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Mergers & Acquisitions:
A Delaware Checklist

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A DELAWARE CHECKLIST

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I. FIDUCIARY STANDARDS

A. The Business Judgment Rule Is The Touchstone For Fiduciary Analysis Of Board Action.

In general terms, the business judgment rule provides that a decision by a board of directors in which the directors possess no direct or indirect personal interest, which is made with reasonable awareness of all reasonably available material information, and after prudent consideration of the alternatives, and which is in good faith furtherance of a rational corporate purpose, will not be interfered with by the courts, either prospectively by injunction, or retrospectively by imposition of liability for damages upon the directors, even if the decision appears to have been unwise or to have caused loss to the corporation or its stockholders.

- *Omnicare, Inc. v. NCS Healthcare, Inc.,* 818 A.2d 914, 928 (Del. 2003) ("The business judgment rule embodies the deference that is accorded to managerial decisions of a board of directors. 'Under normal circumstances, neither the courts nor the stockholders should interfere with the managerial decision of the directors.'").
- *McMullin v. Beran*, 765 A.2d 910, 916 (Del. 2000) (holding that the business judgment rule "combines a judicial acknowledgement of the managerial prerogatives that are vested in the directors of a Delaware corporation by statute with a judicial recognition that the directors are acting as fiduciaries in discharging their statutory responsibilities to the corporation and its shareholders").
- *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1373 (Del. 1995) (holding that "a decision made by a loyal and informed board will not be overturned by the courts unless it cannot be 'attributed to any rational business purpose'").
- *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (holding that the business judgment rule "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company").
- *In re Goldman Sachs Grp., Inc. S'holder Litig.,* 2011 WL 4826104, at *23 (Del. Ch. Oct. 12, 2011) ("Through the business judgment rule, Delaware law encourages corporate fiduciaries to attempt to increase stockholder wealth by engaging in those risks that, in their business judgment, are in the best interest of the corporation 'without the debilitating fear that they will be held personally liable if the company experiences loss.'").
- *Gagliardi v. Trifoods Int'l, Inc.*, 683 A.2d 1049, 1053 (Del. Ch. 1996) (holding that the business judgment rule "provides that where a director is independent and disinterested, there can be no liability for corporate loss, unless the facts are such that no person could possibly authorize such a transaction if he or she were attempting in good faith to meet their duty").

B. Duty Of Care. The board of directors must exercise due care in connection with a merger or other business combination. Although the standard of conduct for claims that a director breached her duty of care typically is gross negligence, a breach of the duty of care may be established in certain circumstances for purposes of determining secondary liability (i.e., for situations where the directors themselves do not face liability) by showing simple negligence.

- *Smith v. Van Gorkom,* 488 A.2d 858 (Del. 1985) (holding that in the specific context of a proposed merger, directors have a duty to act in an informed and deliberative manner in determining whether to approve a merger agreement before submitting proposal to the stockholders).
- *Aronson v. Lewis,* 473 A.2d 805 (Del. 1984) (holding that directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them; having become so informed, they must then act with requisite care in the discharge of their duties).
- *McMullin v. Beran,* 765 A.2d 910 (Del. 2000) (holding that complaint adequately stated claim that directors failed to exercise due care when they approved a merger negotiated by the majority stockholder without adequately informing themselves about the transaction and without determining whether the merger consideration equaled or exceeded the value of the company as a going concern).
- *McPadden v. Sidhu,* 964 A.2d 1262 (Del. Ch. 2008) (finding plaintiff adequately pled a duty of care violation in connection with a corporation's sale of a subsidiary corporation to management where: (1) the board delegated the task of selling the subsidiary to its vice-president, the leader of the management group that sought to acquire the subsidiary; (2) the board did very little to oversee the process of selling the subsidiary and therefore provided no check on the vice-president's "half-hearted" efforts to solicit bids for the subsidiary; (3) the vice-president did not contact any of the subsidiary's competitors, who were its most likely buyers; and (4) the sale price was at the lowest end of the valuation range generated by the corporation's financial advisor).
- *RBC Capital Markets,* LLC v. Jervis, 2015 WL 7721882 (Del. Nov. 30, 2015 (stating that when "disinterested directors themselves face liability, the law, for policy reasons, requires that they be deemed to have acted with gross negligence in order to sustain monetary judgment against them," but holding that a breach of the duty of care in a context where *Revlon* is applicable and the plaintiff is attempting to establish a predicate breach of fiduciary duty in connection with a claim for secondary liability (*i.e.,* aiding and abetting), may be established by showing simple negligence).

C. Change In Control: *Revlon.* A number of cases have imposed a heightened standard on directors approving a change in control transaction. In such a situation, directors must act reasonably to maximize the short-term value of the consideration to be received by the stockholders, and courts will scrutinize the methods utilized to do so. *But see Malpiede v. Townson*, 780 A.2d 1075, 1084 (Del. 2001) (explaining that even where "the *Revlon* doctrine imposes enhanced judicial scrutiny