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CASEBOOK
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2024 SUPPLEMENT FOR

MERGERS AND ACQUISITIONS
LAW, THEORY, AND PRACTICE

(3RD EDITION)

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CHAPTER I: Introduction

Add the following new paragraph in Chapter I.C. on page 22 after the second full paragraph:

> All that said, Delaware's pre-eminence may be diminishing, mostly as a result of some recent Delaware law amendments, discussed in this supplement's additions to Chapter XXI. As a prominent commentator noted,
>
> > "Delaware, the legal home of a substantial majority of US public companies, last month passed legislation that would lead, in effect, to the self-destruction of its corporate role —with serious consequences for investors worldwide….Earlier this year, the Delaware Court of Chancery, the state's highly respected corporate trial court, handed down two rulings enforcing statutory protections of minority shareholder rights….Sadly, Delaware's cherished neutrality and circumspection have been sacrificed. Investors will turn elsewhere for protection — whether to other states or, more likely, to the federal government." [1]

[1] Charles Elson, *Delaware Is Jettisoning Its Traditional Approach Of Protecting Investors*, FINANCIAL TIMES, July 15, 2024

CHAPTER II: Deal Structures: Introduction to Mergers and Asset Sales

Insert in Chapter II.C.(Mergers in Practice) on page 50 at the end of the subchapter:

2024 Activision Amendments: Mechanics of Getting the Deal Done

In June 2024, the Delaware General Assembly adopted new §§ 147 and 268. These new provisions make material changes to the process a board must follow in order to approve a merger agreement in compliance with § 251(b).

These provisions were adopted in direct response to *Sjunde Fonden v. Activision Blizzard*. In *Activision*, Chancellor refused a Rule 12(b)(6) motion to dismiss a plaintiff's challenge to approval of the Activision-Microsoft merger. Plaintiffs challenged the validity of the Activision board's approval of its merger agreement with Microsoft as failing to meet the statutory requirements under § 251(b). At this pleading stage motion, Chancellor ruled that § 251(b) requires that the board approve the "merger agreement," which she interpreted to mean an "essentially complete version of the merger agreement," as opposed to an execution version of the merger agreement. At a bare minimum, she ruled the essentially complete version of the merger agreement approved by the board must include the following items: (i) the purchase price; (ii) the company disclosure schedule, which contains exceptions, disclosures, and qualifications to the representations and warranties in the merger agreement; (iii) the certificate of incorporation of the surviving corporation in the merger; and (iv) all finalized key terms. Taking the facts as pleaded by the plaintiff to be true, she ruled that the board did not approve an essentially complete version of the merger agreement and refused to dismiss the complaint.

In response to this ruling, the Corporation Law Council of the Delaware State Bar Association offered two amendments: §§ 147, 268. In essence they were offered to ensure that boards are not penalized by so-called "foot faults" when approving merger agreements.

New § 147 would codify Chancellor McCormick's "essentially complete" interpretation of § 251(b)'s merger agreement by permitting a board to approve a merger agreement in "substantially final form." The statutory language adopted by the Legislature does not provide a definition for "substantially final form" so any interpretation of that language will require judicial interpretation, likely defaulting to Chancellor McCormick's "essentially complete" understanding. The amendments, however, carve out from the "substantially final form" understanding two things: the surviving corporation's certificate of incorporation and the disclosure schedule.

New § 268(a) provides that in a merger where the target's shareholders will be cashed out and will not receive any shares of the surviving corporation as consideration, that for a merger agreement to be in substantially final form, it need not include a copy of the certificate of

incorporation of the surviving corporation. To the extent the merger envisions target shareholders being cashed out and having no future relationship with the surviving corporation, the details of the surviving corporation's certificate of incorporation are not material to the target board or the target's shareholders, so eliminating this requirement is entirely sensible.

And, new § 268(b) provides that disclosure schedules, which can materially alter the meaning of the merger agreement, "shall not be deemed part of the agreement for purposes of any provision of this title." Disclosure schedules can be big, messy documents. They are worked on until the very end of the process, so getting a completed disclosure schedule, or at least one that is substantially completed, can be a challenge for lawyers. However, the new § 268, as written, contemplates a scenario where the board can validly approve a merger agreement without any knowledge of how a disclosure schedule material affects the terms of the merger agreement. This requirement seems entirely nonsensical.

To ensure that boards are not penalized for any foot faults, the *Activision* amendments, under new § 147, permit *ex post* ratification of merger agreements. This creates space for boards to approve something *less than* an agreement in "substantially final form" subject to a subsequent ratification after the deal dust had settled. For example, new § 147 would permit directors to approve a "merger agreement" by approving something less than the agreement in "substantially final form" provided the board subsequently ratify the merger agreement in substantially final form before it is filed with the Secretary of State. In theory, this permits the board to approve a merger agreement based solely on a letter of intent or perhaps even a briefing by the CEO at a board meeting (*a la Van Gorkom*) provided the board subsequently ratifies the merger agreement before the merger becomes effective.

