



Perspectives

Orrick's M&A Newsletter

DELAWARE SUPREME COURT RULES ON WHETHER A "SERIES OF TRANSACTIONS" SHOULD BE AGGREGATED IN ANALYZING THE SALE OF "SUBSTANTIALLY ALL" ASSETS QUESTION

The Delaware Supreme Court recently ruled that a company's proposed splitoff of assets should not be aggregated with three prior spinoff and splitoff transactions, where the proposed splitoff was not "sufficiently connected" to the prior transactions, for purposes of determining whether the company has disposed of "substantially all" of its assets. In an en Banc decision, *The Bank of New York Mellon Trust Co. v. Liberty Media Corp.*, C.A. No. 5702 (Del. Supreme Ct.), the Court distinguished a series of related transactions consummated as part of an integrated plan from multiple transactions that are each a part of an overall business strategy, to determine whether a "series of transactions" warrant aggregation in the context of a "substantially all" analysis.

Factual and Procedural Background

Beginning in 2001, Liberty Media Corporation and Liberty Media LLC ("Liberty") consummated several sales and purchases of cable television businesses and assets. Among these sales and purchases were three spinoff and splitoff transactions: the first spinoff occurred in 2004, the second spinoff in 2005, and the third transaction, a splitoff, in 2009.

In 2010, Liberty announced a proposal to split off businesses allocated to its Capital and Starz Groups. Following the announcement, Liberty received a letter from counsel for an anonymous bondholder stating that the splitoff might violate the successor obligor provision in a bond indenture governed by New York law. This provision prohibited Liberty from transferring "all or substantially all of its assets" in a "transaction or series of transactions" unless the successor entity assumed Liberty's obligations under the indenture. Although the parties agreed that the Capital and Starz Groups splitoff alone would not constitute a transfer of substantially all of Liberty's assets, the indenture trustee claimed that when aggregated with the previous three spinoff and splitoff transactions, the proposed splitoff would violate the successor obligor provision because Liberty would have disposed of substantially all of its assets.

In response, Liberty sought injunctive relief and a declaratory judgment that the splitoff would not constitute a disposition of substantially all of its assets. The Delaware Court of Chancery agreed with Liberty, finding that the proposed splitoff was not sufficiently connected to the previous three transactions to warrant aggregation for purposes of the "substantially all" language in the successor obligor provision. The Supreme Court affirmed the decision, relying on the Second Circuit's holding in *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, which the Court referred to as "the leading decision on aggregating transactions for purposes of a 'substantially all' analysis in the context of a successor obligor provision."

Determination that the Series of Transactions Need Not be Aggregated

In *Sharon Steel*, the Second Circuit considered a transaction in which a corporation had transferred its assets in a series of sales to multiple buyers pursuant to a plan of liquidation. The final purchaser sought to assume the seller's indenture obligations under a boilerplate successor obligor provision, claiming it could do so without bondholder consent because the final sale constituted all or substantially all of the seller's assets as measured immediately prior to the sale. The Second Circuit disagreed, holding that the assets transferred to the final purchaser had to be measured against the totality of assets owned by the seller at the inception of the plan of liquidation, not immediately before the final sale. The Court called the

series of sales a “piecemeal liquidation,” distinguishing it from sales of assets in the regular course of business: “To the extent that a decision to sell off some properties is not part of an overall scheme to liquidate and is made in the regular course of business it is considerably different from a plan of piecemeal liquidation, whether or not followed by independent and subsequent decisions to sell off the rest.”

The Supreme Court in *Liberty Media* focused on this distinction, explaining that where asset transactions are not components of an integrated plan to dispose of almost all of a corporation's assets, and where each such transaction stands on its own merits, courts have declined to aggregate for purposes of the “substantially all” analysis. The Court noted that Liberty's spinoff and splitoff transactions were part of a “context-driven application of the overarching business strategy that Liberty has followed since [2001] . . . not part of a master plan to strip Liberty's assets out of the corporate vehicle . . . [or] a strategy of disposing of substantially all of its assets.” The Court held that this analysis was sufficient to find that Liberty had not disposed of substantially all of its assets.

The Court of Chancery had also analyzed the transactions under the step-transaction doctrine, which treats formally separate but related property transfers as a single transaction if the component transactions meet certain tests, but the Supreme Court found this analysis unnecessary in light of the application of *Sharon Steel* and declined to decide whether the step-transaction doctrine would be adopted as New York law with respect to the “substantially all” analysis.

Finally, the Supreme Court noted that the successor obligor provision in the indenture consisted of boilerplate language, which courts endeavor to apply uniformly to promote market stability. Because boilerplate provisions are not tailored to the specific relationship of the parties—and indeed the successor obligor language had not been a subject of negotiations between the *Liberty Media* parties—the Court looked to the accepted common purpose of the provision. After considering the history of the boilerplate language, the Court concluded that the phrase “series of transactions” was intended to clarify that a disposition of substantially all assets may occur as a single transaction or as an integrated series of transactions, as in *Sharon Steel*. Because the parties in *Liberty Media* did not negotiate the successor obligor language or include a separate covenant apart from the boilerplate, the Court declined to read additional protections into the boilerplate provision.

Take-Away

Liberty Media is important because it clarifies that a series of transactions that may, in the aggregate, result in the sale or transfer of a significant percentage of a company's assets will not necessarily be considered a disposition of substantially all of the company's assets. This decision could have wide-ranging applications, as the phrase “substantially all” appears not only in bond indentures but in successor obligor, assignment and consent provisions in a variety of contracts. While each determination will depend on specific facts and circumstances, if the transactions are done in the ordinary course of business or are an application of a general business strategy rather than part of an integrated plan to dispose of all or substantially all of a company's assets, *Liberty Media* indicates that such transactions most likely will not be aggregated. Both buyers and sellers should carefully consider the context of a transaction involving the transfer of significant portions of the seller's business, whether that transaction stands alone or is part of a series of transactions in what could be viewed as an integrated plan.

Finally, the Court's discussion of boilerplate language is a useful reminder to parties to negotiate separate covenants or use particularized language if they wish to incorporate protections that deviate from the commonly-accepted interpretations of boilerplate provisions.

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