TOP FIVE

Delaware Case Developments in 2014 for M&A Practitioners

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Top 5 Delaware Case Developments in 2014 for M&A Practitioners

During 2014, the Delaware courts again issued a number of decisions directly impacting the M&A practice. Below we describe our picks for the top 5 developments for M&A practitioners with the following key takeaways:

1. MFW Standard Applied

- Business judgment rule applies to going-private transactions involving a controlling stockholder on the buy-side if the merger is conditioned from the start on the approval of both (a) an attentive special committee of independent directors that can decline the transaction, retain its own financial and legal advisors and negotiate a fair price and (b) a majority of the uncoerced and fully informed minority.

2. Control Explained

- A minority stockholder has "control" if it has "actual control" and power over the board's decision-making process in the transaction.
- A non-majority controlling stockholder who is not on both sides of a transaction will not trigger entire fairness review.

3. Indemnification Tested

- A non-consenting stockholder cannot be bound by a broad release of claims in a letter of transmittal or be subject to an uncapped and indefinite indemnification obligation, which requires a direct contractual obligation between the parties.
- Parties should consider the interaction of indemnification provisions with relevant statutes of limitations and survival periods and ensure that the required notices and relevant information are given in a timely manner to preserve a claim.

4. *Revlon* and Fiduciary Duties Examined

- *Revlon* does not require an active pre-signing market check, especially if the board has the ability to conduct a passive post-signing check.
- Courts tend to respect decisions by boards in which a majority of the directors are independent, but such deference is very fact-specific and therefore not easily replicated.

5. Delaware Reaches Out

- Forum selection clauses are enforceable and courts can limit the use of information gathered from books and records requests to actions brought in Delaware courts.
- A fee-shifting bylaw of a non-stock corporation was upheld, but the Delaware legislature will weigh in on this in 2015.

1. MFW Standard Applied

Following the Court of Chancery's 2013 decision in *In re MFW Shareholders Litigation* (May 29, 2013), further discussed **here**, in 2014 the Delaware Supreme Court unanimously upheld that decision in *Kahn v. M&F Worldwide Corp.* (March 14, 2014). Following this case, the business judgment standard of review will apply to going-private transactions involving a controlling stockholder on the buy-side if, and only if, the controlling stockholder agrees at the outset to proceed with the merger only if it receives the approval of both:

- an attentive special committee comprised of directors who are independent of the controlling stockholder, that is fully empowered to decline the transaction and to retain its own financial and legal advisors, and that satisfies its duty of care in negotiating a fair price and
- a majority of the unaffiliated stockholders, who are uncoerced in their vote and fully informed.

Specifically, the Delaware Supreme Court summarized its new standard (the "MFW standard") as follows:

"in controller buyouts, the business judgment standard of review will be applied *if and only if*:

(i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders;

(ii) the Special Committee is independent;

(iii) the Special Committee is empowered to freely select its own advisors and to say no definitively;

(iv) the Special Committee meets its duty of care in negotiating a fair price;

(v) the vote of the minority is informed; and

(vi) there is no coercion of the minority."

The focus on a fair price is the main difference from the original standard proposed by the Court of Chancery. Interestingly, the Delaware Supreme Court indicated that under this new standard the initial complaint would have survived a motion to dismiss because of allegations that called into question the adequacy of the negotiations by the special committee regarding price.

The MFW standard allows parties to structure their transaction to get deferential business judgment review (and avoid entire fairness review), and have a more predictable outcome earlier in a litigation. That said, parties will need to determine if meeting the requirements of the MFW standard are appropriate for their specific circumstances, as they also include certain risks and costs, such as the execution risk stemming from a non-waivable majority-of-the-minority approval requirement. In addition, from a practical perspective, if the MFW standard is met, the transaction would likely also satisfy an entire fairness review, and if after discovery any triable issue of fact relating to process or disclosure remains, entire fairness review would still apply.