> **§ 147. Authorization of agreements and other instruments.**
>
> Whenever this chapter expressly requires the board of directors to approve or take other action with respect to any agreement, instrument or document, such agreement, instrument or document may be approved by the board of directors in final form or in substantially final form. If the board of directors shall have acted to approve or take other action with respect to an agreement, instrument or document that is required by this chapter to be filed with the Secretary of State or referenced in any certificate so filed, the board of directors may, at any time after providing such approval or taking such other action and prior to the effectiveness of such filing with the Secretary of State, adopt a resolution ratifying the agreement, instrument or document. A ratification under this section shall be deemed to be effective as of the time of the original approval or other action by the board of directors and to satisfy any requirement under this chapter that the board of directors approve or take other action with respect to such agreement, instrument or document in a specific manner or sequence. Ratification under this section shall not be deemed to be the exclusive means of ratifying an agreement, instrument or document approved by the board of directors pursuant to this section, but shall be in addition to any ratification or validation that may be available under §§ 204 and 205 of this title or under the common law.

> **§ 268. Amendments to certificate of incorporation of the surviving corporation; disclosure schedules.**
>
> (a) If an agreement of merger entered into pursuant to any provision of this subchapter, other than § 251(g) of this title, provides, with respect to any constituent corporation, that all of the shares of capital stock of such constituent corporation issued and outstanding immediately before the time at which the merger becomes effective shall be converted into or exchanged for cash, property, rights or securities (excluding

stock of the surviving corporation), then, notwithstanding any other provision of this subchapter, with respect to such constituent corporation, (i) the agreement of merger as approved by the board of directors need not include any provision regarding the certificate of incorporation of the surviving corporation in order for the agreement of merger to be considered in final form or substantially final form, (ii) any amendment or amendment and restatement of the certificate of incorporation of the surviving corporation may be adopted by the board of directors of such constituent corporation or any person acting at the direction thereof (or, if under the terms of the agreement of merger the shares or equity interests of a constituent entity are to be converted into all of the shares of capital stock of the surviving corporation, the board of directors or governing body of such constituent entity or other person acting at the direction thereof), and (iii) no alteration or change of such certificate of incorporation shall be deemed to constitute an amendment to the agreement of merger.

(b) Unless otherwise expressly provided by an agreement of merger or consolidation, any disclosure letter, disclosure schedules or similar documents or instruments delivered in connection with the agreement that modify, supplement, qualify, or make exceptions to representations, warranties, covenants or conditions contained in the agreement shall not be deemed part of the agreement for purposes of any provision of this title but shall have the effects provided in the agreement.

CHAPTER IV: Regulation of Mergers and Acquisitions Under Federal Law—Section 13(d)

Make the following changes to Chapter IV B.

On page on page 111, in the second paragraph, change the first sentence to "Until the recent rule changes, Section 13(d) required…"

On page 113, delete the last sentence of the paragraph starting "Following," and add the following:

The SEC recently finalized rule changes governing Schedule 13D and Schedule 13G filings under the Securities Exchange Act of 1934. These changes went into effect in 2024. These changes are aimed at enhancing transparency and accelerating the disclosure of beneficial ownership information. Final rules can be found here.

Schedule 13D Amendments

1. Initial Filing Deadline: The time frame for filing Schedule 13D after acquiring beneficial ownership of more than 5% of a class of securities has been reduced from ten calendar days to *five business days*. This change aims to accelerate public disclosure of significant holdings.

2. Amendment Triggering Events: The requirements for filing an amendment to Schedule 13D remain tied to material changes in previously reported information. However, the deadline for such amendments has been shortened to within *two business days* of the triggering event.

3. Cut-off Time for Filing: The deadline for submitting Schedule 13D filings via the EDGAR system has been extended from 5:30 PM to 10:00 PM Eastern Time

Schedule 13G Amendments

1. Initial Filing Deadlines:

- *Qualified Institutional Investors (QIIs) & Exempt Investors*: Previously were required to file within 45 days after the end of the calendar quarter in which beneficial ownership exceeds 5%. However, going forward:

  - *QIIs*: Must file within five business days after the month-end in which their ownership exceeds 10%.

- *Passive Investors*: The initial filing is due within five business days after acquiring more than 5% ownership.

2. Amendment Triggering Events and Deadlines:

- *Material Changes*: All Schedule 13G filers are required to report any material change within 45 days after the end of the calendar quarter in which the change occurred, instead of the previous annual reporting requirement.

- *Specific Ownership Changes*: QIIs must now amend within five business days if their ownership exceeds 10% or changes by more than 5%. Passive investors must file amendments within two business days upon exceeding 10% ownership or experiencing a 5% change.

Additional Changes

1. Inclusion of Cash-Settled Derivatives: The SEC has provided new guidance clarifying when cash-settled derivatives may confer beneficial ownership under existing rules. This includes scenarios where such derivatives give voting or investment power, are part of schemes to evade reporting, or grant rights to acquire securities.

2. Formation of Groups: The SEC clarified that group status under Sections 13(d)(3) and 13(g)(3) does not solely depend on an express agreement but can also arise from concerted actions aimed at acquiring, holding, or disposing of securities. However, typical shareholder communications and activities, such as discussions or joint proposals, do not automatically constitute group formation.

See: Cadwalader memo; Skadden memo; Foley & Lardner memo.

CHAPTER VI: Regulation of Mergers and Acquisitions Under Federal Law—Proxy Rules

In Chapter VI.A. 3, on page 157, replace the italicized text with the following:

Until August 2022, each side in a contested election was responsible for distributing proxy cards with their own candidates' names. Proxy cards could not include nominees from the company and the dissident on the same card. Voting for a mixed slate with some from each category could only be done in person, something that was difficult and hence rare. However, adoption of Rule 14a–19 now requires the use of a "universal proxy card" in all contested director elections. We describe this rule change below, and discuss it further in Chapter XXI—Shareholder Activism.

