

Significant Delaware Supreme Court Decisions

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Board Was Required to Disclose the Chairman's Reasons for Abstaining From a Board Vote on the Sale of the Company

On February 20, 2018, the Delaware Supreme Court reversed dismissal of a shareholder action alleging that the board of directors failed to disclose the reasons why the chairman of the board, who was also the company's founder, abstained from a board vote on the sale of the company. [Appel v. Berkman, 180 A.3d 1055 \(Del. 2018\) \(Strine, C. J.\)](#). The court rejected defendants' contention that "the reasons for a dissenting or abstaining board member's vote can never be material." The court explained that "when, as here, a board expresses its reasons for voting in favor of a transaction, the contrary view of an individual board member may be material to a stockholder wrestling with whether to accept the board's recommendation."

The Delaware Supreme Court emphasized that its "decision in no way implies that the reason for a particular director's dissent or abstention will always be material." Rather, the court reaffirmed the "contextual approach" for determining whether disclosure "would materially affect the mix of information, or whether the disclosure is required to make sure that other disclosures do not present a materially misleading picture." In the case before it, the Delaware Supreme Court determined that "the founder and [c]hairman's views regarding the wisdom of selling the company were ones that reasonable stockholders would have found material in deciding whether to vote for the merger or seek appraisal, and the failure to disclose them rendered the facts that were disclosed misleadingly incomplete."

Corwin's Cleansing Rule Is Inapplicable If the Disclosures Omitted Material Facts That a Reasonable Stockholder Would Have Considered Important in Deciding How to Vote

On July 9, 2018, the Delaware Supreme Court reversed dismissal of a shareholder class action challenging a take-private transaction on the grounds that the disclosures omitted material information concerning a side agreement between the company's founder and the acquiror. [Morrison v. Berry, 191 A.3d 268 \(Del. 2018\) \(Valihura, J.\)](#). The Delaware Supreme Court held that "partial and elliptical disclosures cannot facilitate the protection of the business judgment rule under the *Corwin* doctrine," particularly in transactions involving the sale of the company.

The Delaware Supreme Court explained that the key inquiry is "whether the stockholder vote was fully informed—that is, whether the [c]ompany's disclosures apprised stockholders of all material information and did not materially mislead them." The court stated that "this

materiality test does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote.” Rather, “[o]mitted information is material if there is a substantial likelihood that a reasonable stockholder would have considered the omitted information important when deciding whether to tender her shares or seek appraisal.” The Delaware Supreme Court cautioned that “[c]areful application of *Corwin* is important due to its potentially case-dispositive impact.”

MFW’s Ab Initio Requirement Is Satisfied if the Controller Conditions the Transaction on MFW’s Procedural Protections Before the Commencement of Substantive Economic Negotiations

On October 9, 2018, the Delaware Supreme Court held that *MFW* does not impose a bright-line rule requiring a controlling stockholder to condition a proposed transaction on the satisfaction of *MFW*’s two “key procedural protections” in the controller’s initial offer. [Flood v. Synutra Int’l](#), 195 A. 3d 754 (Del. 2018) (Strine, C.J.). The court found *MFW*’s *ab initio* requirement is satisfied if the controller “conditions its bid on [these] protections at the beginning stages of the process . . . before any economic negotiations commence.”

The Delaware Supreme Court further held that if the transaction satisfies the *MFW* standard, then plaintiffs can state a duty of care claim only by alleging that the independent special committee acted with gross negligence. Plaintiffs cannot plead a duty of care violation based solely on an allegedly inadequate deal price. Notably, the Delaware Supreme Court expressly overruled *MFW*’s footnote 14 to the extent it suggests that “a due care violation can be premised . . . on a court’s after the fact sense that the committee should have extracted more price concessions.”

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