
March 4, 2020

Delaware Court of Chancery Provides Guidance around Special Committee Approvals in Non-Controller Conflicted Transactions

The Delaware Court of Chancery recently confirmed in *Salladay v. Lev* that conditioning a conflicted (but non-controller) transaction upon approval by a fully empowered, disinterested and independent special committee can restore the business judgment standard of review for the transaction (rather than the more burdensome entire fairness standard that would otherwise apply). However, the court (in an opinion by Vice Chancellor Glasscock) found that such special committee “cleansing” works only if the special committee protections are put in place prior to the commencement of discussions about what might constitute an acceptable price. In *Salladay*, the court held that the company chairman’s discussions with the acquirer regarding price created a price collar before the special committee was formed that set the tone for future negotiations, and therefore, the special committee’s approval of the transaction did not restore the business judgment standard of review.

Salladay arose in the context of the 2018 acquisition of Intersections, Inc., a publicly traded identity protection software services company, by a group of joint venturers led by iSubscribed Inc. The plaintiffs adequately pled that the board was conflicted because certain directors were rolling over substantial equity in the transaction, participating in a consulting agreement with iSubscribed or benefitting personally from the exchange of certain notes at a favorable rate in the event of a transaction.

Due to the conflicted board, the court confirmed that the transaction would be subject to entire fairness review, unless cleansed by either a special committee that was sufficiently constituted and authorized from the beginning of negotiations or the approval of an informed, uncoerced and disinterested stockholder vote (the latter of which we do not discuss in detail here). The standard of review is critically important because entire fairness is a heavy burden that requires the board to show a fair price and fair process. As the court noted in the opinion, “where entire fairness is the standard . . . a motion to dismiss is rarely granted” because review under the standard requires a meaningful record that is not available at an early stage of litigation.

A key issue in *Salladay* involved the disclosure by Intersections’ chairman and CEO of an acceptable price range for the company to the acquirer about a week before the special committee was formed. The court stated that the disclosure of this range “essentially formed a price collar that ‘set the field of play for economic negotiations to come,’” even though the chairman told the acquirer that he did not have the authority to negotiate on behalf of the company and was giving his personal view of what price would be amenable to the directors. Therefore, consistent with case law arising in the context of controlling stockholder transactions under *Kahn v. M&F Worldwide* (“MFW”) (discussed [here](#)), the disinterested special committee was not formed *ab initio* and was ineffective to cleanse the transaction, as it was deprived of full negotiating power sufficient to invoke the business judgment rule.

This decision is a reminder that in all transactions, but especially potentially conflicted transactions with or without a controlling stockholder, it is important for company representatives to proceed cautiously in discussions with potential acquirers and to have a coordinated response with the board about price, and whether a special committee is needed should be discussed early in the process of any potential conflicted transaction.

* * *

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:

Scott A. Barshay

+1-212-373-3040

sbarshay@paulweiss.com

Ariel J. Deckelbaum

+1-212-373-3546

ajdeckelbaum@paulweiss.com

Andrew G. Gordon

+1-212-373-3543

agordon@paulweiss.com

Robert B. Schumer

+1-212-373-3097

rschumer@paulweiss.com

Laura C. Turano

+1-212-373-3659

lturano@paulweiss.com

Michael Vogel

+1-212-373-3137

mvogel@paulweiss.com

Counsel Frances F. Mi, associate Jason S. Tyler and legal consultant Cara G. Fay contributed to this memorandum.

Our M&A Group

The Paul, Weiss M&A Group consists of more than 35 partners and over 125 counsel and associates based in New York, Washington, Wilmington, London, Toronto, Tokyo, Hong Kong and Beijing. The firm's Corporate Department consists of more than 60 partners and over 300 counsel and associates.

Our M&A Partners[Matthew W. Abbott](#)[Neil Goldman](#)[Carl L. Reisner](#)[Michael Vogel](#)[Edward T. Ackerman](#)[Bruce A. Gutenplan](#)[Justin Rosenberg](#)[Ramy J. Wahbeh](#)[Scott A. Barshay](#)[David K. Lakhdhir](#)[Kenneth M. Schneider](#)[Steven J. Williams](#)[Angelo Bonvino](#)[John E. Lange](#)[Robert B. Schumer](#)[Betty Yap](#)[Ellen N. Ching](#)[Brian C. Lavin](#)[John M. Scott](#)[Kaye N. Yoshino](#)[Rachael G. Coffey](#)[Xiaoyu Greg Liu](#)[Brian Scrivani](#)[Tong Yu](#)[Ariel J. Deckelbaum](#)[Jeffrey D. Marell](#)[Kyle T. Seifried](#)[Taurie M. Zeitzer](#)[Ross A. Fieldston](#)[Alvaro Membrillera](#)[Sarah Stasny](#)[Brian P. Finnegan](#)[Judie Ng Shortell](#)[Tarun M. Stewart](#)[Adam M. Givertz](#)[Kelley D. Parker](#)[Laura C. Turano](#)