Since the MFW standard was pronounced last March, the Delaware courts have applied and referred to it in a number of cases, including the following:

In *Swomley v. Schlecht* (August 27, 2014), the Court of Chancery dismissed a complaint challenging a cash-out merger involving a controlling stockholder at the pleading stage, by applying the business judgment standard of review as set out in *Kahn v. M&F Worldwide Corp.* The court held that the plaintiffs did not adequately plead facts undermining the six factors required for application of the business judgment rule in the context of a controlling stockholder merger. It also rejected the plaintiffs' argument that the defendants should have to establish that the requirements of the MFW standard were met, when the parties used a structure designed to meet those requirements. Since the plaintiffs did not meet their burden, their remedy was appraisal, assuming they did not vote for the deal.

The court also clarified that even though this was a private company transaction, Delaware law would not make a distinction. Furthermore, the court indicated that it was appropriate to apply the MFW standard at the pleading stage because its goal is to allow defendants to structure a transaction in a way that allows them to get pleading-stage dismissal of breach of fiduciary duty claims. In the past, because such claims inherently had litigation value, they also had settlement value.

Next, *In re Cornerstone Therapeutics Inc. Stockholder Litigation* (September 10, 2014) involved the acquisition of the minority interest by a controlling stockholder. The Court of Chancery declined to dismiss disinterested members of a special committee (and disinterested directors who voted in favor of the transaction), who are potentially exculpated from liability pursuant to a DGCL Section 102(b)(7) provision, because the transaction is subject to entire fairness review. The court held that, pursuant to the Delaware Supreme Court's decision in *Emerald Partners v. Berlin* (November 28, 2001), it could not determine whether the directors could be exculpated until after a decision had been made as to the entire fairness of the transaction.

The court applied the new MFW standard, which allows a deal involving a controlling stockholder to be subject to business judgment rule review if it was conditioned from the start on the approval of a majority-of-the-minority and of an independent special committee. In this case, because the deal was not contingent *ab initio* on the approval of the majority-of-the-minority, the entire fairness standard was applied instead.

This decision is now the subject of an interlocutory appeal. The Delaware Supreme Court will need to decide whether the exculpatory clause in the charter effectively gave the disinterested directors protection early in the litigation or whether they must prove their innocence.

Before the Delaware Supreme Court pronounced the new MFW standard, the Court of Chancery in *In re Orchard Enterprises, Inc. Stockholder Litigation* (February 28, 2014) applied entire fairness review to a take-private merger with a controlling stockholder, despite approval by a special committee and a majority-of-the-minority, and indicated that post-closing money damages may be awarded for materially misleading disclosures made to the stockholders.

The court did not apply business judgment review because of evidence that the structural protections outlined in the 2013 MFW case may not have effectively operated to protect the interests of the minority stockholders. For instance, the controlling stockholder in this case did not agree upfront not to proceed with a self-dealing transaction and there was a question regarding the independence of one of the members of the special committee.

As a side note, in a recent New York case, *In re Kenneth Cole Productions, Inc., Shareholder Litigation* (November 20, 2014), the Supreme Court of

The MFW standard allows parties to structure their transaction to get deferential business judgment review and have a more predictable outcome earlier in a litigation

Control needs to be "actual control" and constitute power over the board's decision-making process regarding the transaction

New York, Appellate Division affirmed the lower court's dismissal of the complaint against the directors for breach of fiduciary duty. The court found that it was appropriate to apply the business judgment standard to this going-private transaction with the majority shareholder because of the following procedural protections: the merger required the approval of the majority of the minority shareholders, the majority shareholder did not participate in the board's vote on the merger and the remaining directors were not alleged to be self-interested. So, this New York decision is generally in line with Delaware's MFW standard as it provides greater protection for interested transactions using procedural safeguards.

2. Control Explained

Last fall, the Delaware courts also spent some quality time discussing what constitutes "control" by a minority stockholder, which is an important determination as it affects the standard of review applied to an M&A transaction, business judgment or entire fairness. Under the basic test, a stockholder is considered to be a "controlling stockholder" if it either (a) owns more than 50% of the voting power of the corporation or (b) as a minority stockholder, exercises control over the business affairs of the company. Earlier cases have explained that this control needs to be "actual control" and constitute power over the board's decision-making process regarding the transaction, as if the stockholder had majority voting control, and these recent cases generally confirm that the control has to extend to the board process.