Effect of Implementation of Universal Proxy Rules

New Rule 14a-19 relating to the use of the universal proxy for director elections went into effect for all director elections after August 31, 2022.

Under the rule, firms must use a "universal proxy card" for all director elections. Such cards must include all director nominees presented by management *and* shareholders for election at -annual shareholder meetings. Rule 14a-19 established new notice and filing requirements for shareholders seeking access to the company's proxy card, as well as formatting and presentation requirements for universal proxy cards. With respect to the formatting of universal proxy cards, the final rules require that "against" and "abstain" voting options be provided on a proxy card.

Although there were predictions that the number of contested elections and short slates would increase as a result of the implementation of these rules, at least during 2023, that turned out not to be the case. The number of activist campaigns and contested elections were broadly in line with previous years. So, what was expected to be a tsunami was no more than a ripple. In part, this is because firms reacted to implementation of the universal proxy rules by amending their nomination and advance notice bylaws in ways that made it more difficult for shareholders to validly nominate directors via the universal proxy. On the other hand, the National Association for Corporate Directors noted that following implementation of the universal proxy rules that proxy advisor ISS has shown a greater propensity to support partial activist slates.

See: Broadridge memo; NACD memo

CHAPTER VII: Regulation of Mergers and Acquisitions Under Federal Law—Registering Stock

Add, in Chapter VII F. on page 185, at the end of first full paragraph:

As of this writing, in mid-2024, the specter of increased regulation has become a reality, and SPAC transaction volume has not recovered. There have also been lawsuits against SPAC directors, officers, and sponsors, some of which have been successful. We discuss Delaware state law cases in Chapter XX.D. There have also been Federal securities law cases under '34Act Sections 10(b) and 14(a); some of these cases have been successful, but some have not been, leaving the landscape challenging but not overwhelmingly so.

Page 191, delete the first sentence of the last paragraph, starting with "Obviously," and the first word [some] of the next sentence, so that it now starts with "And…"

Page 192

After the first paragraph on the page, add:

Moreover, the SEC has adopted heightened disclosure requirements:

> The new rules and amendments require, among other things, enhanced disclosures about conflicts of interest, SPAC sponsor compensation, dilution, and other information that is important to investors in SPAC IPOs and de-SPAC transactions. The rules also require registrants to provide additional information about the target company to investors that will help investors make more informed voting and investment decisions in connection with a de-SPAC transaction.

These requirements will clearly make SPAC transactions more expensive and riskier for sponsors; it seems likely that transaction volume will not rebound any time soon, if at all.

See Jones Day memo; See Willkie memo.

CHAPTER VIII: Other Regulatory Requirements

Insert on page 213 following CFIUS in Practice, Chapter VIII B.

New Outbound CFIUS Regime

Since 2023, U.S. regulators have been developing a new outbound investment control regime, a type of "reverse CFIUS regime," focusing on U.S. investments in certain advanced technologies in countries of concern. The emphasis for this regime is U.S. investments in China. The Department of the Treasury issued a Notice of Proposed Rulemaking in June 2024 related to this initiative. These proposed rules aim to restrict U.S. investments in technologies critical to national security, including semiconductors, quantum computing, and artificial intelligence, especially when these technologies could be used for military, intelligence, or mass surveillance purposes.

Key aspects of the proposed rules include:

> **1. Covered Foreign Person**: Prohibition against equity investments, convertible debt, joint ventures in "covered foreign persons." A "covered foreign person is a person of a country of concern that is engaged in, or a person of a country of concern that a U.S. person knows or should know will be engaged in, an identified activity with respect to a covered national security technology or product."
>
> **2. Exceptions**: The proposed rules outline several exceptions, such as investments in publicly traded securities, certain limited partner investments under specific conditions, intracompany transactions, and some syndicated debt financings.
>
> **3. Obligations for U.S. Persons**: U.S. persons controlling non-U.S. entities must take reasonable steps to prevent these entities from engaging in prohibited covered transactions. Alternatively, U.S. persons may be under an obligation to provide prior notice to the U.S. Treasury prior to undertaking a transaction involving a covered foreign person if such a transactions would require notification under the rules.
>
> **4. Focus Areas**: The rules particularly target investments related to artificial intelligence, quantum information technologies, and semiconductors, especially if these are intended for military or surveillance applications.

The final rules, including the scope of any rules as well as the implementation timeline, are still under development.

See: Notice of Proposed Rulemaking; Ropes & Gray memo

CHAPTER XIV: Negotiating & Documenting the Merger Agreement

Insert on page 443 following Akorn v. Fresenius */ MAE Termination, at the end of Chapter XIV. K.*

2024 Market Practice Amendments: *Crispo v. Musk*

In *Crispo v. Musk*, 304 A. 3d 567 (Del. Ch. Ct., 2023) the Chancery Court considered the enforceability of a so-called "*Con Ed*" provision contained in a merger agreement governing Elon Musk's acquisition of Twitter, Inc. In *Consolidated Edison, Inc. v. Northeast Utilities*, the Second Circuit held, under New York law, that target stockholders could not seek lost premium damages against a buyer who had wrongfully terminated a merger agreement because of a general "no-third party beneficiaries" provision in the governing merger agreement. In response to the Second Circuit's decision in *Consolidated Edison, Inc.*, practitioners started to include so-called "*Con Ed*" provisions in merger agreements to establish that lost stockholder premium damages are recoverable against a buyer in the event of the buyer's wrongful termination. Such provisions had never previously been tested in Delaware, however.

