Business Law and Policy at UCLA School of Law
Governance Under Delaware Law

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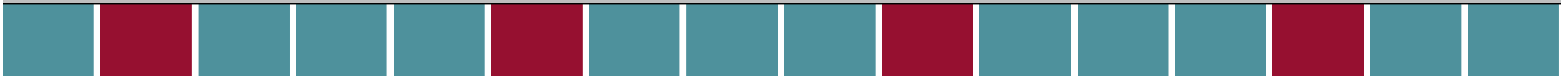

Recent changes in the composition of the Delaware Courts

- Supreme Court (4 of the 5 Justices have joined the Court in the past 3 years)
  - Chief Justice Leo E. Strine, Jr. (February 2014)
  - Justice Randy Holland
  - Justice Karen L. Valihura (July 2014)
  - Justice James T. Vaughn, Jr. (October 2014)
  - Justice Collins J. Seitz, Jr. (April 2015)
- Court of Chancery (3 of the 5 members of the Court joined in the past 3 years)
  - Chancellor Andre Bouchard (May 2014)
  - Vice Chancellor J. Travis Laster
  - Vice Chancellor Sam Glasscock, III (Georgetown)
  - Vice Chancellor Tamika Montgomery-Reeves (November 2015)
  - Vice Chancellor Joseph R. Slights III (Dover) (March 2016)

Changes in the "Disclosure-Only" Settlement Landscape

- Although the Court of Chancery occasionally had denied disclosure-only settlements in the past, and the Court clearly was growing more skeptical of such settlements, the Chancellor's decision in *In re Trulia, Inc. S'holder Litig.,* 129 A.3d 884 (Del. Ch. 2016), made clear to the plaintiffs' bar that disclosure-only settlements (and corresponding easy paydays) would be a rare occurrence going forward.
  – From now on, in order to support a release of disclosure claims (and potentially sales process claims, if the record shows that those claims were investigated sufficiently), the supplemental disclosures must be "plainly" material – *i.e.*, significantly alter the total mix of information made available to stockholders.
- *Trulia* significantly reduced the incentives for plaintiffs' counsel to bring weak disclosure claims in hopes of obtaining attorneys' fees for the corporate benefit allegedly resulting from additional disclosures that, though possibly helpful, are not plainly material.
  – The results were felt almost immediately. According to Cornerstone Research, in the first half of 2016, only 64% of M&A deals valued over $100 million were litigated as compared to 84% in 2015 which itself was the first time since 2009 that the rate dipped below 90%.
  – Mootness fees, whether negotiated or contested, generally are materially less than the fees historically awarded in disclosure-only settlements.
- Other Considerations – Forum Selection Bylaws
  – Reduces likelihood that M&A litigation will be brought outside of Delaware.
  – If litigation were brought in an alternative forum, provides corporate defendants an option to consent to that forum or to move to dismiss on the basis of the exclusive forum bylaw.

Reaffirmation of Shareholder Ratification

- ***Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015)**
  - – Plaintiffs challenged stock-for-stock merger in which KKR & Co. L.P. acquired KKR Financial Holdings LLC at a 35% premium to the unaffected market price.
  - – The Court of Chancery dismissed the complaint, concluding that it was not reasonably conceivable that KKR was a controlling stockholder and that, when a merger transaction is not subject to the entire fairness standard of review, the business judgment rule is invoked for a post-closing damages action if the merger is approved by a fully informed, uncoerced majority of the disinterested stockholders.
  - – On appeal, plaintiffs contended that, even if the trial court were correct in determining that KKR was not a controlling stockholder, it should not have dismissed the complaint because they had adequately pled a claim under *Revlon v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). In response, defendants argued, among other things, that the transaction was subject to the business judgment rule because it had been approved by a fully informed, uncoerced stockholder vote.
  - – The Supreme Court agreed with defendants and affirmed. The Court held that, even if *Revlon* applied pre-closing, an arm's-length transaction with a third party that is approved by an uncoerced, fully informed stockholder vote will invoke the business judgment rule.

