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## Delaware M&A Quarterly

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### Board Oversight of “Mission-Critical” Regulatory Issues

In [In re The Boeing Company Derivative Litigation](#), the Delaware Court of Chancery declined to dismiss claims that the board breached their duty of oversight by failing to establish an effective airplane safety monitoring system and follow up on related red flags. Although the litigation is still pending, the opinion by Vice Chancellor Zurn reiterates the importance of board oversight of “mission-critical” regulatory issues and gives guidance as to possible board processes, such as assigning responsibility to a committee specifically in its charter documents or including such matters as part of the regular board agenda (as opposed to *ad hoc* reports by management), and, in either case, ensuring that management reports convey a full picture of such matters. In addition, boards should actively follow up on red flags relating to the failure of a mission-critical company issue and be willing to question management’s assessment. For more, click [here](#).

### Delaware Court of Chancery Finds No MAE

In *Bardy Diagnostics, Inc. v. Hill-Rom, Inc.*, the Delaware Court of Chancery, in an opinion by Vice Chancellor Slights, held that a dramatic 50+% reduction in the Medicare reimbursement rate for target’s sole product (a cardiac medical device) did not constitute a “Material Adverse Effect” (“MAE”) under the merger agreement. The court held, among other things, that the buyer failed to show that any material adverse effect on the target was “durationally significant” (as is required to establish an MAE in the M&A context in Delaware), and, further, such effects did not constitute an MAE under the agreement because of the specifics of the definition. The court ordered the buyer to close the transaction and, in a rare, if not first, imposition of such a remedy in this context, awarded prejudgment interest (which remedy was uncontested by the parties). While the failure to find an MAE is not surprising given the history of jurisprudence in this area and the court’s specific factual findings in this case, the decision provides some helpful insight into the court’s MAE interpretation. For more, click [here](#).

### Delaware Supreme Court Affirms That Common Stockholders May Agree to Advance Waivers of Appraisal Rights

In *Manti Holdings, LLC v. Authentix Acquisition Company, Inc.*, the Delaware Supreme Court affirmed the Court of Chancery’s holding that a corporation may enforce an advance waiver of appraisal rights against its own common stockholders. Prior cases had upheld such advance waivers with respect to preferred stock, but arguably left unresolved whether similar agreements by holders of a corporation’s common stock are consistent with Delaware public policy. While the opinion for the majority, written by Justice Montgomery-Reeves, recognized that there are certain

fundamental features of a corporation that are essential to the corporation’s identity and cannot be waived, the right to seek judicial appraisal is not among them. The stockholders had waived their appraisal rights under the terms of a stockholders

agreement, and the Delaware General Corporation Law did not bar enforcement of the waiver. Justice Valihura dissented from the majority, reasoning, among other things, that the specific contractual waiver of appraisal rights in this case was ambiguous, that it should not be enforceable in the corporate context given the availability of alternative entities and that the right to seek appraisal should not be subject to advance waiver by holders of common stock because it was a statutorily created right meant to compensate stockholders for their loss of veto power over certain merger transactions. For the opinion, click [here](#).

### **Delaware Court of Chancery Holds That Contractual Provisions Not Effective to Block Fraud Claims**

In *Online HealthNow, Inc. v. CIP OCL Investments, LLC*, the Delaware Court of Chancery held that the seller was prohibited from relying on contractual provisions in a stock purchase agreement to prevent well-pled claims of fraudulent inducement from being brought against it. After closing, the buyer discovered that certain representations regarding the purchased company's tax liabilities were allegedly false, and asserted fraud claims that the seller and its affiliates purposely withheld tax information and intentionally made false representations in the purchase agreement. Moreover, the buyer alleged that seller's affiliates knowingly participated in the fraudulent inducement. The court held that Delaware law and public policy prevented the seller from using the survival clause "in a contract allegedly procured by fraud to eviscerate a claim that the contract itself is an instrument of fraud." Moreover, the non-recourse provision did not prevent fraudulent inducement claims and aiding and abetting claims from being brought against defendants that did not sign the agreement. For the opinion, click [here](#).

### **Court of Chancery Opinion Highlights Need to Consider Exclusions in Effect-of-Termination Provisions**

In *Yatra Online, Inc. v. Ebix, Inc.*, the Delaware Court of Chancery, in an opinion by Vice Chancellor Slight, dismissed breach of merger agreement claims brought by Yatra, holding that Yatra extinguished its claims under the agreement's effect-of-termination provision when it elected to terminate. Yatra terminated the agreement after Ebix allegedly deliberately breached certain of its contractual promises under the merger agreement in an effort get out of the merger. The court held that Yatra had no remedy against Ebix due to the effect-of-termination provision (which provided that a party's termination of the agreement extinguishes all liability of both parties for pre-termination breaches except for fraud), and Yatra chose to terminate rather than pursue legal action against Ebix prior to termination. The court also held that Ebix's alleged conduct did not constitute fraud. For the opinion, 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 2021](#)

[August 2021](#)

[September 2021](#)

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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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