BANKING ON CORPORATE

# IT'S RIGHT THERE IN THE AGREEMENT

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Advising on the negotiation of a complex acquisition agreement can trigger some existential questions. For example, how, as counsel, am I adding value? Should I be trying to read the mind of opposing counsel or, if they're doing the same, am I just reading my own mind? Should I be anticipating the unexpected or, in doing so, am I making it actually expected? And can I docket for these thoughts?

The recent Delaware Court of Chancery decision in *Vintage Rodeo Parent, LLC, et al. v. Rent-A-Center, Inc.* vividly illustrated how relatively simple mechanisms in acquisition agreements can create confusion. The genesis of that case was when Vintage Capital (which owned Buddy's, a rent-to-own retailer), entered into a merger agreement to acquire Rent-A-Center, Inc., a bigger participant in the rent-to-own space. The agreement had an "end date" provision, which permitted either party to terminate if the deal was not completed within six months. The agreement further provided that if anti-trust regulatory approval was not obtained by the end date, each party had the right to extend the end date for three months and then for a further three months. If neither party extended, the agreement wouldn't necessarily come to an end, but either party could terminate. The merger agreement had an additional interesting feature: If Vintage chose not to extend the end date, it was required, if either party subsequently terminated, to pay an enormous US$126.5-million fee to Rent-A-Center.

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At some point, as both parties continued to use their contractually mandated commercially reasonable efforts to get regulatory approval, Rent-A-Center's results improved and it decided that it preferred not to proceed with the merger. It fully expected Vintage to extend. When Vintage didn't do so, Rent-A-Center terminated and claimed the huge fee.

At its core, the case was simple. There was a mechanically straightforward provision for the delivery of a notice to extend the end date, and it was not delivered. The arguments advanced by Vintage hint at the complexities of these transactions. It argued first that the parties had been working together diligently to achieve regulatory approval and that, through these efforts (and the documents generated through that process), Vintage had given adequate notice of its intention to extend (or that the extension process had become moot in view of both parties' apparent intention to proceed). The problem noted by the court was that both parties were obligated to chase the regulatory approval until the agreement terminated, so their conduct could not be treated as obviating the relevance of the extension framework. Vintage also argued that Rent-A-Center had fraudulently concealed its intent to terminate. The court considered this position as, in effect, an argument for a "duty to warn," which does not exist (sophisticated commercial counterparties having no obligation to remind each other of their contractual rights). Finally, Vintage argued that the implied covenant of good faith and fair dealing prevented Rent-A-Center from terminating; the court, however, noted that this covenant was a filler for gaps in an agreement and not an all-purpose guarantee of fair outcomes.

During the negotiation of a merger agreement, parties and their advisors will typically think through multiple possible permutations, trying to anticipate how events might evolve, for whose relative advantage those events will be, and how to balance natural desires to maintain optionality for oneself while binding the other party. These thought processes can be confusing, but the confusion is compounded because Rent-A-Center's conclusion that the deal terms were no longer advantageous to it might lead one to think that Vintage would be anxious to proceed with its acquisition of a now more valuable target on previously agreed terms, even putting aside Vintage's incentive to extend to avoid the termination fee. Maybe Vintage simply forgot to send the notice.

This leads to a memorable demonstration of a ubiquitous factor in transactions in the digital age, namely the ironically labelled "paper trail." In the elegant manner of judicial expression, the court noted that when Vintage learned that a notice of extension had not been sent, one financial advisor wrote to another: "We are [prejudiced in the extreme]." We are left to speculate whether the response was: "No [rancid excrement]!" or similar.

The core lesson of the case is that courts will interpret contracts — particularly heavily negotiated contracts between sophisticated parties — according to their plain results and will not read in language to support a disappointed party's rationalization. As I write this, I can hear echoes of my family giggling when I describe these matters as straightforward. I've heard them more than once say, "It's all Greek to me," which begs one final fascinating question, namely what do they say when there are challenging contractual interpretation questions in Athens?

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