INSIGHTS
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MERGERS AND ACQUISITIONS

Deal Protection Devices Enforced in the Delaware Court of Chancery

Vice Chancellor J. Travis Laster's recent decisions in Global Asset Capital, LLC v. Rubicon US REIT, Inc. *and* NACCO, Inc. v. Applica Incorporated *provide good examples of Delaware's approach to analyzing bargained-for deal protection devices. These cases provide the following lessons : (1) in Delaware, deal protection devices including no-shop and prompt notice provisions will be enforced so long as they are part of a reasonable process that adequately protects the interests of the target company; (2) half-hearted attempts to satisfy such provisions generally will not be sufficient; (3) the Delaware Court of Chancery will provide appropriate remedies to protect the non-breaching parties' reasonable expectations; and (4) absent a manifested contrary intent, sufficiently definite letters of intent containing such devices will be enforced as binding contracts.*

By Gregory V. Varallo and Rudolf Koch

The Delaware Court of Chancery's newest member, Vice Chancellor J. Travis Laster, hit the ground running with his bench ruling in *Global Asset Capital, LLC v. Rubicon US REIT, Inc.*[1] and memorandum opinion in *NACCO Industries, Inc. v. Applica Incorporated*.[2] With these decisions, Vice Chancellor Laster strongly affirmed the Court of Chancery's long-held view that reasonable bargained-for deal protection devices, including no-shop[3] and prompt notice provisions, are "valuable rights" which "need to be protected." Among other reasons, buyers use deal protection devices "to protect themselves against being used as a stalking horse and as consideration for making target-specific investments of time and resources in particular acquisitions."[4] Thus, as Vice Chancellor Laster recognizes in these decisions, failure to enforce such reasonable contractual provisions—even at the letter of intent stage of negotiations—would have a substantial negative impact on mergers and acquisitions practice and our capital markets generally.[5]

The Cases

Global Asset Capital v. Rubicon

In *Global Asset Capital*, Vice Chancellor Laster granted plaintiff's motion for a temporary restraining order (TRO), enforcing strict no-shop and confidentiality provisions of a Letter of Intent (LOI).

On November 4, 2009, Global Asset Capital, LLC (Global) and Rubicon US REIT, Inc. (Rubicon) entered into an LOI that provided for (1) the parties to negotiate and enter into a Plan Support Agreement (PSA) by a date certain in connection with Rubicon's plans to file for bankruptcy protection under Chapter 11 of title 11 of the United States Code; and (2) pursuant to the PSA, the bankruptcy court would be asked to approve an auction of 12 of Rubicon's commercial real estate properties (Properties), with Global's negotiated "stalking horse"[6] bid acting as a floor at the auction.[7] The bankruptcy court would also be asked to approve a prenegotiated break-up fee payable

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to Global in the event it was outbid at the bankruptcy auction for the properties.[8]

By its terms, the LOI would expire if Rubicon filed for bankruptcy before executing a PSA with Global. In addition, the LOI contained no-shop and confidentiality provisions that were not qualified by a fiduciary out. Specifically, the LOI provided that Rubicon

> shall not solicit or entertain any other offers involving any of the Properties for the duration of this LOI and prior to the approval of the Plan Support Agreement. For the avoidance of doubt, [Rubicon] shall not engage in any sales or marketing discussions, distribute or make available any diligence or Property related information, or otherwise take any steps to sell or market the Properties prior to the approval of the Plan Support Agreement.

On November 5, 2009, the day after entering into the LOI, Rubicon discussed its bankruptcy plans with its bondholders, who strenuously objected to a Chapter 11 filing. The following day, Global provided Rubicon with a draft PSA. Rubicon, however, failed to provide Global with any comments or even respond to the draft PSA, in direct contravention of the provisions of the LOI.

