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SEC/CORPORATE

Delaware Supreme Court Upholds Chancery Court Ruling that Applied Business Judgment Rule to Going Private Transaction with Controlling Stockholder

In *Kahn v. M&F Worldwide Corp.*, the Delaware Supreme Court unanimously upheld the Chancery Court's decision in *In re MFW Shareholders Litigation.* In that decision, the Chancery Court had granted summary judgment in favor of the board of directors of M&F Worldwide Corp. (M&F) in a suit brought by former stockholders of M&F challenging the going private acquisition of M&F by MacAndrews & Forbes Holdings Inc., the owner of 43.4 percent of M&F's common stock. The Chancery Court held that a going private acquisition by a controlling stockholder that is conditioned, from the outset, on approval by *both* a properly empowered, independent committee, and an informed, uncoerced majority-of-the-minority vote would be reviewed under the business judgment standard of review, rather than the entire fairness standard of review. A summary of the Chancery Court's decision in *In re MFW Shareholders Litigation* is included in the June 7, 2013 issue of *Corporate & Financial Weekly Digest*.

In upholding the Chancery Court's decision, the Delaware Supreme Court held that the business judgment standard of review would apply to a going private acquisition by a controlling stockholder if, but only if, the following facts were established: (1) the controlling stockholder conditioned the transaction on the approval of both a special committee, and a majority-of-the-minority stockholders; (2) the special committee was independent; (3) the special committee was empowered to freely select its own advisors and to say no definitively; (4) the special committee acted with care; (5) the minority vote was informed; and (6) there was no coercion of the minority.

Notably, the Delaware Supreme Court left open the possibility for plaintiffs to question a special committee's independence and its process for selling a target company. The Delaware Supreme Court indicated that if, following discovery, triable issues of fact remain about whether either of the procedural protections were established or were effective, the case would survive a motion for summary judgment and would be subject to entire fairness review at trial. In upholding the Chancery Court's decision, the Delaware Supreme Court confirmed the Chancery Court's findings that the plaintiffs had failed to raise any genuine issues of material fact as to whether the procedural protections had been established or were effective. Accordingly, the Chancery Court's application of the business judgment standard of review at the summary judgment stage was found to be appropriate.

Click here to read the opinion.

BROKER DEALER

Amendments to Uniform Branch Office Registration Form

Broker-dealers are required to use the Branch Office Registration Form (Form BR) to register their branch offices with the Financial Industry Regulatory Authority, the New York Stock Exchange and participating states via the Central Registration Depository system. Form BR enables a firm to: (1) register its branch office(s), either by notice filing or approval, as required by the relevant jurisdiction or self-regulatory organization (SRO), (2) amend a registration; (3) close or terminate a registration; or (4) withdraw a filing in the appropriate participating jurisdiction and SRO.

The Securities and Exchange Commission approved amendments to Form BR to: (1) eliminate Section 6 of the existing Form BR, which was required only for firms seeking to register branch offices with the NYSE; (2) add questions relating to space sharing arrangements and the location of books and records that are currently only in Section 6 and make them applicable to all firms; (3) modify existing questions and instructions to provide more detailed selections for describing the types of activities conducted at the branch office; (4) add an optional question to identify a branch office as an "Office of Municipal Supervisory Jurisdiction," as defined under the rules of the Municipal Securities Rulemaking Board; and (5) make other technical changes to adopt uniform terminology and clarify questions and instructions.

The implementation date for the revised Form BR is April 7, 2014. Firms registering or notice filing new branch offices will be required to use the revised Form BR on or after the implementation date. Firms with existing registered branch offices will not be required to file the revised Form BR for such existing offices immediately upon the implementation date. Instead, firms will be required to provide the new information elicited on the revised Form BR for each existing registered branch office whenever an amendment is otherwise required, in the ordinary course, to update existing information items that have become inaccurate or incomplete.

Click here to read FINRA Regulatory Notice 14-11.

SEC Approves New FINRA Supervision Rules

The current rulebook of the Financial Industry Regulatory Authority consists of FINRA rules, legacy National Association of Securities Dealers (NASD) rules (that apply to all FINRA member firms) and rules incorporated from the New York Stock Exchange (that apply only to those member firms of FINRA that are also members of the NYSE). The Securities and Exchange Commission has approved new FINRA rules to replace existing NASD rules and corresponding provisions of the NYSE rules. The new rules become effective on December 1, 2014.

The new FINRA rules governing supervision are with respect to, and replace existing NASD rules and corresponding provisions of the NYSE rules regarding, supervisory systems, written procedures regarding supervision, inspection requirements, transaction review and reporting, branch office and office of supervisory jurisdiction designations, content requirements, obligations relating to holding of customer mail, and requirements relating to the tape recording of registered persons by certain firms. Specifically, new FINRA Rules 3110 (Supervision) and 3120 (Supervisory Control System) replace NASD Rules 3010 (Supervision), 3012 (Supervisory Control System) and corresponding provisions of the NYSE Rules and Interpretations. In addition, new FINRA Rules 3150 (Holding of Customer Mail) and 3170 (Tape Recording of Registered Persons by Certain Firms) replace NASD Rules 3110(i) and 3010(b)(2), respectively.

