UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Cottle v. Storer Communication, Inc.

849 F.2d 570 (11th Cir. 1988) · No. Nos. 87-5669, 87-5805 · Decided July 14, 1988

SUMMARY

The United States Court of Appeals for the Eleventh Circuit affirmed summary judgment for the defendants in a shareholder derivative action arising from Storer Communications' merger with Kohlberg, Kravis, Roberts & Co. The court held that the business judgment rule protected the directors' decisions concerning asset lock-ups, selection of the winning bid, reliance on financial advisors, and termination fees. The plaintiff failed to identify specific facts showing fraud, bad faith, or an abuse of discretion.

CASE DETAILS

COURT	United States Court of Appeals for the Eleventh Circuit
WRITING FOR THE COURT	Vance, Circuit Judge; Fay, Circuit Judge; Hoffman, Senior District Judge, sitting by designation
JURISDICTION	Federal
DECIDED	July 14, 1988
DOCKET	Nos. 87-5669, 87-5805
DISPOSITION	affirmed
PROCEDURAL POSTURE	Shareholder derivative and individual action challenging directors' conduct in negotiating and approving a merger. After denying defendants' motion to dismiss and allowing discovery, the United States District Court for the Southern District of Florida granted defendants summary judgment. The Eleventh Circuit affirmed.
STANDARD OF REVIEW	Summary judgment is reviewed under the requirement that the nonmoving party with the burden of proof produce specific evidence showing a genuine dispute of material fact. In applying the substantive business-judgment standard, the court viewed the evidence through the applicable evidentiary burden and asked whether plaintiff showed a genuine issue concerning fraud, bad faith, or abuse of discretion.
PRECEDENTIAL VALUE	published precedential federal appellate opinion
PARTIES	Michael Eden Cottle v. Storer Communication, Inc., Kenneth L. Bagwell, et al.

TOPICS

mergers and acquisitions · business judgment rule · corporate governance · shareholder derivative suits · appellate procedure

PRACTICE AREAS

corporate law · mergers and acquisitions · securities law · appellate procedure

QUESTIONS PRESENTED

1. Whether the directors' grant of an asset lock-up to KKR constituted fraud, bad faith, or an abuse of discretion sufficient to overcome the business judgment rule.
2. Whether the directors abused their discretion by accepting KKR's bid without resuming negotiations with Comcast despite an assertedly higher overall valuation of Comcast's proposal.
3. Whether the directors' failure to obtain an independent financial review or retain an independent financial adviser demonstrated a breach of fiduciary duty or abuse of discretion.
4. Whether the $18 million termination fee and related investment-banker fee were impermissible and sufficient to overcome the business judgment rule.
5. Whether the proxy statement violated section 14(a) of the Securities Exchange Act by failing to disclose facts concerning the board's acceptance of KKR's offer and its relationship with Dillon Read.

HOLDINGS

1. The business judgment rule protected the Storer directors because Cottle failed to produce specific evidence creating a genuine issue of material fact concerning fraud, bad faith, or abuse of discretion.
2. The asset lock-up was not shown to constitute an abuse of discretion and therefore did not defeat application of the business judgment rule.
3. The board's decision to accept KKR's offer without resuming negotiations with Comcast did not constitute an abuse of discretion because the alleged price inadequacy was not gross.
4. The board's failure to obtain an independent financial review or retain an independent financial adviser did not, without more, establish an abuse of discretion or defeat the business judgment rule.
5. The $18 million termination fee and related fee did not overcome the business judgment rule because the record showed that the fees were reasonable in relation to a transaction worth nearly $2.5 billion.
6. The challenged omissions did not constitute a section 14(a) violation because the underlying board conduct did not amount to a state-law breach of fiduciary duty.

KEY QUOTATIONS

> *"Under the business judgment rule directors are presumed to have acted properly and in good faith, and are called to account for their actions only when they are shown to have engaged in fraud, bad faith or an abuse of discretion."* (at 573)

> *"The question therefore is not whether the asset lock-up granted to KKR effectively ended the bidding process. The question is whether Storer conducted a fair auction, and whether KKR made the best offer."* (at 575)

> *"We think that appellant's effort to graft a requirement of retaining an independent financial advisor as a prerequisite to invoking the business judgment rule is an unwarranted extension of the law."* (at 578)

FACTUAL BACKGROUND

Storer Communication's board considered competing acquisition proposals from Kohlberg, Kravis, Roberts & Company (KKR) and Comcast after a dissident shareholder group sought to elect directors advocating liquidation of the company. After negotiations, the board accepted KKR's offer, which provided $91 per share in cash and included an asset lock-up and termination fees. Storer shareholders overwhelmingly approved the merger. Cottle challenged the board's use of the lock-up, its decision not to resume negotiations with Comcast, its reliance on financial adviser Dillon Read, and the termination fees.

PROCEDURAL HISTORY

Cottle demanded that Storer's board investigate alleged entrenchment conduct, seek a declaratory judgment concerning the merger, and postpone the shareholder vote. The board refused, and Cottle filed suit the day before shareholders approved the Storer-KKR merger. Following discovery and additional briefing, the district court granted summary judgment to defendants on the fiduciary-duty and federal proxy claims.

DISPOSITION

affirmed

CASES CITED

- Mobil Corp. v. Marathon Oil Co., Fed. Sec. L. Rep. (CCH) P 98,375, at 92,284-85 (S.D. Ohio 1981), rev'd on other grounds, 669 F.2d 366 (6th Cir. 1981)
- Treadway Cos., Inc. v. Care Corp., 638 F.2d 357, 382 (2d Cir. 1980)
- Smith v. Van Gorkom, 488 A.2d 858, 872-73, 876 (Del. 1985)
- Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 180, 182-84 (Del. 1986)
- Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)
- Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986)
- Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2510, 2512-13, 91 L. Ed. 2d 202 (1986)
- Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986)
- Commuter Transp. Sys., Inc. v. Hillsborough County Aviation Auth., 801 F.2d 1286, 1291 (11th Cir. 1986)
- Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F.2d 264, 273-75, 280-81 (2d Cir. 1986)
- Edelman v. Fruehauf Corp., 798 F.2d 882, 886-87 (6th Cir. 1986)
- Samjens Partners I v. Burlington Indus., Inc., 663 F. Supp. 614, 623-25 (S.D.N.Y. 1987)

- Hecco Ventures v. Sea-Land Corp., No. 8486 (Del. Ch. May 19, 1986), reprinted in 12 Del. J. Corp. L. 282
- Gimbel v. Signal Cos., Inc., 316 A.2d 599, 609-10, 615 (Del. Ch.), aff'd, 316 A.2d 619 (Del. 1974)
- Terrydale Liquidating Trust v. Barness, 642 F. Supp. 917, 928 (S.D.N.Y. 1986)
- Freedman v. Restaurant Assoc. Indus., Inc., Fed. Sec. L. Rep. (CCH) P 93,502, at 97,220 (Del. Ch. Oct. 16, 1987)
- Keyser v. Commonwealth Nat'l Fin. Corp., 675 F. Supp. 238, 265-66 (M.D. Pa. 1987)
- Beebe v. Pacific Realty Trust, 578 F. Supp. 1128, 1150-51 & n.7 (D. Or. 1984)
- Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 478-79 (1977)
- Hastings-Murtagh v. Texas Air Corp., 649 F. Supp. 479, 485-86 (S.D. Fla. 1986)