Reaffirmation of Shareholder Ratification

- ***Singh v. Attenborough*, 137 A.3d 151 (Del. 2016)**
  - – Post-closing *Revlon* claim seeking damages in connection with Zale Corp.'s acquisition by Signet Jewelers Limited. Plaintiffs alleged that Zale's board breached its fiduciary duties by failing to inquire into its financial advisor's potential conflicts and that the advisor aided and abetted that breach by not timely disclosing the putative conflict.
  - – The Court of Chancery dismissed plaintiffs' claims against the Zale directors based on a § 102(b)(7) charter provision, but initially declined to dismiss the aiding and abetting claim against the financial advisor.
- – On reargument after *Corwin*, the trial court dismissed the aiding and abetting claim.
  - – The Supreme Court affirmed "solely on the basis of [the trial court's] decision on reargument .. . , finding that a fully informed, uncoerced vote of the disinterested stockholders invoked the business judgment rule standard of review." The Court stated that the trial court's consideration "whether the plaintiffs stated a claim for the breach of the duty of care after invoking the business judgment rule was erroneous."
    - "When the business judgment rule standard of review is invoked because of a vote, dismissal is typically the result. That is because the vestigial waste exception has long had little real-world relevance, because it has been understood that stockholders would be unlikely to approve a transaction that is wasteful."
  - – The Supreme Court also distanced itself from the Court of Chancery's earlier ruling on the financial advisor's knowing participation in the alleged fiduciary breach.

Reaffirmation of Shareholder Ratification

- ***In re Volcano Corp. S'holder Litig.*, 143 A.3d 727 (Del. Ch. 2016)**
  - Plaintiffs brought post-closing damages claims arising from a § 251(h) two-step merger in which 89.1% of the target's outstanding shares were tendered.
  - The Court rejected alleged concerns that stockholder acceptance of tender offer and stockholder vote differ such that no cleansing effect should result from tender of a majority of shares:
    - Target board has role in tender offer because § 251(h) requires a merger agreement and board has same fiduciary obligations as it does in single-step merger.
    - § 251(h) merger is not more coercive than single-step merger because the first-step tender offer must be for all of the target's stock, the second-step merger must be effected as soon as possible, the consideration paid in second-step merger must be the same, and appraisal rights are available.
  - The Court also found that the policy reasons underlying *Corwin* did not provide any basis to distinguish between a stockholder vote and a tender offer.
  - Thus, the Court held that a tender of shares by a majority of fully informed, uncoerced, disinterested stockholders has the same cleansing effect as a vote in favor of a merger.
  - As such, the Court found that the business judgment rule irrebuttably applied to the merger and dismissed plaintiffs' claims because nothing in the complaint suggested the merger constituted waste.

Reaffirmation of Shareholder Ratification

- ***City of Miami Gen. Emps. v. Comstock*, 2016 WL 4464156 (Del. Ch. Aug. 24, 2016)**
  - In prior proceedings, the Court of Chancery enjoined C&J Energy Services, Inc.'s merger with a subsidiary of Nabors Industries Ltd. and imposed a post-signing market check. The Supreme Court reversed, and the transaction closed.
  - Plaintiff sought post-closing damages for alleged breaches of fiduciary duties and disclosure violations.
  - The Court of Chancery granted defendants' motion to dismiss the amended complaint:
    - The Court first addressed the plaintiff's disclosure-related allegations, finding that none had merit. As such, the stockholder vote was fully informed.
    - The Court next noted that the plaintiff had failed to allege that the stockholder vote was coerced or that the merger amounted to waste. As such, the business judgment rule applied.
    - The Court then considered whether the plaintiff's allegations rebutted the business judgment rule by alleging a basis for applying the entire fairness standard. However, the Court found that the complaint failed to allege that a majority of the board was interested in the Nabors transaction, explaining that "the enticement of a future seat on the board of the company surviving the merger is not sufficient to disqualify that director" and that there was nothing in the complaint to suggest that the C&J CEO, whose large equity position helped align his interests with C&J stockholders, deceived the board or tainted its process in any way.

Reaffirmation of Shareholder Ratification

- ***Larkin v. Shah*, 2016 WL 4485447 *(*Del. Ch. Aug. 26, 2016)**
  - – Plaintiffs brought a post-closing damages action challenging a § 251(h) merger in which 78% of the target's stockholders tendered.
  - – The Court explained that "when disinterested, fully informed, uncoerced stockholders approve a transaction absent a looming conflicted controller, the irrebuttable business judgment rule applies."
    - According to the Court, "the only transactions that are subject to entire fairness that cannot be cleansed by proper stockholder approval are those involving a controlling stockholder."
    - That is, "proper stockholder approval of the transaction would cleanse any well-pled allegations that the transaction was the product of board-level conflicts that might trigger entire fairness review."
  - – Because of the fully informed, uncoerced tender of a majority of shares by disinterested stockholders, the Court applied the business judgment rule, irrebuttable in this context.
  - – And, because the plaintiffs had not attempted to state a claim for waste, the Court dismissed plaintiffs' complaint.