For starters, in *In re KKR Financial Holdings LLC Shareholder Litigation* (October 14, 2014), the Court of Chancery dismissed a suit over KKR's $2.6 billion acquisition in a stock-for-stock merger of KKR Financial Holdings (KFN), which was originally formed by KKR in 2004. The court indicated that in a transaction, without a controlling stockholder where the informed vote of a majority of the disinterested stockholders is obtained (even if it was not required), the business judgment rule applies.

In its analysis of KKR's role, the court determined that there was not enough basis to conclude that KKR, which owned less than 1% of KFN's stock, controlled KFN's board when it approved the merger. Specifically, the court mentioned that while an affiliate of KKR managed the day-to-day operations of KFN, ultimate authority for managing the business and affairs (including the merger decision) was up to the board and KKR did not have the ability to change directors or block the board's decision.

In addition, the court held that the plaintiffs failed to show that the majority of the board was not disinterested in the transaction or independent from KKR. The court indicated that directors could be independent even if they were nominated by KKR or had past business relationships involving KKR.

A few weeks later, in *In re Crimson Exploration Inc. Stockholder Litigation* (October 24, 2014), the Court of Chancery applied the business judgment rule and dismissed the claims for breach of fiduciary duties, because if a major stockholder of the target, even a controlling stockholder, does not have a conflict regarding the merger, the business judgment rule applies.

The court also determined that a non-majority stockholder is not a controlling stockholder unless it exercises actual control over the company's board regarding the relevant transaction. In this case, the court indicated that Oaktree was probably not a controlling stockholder, even though it held 33.7% of the outstanding stock, was the company's largest creditor, designated a majority of the board, three of the seven directors were its employees and it had a 10-year relationship with the company's CEO.

The court also discussed that a conflict exists only if the stockholder is either (a) a counterparty to the transaction or (b) receives different consideration (special treatment) that is valuable enough to rebut the presumption of an alignment of interests with the other stockholders to maximize the price (i.e., if it competes with the other stockholders for compensation).

Next, in *In re Sanchez Energy Derivative Litigation* (November 25, 2014), the Court of Chancery dismissed the plaintiffs' claims for breach of fiduciary duty, aiding and abetting and unjust enrichment and again discussed the defining characteristics of a controlling minority stockholder.

Specifically, referring back to the *KKR* and *Crimson Exploration* decisions, the court confirmed that "actual control of corporate conduct means actual control over the corporation's *board of directors* in the transaction at issue" and that "actual board control in the transaction at issue is undoubtedly the defining and necessary feature of a minority controlling stockholder." In this case, the court determined that the two founding stockholders, who together owned 21.5% of the company's equity and controlled two of the five board seats, did not exercise control. The court made this determination even though plaintiffs alleged that the company was a shell without employees or directly managed operations, was established by the directors solely to access the public markets and the directors had firm control over the company's operations and board. This case is currently on appeal to the Delaware Supreme Court.

Finally, in *In re Zhongpin Inc. Stockholders Litigation* (November 26, 2014), the Court of Chancery again explained that actual control is established if the stockholder exercises enough voting and managerial power so that it "as a practical matter, [is] no differently situated than if [it] had majority voting control" (referring to *In re PNB Holding Co. Shareholders Litigation* (August 18, 2006), as did *KKR*). However, the court did not go as far as in the previously described cases to require that the stockholder had to have controlled the board itself during the negotiation of the transaction. Instead, the court held that the minority stockholder in this case, through a combination of "latent and active control," was the company's controlling stockholder, even though the board was not under his influence and negotiated against him (referring to the softer test of control over the corporation set out in *In re Cysive, Inc. Shareholders Litigation* (August 15, 2003)).

Instead the court held that the plaintiffs pled sufficient facts to raise an inference that the 17% stockholder (Zhu), who was the company's founder, chairman and CEO, was a controlling stockholder, even though he did not control the directors' decision regarding his going-private bid. He exercised significantly more power and control than a typical CEO and 17% stockholder, making the transaction more challenging for the special committee, because without his cooperation it had no leverage to negotiate a higher price with him or get a competing bid. For instance, none of the 80 potential bidders contacted during the 60-day post-signing go-shop period submitted a bid. In addition, the company disclosed in its Form 10-K that Zhu was the company's "controlling stockholder," that his loss would have a material adverse effect on the company and that it might not be possible to sell the company to anyone but him.