The Twitter merger agreement included a disclaimer against third-party beneficiaries (Section 9.7). The agreement also included a specific performance provision, in which the parties stipulate that monetary damages would not be an adequate remedy (Section 9.9). In addition, the merger agreement included a *Con-Ed* provision (Section 8.2) that purported to reserve to Twitter the right to seek damages in the event of a breach by the buyer ("[damages] shall not be limited to reimbursement of Expenses or out-of-pocket costs, and, in the case of liabilities or damages payable by Parent and Acquisition Sub, would include the benefits of the transactions contemplated by this Agreement lost by the Company's stockholders").

When Musk attempted to walk away from the merger agreement he signed with Twitter, Twitter immediately sued, seeking specific performance. Crispo soon sued in his capacity as a stockholder in order to claim the lost stockholder premium due to Musk's attempt to walk away. Ultimately, Musk relented and acquired Twitter pursuant to the terms of the merger agreement. Chancellor McCormick then dismissed the specific performance lawsuit brought by Twitter as moot. She then dealt with the *Crispo* litigation, where plaintiff's attorneys were seeking a fee.

Chancellor McCormick addressed the validity of the "lost premium provision" in merger agreements. The Chancellor recognized that merger agreements do not typically grant target stockholders third-party beneficiary status to bring these kinds of suits, specifically because the board would like to manage who can bring suits against buyers and under what circumstances. Granting third party beneficiary status to target shareholders opens up all sorts of problems that sellers' boards want to avoid. A second approach to these lost premium provisions is to make the target board the agent of its stockholders for purposes of recovering lost-premium damages. In

this way, the board can manage any deal-related litigation. However, this approach rested on "shaky ground" because there was no legal basis for a contracting party to unilaterally appoint itself as the agent of a non-party for purposes of controlling that party's rights. The third approach to *Con-Ed* provisions is simply to define the target's damages to include the lost premium and leave it at that, leaving all the messy details for someone else to figure out later, kind of a "tape and glue, hope it works" approach to the contract. The Twitter merger agreement was this third approach to *Con Ed* provisions. As it turns out, when you use tape and glue and hope, it does not always work.

Chancellor McCormick ruled that the shareholder lacked third-party beneficiary status due to the contractual disclaimer. Consequently, she declined to award a fee to plaintiff shareholders because the shareholder lacked standing to bring the suit. Although Chancellor McCormick's opinion did not directly address the issue of whether the target board could bring a similar suit, it raised enough questions to call into doubt the validity of *Con Ed* provisions under Delaware law, putting Delaware in the same place the Second Circuit with respect to such provisions.

In response to the *Crispo* decision, the Delaware General Assembly adopted new § 261 to permit parties to include in merger agreements provisions that would name the target, or other stockholder representative, agent on behalf of shareholders to pursue damages, including any lost premium or other "penalties or consequences." Under § 261 any recovery made pursuant to this provision need not be shared with the shareholders and may be retained by the target.

The codification of *Con Ed* provisions under § 261 raises questions related to the future of merger remedies. Until now, specific performance provisions have been uniformly present in merger agreements. Con Ed provisions have been common, but not uniformly present. And, when they have been present tended to be of the "tape and glue" variety. Until now, the availability of specific performance has done much of the heavy "deal certainty" lifting. Whether that will be true going forward, is an unknown.

As a matter of basic contract law doctrine, specific performance has always been a disfavored remedy. When at all possible, courts will seek to fashion a cash damages remedy rather than look to specific performance. However, since *IBP*[2] in 2001, practitioners have come to rely on the willingness of the Chancery Court to enforce negotiated specific performance provisions in merger agreements. In a recent article Chancellor McCormick noted that the Delaware court has departed from the traditional doctrinal aversion to ordering specific performance to honor the contracting parties desire for deal certainty:

> As specific performance provisions became ubiquitous in M&A agreements, Delaware law's analysis of specific performance in the merger context shifted away from the traditional equitable approach to instead prioritize the parties' contractual scheme. This contractarian approach led the court to, in effect, invert the common-law framework for

[2] *In re IBP Shareholders Litigation*, 789 A.2d 14 (2001).

specific performance and treat specific performance as the presumptive remedy in the event of breach.[3]

Dealmakers have come to understand that when sophisticated parties have negotiated for specific performance and deal certainty, they will get it in Delaware.

New § 261 raises the prospect of reversing the current Chancery Court's approach to remedies in the merger context. The increased salience of a cash damages remedy endorsed by the legislature may signal to the court, as well as parties to merger contracts that, as a matter of policy, Delaware disagrees with the Chancery Court's reliance on specific performance as the presumptive remedy for breach in the context of merger agreements.

Until recently, when a reluctant buyer seeks to walk away from a deal, the negotiation between buyer and seller has been against the backdrop of specific performance. Sellers knew that Delaware courts would enforce specific performance of merger agreements, thus increasing the likelihood of the deal actually closing. On the other hand, following adoption of § 261, future negotiations with reluctant buyers will take place against a backdrop of a damages remedy, making it much more likely that buyers will be able to pay to walk away from deals, thus reducing deal certainty.

Following § 261, reluctant buyers now face two possible outcomes, rather than one, in their decision tree when a buyer wishes to breach and walk away from a deal in the absence of an MAE:

A. Go to court, pay shareholder premium and walk; or
B. Go to court, buy whole company.

The presence of a credible damages remedy, rather than a nebulous handing waving exercise, raises the likelihood that reluctant buyers see an escape other than purchasing the target. Can you imagine if someone had advised that he could have walked away from Twitter by simply paying $10 billion? He might well have done that. In any event, the long-term implications of codifying Con Ed provisions is yet unknown.