Reaffirmation of Shareholder Ratification

- ***In re OM Grp., Inc. S'holders Litig.*, 2016 WL 5929951 (Del. Ch. Oct. 12, 2016)**
  - – Plaintiffs alleged "disquieting narrative" that the target's board of directors rushed to sell the company at a low price to avoid a proxy fight, thereby violating its fiduciary duties under *Revlon*.
  - – The Court dismissed the plaintiffs' post-closing claims under *Corwin*.
    - The Court found that the plaintiffs had failed to allege any disclosure violations. As such, the Court concluded that the stockholder vote was fully informed.
    - The Court explained that, because of the uncoerced, fully informed stockholder vote, the standard of review shifted from enhanced scrutiny (*Revlon*) to the irrebuttable business judgment rule.
    - As the plaintiffs had not alleged that the transaction amounted to waste, the Court dismissed the complaint.

Reaffirmation of Shareholder Ratification

- ***In re Solera Holdings, Inc. S'holder Litig.*, 2017 WL 57839 (Del. Ch. Jan. 5, 2017)**
  - – Post-closing challenge to the acquisition of a corporation.
  - – A disinterested majority of stockholders approved the merger.
    - – The plaintiff contended that the Court was required to apply *Revlon* enhanced scrutiny because the stockholder vote was not fully informed. The plaintiff did not allege that the merger amounted to waste.
    - – The Court first analyzed who had the pleading burden with respect to disclosures when the cleansing effect of a stockholder vote is put at issue.
      - The Court explained that, while the burden is on defendants, it would be illogical to require defendants to plead a negative. Thus, the Court held that the plaintiffs are required to first plead alleged disclosure violations, at which point the burden would fall on the defendants to show that the alleged disclosure deficiency fails as a matter of law.
    - – The Court found the plaintiff's disclosure challenges to be without merit. As such, the Court concluded that the defendants had sustained their burden of showing that the stockholder vote was fully informed.
    - – Accordingly, the Court applied the business judgment standard of review, not enhanced scrutiny, and dismissed the case.

Aiding and Abetting Claims Against Advisors

- ***In re Dole Food Co., Inc. S'holder Litig.*, 2015 WL 5052214 (Del. Ch. Aug. 27, 2015)**
  - In this post-trial decision, the Court of Chancery found that David Murdock and C. Michael Carter breached their fiduciary duties and were liable for damages of more than $148 million in connection with Murdock's take-private of Dole.
  - The Court found that Murdock's financial advisor was not liable for aiding and abetting Murdock's breaches of fiduciary duty, holding that the plaintiffs failed to prove that the advisor knowingly participated in the breaches giving rise to liability.
    - The Court determined that the financial advisor's participation in a lender meeting did not constitute knowing participation because the advisor had no reason to think anything was amiss and, even if it did, it was not the advisor's job "to make sure everything was OK."
    - The Court rejected the plaintiffs' argument that the advisor knowingly participated in Murdock's breaches by having knowingly received confidential Dole information that it used to help Murdock plan the freeze-out, reasoning that there is no bright-line rule prohibiting a fiduciary from sharing information with an affiliated stockholder and his advisor.
    - Further, the Court concluded that these preparatory activities in formulating Murdock's proposal did not amount to a breach of fiduciary duty, and that the actions taken by the financial advisor did not result in harm to Dole stockholders.

Aiding and Abetting Claims Against Advisors

- ***In re PLX Tech. Inc. S'holders Litig*. C.A. No. 9880-VCL (Del. Ch. Sept. 3, 2015 (TRANSCRIPT)**
    - – In connection with Avago's acquisition of PLX, Plaintiffs contended that the financial advisor for PLX's board aided and abetted the board's breaches of fiduciary duties by among other things, not making any meaningful effort to explore higher offers before agreeing to exclusivity, and that PLX management and the financial advisor took steps to make the Avago offer look more attractive. Additionally, the financial advisor allegedly did not disclose its relationship with Avago to the PLX board until one day before the board was scheduled to meet.
  - – The Court concluded that Plaintiffs had stated a claim for aiding and abetting:
        - "By withholding material information from the directors about its conflicts and disclosing at the last minute, Deutsche Bank, at least at the pleading stage, inferably induced the breaches which, for reasons I have already explained, flow from actions that arguably fell outside or inferably fell outside the range of reasonableness. So Deutsche by withholding that information had reason to know that by allowing the directors to proceed in an unknowing fashion, that they were breaching their duties, and by withholding the information, they didn't give substantial assistance or encouragement; they created the situation."

