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In This Issue:

- *Delaware Court of Chancery Clarifies When Minority, Rollover Stockholders Become Controllers in a Take-Private Transaction* [read more](#)
- *Delaware Supreme Court Reverses Dismissal of Claims Challenging CEO's Nondisclosure of Post-Merger Compensation Proposal to the Board* [read more](#)
- *Delaware Court of Chancery Finds Private Equity Controller's Preferred Redemption Entirely Fair* [read more](#)
- *Delaware Court of Chancery Holds That Board Not Obligated to Doubt Information from Management* [read more](#)
- *Delaware Court of Chancery Permits Caremark Claims to Proceed* [read more](#)
- *Delaware Court of Chancery Determines That Board Did Not Breach Fiduciary Duties in Connection with CEO Separation Agreement* [read more](#)
- *Delaware Court of Chancery Issues Courtroom Protocols* [read more](#)

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Delaware Court of Chancery Clarifies When Minority, Rollover Stockholders Become Controllers in a Take-Private Transaction

In *Gilbert v. Perlman*, the Delaware Court of Chancery held that two minority stockholders of Connecture, Inc. did not become controllers of Connecture merely by agreeing to roll over their shares in a going-private merger by Connecture's majority stockholder. The court explained that two conditions must be met for a minority stockholder to be found to have joined a control group (and therefore owe fiduciary duties to the minority stockholders): (i) the stockholders must be connected in some legally significant way, such as by contract, common ownership or other arrangement, towards a shared goal (this being a prerequisite for the formation of any control group under Delaware law), and also (ii) "the controller must perceive a need to include the minority holders to accomplish the goal" and cede "some material attribute of its control to achieve their assistance." For more, click [here](#).

Delaware Supreme Court Reverses Dismissal of Claims Challenging CEO's Nondisclosure of Post-Merger Compensation Proposal to the Board

In a 4-1 split decision in *City of Fort Myers General Employees' Pension Fund v. Haley*, the Delaware Supreme Court reversed the Court of Chancery's dismissal of fiduciary duty claims brought against the CEO of Towers Watson & Co. stemming from his nondisclosure to the board of a proposal regarding his post-merger compensation package. The Supreme Court concluded that plaintiffs adequately alleged that the CEO's receipt of this proposal, which was discussed after announcement of the merger but before negotiations to increase a special dividend paid to the Towers stockholders in connection with merger, was a material self-interest that should have been disclosed to the Towers board. Thus, plaintiffs adequately rebutted the business judgment presumption, leading the Supreme Court to reverse the Court of Chancery's dismissal of the claims. For the court's opinion, click [here](#).

Delaware Court of Chancery Finds Private Equity Controller's Preferred Redemption Entirely Fair

The Delaware Court of Chancery recently held in *The Frederick Hsu Living Trust v. Oak Hill Capital Partners* that a controlling stockholder and its board designees did not breach their fiduciary duties in connection with the controlling stockholder's preferred stock redemption. The court determined that Oak Hill and its representatives satisfied the most exacting standard of review in Delaware—"entire fairness"—by demonstrating that retaining cash was the company's best strategy, because the company's business was in significant decline and alternative uses of the cash would not have created additional value

for the common stockholders. The case stands for the premises that (i) where a controlling stockholder has a preferred stock redemption option, a court will apply the lens of entire fairness to the actions of the stockholder and its board designees, even as those acts relate to ordinary-course management decisions that may affect the stockholder's ability to redeem, and (ii) that a controller may nevertheless prevail under an entire fairness review on the right record. For more, click [here](#).

Delaware Court of Chancery Holds That Board Not Obligated to Doubt Information from Management

In *In re GoPro, Inc. Stockholder Derivative Litigation*, the Delaware Court of Chancery dismissed stockholder claims against the board of GoPro, Inc. relating to its alleged concealment of issues related to GoPro drone products that the plaintiffs alleged the directors knew would cause a decrease in the company's stock price. According to the court, the board received optimistic development projections from management and "was under no obligation to disclose what it did not know or did not believe to be true. Nor was it obliged to doubt the information it was receiving" from management. The court held that the plaintiffs failed to adequately plead demand futility. While it was unclear whether the plaintiffs' claims were based on an intentional misrepresentation or a failure to supervise, the claims were dismissed based on the deference afforded by the business judgment rule and the protection of the exculpatory clause in the company's charter. In addition, the court rejected the plaintiffs' argument that demand should be excused because the board could not competently consider a demand due to related federal securities litigation and a *Brophy* claim. Only one director (the controlling stockholder and CEO) was named as a defendant in the securities litigation or the *Brophy* litigation, and a controller's ability to remove board members at will does not affect their independence for demand futility purposes. For the opinion, click [here](#).

Delaware Court of Chancery Permits *Caremark* Claims to Proceed

In *Hughes v. Hu*, the Delaware Court of Chancery declined dismissal of claims brought against the directors of Kandi Technologies Group, Inc., a Delaware corporation based in China. In its decision, the court determined that a majority of the board faced a substantial risk of liability for breach of their duty of oversight claims under *Caremark*. The plaintiff adequately pled that the audit committee of the company, which had a history of issues with financial reporting and internal controls that it failed to remediate and that led it to restate its financials in certain years, "met sporadically, devoted inadequate time to its work, had clear notice of irregularities, and consciously turned a blind eye to their continuation." In addition, "the board never established its own reasonable system of monitoring and reporting, choosing instead to rely entirely on management." For the opinion, click [here](#).

Delaware Court of Chancery Determines That Board Did Not Breach Fiduciary Duties in Connection with CEO Separation Agreement

In *Shabbouei v. Potdevin*, the Delaware Court of Chancery dismissed stockholder claims against the board of directors of lululemon athletica inc. stemming from an alleged breach of their fiduciary duties for their decision to enter into a separation agreement with the company's former CEO (rather than firing him for cause). According to the court, the plaintiff failed to adequately plead demand futility, and the decision was subject to deferential business judgment review that gave the directors latitude to settle with the CEO. While certain of plaintiff's allegations suggested a breach of the duty of oversight (*i.e.*, a *Caremark* claim), the plaintiff clarified that it was not making such a claim. Further, the court noted, however, that the board adequately responded to any "red flags" when it hired outside counsel to investigate the CEO's misconduct and secured his departure without litigation and minimal negative publicity. For the opinion, click [here](#).

Delaware Court of Chancery Issues Courtroom Protocols

The Delaware Court of Chancery issued an order imposing new courtroom protocols for attorneys and visitors (available [here](#)), which became effective on June 8, 2020 in connection with the Delaware Supreme Court's announcement of the multi-phased, limited reopening of the Delaware courthouses. Pursuant to the Court of Chancery's new protocols, the court "will continue to conduct hearings telephonically or using video technology whenever it is practicable to do so at the discretion of the presiding judge." The protocols implement certain precautionary measures in the event the court conducts in-person trials and hearings, including mandatory screening of attorneys and members of the public, a requirement to maintain six feet of social distancing and the mandatory use of face coverings.

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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.

[➤ April 2020](#)[➤ May 2020](#)[➤ June 2020](#)

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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