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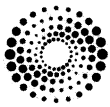

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Chapter 89

Mergers and Acquisitions

*by William Savitt**

I. INTRODUCTION

II. BASIC PRINCIPLES AND STATUTORY AUTHORIZATION

III. CHARACTERISTIC LITIGATION SCENARIOS

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*The author would like to thank Scott Danner for his superb assistance in the preparation of this chapter.

IV. REMEDIES IN M&A LITIGATION

V. FORUM CONSIDERATIONS

VI. DISCLOSURE IN M&A LITIGATION

VII. TRIAL

VIII. SETTLEMENT MATTERS

IX. APPELLATE REVIEW

X. PRACTICE AIDS

Research References

West's Key Number Digest

Corporations and Business Organizations ⚷2630 to 2829

Westlaw Databases

Business and Commercial Litigation in Federal Courts (3d ed.) (BUSCOMLIT)
Carmody-Wait 2d (CW2D)
N.Y. Jur. 2d (NYJUR)
New York Practice (5th ed.) (SIEGEL-NYPRAC)
Successful Partnering Between Inside and Outside Counsel (SPARTNER)

Legal Encyclopedias

N.Y. Jur. 2d, Business Relationships §§ 1307 to 1316

Treatises and Practice Aids

Haig, Business and Commercial Litigation in Federal Courts §§ 73:1 et seq. (3d ed.)
Carmody-Wait 2d § 121:1
Haig, Successful Partnering Between Inside and Outside Counsel §§ 41:1 et seq.

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I. INTRODUCTION

§ 89:1 Scope note

This chapter discusses substantive, procedural, and practical considerations governing the litigation of merger and acquisition disputes in New York state courts. Mergers and acquisitions ("M&A") is an extensive and important subject, frequently meriting entire volumes. In recent years, litigation challenging M&A has become an important part of the transactional landscape, as nearly every transaction draws a litigation challenge, often in multiple courts.

This chapter focuses on the primary issues that arise in such litigation in New York state courts. The chapter sets out the main sources of M&A law and the means for enforcing those laws through litigation, with specific attention to the distinctive features of New York law (as compared, for example, with Delaware law). The chapter then outlines the main kinds of M&A, noting the strategic objectives of shareholders, targets, and potential acquirors, and the tactical choices available to such litigants. Specific areas of focus will include the variable standards of review applicable to different kinds of M&A transactions,[1] problems of standing in M&A litigation,[2] third-party rights,[3] disclosure issues,[4] injunctive relief,[5] potential damages,[6] and appellate review.[7] The chapter will also examine relevant doctrinal and procedural matters, including the distinction between direct, derivative and class actions as applied to deal litigation;[8] issues in choice of venue in M&A litigation;[9] the rise of multi-jurisdictional M&A litigation and how New York courts re-

[Section 89:1]

[1]See §§ 89:13 to 89:15.

[2]See § 89:17.

[3]See §§ 89:26 to 89:31.

[4]See §§ 89:53 to 89:55.

[5]See §§ 89:39 to 89:41.

[6]See §§ 89:43 to 89:46.

[7]See § 89:62.

[8]See §§ 89:17 to 89:18.

[9]See §§ 89:47 to 89:50.

spond to such situations;[10] choosing a forum, and the law and increasingly complex practice of settling merger cases.[11]

This chapter does not consider—except to the extent relevant to the subject of M&A litigation—the equally broad range of topics covered in Chapter 90, "Securities Litigation" (§§ 90:1 et seq.), Chapter 93, "Shareholder Derivative Actions" (§§ 93:1 et seq.) or Chapter 94, "Director and Officer Liability" (§§ 94:1 et seq.).