Aiding and Abetting Claims Against Advisors

- ***In re TIBCO Software Inc. S'holders Litig.*, 2015 WL 6155894 (Del. Ch. Oct. 20, 2015)**
  - A TIBCO stockholder brought suit to enjoin the closing of TIBCO's acquisition by Vista until the merger agreement was reformed to reflect an additional $100 million in consideration—the result of a share count error in TIBCO's capitalization table.
  - Among other causes of action, Plaintiff asserted a claim for aiding and abetting against TIBCO's financial advisor, alleging that the advisor knew the TIBCO board had failed to inform itself about the share count error and that the advisor knew that Vista had relied on the erroneous share count in making its final bid, but never informed the board about it.
  - The Court of Chancery found that the plaintiff stated a claim for aiding and abetting:
    - According to the Court, because the advisor allegedly knew the board did not ask it basic questions about the circumstances of the share count error, it was reasonably inferable that the advisor knew the board was not fulfilling its duty of care to gather all material information reasonably available about the error.
    - The Court also observed that it was reasonably conceivable that the advisor's alleged failure to disclose to the board that Vista had relied on the error to make its final bid "created an informational vacuum at a critical juncture when the Board was still assessing its options."

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Aiding and Abetting Claims Against Advisors

- ***RBC Capital Markets, LLC v. Jervis*** **129 A.3d 819 (Del. 2015)**

  – In this *en banc* decision, the Delaware Supreme Court affirmed the principal legal holdings and final judgment of the Court of Chancery finding, among other things, that RBC aided and abetted breaches of fiduciary duty by former directors of Rural/Metro in connection with the sale of the company to an affiliate of Warburg Pincus.

  – Following trial, the Court of Chancery held that RBC was liable for aiding and abetting the Rural board's breaches of fiduciary duty by, among other things, putting the company in play without board authorization, providing false and materially misleading information to the board, and having an undisclosed conflict of interest in the transaction.

  – The Supreme Court affirmed, agreeing with the trial court's "narrow holding" that "[i]f [a] third party knows that the board is breaching its duty of care and participates in the breach by misleading the board or creating [an] informational vacuum, then the third party can be liable for aiding and abetting."

  - The Court explained: "[i]t is the aider and abettor that must act with the *scienter*," and, "[t]o establish *scienter*, the plaintiff must demonstrate that the aider and abettor had 'actual or constructive knowledge that their conduct was legally improper.'"
  - The Court held that the record supported the trial court's finding that "RBC acted with the necessary degree of *scienter* and can be held liable for aiding and abetting," stating: "[t]he manifest intentionality of RBC's conduct – as evidenced by the bankers' own internal communications—is demonstrative of the advisor's knowledge of the reality that the Board was proceeding on the basis of fragmentary and misleading information."

Aiding and Abetting Claims Against Advisors

- ***Singh v. Attenborough*, 137 A.3d 151 (Del. 2016)** (Continued from Slide 5)
  - On the issue of aiding and abetting, the Supreme Court distanced itself from the Court of Chancery's earlier ruling on the financial advisor's knowing participation in the alleged fiduciary breach.
    - The Supreme Court noted that it was "skeptical" that "the late disclosure of a business pitch that was then considered by the board, determined to be immaterial, and fully disclosed in the proxy" was sufficient for a court to infer knowing wrongdoing on the part of the financial advisor.
    - The Court stated that aiding and abetting requires "the second highest state of scienter—knowledge—in the model penal code," and that "[n]othing in this record comes close to approaching the sort of behavior" in *Rural Metro* where aiding and abetting liability was imposed due to a financial advisor's "fraud on the board."

“Fair Value” in Appraisal: Deal Price or DCF?

- **Determination of “Fair Value”**

    – Under Section 262 of the DGCL, stockholders who dissent from a merger (and meet certain other statutory requirements) are entitled to an appraisal by the Court of Chancery of the “fair value” of their stock in the acquired company.

    – “Fair value” is the “value to a stockholder of the firm as a going concern, as opposed to the firm’s value in the context of an acquisition or other transaction,” and is “based upon the operative reality of the company as of the time of the merger, taking into account its particular market position in light of future prospects.”

  – “In determining. . . fair value, the Court shall take into account all relevant factors.”

    – Speculative elements of value arising from the accomplishment or expectation of the merger, such as synergies to be realized by the combined company, are excluded by the Court in determining the fair value of the acquired company.

“Fair Value” in Appraisal: Deal Price or DCF?

- **Determination of “Fair Value” – Deference to the Merger Price**

  – While the Court of Chancery has wide latitude to consider all relevant factors in determining the fair value of appraised stock, historically the Court has tended to favor the discounted cash flow (“DCF”) method.

