DOLLAR THRIFTY DECISION PUTS DIRECTORS IN THE DRIVER'S SEAT

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To Our Clients and Friends:

On September 8, the Delaware Court of Chancery issued a ruling in *In re Dollar Thrifty Shareholder Litigation*, Consolidated C.A. No. 5458-VCS (Del. Ch. Sept. 8, 2010), further evidencing a willingness to grant directors considerable latitude in reasonably managing a corporate sale process where they are not subject to conflicts of interest.[1]

The case involves the pending merger of Dollar Thrifty and Hertz, which plaintiffs sought to enjoin. The merger agreement, signed in April, was the culmination of three years of on-again, off-again discussions by Dollar Thrifty with rivals Hertz and Avis over a possible sale. During that period, Dollar Thrifty's business was rocked by the seismic shocks experienced by the automotive, travel and finance industries, with its stock gyrating from upwards of $50 to less than $1 per share. Efforts at a sale included a failed auction in mid-2008, in which both Hertz and Avis participated but ultimately dropped out. Intermittent high-level exchanges between Dollar Thrifty and Hertz continued over the subsequent 16 months, turned serious in December 2009 and resulted in a merger agreement, signed in April of this year. The merger consideration, a mix of cash, stock and a pre-closing dividend, was valued at $41 (a 19% premium to the 30-day average closing price and a 5.5% premium to the previous trading day's price). The merger agreement included a "no shop" provision (subject to a standard fiduciary out for superior proposals), Hertz's right to match unsolicited competing offers and a termination fee and expense reimbursement (representing approximately 3.9% of the equity value) if Dollar Thrifty went with a superior proposal.

Plaintiffs claimed Dollar Thrifty's directors breached their *Revlon* duties by failing to conduct the sale process in a manner calculated to achieve the highest price for shareholders. In particular, plaintiffs complained that Dollar Thrifty failed to reach out to Avis one last time before signing up with Hertz for what they argued was an insufficient premium. Plaintiffs claimed the directors compounded this error by agreeing to the deal protection provisions in the merger agreement, which plaintiffs argued improperly chilled competing offers.

Vice Chancellor Strine, in his opinion denying a preliminary injunction, came down squarely on the side of the Dollar Thrifty directors. As an initial matter, he characterized *Revlon* as

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[1] *Debevoise & Plimpton LLP is acting as counsel to Hertz in connection with its pending acquisition of Dollar Thrifty.*

directing courts to steer a middle ground between the deferential business judgment review (bare rationality) and the far more demanding entire fairness standards in a corporate sale context. That middle ground places upon directors an affirmative burden to show the reasonableness of their actions. In testing reasonableness, the decision suggests the focus is on good faith (absence of conflicts), care and logic. In Dollar Thrifty's case, Vice Chancellor Strine found the directors demonstrated all three.

According to Vice Chancellor Strine, the predicate question in applying the reasonableness test of *Revlon* is a realistic look at whether personal interests short of pure self-dealing influenced the board to block a bid or steer a deal toward one bidder rather than another. In Dollar Thrifty's case, the directors were judged well motivated and free from personal interests at odds with those of Dollar Thrifty's stockholders. Having made that determination, the Court of Chancery was prepared to defer to the board in judging the reasonableness of how it conducted the sale of the company. Noting that the *Revlon* decision does not mandate an auction process, the court accepted the Dollar Thrifty board's decision not to reach out to Avis, whose ability to close a transaction was open to question and where doing so might have meant losing the Hertz deal. The court likewise accepted the board's refusal to declare a subsequent higher-priced Avis offer superior in the face of perceived incremental antitrust risk, noting that "value is not value if it is not ultimately paid." Finally, the deal protections provided for in the merger agreement were upheld as not imposing a substantial barrier to competing proposals – borne out by the fact that Avis did, in fact, lob in a post-signing bid.

The Court of Chancery's decision can be contrasted with a bench ruling by Vice Chancellor Strine just five days earlier in *Forgo v. Health Grades, Inc.*, C.A. No. 5176/5732-VCS (Del. Ch. Sept. 3, 2010). In *Forgo*, while the court denied on other grounds a request to preliminarily enjoin a tender offer, it found that the plaintiffs had shown a reasonable probability of success in proving their *Revlon* claim. The court was concerned that the continued employment of management and the equity grants provided to them demonstrated that their interests were not completely aligned with those of shareholders. In addition, the court criticized the lack of an active and searching inquiry by the board and its advisors into other potential bidders (including one who expressed interest) before concluding there were no realistic alternative prospects.

In sum, the *Dollar Thrifty* decision stands as additional authority for the proposition that *Revlon* does not impose a straightjacket on how a board may go about selling a company, and that Delaware courts will not overturn the culmination of a careful and reasoned process reasonably calculated to maximize shareholder value.

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