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In Delaware, Notices and Deadlines Matter

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The recent Delaware Court of Chancery decision by Vice Chancellor Glasscock in *Vintage Rodeo Parent, LLC v. Rent-A-Center, Inc.*[1] is illustrative of the principle that merger partners should not assume that anything less than strict compliance with notice requirements (particularly when they relate to termination rights) and deadlines in a merger agreement will be enforced.

In *Rent-A-Center*, the merger partners had extensive negotiations over the "end date" in the merger agreement, and under what circumstances it could be extended. The deal involved the $1 billion-plus acquisition by Vintage Capital of Rent-A-Center, a publicly traded company. Because the parties anticipated an extended antitrust review, the end date was initially set at six months, with each party having the unilateral right to extend the end date in certain circumstances by another three months (and a second unilateral right to extend for an additional three months) but only, in each case, if such party delivered a written notice of its election to extend the end date to the other party prior to the then current end date. If neither party elected to extend the end date, either party then had the right to terminate the merger agreement by providing notice of termination.

Between signing of the merger agreement and the initial six-month end date, Rent-A-Center's business had improved such that Rent-A-Center's board of directors no longer found the merger to be in the best interests of its stockholders. Rent-A-Center believed that Vintage Capital would almost certainly extend the end date (because the parties had been working on securing antitrust clearance), but determined to terminate the merger agreement if Vintage Capital did not exercise its right to extend the end date in the merger agreement. When the six-month end date passed, Vintage Capital had not given notice to extend the end date. Rent-A-Center immediately thereafter delivered a termination notice to Vintage Capital early the next day with a demand for payment of the negotiated termination fee, and issued a press release announcing the termination of the merger agreement. The Court described Vintage Capital as "blindsided"; Vintage Capital immediately disputed the termination notice as a "brazen example" of seller's remorse and commenced litigation in the Delaware Court of Chancery seeking (among other things) an order that the merger agreement was still in force. In its complaint, Vintage Capital alleged that Rent-A-Center's "post-signing change of heart and a desire to score a hefty reverse termination fee" were not grounds to terminate the merger agreement under Delaware law.

Vice Chancellor Glasscock considered, but rejected, Vintage Capital's two principal arguments: (i) that the parties collectively took numerous actions intended to achieve regulatory approval, which approval was not anticipated until after the end date, and documents jointly executed by the parties evidenced Vintage Capital's notice of its election to extend the merger agreement (or acted as a waiver by Rent-A-Center of the notice of election to extend), and (ii) Rent-A-Center engaged in a form of fraud by concealing its intent to terminate. In enforcing the terms of the Merger Agreement as written, Vice Chancellor Glasscock was left to the "startling conclusion" that Vintage Capital had simply forgotten to provide the extension notice by the required deadline. Consistent with the Delaware Supreme Court's recent decision in *Oxbow*,[2] which overturned a Court of Chancery decision that had found an implied covenant inconsistent with the plain language of the operative limited liability company agreement, Vice Chancellor Glasscock declined to allow Vintage Capital to escape the parties "contracted bargain" or deny Rent-A-Center the exercise of "its bargained-for contractual rights." This forgetfulness had significant consequences—it potentially exposed Vintage Capital to pay a reverse termination fee on the order of 15.75% of equity value, or $126.5 million, to Rent-A-Center. That matter is being separately litigated.

Rent-A-Center is a reminder to deal participants to ensure that they are scrupulously complying with their obligations under the merger agreement. Too often deal participants are too casual with obligations, sometimes with the erroneous

[1] *Vintage Rodeo Parent, LLC v. Rent-A-Center, Inc.*, C.A. No. 2018-0927-SG, 2019 WL 1223120 (Del. Ch. Mar. 14, 2019).
[2] *Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, No. 536, 2018, 2019 WL 237360 (Del. Jan. 17, 2019).

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belief that they would find relief in the courts if failure to strictly comply with contractual requirements were to occur. *Rent-A-Center* is a wake up call in that regard.

Rent-A-Center is also a cautionary tale of why one merger partner should never assume that the other merger partner still wants to do the deal as much as it does. There have been many situations over the years where a remorseful buyer or seller begins to look for any avenue out of the deal. This “sharp practice,” which term the Court used to characterize Rent-A-Center’s actions, was a clear result of one party’s failure to follow the strict requirements of the agreement at issue.

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