  – In recent years, though, the Court has been more willing to rely on the merger price as the best evidence of fair value of appraised stock, minus any merger-related synergies.
  See, e.g., *Merion Capital LP v. BMC Software, Inc.*, 2015 WL 6164771 (Del. Ch. Oct. 21, 2015); *LongPath Capital, LLC v. Ramtron Int’l Corp.*, 2015 WL 4540443 (Del. Ch. June 30, 2015); *Merlin Partners LP v. AutoInfo, Inc.*, 2015 WL 2069417 (Del. Ch. Apr. 30, 2015); *In re Appraisal of Ancestry.com, Inc.*, 2015 WL 399726 (Del. Ch. Jan. 30, 2015); *Huff Fund Inv. P’ship v. CKx, Inc.*, 2013 WL 5878807 (Del. Ch. Nov. 1, 2013).

  – The Court relied on other analyses, usually the DCF method, to determine fair value when the respondent did not argue that the merger price was the best evidence of fair value or where the Court found that the merger price was not a reliable indicator of fair value.

“Fair Value” in Appraisal: Deal Price or DCF?

- ***In re Appraisal of Dell Inc.*, 2016 WL 3186538 (Del. Ch. May 31, 2016)** – Company founder partnered with private equity firm to take company private.
  - – After a thorough sales process that “easily would sail through if reviewed under enhanced scrutiny,” founder and PE firm acquired the company’s public stock at a price of $13.75 per share.
  - – The Court found that the original price generated by the sales process, prior to the go-shop and competing bids, was not indicative of fair value because of the LBO pricing model used, a “valuation gap driven by the market’s short-term focus,” and the limited pre-signing competition.
  - – The Court also found that the final, increased price (following the competing bids) was not indicative of fair value because it still was based on a bidder whose highest price was derived from an LBO pricing model, a successful topping bid would have been unlikely given the size and complexity of the company and potential bidders’ perception that incumbent management has an informational advantage, and the founder was an asset to the company.
  - – Using a discounted cash flow analysis, the Court concluded that the fair value of the company was $17.62 per share, approximately 28% higher than the deal price.

“Fair Value” in Appraisal: Deal Price or DCF?

- ***In re Appraisal of DFC Global Corp.*, 2016 WL 3753123 (Del. Ch. July 8, 2016), *modified on rearg.*, (Del. Ch. Sept. 14, 2016) (ORDER)**
  - – The company was sold to a private equity buyer for $9.50 per share.
  - – The petitioners’ expert calculated a fair value of $17.90 per share, while the respondent’s expert valued the company at $7.94 per share. The respondent also urged the Court to defer to the merger price as the most reliable evidence of fair value.
  - – Because the transaction “was negotiated and consummated during a period of significant company turmoil and regulatory uncertainty,” the Court concluded that neither the deal price nor management’s financial projections were particularly reliable.
    - – As a result, the Court concluded that the most reliable way to determine the fair value of the company’s shares was giving equal weight to “three imperfect techniques”—a DCF model incorporating certain methodologies and assumptions each expert made (as well as some made by the Court), the comparable company analysis the company’s expert performed, and the deal price.
    - – The Court found that the fair value of the company’s stock at the time the transaction closed was $10.30 per share, approximately 8.5% higher than the deal price.

“Fair Value” in Appraisal: Deal Price or DCF?

- ***In re ISN Software Corp. Appraisal Litig.*, 2016 WL 4275388 (Del. Ch. Aug. 11, 2016)**
  - – The controlling stockholder of a closely held corporation cashed out some, but not all, stock held by minority stockholders at $38,317 per share.
  - – Two stockholders sought appraisal. Each stockholder and the company put forth an expert witness. Their valuations ranged from $106 million to $820 million.
  - – The Court relied exclusively on a DCF valuation because the other methodologies employed by the parties’ experts were not reliable or appropriate.
  - – The Court reviewed each expert’s DCF analysis and adjusted the one it found most appropriate.
  - – The Court concluded that the value of the company was $98,783 per share, more than 2.5 times the deal price.

“Fair Value” in Appraisal: Deal Price or DCF?

- ***Dunmire v. Farmers & Merchants Bancorp of W. Pa., Inc.*, 2016 WL 6651411 (Del. Ch. Nov. 10, 2016)**
  - – Community bank (F&M) merged into another community bank (NexTier) in stock-for-stock transaction.
  - – Both banks were controlled by same family. The merger was not the product of an auction and no third parties were solicited. The exchange ratio impliedly valued F&M at $83 per share.
- – Stockholders of F&M sought statutory appraisal of their shares.
  - – Petitioners’ expert valued F&M at $137.97 per share; respondent’s expert valued F&M at $76.45 per share.
- – Although special committee negotiated the transaction for F&M, the Court found that the record did “not inspire confidence that the negotiations were truly arms-length.”
- – Transaction not conditioned on majority-of-the-minority vote.
  - – Court declined to defer to deal price (as respondent had urged) and instead exclusively relied on discounted net income model utilized by both experts, concluding that the fair value of F&M stock was $91.90 per share, approximately 11% higher than the deal price.

