in each case arising out of the breach or alleged breach of this agreement.

2 For an extensive treatment of this subject, *see* Glenn D. West and Sara G. Duran, *Reassessing the "Consequences" of Consequential Damage Waivers in Acquisition Agreements*, 63 The Business Lawyer 777 (May 2008).

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