On Friday, November 13, 2009, Global filed a verified complaint and motion for a TRO in the Delaware Court of Chancery. The complaint alleged, *inter alia*, that Rubicon breached the LOI by: (1) failing to negotiate the PSA with Global in good faith (or indeed, at all); (2) disclosing Global's offer to third parties, including Rubicon's bondholders, without the prior written consent of Global; and (3) soliciting and/or entertaining other offers, including from bondholders, for the Properties while the LOI remains valid and enforceable. Global sought an order (1) temporarily enjoining Rubicon from (a) disclosing any of the contents of the LOI without prior written consent from Global and (b) soliciting or entertaining any third-party offers involving any of the Properties set forth in the LOI for the duration of the LOI; and (2) requiring Rubicon to negotiate the PSA immediately and in good faith.

Rubicon argued that its board owed a fiduciary obligation to the company's creditors and that all contracts contain implicit fiduciary outs.

The following Monday, November 16, Vice Chancellor Laster held a hearing on Global's motion for a TRO.[9] Rubicon argued that its board owed a fiduciary obligation to the company's creditors and that all contracts contain implicit fiduciary outs, whether or not expressed on paper. Vice Chancellor Laster disagreed. In determining that Global's claim was colorable,[10] Vice Chancellor Laster explained that the LOI was likely to be found sufficiently definite to be binding and continued:

> [C]ontracts, in my view, do not have inherent fiduciary outs. People bargain for fiduciary outs because, as our Supreme Court taught in *Van Gorkom*[11], if you do not get a fiduciary out, you put yourself in a position where you are potentially exposed to contract damages and contract remedies at the same time you may potentially be exposed to other claims. . . . That doesn't mean that contracts are options where boards are concerned. Quite the contrary. And the fact that equity will enjoin certain contractual provisions that have been entered into in breach of fiduciary duty does not give someone carte blanche to walk as a fiduciary. . . . I certainly don't regard there as being any type of

> inherent fiduciary out for the benefit of creditors.[12]

The Vice Chancellor also noted that Global faced irreparable harm. The Court explained that

> the fact that you get a leg up through an exclusivity provision or a no-shop provision is a unique right that needs to be protected and is not something that is readily remedied after the fact by money damages. It is an opportunity, and it is an opportunity that cannot readily be reconstructed after the fact.[13]

The Court granted an order restraining Rubicon from: (1) disclosing any of the contents of the LOI; (2) soliciting or entertaining any third-party offers involving any of the properties; or (3) asserting that the LOI had terminated pursuant to the provision of the LOI stating that the LOI terminates if Rubicon files for bankruptcy without having agreed to a PSA. Although the Court expressed that the LOI likely required Rubicon to negotiate the PSA in good faith,[14] it denied Global's request for an order mandating that Rubicon negotiate the PSA immediately and in good faith because it considered such an order a mandatory injunction, *i.e.*, akin to final relief on a preliminary record.[15]

NACCO v. Applica

Roughly one month after issuing the TRO in *Global Asset Capital*, on December 22, 2009, Vice Chancellor Laster issued a memorandum opinion in *NACCO v. Applica* in which he refused to dismiss damages claims for breach of a merger agreement's no-shop and prompt notice provisions arising from a failed attempt by NACCO Industries, Inc. (NACCO) to acquire Applica Incorporated (Applica).

According to the complaint, in January 2006, Applica's board authorized merger discussions with NACCO.[16] In February 2006, the parties entered into a typical nondisclosure agreement that included a standstill provision limiting NACCO's ability unilaterally to acquire Applica stock.[17]

However, also in February 2006, Harbert Management Corporation and its affiliated entities (together, Harbinger),[18] interested in taking Applica private and uninhibited by any standstill agreement, began acquiring Applica stock.[19] Harbinger eventually amassed a nearly 40 percent position in Applica.[20] NACCO alleged that Harbinger's "propitious timing" resulted from Applica management's communication of nonpublic information to Harbinger throughout the timeline of the NACCO-Applica negotiations.[21]

As it acquired Applica stock, Harbinger filed Schedule 13G and 13D forms stating that it was increasing its position in Applica for investment purposes, disclaiming any intent to acquire control of Applica.[22] However, as early as March 31, 2006, Harbinger allegedly was considering a transaction whereby Harbinger would combine Applica with Salton, Inc. (Salton), an Applica competitor.[23] In furtherance of this plan, as it acquired a growing stake in Applica, Harbinger gained control of Salton.[24]

