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Delaware Court of Chancery Clarifies when MFW's Protections Must Be in Place Under "Ab Initio" Requirement

The recent Delaware Court of Chancery opinion in *Olenik v. Lodzinski* held that the parties to an acquisition had met the now well-known roadmap for controller transactions to receive business judgment review under *Kahn v. M&F Worldwide Corp.* ("MFW") and dismissed plaintiff's claims as a result. In so holding, Vice Chancellor Slight provided some helpful reminders about how best to achieve MFW's protection, including that the "ab initio" requirement mandates that the controller condition the transaction on the special committee and majority-of-the-minority protections at the outset of negotiations, which may be after "exploratory" discussions between the parties. For more, click [here](#).

Delaware Court of Chancery Upholds Delaware Choice of Law and Non-Compete in Employment Agreement with Delaware Corporation Headquartered in California

Recently in *NuVasive, Inc. v. Miles*, the Delaware Court of Chancery, in an opinion by Vice Chancellor Glasscock, enforced a Delaware choice of law provision in an employment agreement between a Delaware corporation headquartered in California and a California resident for services to be performed in California. The agreement contained a covenant not to compete, which at the time the contract was entered into was void in California, but enforceable in Delaware, so long as it was reasonable. A few months after the agreement was signed, California adopted California Labor Code Section 925, which prohibits employers from attempting to use choice of law provisions to circumvent the state's prohibition on non-competes, but importantly, contains a carve-out that exempts situations where the employee is represented by legal counsel in negotiation of the choice of law provision. In considering the defendant employee's partial motion for summary judgment that the non-compete was unenforceable, the court concluded that by passing the new law, California now recognizes the validity of choice of law provisions in the narrow circumstance where an employee has legal representation during negotiations (which the court assumed to be the case here for purposes of the summary judgment motion). Therefore, upholding the Delaware choice of law provision and enforcing the non-compete in these circumstances would not violate California's fundamental public policy of freedom of employment. For the court's opinion, click [here](#).

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Delaware Court of Chancery Allows for Contractual Waiver of Appraisal Rights and Gives Helpful Guidance on Drafting Drag-Along Provisions

In *Manti Holdings, LLC v. Authentix Acquisition Co.*, the Court of Chancery held that the petitioners, former stockholders of Authentix, through their execution of a 2008 stockholders' agreement, had waived their statutory appraisal rights in connection with a sale of the company by merger. Vice Chancellor Glasscock's letter opinion in the case is noteworthy insofar as it clarifies that common stockholders are permitted to contractually waive their statutory appraisal rights, an issue that was previously unsettled under Delaware law. In addition, the opinion also provides a helpful discussion on drafting "drag-along" provisions. Pursuant to the terms of the stockholders' agreement at issue, where a company sale was structured as a transfer of equity, the sale would implicate certain drag-along provisions, and the common stockholders were required to cooperate in such a sale (including by refraining from seeking appraisal rights) only if they received the same price per share as certain preferred investors. Where the company sale was structured as a merger, however, the stockholders' agreement required the common stockholders to consent and raise no objection to the sale, regardless of whether the consideration received by the common stockholders differed from that received by the preferred investors. Here, even though the petitioners received less consideration per share than the preferred investors, because the transaction was a merger, the petitioners had the obligation to consent to and raise no objection to the merger (including by refraining from exercising their appraisal rights). Thus, parties intending to allow for the exercise of appraisal rights when differing consideration is received among groups of stockholders may want to ensure that the relevant drag-along and related provisions waive cooperation duties applicable to the class of dragged stockholders, regardless of the structure of the transaction. For the opinion, click [here](#).

