More Kicking and Screaming: Developments in Drag-Alongs and Other Minority Stockholder Squeeze-Out Techniques

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1. Competing Equityholder Interests and Objectives

Majority Equityholders:

- Generally want unfettered exit and liquidity rights
- May seek to include majority-friendly exit or liquidity mechanisms

Minority Equityholders:

- Generally want fair price and fair terms
- May seek to place guardrails on any exit or liquidity mechanisms

2. Exit / Liquidity Mechanisms

1. **Drag-Along Right:**	Right that provides an equityholder engaging in a sale of all or a portion of its interests in the company the right to force the other equityholders to co-sell all or a portion of their interests in the company.
2. **Forced Exit / Liquidity Transaction:**	Provision that requires the company to work towards an exit or liquidity event after a certain period of time has passed.
3. **Buy-Sell Provision:**	Permits an equityholder to offer to purchase the other equityholders' interests in the company at a set price and terms, and the recipient equityholder must then either sell its interests at such price and terms or purchase the offering equityholder's interests at such price and terms.
4. **Call Right:**	Provides an equityholder the right to purchase the interests of the other equityholders at a pre-determined price or a price set pursuant to a pre-determined calculation methodology.

Drag-Along Rights

Drag-Along Right: Complications re: Fiduciary Duties

In re Good Technology, 2017 WL 2537347 (Del. Ch. May 12, 2017)

- Dispute arising out of Blackberry Corporation's acquisition of Good Technology Corporation in 2015. Good Technology attempted to require certain stockholders to comply with the terms of a voting agreement.
- The voting agreement contained drag along provision and an express waiver of appraisal rights that became operative in connection with a sale of the company.
- The obligations under the voting agreement were triggered by board and preferred stockholder approval.
- Former CEO and common stockholder refused to consent to the merger, brought fiduciary duty suit and demanded appraisal.
- Good Technology, after failed attempts to obtain the consents contemplated by the voting agreement, closed the merger and sought to enforce voting agreement and require plaintiff to withdraw appraisal demand.

Drag-Along Right: Complications re: Fiduciary Duties

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Terms of Drag-Along

- In the event "that the Board and the holders of a majority of the outstanding shares of Preferred Stock . . . approve" a Sale of the Company . . . "each Investor and Common Holder hereby agrees . . . (ii) to vote (in person, by proxy or by action by written consent, as applicable . . . in favor of such Sale of the Company . . . (iii) to refrain from exercising any dissenters' rights or rights of appraisal under applicable law . . . and (iv) to execute and deliver all related documentation and take such other action in support of the Sale of the Company as shall reasonably be requested by the Company."
- No proxy.

Key Points from Chancery Decision

- "It seems likely, for example, that an implied term of the drag right and appraisal waiver is that the board did not breach its fiduciary duties when approving the merger that triggers the drag."
- "A key purpose of conditioning a drag sale on board approval is "to require the board to consider its fiduciary duty to all of the company's owners." In light of this purpose, the parties may have regarded it as so obvious that the Company could only enforce the Drag-Along if the board complied with its fiduciary duties that it would have been "obvious and provocative" to include such a term explicitly. Assessing whether the parties intended to imply such a term will require a factual determination based on a full trial record."

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