

# Court of Chancery rules that a merger termination, after the other party ‘simply forgot’ to provide an extension notice, is valid

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In *Vintage Rodeo Parent LLC v. Rent-A-Center Inc.*, No. 2018-0927, 2019 WL 1223026 (Mar. 14, 2019), the Delaware Court of Chancery ruled that Rent-A-Center, Inc.’s termination of the merger agreement pursuant to which it was to be acquired by Vintage Rodeo Parent, LLC was valid.

Rent-A-Center terminated the agreement after Vintage apparently “simply forgot” to provide a formal notice of extension of the merger agreement.

The merger agreement provided that, if the transaction had not closed after six months (the “end date”), either party could terminate the agreement by providing notice; but that, if at the end date, antitrust clearance review for the transaction was still ongoing, thereafter either party could provide a notice of extension of the agreement for an additional period.

The notices were to be in writing and provided to specified addresses. Until the end date, the parties had been working toward obtaining antitrust clearance, arranging financing, and planning for integration (as they were contractually required to do).

Their actions relating to antitrust clearance reflected that they expected that the clearance would not be obtained by the end date and that they would continue to seek the clearance after the end date.

After the agreement was signed, there were no discussions between the parties about extension or termination of the agreement. At the end date, neither party provided an extension notice.

A few days after the end date, Rent-A-Center (whose performance apparently had improved since the parties had agreed to the merger) sent notice of termination of the agreement and a demand for payment of the \$127.6 million reverse termination fee.

Vice Chancellor Glasscock held that the termination was valid and he has sought supplementary briefs from the parties on the issue of payment of the reverse termination fee.

The court emphasized that, generally, contracts will be judicially enforced in accordance with their express terms — which, in this case, required formal written notice to the other party to extend the merger agreement.

## THE COURT REJECTED VINTAGE’S VARIOUS ARGUMENTS THAT THE TERMINATION WAS INVALID

First, Vintage argued that the parties’ actions that contemplated a delayed closing and continued efforts beyond the end date to obtain antitrust approval indicated that notice of extension of the agreement had been effectively provided or waived.

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Second, Vintage argued that the implied covenant of good faith, and the parties’ express covenant to use reasonable efforts to close the transaction, required that Rent-A-Center provide some “warning” to Vintage that Rent-A-Center wanted to terminate the agreement or that Vintage apparently was forgetting the notice requirement for extending the agreement.

The court (i) emphasized that the express, unambiguous terms of the contract will govern, and that, in this case, the terms required formal written notice to the other party to extend the agreement; (ii) stated that there is no general “duty to warn” a counterparty that one is considering termination of an agreement or that there is an upcoming deadline for extension or termination of an agreement; and (iii) clarified that an “efforts” covenant does not override an express right to terminate an agreement.



**IT REMAINS TO BE SEEN WHETHER THE COURT WILL FIND THAT THE REVERSE TERMINATION FEE IS PAYABLE BY VINTAGE**

Because the parties expected that the transaction might not close due to antitrust clearance not being obtainable, the merger agreement provided for a reverse termination fee (RTF) to be paid by Vintage if the transaction did not close and antitrust approval had not been obtained.

The court has asked for supplemental briefing on the issue “whether the implied covenant of good faith and fair dealing should apply to liability for a reverse breakup fee in these circumstances, where the buyer remains willing and able to proceed toward closing.”

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The Vice Chancellor offered that he was “dubious” whether the parties intended the fee to be payable when the termination of the agreement was due to Vintage’s forgetting to give notice of extension of the agreement rather than due to antitrust issues.

**PRACTICE POINTS**

***Awareness of deadlines***

Obviously, it is imperative that parties have a system for reminding themselves of deadlines set forth in their agreements. This is true for deadlines with respect to the right to terminate or extend an agreement, as well as deadlines for taking specified required actions, making indemnification claims (in private deals), and other matters.

***Effect of course of conduct***

Where a party believes that its and/or its counterparty’s course of conduct has effected an implicit change in the provisions of an agreement, the party should consider whether it would be prudent to seek a formal amendment to (or waiver from) the terms of the agreement.

***Reverse termination fees***

The risk of not ultimately obtaining antitrust approval is sometimes (in antitrust-sensitive deals, often) dealt with through a provision requiring the payment of a “reverse termination fee” by the buyer to the target company (or, in a private deal, to the sellers) if antitrust approvals are not received by the end date (or, if applicable, permitted extensions of the end date), or antitrust approval cannot be obtained without divestiture of assets beyond an agreed limit.

*Rent-A-Center* underscores the importance of an RTF provision being drafted so that it accurately reflects the parties’ intention with respect to when it would and would not be payable. With respect to the size of an RTF, the fiduciary duty issues relating to breakup fees as deal protection mechanisms are not applicable. Thus, the amount of the fee is generally a contractual matter, with challenge being possible if the amount may constitute unreasonable liquidated damages.

While the size of RTFs has generally been somewhat above the usual 3-4% range of deal protection fees, conceivably the court in *Rent-A-Center* could be influenced by the size of the RTF (15% of the deal value — which the court called “enormous”) as it decides whether the fee is payable in the unusual circumstances under which the agreement was terminated.

***Interrelationship of termination provision and efforts commitment***

A merger agreement should expressly provide that the exercise of a right to terminate the agreement will not in and of itself constitute a breach of the covenant to use efforts to consummate the proposed transaction.

***Notice provisions***

A merger agreement should be clear with respect to the timing, content, and method of delivery for meeting any notice requirements in the agreement.

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