On July 23, 2006, NACCO and Applica entered into a definitive merger agreement (the NACCO Merger Agreement).[25] The NACCO Merger Agreement contained "customary" no-shop and prompt notice provisions.[26] The no-shop provision permitted Applica to provide information to, and enter into discussions with, an offeror only if it first received a bona fide unsolicited written offer that the Applica board determined was reasonably likely to lead to a Superior Proposal.[27] The NACCO Merger Agreement defined a Superior Proposal to be a proposal that after consultation with financial and legal advisors, the board believed if consummated would result in a superior transaction.[28] The prompt notice provision required Applica to provide prompt notice to NACCO of any "inquiry or proposal" relating to a competing transaction.[29]

The day after executing the NACCO Merger Agreement, Applica contacted Harbinger and signaled that an all-cash offer for the company would be successful.[30] Harbinger responded by allegedly moving up its plans for the Salton-Applica acquisition, and on July 26, a Salton representative contacted Applica to discuss a possible bid financed by Harbinger.[31] Applica did not disclose to NACCO either the outgoing communication from Applica management to Harbinger or the call from Salton.[32]

On September 14, 2006, Harbinger announced a topping bid to acquire all outstanding shares of Applica that it did not already own at $6.00 per share and simultaneously filed an amendment to its prior Schedule 13D indicating that Harbinger had acquired its stake in Applica to acquire control of Applica.[33] Applica advised NACCO that it had received Harbinger's offer and that the offer was reasonably likely to constitute a Superior Proposal such that Applica was initiating discussions with Harbinger.[34]

Applica then effectively went "radio silent" vis-à-vis NACCO until October 10, 2006, when Applica notified NACCO that it was terminating the NACCO Merger Agreement and would enter into a merger agreement with Harbinger.[35] In an effort to cure any violation of the prompt notice provision, Applica waited until October 19 to terminate the NACCO Merger Agreement and paid NACCO a $4 million termination fee and $2 million in expense reimbursement pursuant to the NACCO Merger Agreement's termination provisions.[36] Applica then entered into a merger agreement with Harbinger.[37]

A bidding war between NACCO and Harbinger ensued, which spanned from December 15, 2006 to January 17, 2007, culminating in Harbinger's winning bid of $8.25 per share.[38] Applica stockholders then approved the Harbinger merger agreement.[39] Shortly thereafter, Salton and Applica entered into a merger agreement.[40] The Salton-Applica merger closed on December 28, 2007, leaving Harbinger as the 92% owner of the combined company.[41]

Defendants aggressively argued that the contract claims should be dismissed because NACCO had not sufficiently pled damages.

In considering these well-pled facts, the Court determined that NACCO stated a claim for breach of the NACCO Merger Agreement, specifically the no-shop and prompt notice provisions. In reaching this conclusion, the Court focused on the breadth of both clauses.

The Court held that the complaint clearly supported a claim for breach of contract for, among other things, Applica's active solicitation of an offer from Harbinger and its failure to notify NACCO promptly of Harbinger's inquiries and Salton's proposal relating to a competing transaction.[42] The Court similarly held that the complaint stated a claim for breach of the prompt notice clause based on Applica's failure to keep NACCO informed of the status of its discussions with Harbinger after the announcement of Harbinger's initial competing bid.[43] During its negotiations with Harbinger, Applica did not provide NACCO with any more information than was disclosed in various public filings, and, according to Vice Chancellor Laster, NACCO had certainly bargained for more than this.[44] Indeed, the Court held that the prompt notice clause created an affirmative obligation on the part of Applica to "regularly pick[ ] up the phone," especially in the context of a topping bid where "days matter."[45]

Defendants aggressively argued that the contract claims nevertheless should be dismissed because NACCO had not sufficiently pled damages. The Court rejected defendants' argument that plaintiffs had failed to plead damages adequately in light of Applica's payment of a termination fee and expense reimbursement pursuant to the NACCO Merger Agreement.[46] Dismissal on these grounds was not appropriate because Applica's right to terminate the NACCO Merger Agreement and pay only fees depended on Applica complying with its obligations, including the no-shop and prompt notice provisions.[47]