§ **261. Remedies; appointment of stockholder representatives; Effect of merger upon pending actions.**

(a) Any agreement of merger or consolidation governed by § 251, other than a merger effected pursuant to § 101 251(g) of this title, § 252, § 254, § 255, § 256, § 257, § 258, § 263 or § 264 of this title may provide:

(1) That (i) a party to the agreement that fails to perform its obligations under such agreement in accordance with the terms and conditions of such agreement, or that otherwise fails to comply with the terms and conditions of such agreement, in each case, required to be performed or complied with prior to the time such merger or consolidation becomes effective, or that otherwise fails to consummate, or fails to cause the consummation of, the merger or consolidation (whether prior to a specified date, upon satisfaction or, to the extent permitted by law, waiver of all conditions to such consummation set forth in such agreement, or otherwise) shall be subject, in addition to any other remedies available at law or in

[3] Chancellor Kathaleen St. Jude McCormick & Robert Erikson, *Delaware's Approach to Specific Performance in M&A Litigation*, 20 NYU J. L & BUS. 7, 8 (2023).

equity, to such penalties or consequences as are set forth in the agreement of merger or consolidation (which penalties or consequences may include an obligation to pay to the other party or parties to such agreement an amount representing, or based on the loss of, any premium or other economic entitlement the stockholders of such other party would be entitled to receive pursuant to the terms of such agreement if the merger or consolidation were consummated in accordance with the terms of such agreement) and (ii) if, pursuant to the terms of such agreement, a corporation is entitled to receive payment from another party to an agreement of merger or consolidation of any amount representing such a penalty or consequence (as specified in clause (i) of this paragraph (a)(1)), such corporation shall be entitled to enforce the other party's payment obligation and, upon receipt of any such payment, shall be entitled to retain the amount of such payment so received.

(2)(i) For the appointment, at or after the time at which the agreement of merger or consolidation is adopted by the stockholders of a constituent corporation to such merger or consolidation in accordance with the requirements of this subchapter, of one or more persons (which may include the surviving or resulting entity or any officer, manager, representative or agent thereof) as representative of the stockholders of a constituent corporation of this State, including those whose shares of capital stock shall be cancelled, converted or exchanged in the merger or consolidation and for the delegation to such person or persons of the sole and exclusive authority to take action on behalf of such stockholders pursuant to such agreement, including taking such actions as the representative determines to enforce (including by entering into settlements with respect to) the rights of such stockholders under the agreement of merger or consolidation, on the terms and subject to the conditions set forth in the agreement, (ii) that any appointment pursuant to clause (i) of this paragraph (a)(2) shall be irrevocable and binding on all such stockholders from and after the adoption of the agreement of merger or consolidation by the requisite vote of such stockholders pursuant to this subchapter, and (iii) that any provision adopted pursuant to this paragraph (a)(2) may not be amended after the merger or consolidation has become effective or may be amended only with the consent or approval of persons specified in the agreement of merger or consolidation.

Any provision of the agreement of merger or consolidation adopted pursuant to this subsection (a) may be made dependent upon facts (including, but not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation) ascertainable outside of such agreement, provided that the manner in which such facts shall operate upon the terms of the agreement is clearly and expressly set forth in the agreement of merger or consolidation.

CHAPTER XV: Resisting a Hostile Offer

Add a paragraph on page 491, after the first full paragraph, as the last paragraph of Chapter XV.F.4:

Recall the earlier discussion on poison pills. These may be put in place during or anticipating an activist campaign, or prior to any such campaign (respectively, "rainy day" and "clear day" pills). Similarly, a poison put may be put in on a clear day, making it properly "embedded," or on a rainy day, as discussed above in the context of the Couche-Tard offer.

When do firms use poison pills and when do they use poison puts? Recent research on poison puts, or, as the authors call them, poison bonds,[4] provides evidence that pressure to get rid of poison pills (discussed in Chapter XXI, on Shareholder Activism) has led to greater adoption of poison bonds. The authors find that:

> The share of poison bonds among new issues has grown substantially in recent years, from below 20% in the 90s to over 60% since mid-2000s. This increase is predominantly driven by investment-grade issues. We provide causal evidence that the pressure to eliminate poison pills has led firms to issue poison bonds as an alternative. Our analysis suggests that this practice entrenches incumbent managers and destroys shareholder value. Holding a portfolio of firms that remove poison pills but promptly issue poison bonds results in negative abnormal returns of -7.3% per year.[5]

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[4] The puts are covenants; the authors are using the term to mean loan agreements that contain these 'poison' covenants.

[5] Rex Wang Renjie & Shuo Xia, "*Poison Bonds*," IWH Discussion Papers 3/2024, Halle Institute for Economic Research (IWH) (2024).

CHAPTER XVI: Fiduciary Duty Litigation

On page 516, at the end of the carryover paragraph in Chapter XVI.C:

Thus, it can be said that in a meaningful sense, there are really only two standards, entire fairness and business judgment. The question as to which standard applies, for purposes of a finding of liability and damages, may be approached directly, or, where the facts and arguments warrant, after a first step, "enhanced scrutiny."

