

IV. *Don't Ask, Don't Waive Standstill Agreements*

A. Introduction

For boards of directors trying to sell their company, “Don’t Ask, Don’t Waive” standstill agreements have become a significant tool to effectively run the public auction process.¹ “Don’t Ask, Don’t Waive” standstill agreements differ from the traditional standstill agreements that are used to delay or end a hostile takeover.² In a traditional standstill agreement, a target company offers a large premium to buy back the holdings of a hostile bidder or asks the bidder to limit its holdings to prevent a takeover in exchange for membership on the target board or certain securities rights.³ A target company’s board of directors can use this preventative measure to give the company additional time to determine its best course of action.⁴ On the other hand, “Don’t Ask, Don’t Waive” provisions apply exclusively to help facilitate an auction to sell a company.⁵ The provision prohibits a potential purchaser from submitting a bid without the target company’s invitation, and prevents the bidder from publicly or privately requesting that the target company waive the standstill agreement.⁶ Thus, “Don’t Ask, Don’t Waive” standstill agreements allow an auction to come to an end while ensuring that

¹ See *In re Topps Co. S’holders Litig.*, 926 A.2d 58 (Del. Ch. 2007) (authorizing the use of “Don’t Ask don’t Waive” standstill agreements); Brian M. Lutz & Jefferson E. Bell, *Chancery Court Provides Guidance on Don’t Ask Don’t Waive Standstill Provisions*, DEL. BUS. CT. INSIDER, Jan. 16, 2013, at 1, available at <http://www.gibsondunn.com/publications/Documents/LutzBell-ChanceryCourtProvidesGuidance.pdf>.

² BRIAN O’NEAL, MOD. CORP. CHECKLISTS § 19:20 (2012).

³ See Steven A. Baronoff, *The Standstill Agreement: A Case of Illegal Vote Selling and A Breach of Fiduciary Duty*, 93 YALE L.J. 1093, 1095 (1984).

⁴ *Id.* at 1096.

⁵ See Peter J. Walsh Jr. et al., *Delaware Insider: “Don’t Ask, Don’t Waive” Standstill Provisions: Impermissible Limitation on Director Fiduciary Obligations or Legitimate, Value-Maximizing Tool?*, BUS. L. TODAY 1 (Jan. 2013), <http://apps.americanbar.org/buslaw/blt/content/2013/01/delawareinsider.pdf> (stating that “don’t Ask Don’t Waive are “designed to extract the highest possible offer from the bidder” in an auction).

⁶ Marc Kushner et al., *“Don’t Ask, Don’t Waive” Standstill Provisions and the Board’s Duty to Stay Informed*, OSLER, HOSKIN, & HARCOURT LLP (Jan. 30, 2013), <http://www.osler.com/NewsResources/Dont-Ask-Dont-Waive-Standstill-Provisions-and-the-Boards-Duty-to-Stay-Informed/>.

the target company receives the best possible bid.⁷ While the Delaware Court of Chancery originally approved the use of “Don’t Ask, Don’t Waive” provisions, recent Delaware decisions have challenged the validity of these provisions.⁸ As a result, the public auction process may change dramatically.⁹

This article will focus on the use of “Don’t Ask, Don’t Waive” standstill agreements and recent developments regarding the validity of such provisions. Part B examines the origins of “Don’t Ask, Don’t Waive” in order to understand the provision. Part C discusses the debates surrounding “Don’t Ask, Don’t Waive” agreements and the recent rulings by the Delaware courts.

B. Origin of Don’t Ask, Don’t Waive

Although standstill agreements were prevalent in auctions and as defensive measures, the decision in *Revlon v. MacAndrews and Forbes Holdings* changed the landscape of the auction process for public companies about to be sold and made the use of standstill agreements intended to stop a hostile takeover seem risky.¹⁰ The decision, which created the *Revlon* doctrine, instructed a board of directors to focus on maximizing shareholder wealth when the sale of a company becomes inevitable.¹¹ Before the *Revlon* decision, companies used an array of defensive measures such as no-shop clauses to attempt to thwart a potential sale while the directors

⁷ See *Don’t Ask, Don’t Waive Standstill Provisions: A Tool to Maximize Value or Willful Blindness?*, JONES DAY COMMENT. (Jones Day, New York, N.Y.), Jan. 2013, at 2 [hereinafter *A Tool to Maximize Value or Willful Blindness?*], available at <http://www.jonesday.com/files/Publication/fdfb33b8-5f7d-41d2-8f07-ffca657246ca/Presentation/PublicationAttachment/3acf3522-e47e-4cef-8167-001f69cb264f/Don%27t%20Ask%2c%20Don%27t%20Waive.pdf>.

