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## ImClone And The Phantom Bidder

Matthew Herper

**ImClone Systems** has rejected a takeover bid from **Bristol-Myers Squibb**.

Why? Because, according to an ImClone (nasdaq: IMCL - news - people ) statement, a mystery bidder has surfaced with a better offer. But the bidder refuses to be named and needs two weeks of due diligence before its \$70-per-share offer--\$10 a share more than Bristol's (nyse: BMY - news - people )--is legitimate.

So do they even exist? Wall Street seems pretty sure the offer is real. ImClone shares rose 7% to \$68, and Bristol's stock dropped 2% to \$21.60. There's plenty of speculation regarding which drug company made the offer, along with abundant praise for the deal-making prowess of ImClone's chairman, the billionaire investor Carl Icahn who gained control of the company two years ago.

But how seriously should anyone, be it Bristol executives or ImClone shareholders, take a deal without a name attached? Two law professors say the emergence of a phantom bidder is highly unusual. Deal-jumpers generally make no bones about making a bid, even if it is still subject to due diligence.

"If someone has made a genuine offer that is seriously looking toward a merger at that higher price, you'd think that their stockholders would care," says Lawrence Hamermesh, Ruby R. Vale professor of corporate law at Widener Law School. "If the offer is such that it's not being disclosed, you're several steps from it being concrete." Hamermesh says that the tactic of alluding to an unnamed buyer is "very odd" and that he doesn't recall seeing it before.

"Until you get an offer, there is no offer," says Charles Elson, director of the Weinberg Center for Corporate Governance at the University of Delaware. But he says that Icahn's statement has to be accurate, full and complete, and if this prospective buyer decides to walk, Icahn will have to disclose that too. "[Icahn] is a master at extracting good prices," says Elson. "This is why he's a master."

The tactic works because there are many possible bidders for ImClone, but the one that makes the most sense is Bristol. Erbitux, the \$2 million-a-year cancer fighter is the biggest attraction, but any company that buys ImClone will only get 40% of U.S. sales, the rest go to Bristol. And the winning bidder would still have to deal with Bristol on sales tactics and clinical trials.

Timothy Anderson, pharmaceuticals analyst at Sanford C. Bernstein, wrote in a note to investors that all 10 companies he covers in the U.S. and Europe, including **Pfizer** (nyse: PFE - news - people ), **Merck** (nyse: MRK - news - people ) and **Novartis** (nyse: NVS - news -

people ), could, in theory, make a bid for ImClone. But he hadn't thought that any of them would actually do so. He also argues that buying ImClone could be a prelude to acquiring Bristol.

Bernstein's European analyst Jack Scannell thinks ImClone's European partner, Merck KGaA, is an "unlikely" buyer. But it's easy to imagine Pfizer coveting Erbitux revenue as a cushion against Lipitor's 2001 patent expiration. Or to guess that **Sanofi-Aventis** (nyse: SNY - news - people ), **AstraZeneca** (nyse: AZN - news - people ), or **GlaxoSmithKline** (nyse: GSK - news - people ) is hoping to take advantage of the weak dollar. Or maybe Merck wants a marketed cancer drug to serve as a basis for selling the cancer drugs it has in development.

**It's also possible that some chief executive might figure that trying to scare Bristol into paying a higher price for ImClone makes strategic sense and is talking to Icahn for that reason. Says Jerry Reisman, a securities lawyer at Reisman, Peirez, and Reisman, "Carl Icahn is a pro at knowing how to increase interest and increase bidding for his assets. There is a real degree of interest by some pharmaceutical company, otherwise he would be committing fraud."**

Barbara Ryan, the pharmaceuticals analyst at **Deutsche Bank** , thinks the mystery bid will force Bristol to increase its bid to match \$70 per share, without any due diligence concerns. But Bristol could wait to see if the deal actually emerges. If the phantom buyer walks, it could still possibly get ImClone for \$60 a share.