CHAPTER XIX: Selling the Corporation

Add to page 683, as its own paragraph at the end of Chapter XIX. C. 4:

A recent case, *In Re Edgio, Inc. Stockholders Litigation,* C.A. No. 2022-0624-MTZ (Del. Ch. 2023) addressed the effect of *Corwin* on claims for post-closing equitable relief under *Unocal.* Limelight, a public company, bought another company from an investor, with the investor receiving 35% of Limelight's stock. The transaction required Limelight shareholder approval because of the NASDAQ rule (issuance of 20% or more of a company's stock) discussed in Chapter II. Limelight and the investor/seller entered into an agreement in which the seller agreed to, among other things, "vote in favor of the Board's recommendations with respect to director nominations and against any nominees not recommended by the Board," for other non-routine matters submitted for a stockholder vote, …vote in favor of the Board's recommendation or pro rata with all other Company stockholders" and agree to certain restrictions on transferring their shares. Shareholders made Unocal claims of board entrenchment. Limelight claimed that they were entitled to business judgment deference. The court held that:

> the claim here—a claim to enjoin enduring alleged entrenchment devices—is not a type of claim that Corwin was designed to cleanse. In Corwin, our Supreme Court held a stockholder vote could cleanse a post-closing claim for damages, even if enhanced scrutiny under Revlon was warranted. Emphasizing that holding was limited to claims seeking monetary relief, our Supreme Court explained the ruling would not "impair the operation of Unocal" in its core function of elevating scrutiny for claims for injunctive relief.

CHAPTER XX: Conflicts of Interest: Director, Officer, and Shareholder conflicts

Add a new paragraph at the end of XX. B. 10, on page 744

Companies sometimes conclude that an entire fairness review is preferable to attempting to meet the MFW conditions, and cases support that doing so may be a winning strategy for companies not wishing to take, for instance, the risk that they might not receive a majority of the minority vote. For instance, in *In re BGC Partners Inc. Derivative Litigation,* C.A. 2018-7022 (Del. 2023), the Delaware Supreme Court affirmed the Chancery Court's finding that notwithstanding a flawed process, the defendant had succeeded in showing that the transaction met entire fairness: the process was fair enough, as was the price. Other cases finding that entire fairness was met include *In re Tesla Motors, Inc. Stockholder Litigation*, C.A. No. 12711 (Del. 2023), in which the Delaware Supreme Court affirmed the Chancery Court's finding that, similarly, notwithstanding a flawed process, the acquisition by Tesla, a company Elon Musk controls, of another company that Musk controls, Solar Winds, met the test for entire fairness.

At the bottom of the page on 745, add the following text, as its own paragraph:

Indeed, in *In re Match Grp., Inc. Deriv. Litig.* (*Match Group II*), __ A.3d __, 2024 WL 1449815 (Del. 2024), the Delaware Supreme Court expressly held that even where there is no freeze-out merger, a controlling stockholder transaction in which the controller gets a non-ratable benefit nevertheless requires compliance with MFW in order to get business judgment deference, rejecting the defendants' argument that either shareholder approval (that is, majority of the minority) or approval by an independent special committee should suffice. The court further held that for purposes of MFW, the independence of the special committee requires more than that a majority of the members be independent.

Insert at the end of page 745, as a new Subsection 12: What Is Control?

Since the applicability of caselaw concerning controlling shareholders turns on whether there is a controlling shareholder, the definition of controlling shareholder is of great importance. Beyond the obvious cases (holder of a majority of stock of the corporation), there are more contested cases. One new issue raised by a recent statutory change is whether that change will affect determinations of control status, as discussed below.

Shareholder Agreements and Non-Traditional Controllers

Following the recent adoption of § 122(18) by the Delaware Assembly, boards now have statutory authority to enter into contracts with shareholders that can, in effect, outsource questions of internal governance to shareholders. Section 122(18) does not include any requirement that the shareholder own a specific number of shares to justify the shareholder's right to dictate the result of internal governance matters. The effect of § 122(18) is that a shareholder holding a single share of common stock could end up in a position of control as a result of a shareholder agreement. As a function of the control such a shareholder could have over internal governance questions, the shareholder agreement could impose fiduciary obligations on the shareholder counterparty. As a "contractual controller," the shareholder counterparty may be required to bear the burden of proving entire fairness in the event non-controlling shareholders were able to challenge the implementation of any shareholder agreement.

Add a line at the end of the text on 766, with additional text afterwards, as follows:

One reaction to these cases (and their holdings) has been for SPACs to increasingly organize outside of Delaware, with some instead favoring the Cayman Islands.

See WoodruffSawyer Memo.

CHAPTER XXI: Shareholder Activision

Insert on page 780 at the end of Chapter XXI.B, "What is Activism?"

2024 Market Practice Amendments: Moelis and § 122(18) Shareholder Agreements

In June 2024, the Delaware General Assembly adopted new § 122(18). New § 122(18) authorizes boards to enter into contracts with stockholders that, notwithstanding § 141(a), outsource internal governance decisions to stockholders. This new provision was adopted by the Assembly at the instigation of the corporate bar following a Chancery Court decision in *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, No. 2023-0309-JTL (Del. Ch. Feb. 23, 2024). In 2009, the board of Moelis & Co. signed an agreement with Ken Moelis, its then controlling stockholder. At the time, Moelis & Co. was still a private company. The agreement was intended to ensure that notwithstanding the number of shares Moelis might have in the future that he would maintain actual control of the corporation. Among other things, the agreement included the following:

- Pre-approval requirements: Moelis' consent was required before the board could take 18 different types of actions, including:
  - (i) the incurrence of debt above a specified amount,
  - (ii) the issuance of common and preferred stock,
  - (iii) the adoption of a stockholder rights plan,
  - (iv) the removal or appointment of certain officers of the Company (including its founder/CEO),
  - (v) the approval of annual budgets,
  - (vi) the declaration of dividends, and
  - (vii) entering material contracts.
- Board composition: The agreement required the board to recommend that stockholders vote for Moelis' board nominees and that the board have 11 seats or fewer
- Committee composition: The agreement included provisions to ensure that Moelis' nominees would represent a proportionate number of any committee's composition.