Interestingly, as described above, to obtain business judgment review for a transaction with a controlling stockholder, the MFW standard requires an independent committee and a majority-of-the-minority stockholder vote from the outset. In this case, the transaction occurred before the MFW standard was set and did not meet its requirements, as the provision requiring a stockholder vote by the minority was included as part of negotiations later in the process. A portion of this decision relating to the alleged liability of the special committee is currently the subject of an interlocutory appeal from the Court of Chancery to the Delaware Supreme Court.

Parties should consider the interaction of indemnification provisions with relevant statutes of limitations and survival periods

Despite the consistent use of control over the board and board process as the defining factor in the determination of “control”, as a result of this last decision in the Zhongpin case, the meaning of “control” is somewhat unclear again. Presumably the Delaware courts will continue to refine this concept and application in future cases.

3. Indemnification Tested

The Delaware courts also tackled the limits of indemnification obligations and their interaction with notice provisions, statutes of limitations and survival periods. Practitioners should be careful in their drafting of these provisions to clarify the exact notification, timing and other requirements to avoid unintended results.

In *Cigna Health and Life Insurance Company v. Audax Health Solutions Inc.* (November 26, 2014), the Court of Chancery held that a broad release was unenforceable for lack of consideration and the court did not enforce an indemnification obligation of a non-consenting stockholder. The plaintiff did not vote for the merger and did not execute the letter of transmittal or a support agreement. In this context, the court made two important determinations.

First, the court decided that the broad release of claims (contained only in the letter of transmittal) was unenforceable because of lack of consideration, since the plaintiff was entitled to the merger consideration upon surrender of its cancelled certificates pursuant to Section 251 of the DGCL. As a result, the release was a new, post-closing obligation for which no new consideration was provided and therefore the court held it to be unenforceable.

Second, the court determined that the uncapped and indefinite indemnification obligation (contained in both the letter of transmittal and the merger agreement) violated Section 251 as it prevented the stockholders from determining the value of the merger consideration (which could range from zero to the full amount received) and was therefore void and unenforceable against the plaintiff. While a stockholder can contractually agree to an indefinite indemnification obligation (e.g., in a support agreement), a non-consenting stockholder cannot have such an obligation imposed on it.

Although Section 251 contemplates some purchase price adjustments, the court indicated that non-escrow post-closing price adjustments potentially requiring stockholders to repay a portion of the merger consideration have an "uncertain status" under Delaware law.

The court did, however, state that the opinion does not (a) concern escrow agreements covering future indemnification claims, (b) rule on the general validity of post-closing price adjustments requiring direct repayment from the stockholders or (c) address the validity of a time-limited price-adjustment covering all of the merger consideration or an indefinite adjustment period covering a portion of the merger consideration. Nevertheless, there has been a lot of debate since this decision regarding its impact on the enforceability of indemnification provisions. One way to avoid the issues that arose in this case is to require significant stockholders to either become a party to the merger agreement or to sign a joinder, so the indemnification obligations are based on direct contract obligations between the parties.

In another case, *I/Mx Information Management Solutions, Inc. v. MultiPlan, Inc.* (March 27, 2014), the Court of Chancery enforced the notice deadline and related contractual prerequisites for a third-party indemnification claim and the court granted partial summary judgment to the seller disallowing a post-closing attempt to access escrow funds that were set aside for such purposes.

First, the court held that third-party correspondence notifying the buyer of an issue under a material contract by itself did not trigger indemnification rights under the purchase agreement, because the agreement required that an action had to be commenced or threatened.

This decision highlights the importance of including clear language about what constitutes an indemnifiable claim, particularly with respect to third-party claims. Parties should also consider whether it is appropriate to allow a party to make an indemnification claim to preserve a claim beyond the claims survival period, when the indemnified party becomes aware of a potential third-party claim but the claim has not yet been threatened or commenced. These provisions should also tie to the standards for releasing any escrowed funds and whether a "pending" claim allows funds to remain in escrow.