Click here to read FINRA Regulatory Notice 14-10.

CFTC

CFTC Requests Comment on Swap Data Reporting Rules

On March 19, the Commodity Futures Trading Commission approved for publication in the Federal Register a request for public comment on swap data reporting requirements under Part 45 of the CFTC's regulations. The request was developed by a CFTC interdivisional working group that was charged with reviewing the reporting rules and making recommendations for resolving reporting challenges. The request seeks comment on confirmation data reporting, continuation data reporting, reporting transactions and workflows not explicitly addressed in swap data reporting rules, monitoring the primary economic terms of a swap, reporting of cleared swaps, other swap data repository (SDR) and counterparty obligations, swap dealer and major swap participant oversight, risk monitoring and surveillance, and swap data ownership and transfer across SDRs. Although the CFTC did not specifically request comments regarding the requirements imposed by Part 43 of its regulations (real-time public reporting of swap transaction data) or Part 46 (recordkeeping and reporting for pre-enactment and transition swaps), it did invite comments on other "challenges" associated with the reporting of swap transaction data.

Comments are due 60 days after publication in the Federal Register.

The request for comment is available here.

LITIGATION

Fourth Circuit Holds Minority-Owned Corporation Can Bring Race Discrimination Suit

The United States Court of Appeals for the Fourth Circuit recently decided in a case of first impression, that a minority-owned corporation had standing to bring a Title VI race discrimination suit because it established an "imputed racial identity" for the purposes of prudential standing considerations under federal law.

The plaintiff, Carnell Construction Corporation (Carnell) won a bid to build low-income rental units in a public, federally funded housing project in Danville, Virginia. After extensive delays, the relationship between Carnell and the Danville Redevelopment and Housing Authority became strained. In May 2009, the Housing Authority informed Carnell that it would not extend its contract. Carnell sued claiming, among other things, race discrimination under Title VI.

On appeal, the Fourth Circuit addressed whether Carnell, as a corporate entity, met the statutory requirements of Title VI, which protects any "person" from discrimination based on a "race, color or national origin." Adopting the position of many other circuits, the court held that a properly certified minority-owned corporation could be the direct object of discrimination and meet the prudential standing requirements of showing that Carnell fell within the zone of interests protected by Title VI. Because Carnell publicly represented itself as a minority business enterprise, was owned by an African-American and was properly certified, the court held that it had standing to bring the claim.

Carnell Construction Corp. v. Danville Redevelopment & Hous. Auth., Nos. 13-1143, 13-1229, 13-1239 (4th Cir. Mar. 6, 2013).

Second Circuit Vacates Conviction After Counsel Misstated Deportation Consequences

The United States Court of Appeals for the Second Circuit recently vacated the 1999 conviction of an Australian national living in the United States for misprision of felony. The court granted a writ of error after Stephen Kovacs demonstrated that his guilty plea relied on ineffective assistance of counsel. Kovacs's attorney affirmatively misstated the immigration consequences of a misprision of felony conviction and based on that advice, Kovacs accepted a plea he would not otherwise have taken.

Kovacs was charged in October 1996 with the substantive offense and conspiracy to commit wire fraud after submitting an inflated insurance claim at the recommendation of his corrupt insurance adjuster in September 1991. Kovacs instructed his attorney to negotiate a plea with no immigration consequences. Kovacs's attorney advised a misprision of felony charge for failing to disclose the criminal conduct of the public adjuster, believing in error that it was not a deportable offense. The government agreed to the proposed plea, aware of Kovacs's immigration concerns, and Kovacs was sentenced to probation and restitution. Between 2006 and 2009, Kovacs travelled internationally until immigration officials questioned his eligibility to return to the United States, after which Kovacs remained in Australia, separated from his wife and children, who resided in the United States where they were citizens. In May 2012, Kovacs submitted a petition for *coram nobis* relief asking the court to overturn his conviction on the grounds of ineffective assistance of counsel. The District Court for the Eastern District of New York denied the petition and Kovacs appealed.

The Second Circuit reversed, finding that Kovacs reached the demanding standard for obtaining the extraordinary remedy of the writ. Counsel's affirmative misrepresentation regarding the deportation consequences of a guilty plea was outside the range of professional competence and therefore objectively unreasonable and deficient representation. Kovacs was prejudiced by his counsel's error because he was primarily interested in reaching a plea that did not have an adverse effect on his immigration status. He chose not to litigate a statute of limitations defense because he was satisfied that he would not be deported if he accepted the plea. The court found that Kovacs demonstrated a reasonable probability that he would have negotiated a more favorable plea but for his counsel's error.

Kovacs v. United States, No. 13-0209 (2d Cir. Mar. 3, 2014).

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