“Fair Value” in Appraisal: Deal Price or DCF?

- ***Merion Capital L.P. v. Lender Processing Servs., Inc.*, 2016 WL 7324170 (Del. Ch. Dec. 16, 2016)**
  - The company was sold for $33.25 per share, split between cash and stock of the buyer. The buyer’s stock price increased between the signing of the merger agreement and the closing of the transaction, resulting in a final aggregate consideration of $37.14 per share.
  - The Court determined that the fair value of the company’s stock was the final merger consideration.
  - The consideration at signing provided reliable indicator of value at that time because there was meaningful competition among a mix of potential strategic and financial buyers, all of whom had adequate and reliable information, and a lack of collusion or favoritism towards any particular bidder.
  - The consideration at closing likewise provided a reliable indicator of value at that time since there was no topping bid, even with a go-shop, the buyer’s stock rose after the announcement of the merger, which increased the value of the merger consideration, and the company’s performance declined.
  - After reconciling differences between the DCF analyses performed by the parties’ experts, the Court’s DCF analysis produced a fair value figure of $38.67 per share.
  - The Court gave 100% weight to the deal price, choosing not to rely on its DCF analysis even though it found the company’s management projections reliable and its own DCF analysis “meaningful.”

Determining Independence in Derivative Suits

- ***In re Ezcorp Inc. Consulting Agreement Deriv. Litig.*, 130 A.3d 934 (Del. Ch. 2016)**
  - – Plaintiffs challenged the fairness of three agreements between EZCORP, Inc. and an affiliate of its controlling stockholder.
  - – Invoking *Aronson* and noting that agreements had been approved by an audit committee, defendants argued that the business judgment rule applied.
  - – In denying the motion to dismiss, the Court (i) clarified that contracts between a company and it's controlling stockholder are subject to entire fairness and (ii) limited *Aronson's* scope to the demand futility context. The Court also noted that a controller could adopt procedural mechanisms to shift the burden of proof or avoid entire fairness review altogether.

- ***Sandys v. Pincus*, 2016 WL 7094027 (Del. Dec. 5, 2016)**
  - – Underlying breach of fiduciary duty claims involved allegations that certain managers and directors of Zynga, including its controlling stockholder, breached their fiduciary duties in connection with a sale of stock in a secondary offering before an earnings announcement.
  - – Applying the standard articulated in *Rales v. Blasband*, the Court of Chancery found that demand was not excused because five of Zynga's nine directors were independent, and granted defendants' motion to dismiss.
  - – The Delaware Supreme Court reversed and determined that a majority of the Zynga board could not impartially consider the stockholder demand. A majority of the Court disagreed with the Court of Chancery's findings of independence with respect to three of the directors.
    - One director, along with her husband, co-owned a private plane with the company's controlling stockholder.
    - The other two directors were deemed not independent for pleading stage purposes. Both are partners at a firm that controls 9% of the company's equity and holds investments in a company co-founded by the controlling stockholder's wife.

Alternative Entity Issues

- ***The Haynes Family Trust v. Kinder Morgan G.P., Inc.*, 2016 WL 912184, 135 A.3d 76 (Del. 2016)**
  – Former unitholders of a master limited partnership brought a class action challenging a going-private transaction whereby the partnership was merged with a wholly owned subsidiary of its general partner.
  – The general partner formed a conflicts committee and obtained “Special Approval” for the transaction under the conflict resolution provisions of the limited partnership agreement.
  – The Court of Chancery dismissed the plaintiffs’ complaint for failure to state a claim. The Court interpreted the “Special Approval” provision in the partnership agreement as providing a “permissive contractual safe harbor” for the merger if the conflicts committee satisfied the terms of the conflicts resolution provision.
  – On appeal, the Supreme Court, sitting *en banc*, affirmed the Court of Chancery’s dismissal of the case, stating that “there was no room for a substantive judicial review of the fairness of the transaction, because the general partner had complied with its contractual duties in the approval process of the merger and that compliance conclusively established the fairness of the transaction.”