Second, the court held that even if an action had been threatened under the relevant contract, the buyer did not provide adequate notice prior to the termination period. The initial communication regarding a possible breach of the relevant material contract was too general (using 'placeholder' language), did not identify the relevant issue and did not provide enough information for the noticed party to determine whether to assume the defense.

This case also emphasizes the need to consider the interaction of indemnification provisions with relevant statutes of limitations and survival periods, and to ensure that the required notices and relevant information are given to preserve a claim before expiration of such periods. As described **here**, effective August 1, 2014, Delaware law was changed to allow parties to agree to an *extension* of the statute of limitations for up to 20 years without having to use a sealed instrument, as long as the written contract involves at least $100,000. In addition, in *ENI Holdings, LLC* *v. KBR Group Holdings, LLC* (November 27, 2013), the Court of Chancery confirmed that in Delaware parties may contractually agree to a period of limitations that is *shorter* than that provided for by statute, as long as the shorter period is reasonable.

4. *Revlon* and Fiduciary Duties Examined

Last year, the Delaware courts decided several cases involving board of directors' *Revlon* and fiduciary duties (see *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* (March 13, 1986)). In the recent cases, the courts tended to respect the boards' decisions, particularly when the majority of the directors was independent. In most cases, however, such deference is very fact specific and therefore not easily replicated in another company's sale process. Here we describe some interesting highlights of such cases, including market check requirements, disclosure issues and the impact of having a control group.

Recently, in *C&J Energy Services, Inc. v. City of Miami General Employees' and Sanitation Employees' Retirement Trust* (December 19, 2014), the Delaware Supreme Court unanimously reversed the Court of Chancery's November 2014 preliminary injunction of a merger between C&J and a subsidiary of Nabors and its imposition of a go-shop in violation of the merger agreement's no-shop provisions. While the lower court found that the C&J board was well informed regarding C&J's value and that it appeared to not be conflicted, it still imposed the injunction because the board did not conduct an active pre- or post-signing market check. The lower court held that this approach may have violated C&J board's duty to achieve the highest value in the transaction because without an auction or other active market check, a seller cannot have "impeccable knowledge of the company that it is selling," which the lower court seemed to imply to be a *Revlon* requirement.

- In reversing the injunction, the Delaware Supreme Court assumed for purposes of its analysis that *Revlon* was invoked. The court made it clear that a pre-signing auction or other active post-signing solicitation of value is not necessary to satisfy a board's *Revlon* duties and that a board is not required to have impeccable knowledge of its company's value. The court confirmed that the question under *Revlon* is "whether the directors made a *reasonable* decision, not a *perfect* decision." The court discussed a number of factors specific to this transaction indicating that the C&J board had met its duties, including the following: a majority of the C&J board was independent,
- the lower court had determined that the C&J board was well informed regarding C&J's value for various reasons, including as a result of having received and analyzed two different valuation analyses and fairness opinions from investment banks,
- the lower court found that no conflict of interest or improper motive had influenced the C&J board's decision, and the court noted with approval that one of the C&J directors was employed by a 10% stockholder, suggesting a strong incentive to maximize the value received by all stockholders,
- the merger agreement contained a broad fiduciary out allowing C&J to terminate the transaction if a more favorable deal emerged,
- the 2.27% break-up fee was modest and
- the C&J stockholders would have a fair chance to vote on the transaction and were fully informed, according to the lower court.

The court's decision supports the notion that a passive post-signing market check can help satisfy a board's *Revlon* duties if the board is well informed, there are no material impediments to a possible superior proposal and the transaction is presented to the stockholders for approval in a non-coercive, fully informed manner. While the decision reaffirms a board's flexibility and discretion in satisfying its *Revlon* duties, it is also clear that it is very fact-specific and dependent on the complete record and process of the transaction.