Moelis & Co. later went public. Ken Moelis' stock position then declined to less than a majority. Nevertheless, through the stockholder agreement signed with the board more than a decade earlier, Ken Moelis was able to maintain control over the corporation and its board. Public stockholders sued arguing that by outsourcing critical internal governance decisions to Ken Moelis that the stockholder agreement infringed on § 141(a) was thereby illegal. Vice Chancellor Laster agreed.

As it turns out over the past few years, firms have been increasingly relying on stockholder agreements in a variety of circumstances. For example, in In *Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, No. 354, 2020, 2021 WL 4165159 (Del. Sept. 13, 2021), the Delaware

Supreme Court affirmed the use of stockholder agreements by to waive stockholders' rights of appraisal under Section 262 of the Delaware General Corporation Law. Of course, the stockholder agreement approved by the Court in Manti Holdings related to the stockholders and their rights as stockholders. These agreements did not infringe on the board's statutory authority under § 141(a).

The use of stockholder agreements to confer rights on shareholders to manage the corporation directly, have only recently become the subject of academic research. Their use was documented by Prof. Gabriel Rauterberg (Gabriel Rauterberg, *The Separation of Voting and Control: The Role of Contract in Corporate Governance*, 38 YALE J. REG. 1124 (2021) (finding that 15% of IPOs in recent years included such agreements)) and Prof. Jill Fisch (Jill E. Fisch, *Stealth Governance: Shareholder Agreements and Private Ordering*, 99 WASH. U. L. REV. 913 (2022) (arguing that the use of shareholder agreements evades statutory limits on charter and bylaw provisions)).

In response to the release of the *Moelis* opinion, the organized corporate bar mobilized to have the Delaware General Assembly revised the DGCL to authorize agreements such as the one entered into by Moelis & Co. (see new § 122(18)).

While the organized bar has represented to the Assembly and the public that the addition of new § 122(18) is merely a technical amendment, it goes much further than that. While the *Moelis* agreement represented an extreme version of existing stockholder agreements at the time, it now represents the baseline agreement permitted under new § 122(18).

It is still too early to tell how new § 122(18) will impact on corporate governance, however one can already predict a couple of things that will be relevant to an M&A practice.

1. Greater tail-end control of public companies by private equity investors. Typically, when a private equity investor takes a company public through an IPO, the private equity investor's control over the business declines as they liquidate their positions and return capital to their investors. Section 122(18) will make it possible for private equity investors to reduce their economic exposure to their portfolio companies, while maintaining operational control. To the extent private equity investors have interests in so-called "continuation funds" they may find having greater tail-end control to be valuable.
2. Dual class stock structures will be less important over time. Over the past decade, VC back start-ups went public with dual class stock structures that permitted the founders to maintain control of the public corporation through high vote stock. This complicated the capital structure of the company, but for many founders maintaining control of the company post-IPO was worth it. Going forward, founders of VC-backed corporations can go public with stockholder agreements in place that cement their personal control of the corporation. This will permit founders to sell large amounts of stock while not giving up control of the public company.
3. When challenged by stockholder activists, boards have typically settled stockholder contests with settlement agreements in which the board promises to appoint a

representative of the stockholder to the board. Going forward, one can expect stockholder activists to be more aggressive in their "settlement demands."

4. Section 122(18) specifically permits stockholder agreements to elect choice of law/choice of forum provisions that send litigation over enforcement of the contracts outside the state of incorporation. One can expect an increase in confidential arbitration provisions as well as selection of NY contract law to govern the contracts. This will ensure that stockholders who have signed these contracts will be insulated from the jurisdiction of the Delaware courts, which controlling stockholders believe is too antagonistic to their interests.
5. At some point in the future, it may be that institutional stockholders will resist permitting corporations to go public in Delaware and encourage them to re-incorporate in states that are more protective of minority rights.

§ 122. Specific powers.

Every corporation created under this chapter shall have power, whether or not so provided in the certificate of incorporation, to:

(18) Notwithstanding § 141(a) of this title, make contracts with one or more current or prospective stockholders (or one or more beneficial owners of stock), in its or their capacity as such, in exchange for such minimum consideration as determined by the board of directors (which may include inducing stockholders or beneficial owners of stock to take, or refrain from taking, one or more actions); provided that no provision of such contract shall be enforceable against the corporation to the extent such contract provision is contrary to the certificate of incorporation or would be contrary to the laws of this State (other than § 115 of this title) if included in the certificate of incorporation. Without limiting the provisions that may be included in any such contracts, the corporation may agree to: (a) restrict or prohibit itself from taking actions specified in the contract, (b) require the approval or consent of one or more persons or bodies before the corporation may take actions specified in the contract (which persons or bodies may include the board of directors or one or more current or future directors, stockholders or beneficial owners of stock of the corporation), and (c) covenant that the corporation or one or more persons or bodies will take, or refrain from taking, actions specified in the contract (which persons or bodies may include the board of directors or one or more current or future directors, stockholders or beneficial owners of stock of the corporation). Solely for purposes of applying the proviso in the first sentence of this subsection, a restriction, prohibition or covenant in any such contract that relates to any specified action shall not be deemed contrary to the laws of this State or the certificate of incorporation by reason of a provision of this title or the certificate of incorporation that authorizes or empowers the board of directors (or any one or more directors) to take such action. With respect to all contracts made under this paragraph (18), the corporation shall be subject to the remedies available under the law governing the contract, including for any failure to perform or comply with its agreements under such contract.

