
Can Appraisal Rights be Waived by Agreement?

By William E. Sigler

In M&A transactions, an appraisal right is the statutory right of a corporation's minority shareholders to have a fair stock price determined by a judicial proceeding or independent valuator, and the obligation of the acquiring corporation to purchase shares at that price.

Background

Coinciding with the increase in M&A activity over the last few years has been an increase in the number of M&A disputes between companies and their minority shareholders. Most commonly, these disputes have involved pre-closing disclosure issues, post-closing accounting issues or breach of fiduciary duty claims. Recent cases, however, have increasingly involved litigation in which minority shareholders have exercised appraisal rights to contest the deal prices offered in the transactions.

Facts

In *Halpin v. Riverstone National, Inc.*, C.A. No. 9796-VCG (Del. Ch. Feb. 26, 2015), the Delaware Chancery Court raised, but left unanswered, the question as to whether minority shareholders, by agreeing to a "drag-along" provision in a shareholder agreement, waived their statutory appraisal rights. Riverstone had five minority shareholders all of whom entered into the shareholders' agreement containing the "drag-along" provision. This provision required them to vote or tender their shares in favor of any change-in-control transaction supported by Riverstone's 91% majority shareholder.

On May 29, 2014, Riverstone's majority shareholder provided its written consent to a merger with a third party without prior notice to the minority shareholders. The merger agreement was executed on May 30, 2014, and became effective on June 2, 2014. On June 9, 2014, Riverstone sent a letter to the five minority shareholders advising them that it "has 'exercised the 'drag-along right' ... and specifically is requiring you to vote to approve the adoption of the merger agreement." The letter stated that the minority shareholders "may be entitled to

exercise appraisal rights,” but that any attempt to do so would constitute a breach of the shareholders’ agreement. Two of the minority common shareholders filed an appraisal action. Riverstone brought counterclaims and third-party claims against all five minority shareholders, seeking specific performance of the drag-along provision.

Arguments

The minority shareholders argued that they should not be able to waive statutory appraisal rights in advance because doing so would allow the majority shareholder to set the consideration for the waiver unilaterally at a later date. Riverstone argued that minority shareholders should be allowed to contractually waive their appraisal rights.

Decision

The court dismissed Riverstone’s claims, finding that the drag-along rights under the shareholders’ agreement could only be exercised prospectively with respect to a “proposed” merger and could not be exercised retrospectively after the merger had already been closed. The court based its ruling entirely on what it found to be the unambiguous language of the parties’ contract.

Although the minority shareholders sought a ruling that they could not waive their statutory appraisal rights, the court found it unnecessary to decide whether, as a matter of law or public policy, minority shareholders may waive their statutory appraisal rights by contract. The court distinguished cases in which preferred shareholders have been found to have waived appraisal rights, stating that the question of whether common shareholders may waive appraisal rights is “more nuanced.”

Lessons

Companies seeking to enforce a waiver of appraisal rights through a drag-along provision should include an explicit acknowledgment by the minority shareholders that they waive their appraisal rights if the drag-along provision is invoked. In addition, exercise of a drag-along right should be made precisely in accordance with its terms. For example, if the drag-along provision requires a vote in favor of the merger, then the vote should be taken before the company itself approves and consummates the merger. Similarly, the company should comply with all of the

prescribed time periods and other requirements of the drag-along provision.

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