Defendants also argued that because NACCO had engaged in a bidding war for Applica and lost in the marketplace, it should not have a remedy in court. Vice Chancellor Laster forcefully explained, however, that, if embraced as grounds for a pleading-stage dismissal, defendants' theory "would have serious and adverse ramifications for merger and acquisitions practice and for our capital markets."[48] Echoing his language in *Global Asset Capital*, he explained:

> Parties bargain for provisions in acquisition agreements because those provisions mean something. Bidders in particular secure rights under acquisition agreements to protect themselves against being used as a stalking horse and as consideration for making target-specific investments of time and resources in particular acquisitions. Target entities secure important rights as well. It is critical to our law that those bargained-for rights be enforced, both through equitable remedies such as injunctive relief and specific performance, and, in the appropriate case, through monetary remedies including awards of damages.[49]

While the Court recognized that NACCO ultimately may have a difficult task in establishing that the breach by Applica was willful, it refused to address such questions at the motion to dismiss stage.[50]

Implications of the Decisions

Delaware Courts Will Enforce Reasonable Deal Protection Devices

As *Global Asset Capital* and *NACCO* illustrate, given their important function, Delaware courts will enforce deal protection devices, including no shop and prompt notice provisions, so long as those provisions are part of a reasonable process that adequately protects the interests of the target company.

In *Global Asset Capital*, for example, the court preliminarily enforced very strict no-shop and confidentiality provisions in the face of Rubicon's argument that fulfilling these obligations would not have been in the best interest of the company and its bondholders. In so doing, Vice Chancellor Laster explained that contracts do not contain inherent fiduciary outs and that, without negotiating for a fiduciary out, a director puts himself in the unenviable position of simultaneously facing potential exposure to claims from various parties for breach of contract and potentially for breach of fiduciary duty. It is important to note that this decision arose in the context of a contract that anticipated an auction process, which would be open to all interested bidders and supervised by the bankruptcy court. As *Global Asset Capital* illustrates, once a target company agrees to such a reasonable process, it may be prohibited from pursuing what it perceives to be a better deal outside of that process.[51]

Similarly, in *NACCO*, Vice Chancellor Laster emphasized that NACCO would be entitled to seek to recover its expectation damages for an alleged breach of no-shop and prompt notice provisions even though it had entered into and lost a bidding contest with Harbinger. Thus, although stockholders of Applica benefited generally from the bidding contest and specifically from Harbinger's higher bid, that did not absolve the company of its contractual obligations with respect to the no-shop and prompt notice provisions of the NACCO Merger Agreement.

> ***Half-hearted attempts to comply with contractual obligations simply will not be sufficient to satisfy a party's obligations under Delaware law.***

In *NACCO*, the no-shop provision itself provided for an appropriate post-market process that would have allowed the board to engage an offer that was reasonably likely to lead to a superior proposal. Applica, however, was alleged to have willfully gone outside of that process and may be held liable for having done so.

Half-Hearted Attempts to Comply with Contract Obligations Do Not Suffice

These decisions also underscore that half-hearted attempts to comply with contractual obligations simply will not be sufficient to satisfy a party's obligations under Delaware law. Rather, where appropriate, the court will hold parties to good faith compliance with such provisions.

For example, Vice Chancellor Laster appeared to be thoroughly unimpressed with Applica's efforts to provide prompt notice to NACCO of any discussions with Harbinger. Pursuant to the NACCO Merger Agreement, Applica had an affirmative obligation to use commercially reasonable efforts to keep NACCO informed of the status of discussions with Harbinger. Notably, the prompt notice provision was not limited to competing bids but rather extended to any "inquiry or proposal" relating to a competing transaction.

