

August 28, 2012

Delaware Supreme Court Affirms \$2 Billion *Southern Peru Copper* Damages Award

In *Americas Mining Corporation* the Delaware Supreme Court affirmed the Court of Chancery's decision in the Southern Peru Copper litigation in which the Court of Chancery awarded damages of \$2 billion and \$300 million in attorneys' fees.

While the damage and fee levels were unprecedented, the Delaware Supreme Court found that the Court of Chancery followed existing precedent and exercised its discretion appropriately in awarding such amounts after the plaintiffs had prevailed in showing that Southern Peru Copper had overpaid to acquire an asset owned by its controlling stockholder. The Delaware Supreme Court affirmed the Court of Chancery's calculation of the damages award based on the difference between the fair value of the asset and the amount paid. Further, the Delaware Supreme Court found that the Court of Chancery properly used its discretion in awarding the attorneys' fee as a percentage of the damages award.

The Delaware Supreme Court also discussed the use of special committees and minority stockholder approval as a means of shifting the burden of proof in transactions involving conflicts of interest and encouraged the use of such mechanisms as "integral parts of the best practices that are used to establish a fair dealing process." In a transaction where a majority stockholder stands on both sides (which the Court of Chancery found was the case in the Southern Peru Copper transaction), entire fairness will apply instead of the business judgment rule. By default when entire fairness applies, the defendants must prove that the transaction was entirely fair by showing that the process and price were fair, unless the defendants use a properly-functioning, independent special committee or subject the transaction to the informed approval by the minority shareholders, in which case, the burden of proof shifts to the plaintiffs. As a result, transactions involving interested parties frequently employ such devices to shift the burden of proof. The Supreme Court did not directly address the viability of the so-called "unified standard" that has gained some currency in the Court of Chancery. Under that standard, entire fairness is not at issue and defendants may rely instead on the protection of the business judgment rule, provided that both an independent special committee and a majority of the minority stockholders approves the transaction after full disclosure. While it is unclear whether the Supreme Court intended to reject the unified standard—or foreshadow a rejection when the issue is clearly presented to the Court—nothing in its opinion indicates that business judgment protection will be afforded any interested transaction.

The Delaware Supreme Court noted that the benefit of the burden shift is "modest" and generally only significant where the evidence is in perfect balance. But the Court emphasized that the use of special committees and minority stockholder approvals in conflict transactions is nonetheless critical to proving the fairness of the process by which the transaction was approved. Whether or not the defendants bear the burden of proving entire fairness, these procedural protections help demonstrate that the transaction was fair.

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For the *Americas Mining Corporation* opinion, see:
<http://www.paulweiss.com/media/1160054/amvth.pdf>.

For our memorandum on the Court of Chancery decision *In re Southern Peru Copper*, see:
<http://www.paulweiss.com/media/102531/18-Oct-11DE.pdf>.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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