Morris James DELAWARE

TRANSACTION ADVISORS

San Francisco M&A Conference

May 12, 2016

M&A Litigation and Governance

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PROBLEM OF DISCLOSURE SETTLEMENT

- Public company mergers or acquisitions spawn flurry of lawsuits, challenging the deal - often in multiple jurisdictions

- To avoid cost and disruption of the deal, defendants are incentivized to settle quickly for minor additional disclosures in return for broad releases of class claims, and six-figure plaintiff attorney's fee awards

- Court of Chancery approval of these settlements resulted in explosion of so-called deal-tax litigation

FORUM SELECTION BYLAWS

To channel deal litigation in multiple jurisdictions, provide for Delaware as exclusive forum for internal corporate claims in charter or bylaws under DGCL

- *8 Del. C.* § 115 codifying *Biolermakers Local 154 Retirement Fund v. Chevron Corp*., 73 A.2d 934 (Del. Ch. 2013) (enforced bylaw amendment adopted by board that selected Delaware as exclusive forum for stockholder fiduciary duty claims)

FEE-SHIFTING

To preserve Delaware's role as neutral adjudicator for internal corporate claims that properly balance stockholder right to remedy abuse against director protection for business judgments, fee-shifting provisions are not permitted in charter or bylaws of stock corporations

- *8 Del. C.* § § 102(f), 109(b); *but see ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014) (enforced fee-shifting bylaw for internal corporate claims in non-stock member corporation)

DEMISE OF DISCLOSURE-ONLY SETTLEMENTS IN DELAWARE

Court of Chancery signals continued disfavor and rigorous scrutiny of disclosure-only settlements

- *In re Trulia, Inc. Stockholder Litig*., 2016 WL 270821 (Del. Ch. Jan. 22, 2016)

  - Preferred options to adjudicate disclosure claims in adversarial process: preliminary injunction or mootness fee application
  - Plainly material disclosures (get) vs. breath of release (give)
  - Impact: decline in deal-litigation, higher quality suits, loss of cheap deal insurance, and potential increase in deal litigation outside of Delaware (in absence of forum selection bylaw)

PROTECTING CONTROLLING STOCKHOLDER BUYOUTS

To protect self-interested transactions between a company and its controlling stockholder, business judgment review is applicable standard if the merger is preconditioned on approval of both a (1) special committee and (2) vote of the majority of the minority stockholders

- *Kahn v. M&F Worldwide, 88 A.3d 635 (*Del. 2014)
- *In re Dole Food Stockholder Litig.,* 2015 WL 5052214 *(*Del. Ch. Aug. 27, 2015) (fraud on the special committee and stockholders vitiates business judgment protection)

DISMISSING DIRECTORS PROTECTED BY EXCULPATORY CHARTER PROVISIONS

To save independent directors exculpated from duty of care claims from the burden of litigation, such claims can now be dismissed pre-trial even in self-interested transactions subject to the most rigorous entire fairness standard of review

- *In re Cornerstone Therapeutics Inc. Stockholder* Litig., 115 A.3d 1173 *(*Del. 2015)
- Ensure corporate charter contains a provision exculpating directors from monetary liability for duty of care claims under *8 Del. C.* § 102(b)(7).

PROTECTING AGAINST FRAUD CLAIMS IN THE MERGER

To prevent fraudulent inducement claims based on extra contractual statements in the merger, standard integration clauses should also include an explicit anti-reliance representation disclaimer

- *Prairie Capital III LP v. Double E Holding Corp.,* 2015 WL 7461807 *(*Del. Ch. Nov. 24, 2015) (negative disclaimer clause that buyer is not relying on statements outside the agreement is typical, but positive disclaimer that buyer is only relying on representations in the agreement will suffice to bar extra contractual fraud claims provided universe of info relied upon is defined)

LIABILITY OF FINANCIAL ADVISORS PLAYING BOTH SIDES OF THE DEAL

To avoid financial advisor liability, bankers should not serve as both adviser to the seller's board and financier to the buyer, and must make complete and ongoing disclosures of actual or potential conflicts of interest in the sale process to the seller's board

- *In re Rural Metro Corp. Stockholder Litig.,* 2015 WL 7721882 *(*Del. Nov. 30, 2015) (banker liable for aiding and abetting board's breach of fiduciary duties to private equity buyer)

PROTECTING CONFLICT TRANSACTIONS IN LIMITED PARTNERSHIP AGREEMENTS

To protect conflict transactions between a controller and a limited partnership, eliminate all fiduciary duties and replace them with a conclusive presumption of good faith for transactions approved by conflicts committee

- *In re Brinckerhoff v. Enbridge Energy Company, Inc.*, 2016 WL 1757283 *(*Del. Ch. April 29, 2016) (continuing trend to find no breach of the contractual standard of good faith and refusing to use implied covenant of good faith and fair dealing to sustain claims eliminated by the LP agreement even though such claims would have been viable under default fiduciary duties)

PROBLEM OF APPRAISAL ARBITRAGE

- Appraisal arbitrageurs, often hedge funds, buy stock after a merger is announced, dissent from the merger, forego the merger consideration, and seek a higher value than the deal price in an appraisal action

- The increase in appraisal actions in Delaware may be attributable to rulings, *e.g., In re Appraisal of Ancestry.com, Inc.*, 2015 WL 66825 (Del. Ch. Jan. 5, 2015) that allow appraisal rights for shares bought after the record date for the merger without a showing that prior share owners did not vote in favor of the merger (provided the appraisal-demand shares do not exceed the total shares that voted against the merger)