Alternative Entity Issues

- ***Employees Retirement System of the City of St. Louis v. TC Pipelines GP, Inc.*, 2016 WL 7338592 (Del. Dec. 19, 2016)**
  - – Unitholders in master limited partnership brought suit challenging dropdown approved by conflicts committee. The plaintiffs asserted claims for, *inter alia*, breach of the limited partnership agreement and breach of the implied covenant of good faith and fair dealing, contending that the conflicts committee did not act in good faith and that the dropdown was not fair and reasonable.
  - – The Court of Chancery dismissed the action, holding that the transaction was conclusively deemed fair and reasonable because it was approved pursuant to a "safe harbor" in which the conflicts committee provided "Special Approval." The Court also dismissed the claims for breach of the implied covenant of good faith and fair dealing.
  - – On appeal, the Supreme Court, sitting *en banc*, affirmed. The Court stated, in pertinent part:
    - "[T]he appellant cannot escape the conclusive effect given to Conflicts Committee approval solely by attacking the fairness of the underlying transaction. If that was the case, the safe harbor would be virtually no safe harbor at all as every case would proceed to discovery so long as a plaintiff could plead facts suggesting a rational person could deem the transaction unfair."
  - – The Court also observed that, for a plaintiff to invoke the implied covenant of good faith and fair dealing in the MLP special approval context, she "must plead some specific facts suggesting that the Conflicts Committee process was tainted in some specific way by unanticipated behavior, such as the example of bribery.. . , or other factors bearing on whether the Conflicts Committee process fulfilled its evident contractual purpose."

Alternative Entity Issues

- ***Dieckman v. Regency GP LP,* 2017 WL 243361 (Del. Jan. 20, 2017)**
  - – A former unitholder of a master limited partnership brought a class action challenging the fairness of an acquisition of the MLP by an entity affiliated with its general partner.
  - – After plaintiff filed his complaint challenging the fairness of the merger, the defendants moved to dismiss, invoking the permissive contractual safe harbors of "Special Approval" and "Unaffiliated Unitholder Approval."
  - – In granting the defense motion, the Court of Chancery reached only the Unaffiliated Unitholder Approval safe harbor, finding that it had been satisfied. The Court explained that all fiduciary duties had been displaced by the partnership agreement, which contained "just a single disclosure requirement"—providing a copy or summary of the merger agreement to unitholders before they voted on a transaction—that had been fulfilled.
  - – On appeal, the Supreme Court, sitting *en banc*, reversed, concluding that the plaintiff had adequately pled claims for breaches of the partnership agreement and the implied covenant.
  - – According to the Court, there were sufficient facts in the complaint suggesting that the general partner allegedly made false and misleading statements in the proxy statement to obtain Unaffiliated Unitholder Approval and purportedly used a conflicted conflicts committee to obtain Special Approval; therefore, it was reasonably conceivable that those safe harbors were not available to the general partner and did not shield the merger from judicial review. The Court held that implicit in the limited partnership agreement's conflict resolution provision is a requirement that the general partner "not act to undermine the protections afforded unitholders in the safe harbor process."

Controlling Stockholder Transactions

- ***Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014)**
  - – Held that going-private merger between a controlling stockholder and its subsidiary will be subject to the business judgment standard of review if:
    - The controller *ab initio* conditions the procession of the transaction on the approval of both a special committee and a majority of the minority stockholders
    - The special committee is independent
    - The special committee is empowered to freely select its own advisors and to say no definitively
    - The special committee meets its duty of care in negotiating a fair price
    - The vote of the minority is fully informed
    - There is no coercion of the minority stockholders
- **Open issues after *MFW*:**
  - – Continuing vitality of footnote 14 ("These allegations about the sufficiency of the price call into question the adequacy of the Special Committee's negotiations, thereby necessitating discovery on all of the new prerequisites to the application of the business judgment rule."). *See Swomley v. Schlecht*, 128 A.3d 992, 2015 WL 7302260 (Del. Nov. 19, 2015) (TABLE) (affirming trial court's dismissal of complaint at pleading stage because transaction complied with *MFW*'s procedural requirements).
  - – Whether *MFW* will be extended to controller tender offers in two-step transactions.