§ 89:2 Significance of M&A litigation in New York

For nearly 100 years, the State of Delaware has had a claim as the center of corporate life in this country. Delaware is presently the corporate home of over 60% of the largest 500 corporations in the United States, as well as over half of the corporations listed on the New York Stock Exchange. Although a great deal of M&A litigation arises under Delaware law, litigants frequently turn to courts outside of Delaware, sometimes because Delaware law does not supply the rule of decision, sometimes because litigants perceive a tactical advantage in avoiding the courts of Delaware, and sometimes because of contractual venue restrictions.[1] New York's body of law on these issues is well developed and New York State courts are an attractive forum for the resolution of M&A-related disputes, in increasing part because of the development of the Commercial Division of the Supreme Court. In addition, sophisticated commercial parties often agree that disputes arising under their contracts will be governed by New York law, and/or litigated in a New York forum.[2]

New York courts lend themselves to M&A litigation for a variety of additional reasons. New York and its courts have a long tradition in corporate law (both statutory and case law). Many large and important companies are incorporated in New York, and many more are headquartered in New York. New York is also the headquarters of leading financial and lending institutions that fund change of control transactions, as well as the

[10]See §§ 89:51 to 89:52.

[11]See §§ 89:57 to 89:61.

[Section 89:2]

[1]See Quinn, Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision, 45 U.C. Davis L. Rev. 137, 143–56 (2011) (noting the recent trend away from Delaware litigation of shareholder lawsuits); see also Armour, Black & Cheffins, Delaware's Balancing Act, 87 Ind. L.J. 1345, 1356–59 (2012) (noting that "while it used to be common for suits in cases arising from large M&A transactions to be filed only in Delaware, this has become rare").

[2]See generally Moskin, Commercial Contracts: Strategies for Drafting and Negotiating, Chapter 1: Milestones: How New York Law Became America's Defining Law of Contract.

investment banks and law firms that often advise corporations in such transactions. Directors and officers are often amenable to personal jurisdiction in New York.[3] Finally, as the historic home of the major stock exchanges and financial institutions, New York has a long history and strong interest in litigating and regulating capital markets, financial matters, and corporate and commercial transactions.[4]

§ 89:3 New York law and Delaware law

In assessing potential or pending litigation in New York arising from an M&A transaction, litigation counsel must at the outset determine the governing substantive law. As discussed further below, New York choice of law rules often point to Delaware law (given Delaware's status as the preferred jurisdiction of incorporation) or New York law (given New York's status as a preferred jurisdiction in contractual choice of law provisions).[1] While Delaware and New York law have many similarities, there are also important differences. Counsel must therefore take care not to assume that familiar Delaware corporate law principles will be applied in a case governed by New York substantive law.

On the other hand, New York courts will frequently retain jurisdiction over suits that arise exclusively under Delaware law.[2] Thus, litigating M&A cases in New York courts regularly involves application of Delaware substantive law.[3]

Moreover, there are important procedural features of New York law that lay a trap for the unwary practitioner better versed in Delaware (or Federal) practice. Among these are restrictions on the availability of non-opt out class settlements that affect dam-

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[3]See Chapter 94, "Director and Officer Liability" (§§ 94:1 et seq.), for discussion of jurisdiction of New York courts over corporate directors and officers.

[4]See generally In re Topps Co., Inc. Shareholder Litigation, 19 Misc. 3d 1103(A), 859 N.Y.S.2d 907 (Sup 2007). See discussion of the *Topps* decision at § 89:51.

[Section 89:3]

[1]See § 89:51 for a further discussion of New York's choice of law rules as they impact M&A litigation. See also Chapter 14, "Enforcement of Choice of Law Provisions" (§§ 14:1 et seq.) (discussing contractual choice of law provisions), and Chapter 93, "Shareholder Derivative Actions" (§§ 93:1 et seq.), and Chapter 94, "Director and Officer Liability" (§§ 94:1 et seq.) (discussing choice of law in suits against directors).

[2]See, e.g., In re NYSE Euronext Shareholders/ICE Litigation, 39 Misc. 3d 619, 965 N.Y.S.2d 278 (Sup 2013).