On the same day, in *In re Family Dollar Stores, Inc. Stockholders Litigation* (December 19, 2014), the Court of Chancery denied a preliminary injunction of the proposed acquisition of Family Dollar by Dollar Tree, showing deference to the decisions made by the disinterested board. The stockholders claimed that the Family Dollar board breached its fiduciary duty under *Revlon* to maximize the value of the company because it did not engage in negotiations with Dollar General after it made its offer. The court decided, however, that the board was properly motivated to maximize the company's value and that it "acted reasonably within the constraints of the fiduciary out provision in the merger agreement when it decided not to engage in negotiations with Dollar General because of the antitrust risks associated with that proposal." The fiduciary out provision included language that a superior proposal had to be "reasonably likely to be completed on the terms proposed."

Therefore, even though the Dollar General offer was financially superior on its face ($80/share versus about $75/share), when the board considered the offer and was advised that it had a 60% chance of failure because of antitrust issues, among other considerations, it acted reasonably when it decided not to pursue the offer. The court also dismissed plaintiffs' disclosure claims. Since then, on January 22, 2015, Family Dollar's stockholders voted to approve the $8.5 billion buyout bid from Dollar Tree.

In both this case and the *C&J* case, the courts determined that an active pre-signing market check is not necessary to fulfill a board's *Revlon* duties, especially if the board rejects the option after reasonable consideration and the board has the ability to conduct a passive post-signing check.

An active pre-signing market check is not necessary to fulfill a board's Revlon duties

In *In re Comverge Shareholder Litigation* (November 25, 2014), the Court of Chancery declined to dismiss claims for breach of fiduciary duty based on preclusive deal protection measures, as the court found that the combination of the deal protections was conceivably unreasonable. Specifically, the court held that the combination of a termination fee, an expense reimbursement provision and convertible notes that collectively amounted to a termination fee of 13% of the equity value of the transaction was too much protection and may have unreasonably precluded a competing bid.

In addition, the decision explains when a buyer may be charged with aiding and abetting liability, in this case for breaching a fiduciary duty, which requires "knowing participation" in the breach. As the court indicated, being an aggressive negotiator in an arm's-length bargaining situation is not enough to meet the requirement.

In *Chen v. Howard-Anderson* (April 8, 2014), the Court of Chancery applied the enhanced scrutiny standard of review and considered the board's alleged breaches of fiduciary duty regarding the company's sale process and disclosures in the company's proxy statement.

Regarding the sale process claims, the court granted the director defendants' motion for summary judgment; even though under the enhanced scrutiny standard the record supported an inference that certain decisions did not meet the reasonableness test, plaintiffs failed to show that the directors acted with an improper motive. The court explained when conduct that is wrong under a reasonable basis test can still not be so bad as to avoid exculpation under the director exculpation statute. As a result, the exculpatory provision in this case insulated the disinterested director defendants from liability, but not the officers. Specific issues in this case were the board's ultimatum to a competitor bidder to make an offer in 24 hours and the board's reliance on the financial advisor's "market check" conducted over the July 4th weekend, giving bidders only 24 hours to respond.

Next, regarding the disclosure claims, the court denied the motion for summary judgment. The court found that the record supported an inference not only that that the proxy statement contained materially misleading disclosures and material omissions, but also that the defendants knew about the disclosure issues before approving the proxy statement and may have tried to conceal evidence about potential disclosure issues until after the closing of the merger. Because the defendants' conduct reinforced the inference of scienter, the court denied summary judgment and ordered a trial to develop the facts. Also, if the board was aware that disclosure materials were inaccurate, it may not be exculpated because the failure to correct the errors goes beyond a simple duty of care violation.

In applying the enhanced scrutiny standard of review, the court explained on the one hand that the fact that the transaction closed did not relax the standard from enhanced scrutiny to the business judgment rule. On the other hand, the court noted that the plaintiffs did not call into question the disinterestedness and independence of enough directors to raise the standard to entire fairness. Under the enhanced scrutiny standard, the defendants have to show that they "act[ed] reasonably to seek the transaction offering the best value reasonably available to the stockholders," which could mean not engaging in any transaction at all.

In *Frank v. Elgamal* (March 10, 2014), the Court of Chancery denied several of the defendants' motions for summary judgment and referred them for further fact finding at trial, because plaintiff adequately alleged that the majority stockholder group (the "group," consisting of four key employees) acted as a control group.