Vice Chancellor Laster concluded that at the pleading stage he had "no difficulty inferring that Applica breached the [NACCO] Merger Agreement by dragging its feet (at best) in providing information to NACCO and offering up only minimal and parsimonious disclosures that it was making publicly in any event."[52] The Vice Chancellor also explained that Applica had not acted in a "commercially reasonable fashion by effectively going radio silent" between the time Harbinger announced its topping bid and Applica informed NACCO that it was terminating the NACCO Merger Agreement and would enter into an agreement with Harbinger.[53] Instead, NACCO "could reasonably expect Applica to have regularly picked up the phone" because in the "fast-paced world" of mergers and acquisitions activity, and particularly in the context of a topping bid, "days matter."[54] Thus, half-hearted attempts to satisfy such provisions will not be sufficient to satisfy parties' contractual obligations.

The Court Will Provide an Appropriate Remedy

These cases also underscore the Court of Chancery's understanding that in order for deal protection devices to have any significance, the court must be in a position to provide the non-breaching party with an appropriate remedy given the unique circumstances of each case.

For example, in *Global Asset Capital*, Vice Chancellor Laster recognized that, absent extraordinary relief, Global faced irreparable harm because a right to receive a leg up in an auction, protected by no-shop and confidentiality provisions, is a unique right. To protect this unique right, the court granted Global's request to restrain Rubicon from (1) disclosing any of the contents of the LOI without prior written consent from Global, and (2) soliciting or entertaining any third-party offers involving any of the auction properties set forth in the LOI for the duration of the LOI. Further, although Vice Chancellor Laster denied Global's request to require Rubicon to negotiate the PSA immediately and in good faith, during the TRO hearing, he raised the concept of enjoining Rubicon from asserting that the LOI had terminated pursuant to the provision of the LOI stating that the LOI would terminate if Rubicon files for bankruptcy without having agreed to a PSA. The Vice Chancellor recognized that without such an injunction Rubicon would be permitted to violate the no-shop and confidentiality provisions of the LOI with virtual impunity. That is, were Rubicon to file simply for bankruptcy absent such an injunction, it would have effectively circumvented all of its obligations under its binding LOI—a result surely not contemplated by the contracting parties.

For deal protection devices to have any significance, the court must be in a position to provide the non-breaching party with an appropriate remedy.

Adhering to the old maxim that equity will not suffer a wrong to be without a remedy,[55] Vice Chancellor Laster, *sua sponte*, added a provision to Global's proposed TRO restraining Rubicon from asserting that the LOI has terminated. In so doing, the Vice Chancellor explained that if Rubicon decided to file for bankruptcy, at least the LOI would follow it and a bankruptcy judge could then determine whether and to what extent to enforce the agreement.[56]

Similarly, in *NACCO*, the court could have determined at the pleading stage that the appropriate remedy was the termination and expense fees already paid to NACCO and dismissed the contract claims, particularly since NACCO ultimately lost a bidding war. Vice Chancellor Laster, however, recognized that in the case of a potentially willful breach, if NACCO were not permitted to pursue expectation damages, that would have "serious and adverse ramifications for merger and acquisitions practice and for our capital markets."[57] According to the Vice Chancellor, "[i]t is critical to our law that those bargained-for rights be enforced, both through equitable remedies such as injunctive relief and specific performance, and in the appropriate case, through monetary remedies including award of damages."[58] Therefore, the Vice Chancellor permitted the case to proceed past the dismissal stage, even though he recognized that proof of damages at trial could be challenging for the plaintiff.

The Binding Effect of Letters of Intent

Finally, *Global Asset Capital* teaches that reasonable deal protection devices may be enforced even at the stage of a letter of intent. Indeed, the court recognized in *Global Asset Capital* that, unless the parties manifest a contrary intent, sufficiently definite letters of intent will be considered binding contracts under Delaware law. As Vice Chancellor Laster explained, "[l]etters of intent mean something."[59] Parties "don't enter into them because they are gossamer and can be disregarded whenever situations change. They enter into them because they create rights."[60] He further advised that if parties want to enter into a non-binding letter of intent, it is wise to provide expressly that the letter of intent is non-binding or is subject in all respects to future documentation.

Global Asset Capital *teaches that reasonable deal protection devices may be enforced even at the stage of a letter of intent.*

Although the court did not rule on whether the LOI was in fact binding because of the preliminary nature of a TRO hearing, Vice Chancellor Laster expressed that he thought the LOI was very likely binding and ordered temporary relief on the basis that Global's claims for breach of the LOI's no-shop and confidentiality provisions were colorable. Such provisions, therefore, may have teeth even at the letter of intent stage of negotiations.