⁸ *Id.* at 1.

⁹ See GARY E. THOMPSON & STEVEN M. HAAS, HUNTON & WILLIAMS LLP, *THE STATE OF M&A STANDSTILL AGREEMENTS IN DELAWARE 2-4* (2013), available at http://www.hunton.com/files/News/b91c8716-e69d-4ef1-b510-c3810f99af9d/Presentation/NewsAttachment/ee1368da-fab8-489e-9652-c3a423539c68/DE_MA_Standstill_Agreements.pdf.

¹⁰ See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

¹¹ *Id.* at 185.

sought a favorable partner with whom to organize a sale.¹² However, *Revlon* changed these practices, forcing boards of directors to treat potential buyers equally in the attempt to find the best price for stockholders.¹³ Furthermore, if the court found that a board of directors gave one company an advantage (i.e., through the use of a standstill agreement) the court could terminate a deal and even hold directors personally liable.¹⁴

The change in the auction process created a dilemma for companies. How could companies secure the best price in a timely matter while treating each bidder equally?¹⁵ After all, an auction like the one mentioned above seems to give the buyer an incentive to bid low in hopes that no one else would match the bid, allowing that buyer to purchase the company at a bargain.¹⁶ Furthermore, requiring a condition of equal treatment for all bidders could create an advantage for hostile bidders that have acquired blocks in the target company.¹⁷

This environment and the pressure to secure the best price from stockholders led companies to innovate by creating new standstill agreements that would allow the target company to stay in a position of power and maximize profit for shareholders.¹⁸ Target companies started to use standstill agreements to stop other companies from sharing confidential information and to promote a

¹² Kenneth J. Nachbar, *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.—the Requirement of A Level Playing Field in Contested Mergers, and Its Effect on Lock-Ups and Other Bidding Deterrents*, 12 DEL. J. CORP. L. 473, 480 (1987).

¹³ Gilbert R. Serota, *Potholes on the Level Playing Field—the Role of Courts and Counsel in Takeovers*, 39 HASTINGS L.J. 699, 700 (1988).

¹⁴ Clark W. Furlow, *Reflections on the Revlon Doctrine*, 11 U. PA. J. BUS. L. 519, 564 (2009).

¹⁵ Serota, *supra* note 13, at 703 stating that hostile bidders lacking a confidentiality agreement may use their position to go out and get financiers that could force a board to take a bad deal by purchasing stock).

¹⁶ *See id.* at 703.

¹⁷ *Id.* at 706 (stating that friendly bidders may choose not to compete against a hostile bidder that has acquired large blocks in the target company because the hostile bidder has a profit fall-back regardless of who wins the bid, indicating that rules made to level the playing field actually make it more uneven by giving everyone the same information).

¹⁸ *See* Brian K. Kidd, Note, *The Need for Stricter Scrutiny: Application of the Revlon Standard to the Use of Standstill Agreements*, 24 CARDOZO L. REV. 2517, 2521 (2003).

blind bidding system.¹⁹ Although these agreements seem to cut against the *Revlon* Doctrine, Delaware has left the agreements alone and only struck them down when they were used to stop shareholders from maximizing profit.²⁰

Target companies continued this standstill agreement innovation by creating “Don’t Ask, Don’t Waive” standstill provisions. As mentioned above, “Don’t Ask, Don’t Waive” standstill agreements are meant to prohibit bidders from making an offer for the target company without an express invitation from the target company, while also stopping potential bidders from publicly or privately asking the target company to waive that restriction.²¹ Under these conditions, a company can only make an offer when the target company provides an express invitation.²² Accordingly, if a target company obtains what is believed to be the best possible price, the auction will come to an end without the possibility for more offers. As a result, a “Don’t Ask, Don’t Waive” provision provides the target company with the absolute power to terminate an auction.²³