In the event a control group existed, the entire fairness standard of review would apply. Whether a control group existed is fact-specific and can change during the life of a deal. To be considered a control group, the stockholders must be "connected in some legally significant way – e.g., by contract, common ownership, agreement or other arrangement – to work together toward a shared goal" – just having parallel interests is not enough to establish a control group.

In this case, there were two relevant periods during the merger: (a) from the time the board decided to put the company up for sale until it initially accepted the offer and (b) from the time the offer was renegotiated until the final terms were accepted.

Here, the court determined that the group was not a control group during the first period because there was no evidence to suggest that it exerted any control during that period regarding the initial offer (which included a partial equity roll-over by the group). On the other hand, the court determined that during the second period, it could reasonably be inferred that the group "may have been united in interest" in preferring one of the proposals (with less equity rolled over, more cash for the group, but less cash for the minority stockholders) and may have used control over the selection of one of the proposals by the special committee.

The court also indicated that the company entered *Revlon* mode when the board put the company up for sale during the first period; because there was no indication of a control group during that time, the board had to seek the best price reasonably available to all stockholders. During the second period, when the group may have become a control group, the board's Revlon obligation shifted to require that it seek the best price reasonably available to the minority stockholders.

This case highlights the importance of determining if and when a control group might exist. Once a transaction involves a control group, parties should consider implementing procedural protections to safeguard the interests of the minority stockholders, for example by forming an independent, disinterested and fully informed special committee or requiring the approval of the majority-of-the-minority stockholders.

Finally, in *In Re Answers Corporation Shareholders Litigation* (February 3, 2014), the Court of Chancery granted summary judgment to the target board of directors and the private equity buyer of the target, holding that the directors had satisfied their *Revlon* duties and that the buyer did not aid and abet any breach of fiduciary duty (allegedly by pressuring the board to agree to do a limited market check). The court applied the Delaware Supreme Court's 2009 *Lyondell* standard to determine bad faith in the context of this change in control transaction (where four of the seven directors were disinterested), and found that there was no conscious disregard of fiduciary duties. In particular, the court mainly considered:

- the short market check period of two weeks during the holiday season; however, the company rejected the buyer's requests for exclusivity and a limited market check does not by itself establish bad faith,
- the board's decision to pursue only ten strategic buyers, instead of more financial and strategic buyers; however, the company also considered a number of unsolicited offers,
- the board's alleged failure to significantly renegotiate the price or consider strategic alternatives after its strong fourth quarter 2010 earnings; however, it is in the board's discretion to balance the pros and cons of a transaction and the plaintiffs did not explain why disinterested directors would disregard their fiduciary duties and
- the allegations that the disinterested directors were controlled by the CEO and large stockholder directors who pursued the deal, and that they were not as involved in the transaction; however, the plaintiffs did not offer convincing evidence to support the first claim and the board is entitled to have some directors lead the negotiations and keep the rest informed.

Recently, in *Iroquois Master Fund Ltd. v. Answers Corporation* (December 4, 2014), the Delaware Supreme Court upheld the lower court's decision, finding nothing improper in the original decision.

5. Delaware Reaches Out

During 2014, the Delaware courts asserted and confirmed their reach in a number of different ways. The Delaware courts not only (a) affirmed forum selection clauses (as did many courts in other jurisdictions), but they also (b) upheld their jurisdiction over a non-resident manager of a Delaware entity and (c) allowed state courts to limit the use of information gathered from books and records requests to actions brought in Delaware courts. In addition, the Delaware Supreme Court upheld the validity of a fee-shifting bylaw of a non-stock corporation and the application of this decision will be considered by the Delaware legislature in 2015.