Delaware Court of Chancery Appraisal Decisions Demonstrate Importance of Robust Sale Process

Two appraisal opinions issued this quarter by the Delaware Court of Chancery highlight the importance of a robust sale process in determining the fair value of a target company. In the first, *Blueblade Capital Opportunities, LLC v. Norcraft Companies, Inc.*, Vice Chancellor Slight's determined that the pre-signing market check and post-signing go-shop relating to the sale of Norcraft Companies, Inc. to Fortune Brands Home & Security, Inc. were ineffective. The *Blueblade* court acknowledged the Delaware Supreme Court's "embrace" of deal price as a strong indicator of fair value in *Dell* and *DFC*, but noted the higher court's conclusion not to create a presumption that deal price reflects fair value. Thus, based on serious flaws in the deal process relating to the sale of Norcraft, the court concluded that deal price was not a reliable indication of fair value and afforded it no weight in its analysis. In addition, the court gave no weight in its analysis to Norcraft's unaffected market price, as the company's stock was thinly traded and thinly covered by analysts, and the parties did not introduce significant evidence of market efficiency. As such, the court relied on its own discounted cash flow analysis to conclude that the fair value of Norcraft's stock was about 2.5% greater than the deal price. For the *Blueblade* opinion, click [here](#).

In a second appraisal opinion by the Court of Chancery this quarter, *In re Appraisal of Solera Holdings, Inc.*, Chancellor Bouchard concluded that the fair value of Solera Holdings, Inc. in connection with its acquisition by Vista Equity Partners was the deal price less synergies, which resulted in a valuation about 3.4% less than the deal price. In so holding, the court found that Solera's sale process "was characterized by many objective indicia of reliability." Additionally, the fact that the merger price represented a significant premium to Solera's unaffected market price (which the court found to be reliable given the "efficient and well-functioning market for Solera's stock") was further evidence that the stockholders received fair value in the transaction. For the *Solera* opinion, click [here](#).

Delaware Court of Chancery Emphasizes Importance of Complete Appraisal Notices

Recently in *The Cirillo Family Trust v. Moezinia*, the Delaware Court of Chancery granted a motion for summary judgment by the defendants, the board of directors of DAVA Pharmaceuticals, Inc., relating to claims by a former stockholder that the board breached its duty of loyalty by acting in bad faith by sending an insufficient appraisal notice to the stockholder in connection with DAVA's acquisition by a subsidiary of Endo Pharmaceuticals, Inc. While Chancellor Bouchard acknowledged in his opinion that the appraisal notice was "totally bereft of information required under Delaware law to permit a stockholder to decide whether to seek appraisal in lieu of accepting the Merger consideration," their actions did not rise to the threshold required for bad faith as a matter of law, as they reasonably relied on DAVA's outside corporate counsel to prepare the appraisal notice. Additionally, the directors were protected from liability under Section 141(e) of the Delaware General Corporation Law ("DGCL") when they rely in good faith on information provided by a person the director "reasonably believes are within such . . . person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation." Although the directors were not found to be liable to the stockholder, the case highlights the importance of providing stockholders with accurate and complete appraisal notices in accordance with the requirements of Delaware law. For the decision, click [here](#).

Delaware Court of Chancery Discusses Distinction Between Arbitration and Expert Determination in Dispute Resolution Provisions

A recent Delaware Court of Chancery opinion in *Penton Business Media Holdings, LLC v. Informa PLC* highlights the distinction between arbitration and expert determination dispute resolution provisions that is recognized by Delaware courts. In *Penton*, Vice Chancellor Laster found that the plain language of the dispute resolution provision at issue provided that an accounting firm chosen under the provision was to act as an expert only and not as an arbitrator, and therefore did not have authority to interpret the merger agreement or decide whether it could consider extrinsic evidence. The case highlights the need for parties to be clear in such provisions as to their intentions on their chosen method of dispute resolution. For the opinion, click [here](#).

2018 Amendments to the DGCL

The 2018 amendments to the DGCL went into effect on August 1, 2018. For a discussion of the amendments, see the Summer 2018 Delaware M&A Quarterly, found [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 2018](#)

➤ [August 2018](#)

➤ [September 2018](#)

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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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