Conclusion

Delaware has correctly been regarded by many practitioners as a jurisdiction that places emphasis on the "sanctity" of contracts. The commercial stability and predictability that this approach offers is on display in *Global Asset Capital* and *NACCO*. The Court's willingness to enforce and provide creative remedies for the breach of deal protection devices provides another important brick to the edifice of Delaware merger and acquisitions law. *Global Asset Capital* also provides a useful reminder that if letters of intent are not meant to be binding, this should be made clear, and that in the absence of express language to this effect, sufficiently definite letters of intent will be enforceable when challenged in court.

NOTES

1. *Global Asset Capital, LLC v. Rubicon US REIT, Inc.,* C.A. No. 5071-VCL (Del. Ch. Nov. 16, 2009).

2. *NACCO Industries, Inc. v. Applica Incorporated,* 2009 WL 4981577 (Del. Ch. Dec. 22, 2009).

3. A standard no-shop or no-solicitation provision prohibits the target company from soliciting, initiating or encouraging the making of any proposal competing with the parties' agreement. *See Mergers & Acquisitions 2010: Trends and Developments*, Practising Law Institute Corporate Law and Practice Course Handbook Series, 1781 PLI/Corp. 519 (2010). Generally, prompt notice provisions require the target to give the acquiror prompt notice of any request for information from a third party and of the terms of any competing proposal.

4. Indeed, deal protection devices are generally used to reduce the risk that the target company will not consummate the deal after the acquiring company has invested time and capital into negotiating the transaction and incurred an opportunity cost. Absent such devices, to compensate for this risk, acquirors would discount the price they are willing to pay for targets, resulting in inferior and ultimately fewer deals. For a broader discussion on deal protection devices, *see* Gregory V. Varallo & Srinivas M. Raju, *A Process Based Model for Analyzing Deal Protection Measures*, 55 *Bus. Law.* 1609 (2000).

5. Although these cases have several other important aspects and lessons for practitioners, for purposes of this article, we focus on the Court's view of deal protection devices.

6. A "stalking horse" bid is a bid that guarantees a "floor" in an auction to sell the assets of a company. In essence, a stalking horse bid prevents other bidders from low-balling the purchase price.

7. The facts described herein are taken primarily from the Verified Complaint and exhibits thereto. In addition, some are taken from the November 16 hearing transcript.

8. A break-up or termination fee is a payment that must be made by one party to the other upon the termination of their agreement after specified triggering events. *See Mergers & Acquisitions 2010: Trends and Developments*, Practising Law Institute Corporate Law and Practice Course Handbook Series, 1781 PLI/Corp. 519 (2010). Because under the terms of the LOI Rubicon would have to pay a break-up fee if it did not accept Global's bid, in a bankruptcy auction Rubicon would only accept a bid from another party that is equal to or greater than Global's bid plus the break-up fee.

9. The ability of the Court of Chancery quickly to digest and rule on complex issues of corporate law is one reason it is generally regarded as the premier business court in the nation.

10. A TRO will generally be issued if "a colorable claim has been advanced by the moving party" and "there is a genuine threat of an irreparable harm or injury." *True N. Commc'ns, Inc. v. Publicis S.A.*, 1997 WL 33173290, at *1 (Del. Ch. Dec. 16, 1997).

11. In *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985), the Delaware Supreme Court held that directors have a duty to act in an informed and deliberate manner in determining whether to approve a merger agreement before submitting the proposal to the stockholders.

12. *Global Asset Capital*, Hearing Tr. at 90-91.

13. *Id.* at 90.

14. Vice Chancellor Laster explained that he thought that it was "clear . . . from the contract that there is an obligation contractually to negotiate in good faith." *Global Asset Capital*, Hearing Tr. at 97.

15. The parties subsequently reached a compromise. On January 21, 2010, Global dismissed its case, and Rubicon filed for bankruptcy protection.