[3]In re Topps Co., Inc. Shareholder Litigation, 19 Misc. 3d 1103(A), 859 N.Y.S.2d 907 (Sup 2007) ("Indeed this court is frequently called upon to apply the laws of Delaware.").

ages claims of out-of-state class members,[4] and a growing trend of New York courts sharply scrutinizing—and even refusing to approve—certain "disclosure only" settlements.[5]

Thus, while a full treatment of the differences between New York and Delaware substantive and procedural law in the M&A context is beyond the scope of this chapter, several key distinctions and common pitfalls are identified and discussed below.[6]

§ 89:4 Litigation counsel as advisor

Ideally, litigation counsel will be involved in the planning and preparation of an M&A transaction. M&A transactions involving a publicly traded company are nearly certain to generate litigation.[1] If the transaction is a friendly one (between a willing buyer and a willing seller), shareholder class actions will likely be filed challenging it,[2] or a third party might seek to disrupt it.[3] Litigation counsel should be familiar with the transaction in order to defend such litigations, which may occur on an expedited basis. If the transaction is hostile, the target may begin defensive litigation, or the acquiror itself may have to bring litigation to defuse or dismantle legal defenses or defenses in the target's bylaws or charter. In any event, the participation of litigation counsel is essential to the success of the project. Litigation counsel must assess and prepare for the types of litigation that are likely to be brought against her client, as well as prepare to file whatever strategic litigation is necessary to enable the transaction to proceed.

In addition to anticipating, preparing for, and possibly bringing

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[4]See § 89:58 (discussing Colt Industries Shareholder Litigation v. Colt Industries Inc., 77 N.Y.2d 185, 565 N.Y.S.2d 755, 566 N.E.2d 1160 (1991)).

[5]See § 89:61 (discussing City Trading Fund v. Nye, 46 Misc. 3d 1206(A), 9 N.Y.S.3d 592 (Sup 2015)).

[6]See, e.g., § 89:14 (discussing so-called "Revlon" duties under New York and Delaware substantive law); § 89:58 (discussing availability of non-opt out class settlements under New York and Delaware procedural law).

[Section 89:4]

[1]Academics Matthew D. Cain and Steven M. Davidoff found in their research on mergers and acquisitions-related litigation from 2005 to 2014 a dramatic increase in the proportion of mergers and acquisitions valued at over $100 million that were challenged in court (39.3% in 2005 and 94.9% in 2014), the average number of suits per deal (2.2 in 2005 and 4.3 in 2014), the percentage of those suits brought in multiple jurisdictions (8.3% in 2005 to 33.8% in 2014). Matthew D. Cain and Steven M. Davidoff, Takeover Litigation in 2014 (Feb. 20, 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567902.

[2]See §§ 89:16 to 89:24.

[3]See §§ 89:26 to 89:31.

litigation, litigation counsel may also have a due diligence role in M&A transactions. An acquiror of all the stock of a corporation (as opposed to specific assets) generally acquires all of the rights and liabilities of that corporation. Thus, an acquiror may inherit the existing litigation of a target, and accordingly will want to know as much as possible about that litigation, including the liability risks, range of potential damages, and the availability of insurance for litigation costs, settlement, or judgment. When the contemplated transaction is hostile, information about the target's pending litigation will be limited to what is available in the public record. Counsel should review the target's SEC filings, court files, and relevant press reports. Even where the contemplated transaction is friendly, target counsel may restrict complete access to litigation files from fear that allowing a potential acquiror access to privileged information may waive a privilege. Moreover, until the merger is consummated, the target company may have an obligation to consider alternative transactions, or labor under "gun-jumping" antitrust restrictions, and accordingly be unwilling or unable to share certain confidential information with the acquiror, even in the context of litigation.

II. BASIC PRINCIPLES AND STATUTORY AUTHORIZATION

§ 89:5 Change of control transactions defined

Mergers and acquisitions involve fundamental changes in the corporate structure of two or more corporations. Examples of transactions whereby the interests of corporations are transformed include:

Stock-for-Stock Merger. In a stock merger, the acquiring corporation ("Acquiror") exchanges shares of its own stock to acquire all outstanding shares of stock of the selling corporation ("Target") at an agreed-to merger exchange ratio. Target merges into Acquiror, Target is extinguished and Acquiror is the surviving corporation, absorbing Target's assets and liabilities. Alternatively, Acquiror and Target could merge into a separate new corporation, or, in the most common structure, Target could merge into a newly formed subsidiary of Acquiror.

