

Spring 2014



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Delaware Supreme Court Affirms Roadmap to Avoid Entire Fairness in a Going-Private Transaction

In *Kahn v. M&F Worldwide Corp.*,¹ the Delaware Supreme Court provided a clear path for controlling stockholders of Delaware corporations to structure going-private transactions to avoid the entire fairness standard of review. The requirements to avoid entire fairness, and revert to the business judgment standard of review, are as follows: (i) the controller must condition the transaction from the outset on the approval of both a special committee and a majority of the minority stockholders, (ii) the special committee must be independent, empowered to freely select its own advisors and to say no definitively, and meet its duty of care in negotiating a fair price and (iii) the vote of the minority must be informed and uncoerced. It is critical that the conditions related to approval by the special committee and a majority of the minority stockholders be established by the controlling stockholder at the outset of its efforts to take the corporation private. The decision provides controlling stockholders who engage in a fair process a more predictable path to take controlled companies private. While the going-private process must still be carefully managed and the decision will not prevent lawsuits challenging such transactions, it now may be possible to end the litigations at an earlier stage. For more detail, click [here](#).

Delaware Court of Chancery Holds Financial Advisor Liable for Aiding and Abetting Breaches of Fiduciary Duties.

In *In re Rural Metro Corp. S'holder Litig.*,² the Court of Chancery found a financial advisor liable for aiding and abetting breaches of fiduciary duties of the board of Rural/Metro Corporation in connection with a 2011 sale of the Company. In a post-trial opinion, the court found that the financial advisor (i) allowed its interest in pursuing buy-side financing to affect Rural/Metro's sale process, (ii) failed to adequately inform the board of its conflicts of interest and (iii) provided a flawed valuation analysis at too late a stage in the sale process. The opinion serves as a reminder of the need for financial advisors to fully and timely disclose conflicts of interest. It also highlights that financial

advisors could face potentially significant liabilities in their role as board advisors. For the full opinion, click [here](#).

Delaware Court of Chancery Dismisses Buyer Aiding and Abetting and Other Fiduciary Breach Claims

In *In re Answers Corp. S'holders Litig.*, the Delaware Court of Chancery granted summary judgment in favor of a target's board of directors and the private equity buyer of the target, holding that the directors did not act in bad faith by conducting a limited market check and continuing the sale process in the face of improved financials, and the private equity buyer did not aid and abet a breach of fiduciary duty. For more detail, click [here](#).

Delaware Court of Chancery Discusses the Application of Entire Fairness Review and *Revlon* in a Controlling Stockholder Context

The Delaware Court of Chancery in its most recent *Frank v. Elgamal* decision has further clarified the application of the entire fairness and *Revlon* standards of review in the context of a transaction involving a possible control group. In a nuanced decision, the true impact of which will only be known after further fact finding at trial, the court focused in particular on whether there was a control group during different periods of the sale process. For more detail, click [here](#).

Delaware Court of Chancery Provides Guidance on Entire Fairness and Damages in a Squeeze-Out Merger

In *In re Orchard Enters., Inc. S'holder Litig.*, on cross-motions for summary judgment after a cash-out merger of the minority by a controlling stockholder, the Delaware Court of Chancery held that post-closing damages were available to stockholders as a remedy for disclosures in the merger proxy statement that were materially false or misleading, and such damages were available in the form of quasi-appraisal and rescissory damages. The court also held that even though the company employed a special committee and conditioned the merger on the approval of a majority of the minority stockholders, the business judgment rule would not apply to the court's review of the transaction, as those protective devices were not agreed to by the controlling stockholder in advance of commencing negotiations. For more detail, click [here](#).

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M&A Markets

The following issues of M&A at a Glance, our monthly newsletter on trends in the M&A marketplace and the structural and legal issues that arise in M&A transactions, were published this quarter. Each issue can be accessed by clicking on the date of each publication below.

➤ [January 2014](#)

➤ [February 2014](#)

➤ [March 2014](#)

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Cara M. Grisin and Justin A. Shuler contributed to this update.

¹ Paul, Weiss served as counsel to M&F Worldwide in this matter.

² Paul, Weiss served as counsel to another investment banker involved in this matter that settled prior to trial.