Controlling Stockholder Transactions

- ***In re Books-A-Million, Inc. S'holders Litig.*, 2016 WL 5874974 (Del. Ch. Oct. 10, 2016)**
  - Controlling stockholders took company private through squeeze-out merger following *MFW* framework.
  - The Court concluded that there were no well-pled allegations suggesting that the *MFW* elements had not been satisfied. Therefore, the business judgment rule applied and the complaint was dismissed.
  - In so concluding, the Court found, among other things, that:
    - Non-independent director sitting in on fairness presentation did not taint process.
    - Acceptance of controller proposal in face of higher offer from third party was not bad faith.
    - While pleading subjective bad faith is a theoretically viable means of attacking *MFW* framework, the committee would not have acted loyally if it used corporate power against the controller to facilitate a third-party deal. However, if the committee had "facilitated a grossly inadequate offer" with an "extreme" minority discount, then it potentially could be inferred that the committee acted in bad faith, "sought to serve the interests of the controller, confident that [minority] stockholders focused on short-term gains would approve any transaction at a premium to market."
    - Requirement that controller *ab initio* conditions its proposal on special committee approval and majority-of-minority vote not violated by prior merger proposal in 2012 that did not satisfy *MFW*.

Controlling Stockholder Transactions

- ***In re Dole Food Co., Inc. S'holder Litig.* 2015 WL 5052214 (Del. Ch. Aug. 27, 2015)**

  – Dole's CEO (controlling stockholder) and its President/GC found liable to stockholders for $148M for breaches of fiduciary duties in connection with going-private transaction.

  – Entire fairness standard of review applied. While the board's process technically complied with procedure established in *MFW* – the deal was approved by special committee of independent directors and by a fully-informed "majority of the minority" stockholder vote – the officer defendants' actions undermined the fairness of the process.

  – The Court found that the President/GC, in his capacity as an officer, took action leading up to the merger to intentionally depress Dole's stock price, including issuing press releases understating projected cost-savings arising from certain divestitures and improperly suspending a share repurchase program for pretextual reasons.

  – The Court further found that the President/GC, in his capacity as an officer, intentionally undermined and obstructed the special committee's process:

    − He provided "lowball" projections to the committee and withheld from the committee financial information and business plans shared with the controlling stockholder's advisors.

    − He (i) initially sought to restrict the committee's mandate, (ii) attempted to influence the selection of the committee's financial advisors, (iii) insisted that he, not the committee, control confidentiality agreements with bidders, and (iv) improperly provided the CEO's advisors with access to the data room.

  – Even assuming the $13.50 merger consideration fell within a range of reasonableness, the Court held that Dole stockholders were entitled to a "fairer" price to "eliminate the ability of [the officer defendants] to profit from their breaches of the duty of loyalty."

Other Conflicts of Interest

- ***El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff,* 2016 WL 7380418 (Del. Supr. 2016)**
  - Shortly after a trial in which El Paso Pipeline Partners, L.P. ("El Paso MLP")'s general partner ("El Paso GP") was found liable for breaching El Paso MLP's partnership agreement, El Paso GP and El Paso MLP were parties to a related-party merger that brought an end to El Paso MLP's separate existence as a publicly traded entity.
  - El Paso GP moved to dismiss the litigation, contending that because plaintiff styled his claim as derivative, the closing of the merger required that the case be dismissed.
  - The Court of Chancery held that plaintiff's breach of contract claim was direct, and that the more appropriate way to view the cause of action was as a dual-natured claim that was both derivative and direct – derivative for the purposes the doctrine of demand, and direct for determining whether sell-side investors can continue to pursue the claim after a merger, and that the limited partners who were not affiliated with the general partner were entitled to a pro rata recovery.
  - The Court of Chancery noted that dismissing would leave the unaffiliated limited partners without compensation for the general partner's prior unfair dealing and denied the general partner's motion to dismiss.

Other Conflicts of Interest

- ***El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff,* 2016 WL 7380418 (Del. Supr. 2016) (con't)**
  - – The Delaware Supreme Court reversed the Court of Chancery's holding and found that plaintiff's claims were derivative. The Supreme Court stated that while prior holdings of the Supreme Court held that suits by a party to a commercial contract to enforce its own contractual rights were not derivative under Delaware law, partnership agreements were not merely traditional commercial contracts but instead were the constitutive contracts of the partnerships themselves.
  - – Applying the *Tooley* direct/derivative test, the Supreme Court found that the harm alleged solely affected the partnership, rather than the suing partners individually, and that the benefit of any recovery must flow directly to the partnership. The Supreme Court found that the precedent on which the Court of Chancery relied involved cases regarding insider transfers of stock and stock dilution and were inapposite.
  - – The Supreme Court noted that its opinion in *Gentile v. Rossette* allowed for a dual-natured claim, but found plaintiff's claims failed to satisfy the unique circumstances presented by *Gentile*. The Supreme Court declined to extend *Gentile*.
  - – The Supreme Court also noted that plaintiff never presented evidence at trial of a specific harm suffered by the limited partners and that the general partner should not be penalized for failing to defend at trial an element that the plaintiff never attempted to prove. The Supreme Court therefore dismissed plaintiff's claim.

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