First, in *City of Providence v. First Citizens Bancshares Inc. et al.* (September 8, 2014), further discussed **here**, the Court of Chancery upheld a forum selection bylaw that designated North Carolina (where the company is headquartered) as the exclusive forum for certain stockholder litigation and was adopted by the board of directors on the same day the company entered into a merger agreement. Among other things, the court stated that the board's adoption of the forum selection bylaw on "an allegedly cloudy day when it entered into the merger agreement" rather than a "clear" day is immaterial because the bylaw merely regulates where, not whether, a stockholder may file suit. This conclusion is explicitly contrary to an outlier decision by an Oregon court in *Roberts v. TriQuint SemiConductors, Inc.* (August 14, 2014), where that court decided that a forum selection bylaw adopted by the board of directors at the same time as it entered into a merger agreement was unenforceable as against public policy.

The *City of Providence* decision provides additional support for the validity of forum selection bylaws, which have become increasingly popular since the Court of Chancery rendered its 2013 decision in *Boilermakers Local 154*

Delaware courts asserted and confirmed their reach in a number of different ways

Retirement Fund v. Chevron Corporation (June 25, 2013), further discussed **here**, holding that such exclusive bylaw provisions are within the power of the board of directors to unilaterally adopt under Delaware law. Since *Chevron*, several courts in other jurisdictions have honored forum selection bylaws and more and more companies are adopting them, but as shown by the *Roberts* decision in Oregon, the timing of a board's adoption of a forum selection bylaw may be an important factor for some courts when assessing enforceability. In light of the risk of potential litigation, boards of directors should consider adopting these bylaws on a "clear" day prior to any wrongdoing that could be alleged. Boards should also make sure that the board minutes accurately and fully reflect the board's deliberations and the reasons why the board believes the provision is in the best interests of the corporation and its stockholders.

Second, in *2009 Caiola Family Trust v. PWA LLC* (December 18, 2014), the Court of Chancery upheld its jurisdiction over a nonresident who, through a non-Delaware entity, manages a Delaware LLC. The court stated that, because the manager voluntarily agreed to manage a Delaware LLC and received benefits for this role, it is reasonable to hold him accountable for alleged damage to the plaintiffs resulting from his management of the company. So, merely putting a non-resident entity between a person and a Delaware entity does not guarantee protection from Delaware's jurisdiction.

And lastly, in *United Technologies Corp. v. Treppel* (December 23, 2014), the Delaware Supreme Court held that when granting inspection of a company's books and records, Section 220 of the DGCL gives broad discretion to the Court of Chancery to condition such an inspection and usage, and therefore the Court of Chancery may limit the use of those records to litigation filed in Delaware. The court indicated that a stockholder's inspection right is a "qualified" one and that the court may consider factors such as a company's "legitimate interest in having consistent rulings on related issues of Delaware law, and having those rulings made by the courts of this state." In addition, the company also adopted a forum selection bylaw while the Section 220 lawsuit was pending and the Delaware Supreme Court reaffirmed the board's power to adopt such a bylaw and its applicability even to a stockholder who bought his shares before its adoption. This decision is in effect an extension of the forum selection notion and confirms the reach of the Delaware courts where companies and their boards have indicated their desire to have disputes resolved in Delaware.

As a final point, in *ATP Tour, Inc. v. Deutscher Tennis Bund* (May 8, 2014), further discussed **here**, the Delaware Supreme Court addressed the validity of a fee-shifting provision in a non-stock membership corporation's bylaws. ATP's fee-shifting provision provided, in general, that any member asserting a claim against the corporation that did not obtain a judgment that substantially achieved, in substance and amount, the full remedy sought would be obligated to pay the corporation for all legal fees, costs and expenses incurred by the corporation in connection with the claim.

The court found that the bylaw was permissible as a matter of law and facially valid, but also indicated that such a bylaw could be invalid if adopted or used for an improper purpose, importantly noting that “the intent to deter litigation, however, is not invariably an improper purpose.” The court also said that “the fact it was adopted after entities became members will not affect its enforceability.” Although the *ATP* case involved a non-stock corporation, the decision could impact all Delaware corporations.

Since this decision, some Delaware and non-Delaware corporations have adopted fee-shifting bylaws. In the meantime, the Delaware legislature has postponed its consideration of legislation aimed at limiting enforceability of fee-shifting bylaw provisions to non-stock corporations until its 2015 session, so we will have to wait to find out the application of these bylaws and the real impact of the *ATP* decision.

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