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Delaware Court of Chancery Upholds Forum Selection Bylaw Adopted Concurrently with Merger Agreement and Designating North Carolina as Exclusive Forum

In *City of Providence v. First Citizens BancShares, Inc.*, the Delaware Court of Chancery held that the board of directors of First Citizens BancShares, Inc. (“BancShares”), a Delaware corporation with the majority of its operations in North Carolina, did not breach their fiduciary duties by adopting a forum selection bylaw designating the courts of North Carolina as the exclusive forum for intra-corporate disputes on the same day that BancShares announced that it had entered into a merger agreement to acquire First Citizens Bancorporation, Inc., an entity allegedly controlled by the same group of stockholders that controlled BancShares. For more, click [here](#).

Other Notable Developments

2014 Amendments to the Delaware General Corporation Law

The Delaware General Corporation Law’s 2014 amendments went into effect on August 1, and include several important changes that will be helpful to the deal and broader corporate community. The key changes include the following:

- Amending the Section 251(h) “medium-form” merger procedures to enhance their usability (including by eliminating the prohibition against 15% “interested stockholders” being a party to the merger);
- Allowing board or stockholder actions by written consent to be effective at a future or contingent time and clarifying that a person signing a consent need not be a director at the time of execution so long as he or she is a director at the effective time of the consent;
- Allowing corporations to amend their certificates of incorporation to effect name changes, delete references to the incorporator, initial board and initial stockholders and delete certain provisions related to capital structure changes, if such recapitalization already occurred, in each case, without stockholder approval; and

For more regarding the 2014 Amendments to the Delaware General Corporation Law, click [here](#).

Statute of Limitations for Breach of Contract Claims

Effective August 1, 2014, the Delaware Code was amended to allow parties to a written contract involving at least \$100,000 to agree to extend the statute of limitations for up to 20 years from the accruing of a cause of action without having to place the contract under seal. Unless otherwise agreed upon pursuant to the new amendment, the statute of limitations period for breach of contract claims in Delaware is typically three or four years.

Controlling Stockholder Transactions

In *Swomley v. Schlecht*, the Court of Chancery issued a bench ruling applying the business judgment standard of review and dismissing a challenge to a transaction that was structured to comply with *Kahn v. M&F Worldwide Corp.*, previously discussed [here](#). In *Slecht*, the plaintiffs alleged that the board of directors breached their fiduciary duties by agreeing to a cash-out merger with the company's management group, which held approximately 46% of the outstanding stock of the company, and that *M&F Worldwide* did not apply because the company was privately held. The defendants moved to dismiss, arguing that the business judgment standard of review rather than entire fairness applied pursuant to *M&F Worldwide* because (i) the controller conditioned the transaction on the approval of both a special committee and a majority of the minority stockholders; (ii) the special committee was independent; (iii) the special committee was empowered to freely select its own advisors and to say no definitively; (iv) the special committee met its duty of care in negotiating a fair price; (v) the vote of the minority stockholders was informed; and (vi) there was no coercion of the minority stockholders. Although the requirement that a special committee meet its duty of care in negotiating a fair price was an element of the *M&F Worldwide* standard added by the Delaware Supreme Court, rather than the standard originally formulated by the Delaware Court of Chancery, the court explained that a breach of the duty of care requires gross negligence which is "a very tough standard to satisfy" and that the plaintiffs had failed to adequately plead such facts. Additionally, the court held that the fact that a company is private does not prevent the application of *M&F Worldwide*, reiterating the court's prior positions that "the same rules apply" to Delaware corporations whether they are private or public. Finding that the defendants fulfilled the other requirements under *M&F Worldwide*, and that appraisal was the plaintiffs' proper and sole remedy, the court granted the defendants' motion to dismiss. For the full transcript, [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.

➤ July 2014

➤ August 2014

➤ September 2014

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