At the end of A on page 772, before B:

Replace the sentence that starts "During the 2021 proxy season" with the following text:

Over the years, there have been increasing numbers of climate proposals made. However, there has also been a backlash, and support for the proposals is generally declining.[6] And indeed, Engine No. 1's influence on ExxonMobil does not seem to have yielded much in the way of environmental improvement (with, it should be noted, its stock price near a historical high at this writing).[7]

[Starting a new paragraph] There are also other interactions between economic and social activism, some in the general category of "backlash to woke-ism." In this regard, one campaign, by economic activist Nelson Peltz's fund Trian, sought to replace Disney directors with himself and another person. [8] One important component of their campaign was an objection to "woke" approaches to movie casting. Trian lost the director election decisively, and Trian sold its entire stake in Disney soon afterwards.

Insert on page 793 at the end of XXI. D, Defenses Against Activism

Unocal applied to Advance Notice Bylaws

In 2024, Delaware courts have addressed concerns about the validity and enforcement of advance notice bylaws (ANBs). ANBs require shareholders to notify a corporation about their intent to nominate directors or propose other matters for consideration at shareholder meetings. A key recent case include Kellner v. AIM ImmunoTech, Inc., which involved significant scrutiny of the AIM's ANB provisions. In *Kellner*, the court demonstrated its willingness to use the intermediate standard to evaluate a board's decision to use ANBs to thwart shareholders attempts to access the corporate ballot.

In *Kellner*:

> A group of AIM ImmunoTech, Inc. shareholders thought that the board of directors was mismanaging the company. They launched an activism campaign and proxy contest to elect new directors. The insurgents included two felons convicted of wire fraud, insider trading, and other crimes. The campaign escalated into two attempts to nominate directors to the AIM board. …
>
> The AIM board … rejected [plaintiff] Kellner's nominations for failing to comply with the new advance notice bylaws. Kellner filed suit. After trial, the Court of Chancery invalidated four of the six main advance notice bylaws and reinstated the 2016 version of one of the invalidated bylaws. Ultimately, the court upheld the board's rejection of the third nomination notice because it failed to comply with the two advance notice bylaws left standing, including the reinstated 2016 bylaw provision. …

[6] https://insights.issgovernance.com/posts/2023-united-states-proxy-season-review-environmental-and-social/
[7] https://www.nytimes.com/2023/05/31/business/dealbook/engine-no-1-exxon-mobil.html
[8] https://www.vulture.com/article/disney-proxy-fight-shareholder-meeting-nelson-peltz.html

> In a challenge to the adoption, amendment, or enforcement of a Delaware corporation's advance notice bylaws that is ripe for judicial review, the court should consider the following: first, if contested, whether the advance notice bylaws are valid as consistent with the certificate of incorporation, not prohibited by law, and address a proper subject matter; and second, whether the board's adoption, amendment, or application of the advance notice bylaws were equitable under the circumstances of the case.
>
> Applying this framework to the current appeal, we hold that: (1) one "unintelligible" bylaw is invalid; (2) the remaining amended advance notice bylaws subject to this appeal are valid because they are consistent with the certificate of incorporation, not prohibited by law, and address a proper subject matter; and (3) the AIM board acted inequitably when it adopted the amended bylaws for the primary purpose of interfering with, and ultimately rejecting, Kellner's nominations. Thus, the remaining bylaws challenged on appeal are unenforceable.

1. Facial Validity of Bylaws: Generally, Delaware law presumes bylaws to be valid. However, to successfully challenge a bylaw's validity, a plaintiff must prove that the bylaw cannot operate lawfully under any circumstances. In *Kellner*, certain provisions were invalidated for being "unintelligible" or overly broad, such as the "Ownership Provision," which was deemed vague and burdensome.

2. ANBs as Defensive Measure: Courts apply enhanced scrutiny when ANBs are adopted or enforced during contentious times, such as proxy contests. Application of *Unocal*'s enhanced scrutiny standard ensures that the board's actions are proportionate and not motivated by self-interest or to unduly block shareholder actions, including the free use of the shareholder franchise. In *Kellner*, the Delaware Supreme Court found that some bylaws were adopted with improper motives, undermining their enforceability.

3. Specific Provisions:

- *Consulting/Nomination Provision*: Required disclosure of arrangements regarding consulting or nominations for other companies. It was found overly broad and ambiguous, leading to its invalidation.

- *Known Supporter Provision*: Required disclosing all supporters of a nomination, not just financial ones. It was struck down due to its vagueness and potential to unfairly exclude nominees.

- *Ownership Provision*: Aimed at disclosing a wide range of ownership interests, but was criticized for its complexity and ambiguity, resulting in its invalidation.

4. Provisions Found Valid: Some provisions, such as the "First Contact" and "Questionnaire" provisions, were upheld. These required disclosure of initial contacts and completion of questionnaires, respectively, and were deemed reasonable and enforceable.

Courts have been vigilant in ensuring that advance notice bylaws do not overreach or impede the shareholder franchise unduly.