

# Delaware Court of Chancery Addresses Enforceability of Con Ed Provision

## WRITTEN BY

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In *Crispo v. Musk*, the Delaware Court of Chancery considered the enforceability of a so-called “Con Ed” provision contained in a merger agreement governing the well-publicized and troubled acquisition of Twitter, Inc. (Twitter) by Elon Musk and his affiliates (defendants). Practitioners have long included such provisions in merger agreements to establish that lost stockholder premium damages are recoverable against a buyer in the event of the buyer’s wrongful termination.<sup>[1]</sup>

## Analysis

In April 2022, the defendants agreed to acquire Twitter pursuant to a merger agreement. Months later, the defendants attempted to terminate the agreement, which resulted in Twitter filing a complaint against the defendants, seeking specific performance of the merger agreement, and a Twitter stockholder (plaintiff) filing a complaint against the defendants, seeking specific performance of the merger agreement and damages. The defendants ultimately changed their mind and closed the transaction on the original terms of the merger agreement in October 2022. In a separate decision, the court held that the plaintiff lacked standing to seek specific performance of the merger agreement. Following the closing, the plaintiff claimed partial credit for the successful closing of the transaction and petitioned the court for mootness fees.

In analyzing the plaintiff’s bid for mootness fees, the court noted that the plaintiff was not a party to the merger agreement, making the plaintiff’s demand dependent upon whether he had standing to sue for breach of the agreement as a third-party beneficiary. The plaintiff argued that the *Con Ed* provision contained in the merger agreement — that is, the provision that made clear that damages available to the target in the event of the defendants’ breach of the agreement expressly include lost premium damages (the Lost Premium Provision) — conferred upon him the necessary third-party beneficiary status. The merger agreement also contained a blanket disclaimer on third-party beneficiaries and included several carve-outs, none of which, according to the court, were relevant to the matter before it. As part of its analysis, the court summarized the three types of *Con Ed* provisions: (i) provisions expressly providing stockholders with third-party beneficiary status, (ii) provisions making the target the agent for recovering damages on behalf of its stockholders, and (iii) provisions defining damages resulting from breach in terms of lost premiums (with the court noting that the Lost Premium Provision represented this type of *Con Ed* provision). With respect to (i), the court noted that practitioners are wary to adopt such provisions because they deprive the target board of control over emerging litigation and confer stockholders with that control. With respect to (ii), the court stated that such provisions are “on shaky ground” because “there is no legal basis for allowing one contracting party to unilaterally and irrevocably appoint itself as an agent for a nonparty for purposes of controlling that party’s rights.” Finally, with respect to (iii), the court commented that practitioners do

not view such provisions as granting stockholders with third-party beneficiary status. The court ultimately found that the Lost Premium Provision contemplated two plausible interpretations. According to the court, either the Lost Premium Provision conferred stockholders third-party beneficiary status to seek lost premium damages while the target was not also pursuing a claim for specific performance, or it was unenforceable because it effectively purported to allow the target to exclusively collect a premium owed to the stockholders in the merger, which could constitute a penalty. Accordingly, the court held that, under either interpretation, the plaintiff lacked third-party beneficiary status and thus lacked standing to sue at the time his complaint was filed, and rejected his demand for mootness fees.

## Takeaway

The court's decision in *Crispo* signals that, if faced with the question, the court may permit merger agreements to confer upon target stockholders, as third-party beneficiaries, the ability to sue for lost premium damages. However, as highlighted by the court, such an approach is not desirable for targets and their boards of directors since an adoption of that approach would divest a board's control of subsequent litigation and give it to stockholders, who are intended to be purely passive players in corporate disputes. *Crispo* also highlights a potential enforceability pitfall with designating the target itself as an agent on behalf of the stockholders to collect any such lost premium damages. In this regard, the court posited whether a charter provision adopted as part of a broader transaction and designating the target as the stockholders' agent for purposes of collecting those lost premium damages would be enforceable given the broadly enabling provisions of the Delaware General Corporation Law.

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[1] In *Consolidated Edison, Inc. v. Northeast Utilities*, the Second Circuit held, under New York law, that target stockholders could not seek lost premium damages against a buyer who had wrongfully terminated a merger agreement because of a general "no-third party beneficiaries" provision in the governing merger agreement. In response to the Second Circuit's decision in *Consolidated Edison, Inc.*, practitioners started to include "Con Ed" provisions in merger agreements.

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