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Efforts Clauses Do Not Impose Duty to Warn and Notice Provisions Will Be Strictly Enforced

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A recent decision by the Delaware Court of Chancery, *Vintage Rodeo Parent v. Rent-A-Center,* C.A. No. 2018-0927-SG, provides important guidance on two types of contractual provisions that routinely appear in complex purchase agreements—efforts clauses and notice provisions. With respect to efforts clauses, the court's decision makes clear that these provisions do not create a duty to warn a contractual counterparty that its rights are

about to lapse or that the party is intending to exercise certain of its contractual rights in the future. For notice provisions, the court's decision reiterates that Delaware courts will strictly enforce unambiguous notice provisions, including requirements that notice be in writing.

Background

Vintage Capital Management LLC, through two affiliates, entered into a merger agreement to acquire Rent-A-Center Inc. Because the companies operate in the same space, the parties anticipated that receiving antitrust approval could be challenging and take time. Thus, as is customary, the merger agreement required the parties to use "commercially reasonable efforts" to obtain the requisite governmental approvals to consummate the merger, including antitrust approval.

The merger agreement also provided for a negotiated "end date" of six months from signing, after which either party could terminate the agreement for convenience. If the waiting period under the Hart-Scott-Rodino Antitrust Improvements Act (HSR) had not expired by the original end date, either party could unilaterally extend the end date for three months by providing written notice to the other party before the original end date. If neither party extended the end date and the HSR waiting period had not yet expired, either party could terminate the merger agreement, provided that the terminating party had not breached the agreement. If either party terminated after the end date before expiration of the HSR waiting period, Rent-A-Center was entitled to a termination fee of $126.5 million (15.75 percent of the transaction's equity value).

As the end date approached, Rent-A-Center's board of directors met to decide whether it would extend the end date and, if not, whether it should terminate. Rent-A-Center's board decided that it would not extend the end date and that it would immediately terminate the merger and collect the break-up fee if Vintage did not provide timely, |written notice extending the end date. Rent-A-Center's board took steps to keep its decision confidential, but continued working toward achieving antitrust approval. Ultimately, Vintage failed to provide written notice to extend the end date, and Rent-A-Center terminated the merger agreement.

Analysis

Vintage filed suit against Rent-A-Center for breach of the merger agreement, seeking a declaration that Rent-A-Center did not validly terminate the agreement and an order requiring Rent-A-Center to proceed with seeking regulatory approval.

Vintage argued that the written notice requirement to extend the end date was satisfied—even though Vintage did not provide written notice explicitly electing to extend the end date—because the parties' course of conduct made it clear that Vintage intended to extend.

The court rejected that argument, finding instead that Vintage failed to comply with the notice provision because it did not provide written notice. The court held that both parties are presumed to "have knowledge of the terms of the contract that they bargained for and entered into" and that "contracts are to be interpreted as written." Because the agreement expressly required notice to be in writing, constructive notice through course of conduct, the court found, was not sufficient.

Vintage also argued that Rent-A-Center was barred from terminating the agreement because it breached its contractual obligation to use commercially reasonable efforts to consummate the transaction when it did not inform Vintage that it intended to terminate the agreement if Vintage did not extend the end date. According to the court, the essence of Vintage's argument was that the obligation to exercise commercially reasonable efforts required Rent-A-Center to "warn" Vintage that it was planning to exercise its termination rights if Vintage did not properly extend the end date. The court disagreed. Instead, the court found that if Vintage desired to have advance notice of Rent-A-Center's intention to terminate the agreement, it could have bargained for that right in the merger agreement. Vintage did not do so, however, and the court refused to "writ[e] a provision into a contract when the parties could have done so themselves, but chose not to."

Takeaways

Articulated broadly, the key takeaway from the court's decision is that parties to contracts must thoroughly understand and be vigilant in enforcing their own contractual rights, both in a timely fashion and in strict conformance with the letter of the contract.

More specifically, the decision makes clear that, absent unusual circumstance, a notice provision, including a requirement that notice be delivered in writing, will be strictly enforced in accordance with its express terms. Moreover, the court's decision confirms that, while efforts clauses may, in some instances, require a party to notify its contractual counterparty of an obstacle to closing that arose after signing, these provisions do not create a duty to warn a contractual counterparty that its rights are about to lapse or that a party intends to exercise certain of its contractual rights in the future. Instead, parties must separately negotiate for these duties and rights.