

**DELAWARE SUPREME COURT'S NCS HEALTHCARE
DECISION MAY LIMIT EFFECTIVENESS OF VOTING
AGREEMENTS FROM MAJORITY STOCKHOLDERS
AS DEAL PROTECTION MEASURES**

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The Delaware Supreme Court, in a narrow 3-2 vote, recently ordered a reversal of the Delaware Chancery Court's decision in *Omnicare v. NCS Healthcare Inc.*¹ The reversal held that NCS's board had breached its fiduciary duties by approving voting agreements from the holders of a majority of NCS's voting power that, when combined with a merger agreement provision that required the NCS board to present the merger agreement to stockholders, locked up the merger. The case arose when a competing bidder emerged that made a superior proposal for NCS.

Although the Supreme Court referenced the basic principle that deal protection measures must be reasonable in relation to the threat posed and neither preclusive or coercive, the Supreme Court's reasoning is not set forth in any detail in the brief order. Accordingly, the breadth and impact of the reversal will not be known until the release of the court's full opinion, expected next month. At a minimum, the reversal raises serious questions about a target board's ability to approve a merger agreement without a fiduciary termination provision in combination with voting agreements from majority stockholders that would assure completion of the merger. Many practitioners were surprised by the ruling because such protections are not uncommon, the NCS board engaged in an extended auction process, and the lower court had ruled that the NCS board was not subject to *Revlon* duties. In addition, stockholders holding a majority of NCS's voting power effectively ratified the board's actions by signing the voting agreements.

We will update you regarding this matter when the Supreme Court's full opinion is issued. In the meantime, if you have any questions, please do not hesitate to call Robert E. Spatt (212-455-2685), John G. Finley (212-455-2583), Lee Meyerson (212-455-3675) or Maripat Alpuche (212-455-3971).

¹ 2002 WL 31767892 (Del. Supr.), *reversing* 2002 WL 31720732 (Del. Ch.).