As mentioned, target companies use “Don’t Ask, Don’t Waive” agreements to maximize offer price by incentivizing companies to place the best bid right away since they might not have another opportunity to place a bid.²⁴ Furthermore, bidders will make their best offer because they know that other bidders cannot top their bid after the auction ends.²⁵ The Delaware Supreme Court authorized “Don’t Ask, Don’t Waive” standstill agreements in *In re Topps Co. Shareholders Litigation*.²⁶ The court stated that such

¹⁹ Peter J. Walsh, Jr., Janine M. Salomone & David B. DiDonanto, “Don’t Ask, Don’t Waive” Standstill Provisions: Impermissible Limitation on Director Fiduciary Obligations or Legitimate, Value-Maximizing Tool?, *BUS. L. TODAY*, Jan. 2013, at 1, available at <http://apps.americanbar.org/buslaw/blt/content/2013/01/delawareinsider.pdf>.

²⁰ Kidd, *supra* note 18, at 2523.

²¹ Walsh et al., *supra* note 5, at 1.

²² Diane Holt Frankel, *Don’t Ask, Don’t Waive after Ancestry.com*, M&A & CORP. GOVERNANCE NEWSL. (Kaye Scholar LLP, Chicago, Ill.), Winter 2013, at 1, 2, available at http://www.kayescholar.com/news/client_alerts/MA-and-Corporate-Governance-Newsletter-Winter2013/_res/id=sa_File1/MACGN-Winter2013.pdf.

²³ *Id.* at 2 (stating that Don’t Ask, Don’t Waive standstill agreements are “potent tools” that give the target company control of an auction).

²⁴ See Kushner et al., *supra* note 6.

²⁵ See Holt Frankel, *supra* note 22, at 2.

²⁶ *In re Topps Co. S’holders Litig.*, 926 A.2d 58 (Del. Ch. 2007).

agreements would serve a legitimate purpose to end bidding while at the same time obtaining the highest possible bid for the shareholders.²⁷ However, recent decisions by the Delaware Court of Chancery brought into question the validity of these standstill agreements and whether “Don’t Ask, Don’t Waive” agreements can be used prospectively.²⁸

C. Recent Developments in Don’t Ask/Don’t Waive

Target companies use “Don’t Ask, Don’t Waive” standstill agreements as an effective means to maximize shareholder profit by giving them a means to end an auction and encouraging bidders to offer the highest possible bid.²⁹ However, critics argue that standstill agreements deny potential bidders access to the relevant information about what competitors are offering and may eliminate the option of making a bid.³⁰ Once the bidder has placed a bid, the bidder cannot change its bid unless the target company chooses to extend the bidding process.³¹ Thus, if new information arises and the bidder wants to make a stronger offer, it cannot do so absent a request by the target company. The provision may prevent a company from looking at surrounding factors in a deal that may have changed over time, which allows it to present a more favorable bid.³² These conflicting views inspired a great deal of debate and scrutiny by Delaware courts during 2012.

In 2012, the Delaware Court of Chancery issued three major decisions concerning “Don’t Ask, Don’t Waive,” leaving the validity of such provisions in question despite being an industry standard.³³

²⁷ *Id.* at 91.

²⁸ Steven M. Davidoff, *A Technical Debate with Broader Implications for Deal Making*, N.Y. TIMES DEALBOOK (Jan. 25, 2013), <http://dealbook.nytimes.com/2013/01/25/a-technical-debate-with-broader-implications-for-deal-making>.

²⁹ See Lutz & Bell, *supra* note 1, at 1.

³⁰ See Kidd, *supra* note 18, at 2552.

³¹ See Holt Frankel, *supra* note 22, at 2.

³² See *id.* at 3 (stating that a “lapse” provision that would lead to the invalidation of a “Don’t Ask Don’t Waive” provision if certain external events occur, would allow the continuance of information between bidders and the target company if conditions change).

³³ Walsh et al., *supra* note 5, at 1.

