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Sixth Circuit Upholds Tortious Interference Verdict Against Auction Loser's Overbid:
Over-bidder Must Reimburse Winner For Causing Price Bump

The U.S. Court of Appeals for the Sixth Circuit has affirmed a District Court judgment holding an interloper that breached its standstill agreement liable for tortious interference to the winning bidder in an auction. The interloper is required to pay the winner the incremental amount – over \$100 million – that it took to secure shareholder approval for its deal, and may also be liable for punitive damages. In addition to providing important guidance on tortious interference claims in the M&A context, the case offers useful reminders for buyers, sellers and would-be over-bidders in the art of running, winning and “topping” an auction for a public company.

The case stems from a four-year old transaction in which, after our client Ventas won an auction to buy Sunrise REIT, losing bidder Health Care Property Investors (“HCP”) went public with a topping bid at a 20% premium, even though this was prohibited by its standstill agreement with the target. The public announcement of the topping bid did not disclose that it was conditional or that it violated the standstill. Ventas demanded that Sunrise REIT enforce HCP’s standstill agreement as required by the merger agreement. Both the Ontario trial and appellate courts ordered Sunrise REIT to do so, upholding a selling board’s prerogative to structure an auction in a manner that the board believes will maximize shareholder value (including by requiring “best and final” offers from participants and agreeing to enforce a standstill obligation against a losing bidder).

Despite victory in the Ontario courts, Ventas had to increase its offer by \$100 million to secure shareholder approval after HCP’s announcement. Ventas sued HCP for tortious interference, alleging that HCP sabotaged its deal with a fraudulent announcement, and a federal jury in Kentucky agreed and awarded Ventas damages equal to the increased amount it had to pay. HCP appealed but the Sixth Circuit has now affirmed the judgment. The Court emphasized that tortious interference claims are held to an exacting standard, especially among competitors, requiring evidence of “significantly wrongful means.” However in this case, the Court of Appeals agreed with the District Court that the standard was met, and also remanded the issue of punitive damages after finding that “the evidence suggests that HCP’s public announcement of its offer was more than a simple breach of its Standstill Agreement with Sunrise, but instead was a fraudulent act designed to mislead the market and harm Ventas.”

Although this outcome – as is usual in tortious interference cases – was heavily fact-dependent, it provides useful lessons and reminders for parties participating in public company auctions. Both buyers and sellers in auctions must pay careful attention to the precise terms of standstill obligations they sign, as well as the provisions of merger agreements regarding interlopers, including the enforcement of bidders’ standstills. For parties seeking to “top” an announced transaction, this case sounds a loud warning to pay close attention to the “rules of the road” and to the provisions of any confidentiality, standstill or similar agreement they may have with the target.

It is of course also vital to ensure that all material information is disclosed when a competing proposal is announced. The Court emphasized that “the public interest in full and fair competition is furthered by imposing liability on a market player, such as HCP, for fraudulently leveraging a public market to sabotage a competitor, as liability for such conduct will deter similar future conduct and promote economic certainty in the marketplace.”

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