ROBUST AND FAIR SALE PROCESS MILITATES AGAINST APPRAISALS

To prevent or minimize appraisal claims, implementation of a thorough, informed, fair sales process, free from self-interest will allow boards to successfully defend appraisal actions on the grounds that the merger price was the most reliable indicator of "fair value"

- *Merion Capital LP v. BMC Software, Inc.*, 2015 WL 6164771 (Del. Ch. Oct. 21, 2015) (latest in trend of appraisal arbitrage cases with robust and fair sale process to adopt merger price as "fair value")

PROPOSED AMENDMENTS TO DELAWARE'S APPRAISAL STATUTE

De Minimis Exception - To reduce nuisance appraisal actions after public company mergers, the appraisal is dismissed unless (i) the total number of shares entitled to appraisal exceeds 1% of the outstanding number of shares that could have sought appraisal; or (2) the value of the merger consideration for the total number of shares entitled to appraisal exceeds $1 million

PROPOSED AMENDMENTS TO DELAWARE'S APPRAISAL STATUTE

Prepayment Option - To reduce incentive for interest rate arbitrage, surviving corporations may limit the accrual of statutory interest on appraisal awards by making a cash payment to appraisal claimants, with interest then accruing only on the difference between the amount paid and the fair value of the shares

- Query whether prepayment encourages redeployment of funds to pursue other appraisals, increasing the number of appraisal actions?

OTHER M&A ISSUES AFFECTING DEALS

- Defective corporate act due to a failure of authorization is now subject to validation by Court of Chancery under *8 Del. C.* § 205
- To ensure post-closing earn-out obligations are met, sellers must contractually address the scope of the buyer's obligation to operate the seller's business post-closing with respect to the earn-out – *Lazard Technology Partners v. Qinetiq North American Operations LLC,* 114 A.3d 193 (Del. 2015)
- Activist stockholders constitute a take over threat justifying a poison pill with a lower trigger (10%) than the (20%) trigger for passive investors – *Third Point LLC v. Ruprecht*, 2014 WL 1922029 (Del. Ch. May 2, 2014)

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Albert H. Manwaring, IV is a partner of Morris James LLP and a member of the Firm's Corporate and Fiduciary Litigation Group. Mr. Manwaring concentrates his practice in corporate governance, fiduciary, and business litigation. His experience includes appellate arguments before the Supreme Court of Delaware and federal courts of appeal, trials in complex corporate litigation, preliminary injunction actions, AAA arbitrations, class actions, and military court martials. A former partner of Pepper Hamilton LLP, Mr. Manwaring managed Pepper's Delaware litigation practice in its Wilmington office.

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CORPORATE AND FIDUCIARY LITIGATION

Morris James regularly tries cases in the Delaware Court of Chancery, the premier court in the United States for corporate law and fiduciary litigation. We also try corporate disputes in the Delaware Superior Court and the United States District Court for the District of Delaware. Our lawyers are listed in *Chambers USA*, *Benchmark: Litigation*, *The Best Lawyers in America*® and *Delaware Super Lawyers*® for their litigation skills, particularly in the Court of Chancery. When the DuPont Company considered Delaware's law firms to select who it wanted to represent it in Delaware, it chose Morris James. So too did ALFA International, a select group of litigation law firms around the world when it chose Morris James as its sole Delaware member. Morris James maintains ***Delaware Courts Online***, a website that serves as a guide to litigation in Delaware's business courts, and the ***Delaware Business Litigation Report***, a blog featuring summaries and analysis of Delaware business litigation.

We are proud of our experience in litigating significant decisions in corporate litigation in the Delaware Supreme Court and Court of Chancery. This includes upholding the dismissal of a director's attempt to sue derivatively as a director, upholding the Court of Chancery's judgment after trial in favor of a board of directors alleged to have violated fiduciary duties in a transaction with a majority stockholder, proving that the fair value of a company on the date of a merger was less than the merger consideration, defending a company in a tender offer/cash out merger transaction against claims that its transaction with a majority stockholder was required to meet the test of entire fairness, upholding a director defendant's right to advancement of his expenses for the assertion of a counterclaim in litigation initiated against him by the company alleging breach of duty as a director, upholding the Court of Chancery's decision approving a class action settlement which included a release of federal claims and preventing a board from postponing an annual meeting because it believed it was going to lose a proxy contest.

Corporate Counseling

We assist clients who seek advice regarding how to structure transactions to comply with the Delaware laws governing business organizations. This ranges from advising on the board's fiduciary duties in a sale of the company to counseling special committees established to evaluate transactions with interested directors or with a majority stockholder to advising owners and managers of unincorporated entities such as limited liability companies. Two of our partners serve as members of the Delaware Corporate Law Council which monitors and recommends changes to the statutes governing Delaware business organizations. Knowledge from this work and our litigation experience informs our judgment.

Alternative Entities

As more individuals and businesses choose to organize as unincorporated entities such as limited liability companies, limited partnerships or statutory trusts, we have seen a greater increase in disputes involving these entities. These cases are often litigated in the Delaware Court of Chancery. Our attorneys are experienced representing the entities and their owners and managers in disputes ranging from the propriety under a limited partnership agreement of self-dealing transactions to the duties of member- managers of limited liability companies to the rights of unit holders of a statutory trust. One of our partners serves on the drafting committee of the Delaware State Bar Association responsible for recommending legislation to the Delaware General Assembly concerning alternative business entities, thus enabling our attorneys to remain cutting edge.