1. *In re Celera Corp. Shareholder Litigation*

In re Celera Corp. posed the first challenge to the validity of the “Don’t, Ask Don’t Waive” standstill agreement.³⁴ In this decision, the court considered the waiver in connection with a settlement related to an action challenging a merger.³⁵ The decision noted that “Don’t Ask, Don’t Waive” standstill agreements are not *per se* unenforceable, but when combined with a no-shop clause, the agreements prevent the board of directors from soliciting bids from other companies and potentially obtaining a better price.³⁶ A no-shop clause is a provision that prohibits the seller from soliciting a proposal from another potential bidder.³⁷ The court stated that this combination impaired the transfer of information between the target company’s board and potential buyers because the “Don’t Ask, Don’t Waive” agreement blocked previously interested bidders from expressing interest and the no-shop clause prevented the board from seeking out other potential bidders.³⁸ The lack of information could cause the board to fail to meet its *Revlon* duties by failing to secure the best possible price for shareholders.³⁹

2. *In re Complete Genomics Shareholder Litigation*

In re Complete Genomics presented the most notable change to standstill agreement conventions.⁴⁰ The case dealt with shareholders who wanted to enjoin Complete Genomics from using the “Don’t Ask, Don’t Waive” standstill provision when dealing with a failed bidder.⁴¹ The auction process for Complete Genomics took

³⁴ *In re Celera Corp. S’holder Litig.*, C.A. No. 6304-VCP, 2012 WL 1020471, at *20 (Del. Ch. Mar. 23 2012), *aff’d in part, rev’d in part on other grounds*, 59 A.3d 418 (Del. Dec. 27, 2012).

³⁵ Walsh et al., *supra* note 5, at 1.

³⁶ *See In re Celera Corp. S’holder Litig.*, C.A. No. 6304-VCP, 2012 WL 1020471, at *2 1–22.

³⁷ Karl F. Balz, *No-Shop Clauses*, 28 DEL. J. CORP. L. 513, 514 (2003).

³⁸ *See In re Celera Corp. S’holder Litig.*, 2012 WL 1020471 at *21.

³⁹ *Id.*

⁴⁰ *In re Complete Genomics, Inc. S’holder Litig.*, C.A. No. 7888-VCL (Del. Ch. Nov. 27, 2012) (transcript ruling), *available at* http://www.wlrk.com/docs/In_re_Complete_Genomics_Sholder_Litigation_CA_No_7888-VCL_%28Del_Ch_Nov272012%29%2800232324%29.PDF.

⁴¹ *See* Kushner et al., *supra* note 6.

an unfavorable turn, and the company's shareholders thought it would be in the best interest of Complete Genomics to allow for the failed bidder to request a waiver of the "Don't Ask, Don't Waive" provision in order to enter a new bid.⁴² Here, the Court of Chancery found that the "Don't Ask, Don't Waive" standstill agreement suffered from the same disabling effects as no-talk clauses.⁴³ A no-talk clause prohibits the target board from talking to a potential buyer under any circumstances.⁴⁴ The court reasoned that the provision interferes with the board of directors' ability to properly evaluate a competing offer.⁴⁵ For instance, as circumstances change, a company may seek to increase its bid, which would not be possible under "Don't Ask, Don't Waive" without an invitation by the target company.⁴⁶ The decision brought the validity of "Don't Ask, Don't Waive" into question, becoming the second major decision on the agreement within just a few months.

3. *In re Ancestry.com Inc. Shareholder Litigation*

Demonstrating the hotly controversial nature of the *In re Complete Genomics* decision, the Court of Chancery once again assessed the validity of "Don't Ask, Don't Waive" standstill agreements in *In re Ancestry.com*.⁴⁷ The case dealt with an all-cash merger between Permira Advisers LLC and Ancestry.com.⁴⁸ Shareholders claimed that the "Don't Ask Don't Waive" Provision limited the board's ability to stay informed and thus limited their ability to maximize profits.⁴⁹ In a bench ruling, Court of Chancery

⁴² Kushner et al., *supra* note 6.

⁴³ Walsh et al., *supra* note 5, at 3.

⁴⁴ Kushner et al., *supra* note 6.

⁴⁵ See *A Tool to Maximize Value or Willful Blindness?*, *supra* note 7, at 3.

