To Our Clients

Management Recapitalizations

The management recapitalization variation of the leveraged buyout, pioneered by Multimedia and most recently accomplished by FMC, was the subject of litigation last week. Shortly before the Anderson Clayton shareholder meeting to vote on a management recapitalization, a shareholder group made a cash offer, subject to financing, for all the Anderson Clayton shares. The response to this offer is a classic example of how to get a deal enjoined -- which is exactly what happened.

First, instead of a straightforward decision that the recapitalization was in the best interests of the shareholders even if the new offer was not conditional, the Anderson Clayton Board focused on the conditional nature of the offer and gave what the court found to be a false appearance that it was open-minded.

Second, the Board said it would meet with the offer group to seek to clarify the conditions, but then instead of engaging in substantive discussions, created a procedural snarl over a confidentiality-standstill agreement.

Third, the Board rushed the situation by staying with the original meeting date which was only three days away and using mailgram proxies instead of postponing the meeting and doing a full resolicitation in light of the new offer.

In the course of its decision enjoining the deal, the court did make an extremely important statement helpful to management recapitalizations:

> The rejection of even a firm B/S/G offer on such a basis could, of course, be a rational choice. A reasonable director or a reasonable shareholder could, on strictly economic grounds, prefer the recapitalization to even a firm

B/S/G offer at $54 per share. It is unclear what the stub-share that shareholders will receive in the recapitalization may be worth and one could well prefer to maintain the interest in the ongoing business of the Company that that stub-share represents, to the option of receiving now $17 more in cash. Thus, had the board in the proxy supplement said that even were the B/S/G proposal a firm offer, it would reject it because on its view the recapitalization presented better value to the shareholders, shareholder approval of the recapitalization, in those circumstances, would end this matter.

There are a growing number of management recapitalizations and the Anderson Clayton case provides significant guidance in how to avoid problems when faced with a last-minute competing bid.

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