16. Because the decision arose in the context of a motion to dismiss, the Court had to accept all well-pled allegations as true. *See* Ch. Ct. R. 12(b)(6). Similarly, this article sets forth the allegations of the complaint as if true.

17. *NACCO*, 2009 WL 4981577, at *1.

18. The complaint names as defendants several entities affiliated with Harbert Management Corporation, many of which operate under the Harbinger name.

19. *Id.* at *2.
20. *Id.* at *5.
21. *Id.* at *2.
22. When a person or group of persons acquires beneficial ownership of more than 5 percent of a voting class of a company's equity securities registered under Section 12 of the Securities Exchange Act of 1934, they are required to file a Schedule 13D with the SEC. A party may file a Schedule 13G instead of a Schedule 13D if the party owns between 5 percent and 20 percent in the company, is a passive investor, and does not intend to exert control. *See* Sections 13(d) and 13(g) of the Securities Act of 1934, as amended, and Regulations 13D/13G.
23. *NACCO*, 2009 WL 4981577, at *3.
24. *Id.* at *3.
25. *Id.* at *2.
26. *Id.* at *9-10.
27. *Id.* at *9.
28. *Id.*
29. *Id.* at *9-10.
30. *Id.* at *4.
31. *Id.*
32. *Id.* Applica management's role in negotiating with Harbinger was important to the Court and provides a reminder of potential pitfalls when management is closely involved in such negotiations. For a broader discussion of management's proper role in such a process, *see In re Netsmart Techs., Inc. S'holders Litig.*, 2007 WL 1576151 (Del. Ch. Mar. 14, 2007), and *In re Lear Corp. S'holder Litig.*, 2007 WL 1732588 (Del. Ch. June 15, 2007).
33. *NACCO*, 2009 WL 4981577, at *6.
34. *Id.*
35. *Id.* at *13.
36. *Id.* at *6.
37. *Id.*
38. *Id.* at *8. NACCO's highest bid was $8.05 per share. *Id.* at *7.
39. *Id.* at *8.
40. *Id.*
41. *Id*.
42. *Id.* at *9-14.
43. *Id.*
44. *Id.* at *13.
45. *Id.*
46. *Id.* at *14-15.
47. *Id.* at *15.
48. *Id.* at *14.
49. *Id.*
50. *Id.* at *15.
51. Given the fact that the no-shop provision was designed in aid of an impending court-supervised auction, we doubt that *Global Asset* can fairly be read as questioning the continued vitality of cases such as *Barkan v. Armsted Industries, Inc.*, 567 A.2d 1279, 1286 (Del. 1989), and *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34 (1994), which made clear—at least in the change-of-control context—that deal protection measures adopted without a prior market check must not unduly inhibit the target's board from carrying out its fiduciary obligations in considering an unsolicited bid. For an excellent article on fiduciary outs, *see* William T. Allen, *Understanding Fiduciary Outs: The What and Why of an Anomalous Concept*, 55 *Bus. Law.* 653 (2000).
52. *NACCO*, 2009 WL 4981577, at *13.
53. *Id.*
54. The Vice Chancellor echoed this sentiment in *Global Asset Capital*, noting on the preliminary record before the Court that the parties likely were required to negotiate the PSA in good faith and that "radio silence is not negotiating in good faith." *Global Asset Capital*, Hearing Tr. at 97.
55. *See* John N. Pomeroy, *A Treatise on Equity Jurisprudence* §§ 423 -424 (4th Ed. 1918).
56. The Court also recognized that it could not enjoin Rubicon from filing for bankruptcy.
57. *NACCO*, 2009 WL 4981577, at *14.
58. *Id.* That said, the Court in *NACCO* is considering only money damages. Prior to Vice Chancellor Laster's decision, NACCO had unsuccessfully sued in the United States District Court for the Northern District of Ohio to temporarily enjoin the Harbinger merger.
59. *Global Asset Capital*, Hearing Tr. at 88-89.
60. *Id.* at 89. This language is very similar to the Vice Chancellor's language in *NACCO*, where he explains that "[p]arties bargain for provisions in acquisition agreements because those provisions mean something." *NACCO*, 2009 WL 4981577, at *14.