⁴⁶ See Kushner et al., *supra* note 6.

⁴⁷ *In re Ancestry.com, Inc. S'holder Litig.*, C.A. No. 7988-CS 1, 69 (Del. Ch. Dec. 17, 2012), available at http://www.rlf.com/files/6454_In%20re%20Ancestry.com.pdf

⁴⁸ *Delaware Court of Chancery Holds That "Don't Ask, Don't Waive" Provisions are Permissible Under Certain Circumstances*, PAUL WEISS (Jan. 4 2013), <http://www.paulweiss.com/practices/transactional/mergers-acquisitions/publications/delaware-court-of-chancery-holds-that-%E2%80%9Cdon%E2%80%99t-ask,-don%E2%80%99t-waive%E2%80%9D-provisions-are-permissible-under-certain-circumstances.aspx?id=11998>.

⁴⁹ *Id.*

again noted that “Don’t Ask, Don’t Waive” standstill agreements are not *per se* invalid.⁵⁰ The court explicitly stated that it would begin determining the validity of “Don’t Ask, Don’t Waive” standstill agreements on a case-by-case analysis, focusing on maximizing shareholder wealth and directors’ ability to perform their fiduciary duties under Delaware case law.⁵¹ Ultimately, the court decided not to enjoin the deal so long as the target company took curative disclosure measures.⁵²

D. Conclusion

Currently, “Don’t Ask, Don’t Waive” standstill agreements are in a state of limbo. Although the Delaware Court of Chancery has ruled that these agreements are not *per se* inadmissible, the court may consider them invalid in some scenarios.⁵³ Furthermore, the fact that the decisions arose from bench rulings presents another problem because the court stated that bench rulings should not be seen as applying broad law as they are often made quickly and without considering all implications.⁵⁴ Thus, further litigation is needed to determine whether “Don’t Ask, Don’t Waive” standstill agreements are still safe to use.⁵⁵ In the three 2012 cases where the issue came up, the court analyzed the entire transaction. The issues in the “Don’t Ask, Don’t Waive” standstill agreements arose when they were combined with other provisions that severely weakened the ability of the board of directors to remain fully informed, obtain the highest possible price for shareholders, or keep competing bidders on a level playing field.⁵⁶ Problems also arose when the board of the target company was unable to remain completely informed.⁵⁷ For this reason, target companies should only utilize standstill agreements for

⁵⁰ See *In re Ancestry.com, Inc. S’holder Litig.*, C.A. No. 7988-CS, at 224.

⁵¹ Walsh et al., *supra* note 5 (“Chancellor Strine emphasized that determining the validity of these provisions is contextual.”).

⁵² Kushner et al., *supra* note 6.

⁵³ See *In re Ancestry.com, Inc. S’holder Litig.*, C.A. No. 7988-CS, at 224–27.

⁵⁴ THOMPSON & HAAS, *supra* note 9.

⁵⁵ *Id.*

⁵⁶ See *In re Celera Corp. S’holder Litig.*, C.A. No. 6304-VCP, 2012 WL 1020471, at *20–22 (Del. Ch. Mar. 23 2012), *aff’d in part, rev’d in part on other grounds*, 59 A.3d 418 (Del. Dec. 27, 2012).

⁵⁷ See *In re Complete Genomics, Inc. S’holder Litig.*, C.A. No. 7888-VCL (Del. Ch. Nov. 27, 2012) (Transcript Ruling).

their original intended purpose as expressed in *In re Topps Co. Shareholders Litigation*. The provision is meant to bring finality to a bid while encouraging companies to give the highest possible bid immediately because they will not have the ability to submit another bid.⁵⁸ Furthermore, the board should consider adding a “lapse” provision to a “Don’t Ask Don’t Waive” provision that would allow bidders to contact the target company if certain external conditions apply.⁵⁹ Using the provision in this capacity will likely keep a “Don’t Ask, Don’t Waive” standstill agreement valid even under Delaware’s new rulings.

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⁵⁸ *In re Topps Co. S’holders Litig.*, 926 A.2d 58, 91 (Del. Ch. 2007).

⁵⁹ See Holt Frankel, *supra* note 22, at 3.

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