

December 11, 2002

Delaware Supreme Court Reverses Locked-Up Merger Decision

In a memorandum dated December 3, 2002 we reported on the decision of the Delaware Court of Chancery in In re NCS Healthcare, Inc. Shareholders Litigation, Del. Ch., C.A. No. 19786 (Nov. 22, 2002), where, notwithstanding the receipt by NCS of a higher bid, the Court refused to enjoin a proposed merger between NCS and Genesis Health Ventures, Inc. Approval of the merger was assured because the merger agreement required that it be presented for a stockholder vote even if the board withdrew its recommendation (as it did following receipt of the topping bid) and because stockholders holding a majority of NCS's voting power had signed voting agreements promising to vote for the merger. The Court of Chancery found that the NCS board of directors had acted reasonably in approving the merger and the voting agreements in the circumstances, and that the lock-up provisions were not impermissibly preclusive or coercive.

Yesterday, in a rare 3-2 decision, the Delaware Supreme Court reversed. The Court said that it was impermissible for directors to have agreed to the provisions that irrevocably locked up the merger because, in the absence of an effective fiduciary out, the directors were precluded from exercising their continuing fiduciary obligation to negotiate a sale of the company in the interest of shareholders. The Supreme Court's decision was embodied in an order rendered on the same day that the Court heard argument on an expedited appeal. The Court said that it would explain its decision in a written opinion to follow in due course.

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