Cash for Stock Acquisition. In a cash for stock acquisition, Acquiror buys the stock directly from Target shareholders in exchange for cash. The sale and purchase can be accomplished through a merger transaction or a tender offer.[1] Acquiror then owns Target stock, and Acquiror becomes the parent corporation

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[Section 89:5]

[1]A tender offer is a public solicitation offer by a bidder to acquire shares

of its new subsidiary, Target Inc. The shareholders of old Target have exchanged their shares for cash. Note that in a tender offer, if not all Target shareholders sell their shares to Acquiror, there are minority shareholders and Target is a partially (as opposed to wholly) owned subsidiary. In a merger, all shares of Target are converted into the right to receive cash automatically.

Cash Acquisition of Assets. In a cash acquisition of assets, Acquiror pays Target cash consideration for Target's assets. The assets purchased can be intellectual property rights, physical assets, or a subsidiary or division of the corporate parent. In some ways, asset acquisitions are more complex than stock-swap or stock acquisitions, as it is often difficult to identify precisely all assets and liabilities being sold. Cash transactions may be necessary in some cases, such as when the target is a division rather than a subsidiary or other separate legal entity. Finally, cash acquisition of assets may be preferable for buyers, which may be able to limit their exposure to Target's liabilities;[2] conversely, Target may prefer to employ a cash for stock structure to ensure its liabilities are passed on to the acquiring corporation.

As merger and acquisition specialists and the courts have become increasingly sophisticated in structuring and regulating corporate transactions, the lines between types of control change situations have blurred. The traditional forms described above easily substitute for one another and are often manipulated into hybrid forms that do not fit completely into any one category. Despite that variety, and even though novel issues frequently arise

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publicly issued by a company and registered under Section 12 of the Securities and Exchange Act, for either a certain percentage or all of the stock of a target company. The terms for tender of the target's shares are typically not negotiable, but are generally for consideration greater than or at a premium over market price. An acquiror will impose a deadline for submitting tenders, and may condition its obligation to buy any shares under the solicitation on the tendering of a minimum number of shares. See generally Wellman v. Dickinson, 475 F. Supp. 783, Fed. Sec. L. Rep. (CCH) P 96918, 4 Fed. R. Evid. Serv. 1178 (S.D. N.Y. 1979), judgment aff'd, 682 F.2d 355, Fed. Sec. L. Rep. (CCH) P 98731 (2d Cir. 1982). Public offers to purchase shares are controlled by federal law, most importantly the Williams Act. Unsolicited or "hostile" tender offers generate substantial litigation in federal courts, which litigation is beyond the scope of this chapter.

[2]While asset acquisitions do not generally lead to the acquiror assuming the target's liabilities, New York law recognizes four exceptions: "(1) a buyer who formally assumes a seller's debts; (2) transactions undertaken to defraud creditors; (3) a buyer who de facto merged with a seller; and (4) a buyer that is a mere continuation of a seller." Time Warner Cable, Inc. v. Networks Group, LLC, 2010 WL 3563111, at *6 (S.D. N.Y. 2010). The last two exceptions are often similar enough to be treated together. Time Warner Cable, Inc. v. Networks Group, LLC, 2010 WL 3563111, at *6–7 (S.D. N.Y. 2010) (holding that plaintiff had adequately stated a claim for successor liability by alleging "hallmarks of a de facto merger.").

for resolution by the courts, most M&A litigation falls into certain categories and presents similar themes and issues. Those issues generally relate to the rights, duties, relationships, and allocation of power among the various constituents to a change of control transaction, including the acquiror and target corporations, their respective shareholders, and their respective directors.

§ 89:6 Statutory authorization

Traditionally, mergers and consolidations were governed by common law, which required unanimous consent of all shareholders to fundamental control change transactions.[1] Today, through the advent of statutory authorization, change of control transactions are nearly always consummated with less than unanimous consent of shareholders.

New York's statutory authorization for mergers and acquisitions is found in Article 9 of the BCL. Section 901[2] ("Power of merger or consolidation") is New York's general authorization provision for control change transactions. It provides:

> One or more domestic corporations and one or more other business entities or one or more foreign corporations and one or more other business entities may as provided by any other applicable statute and this chapter:
>
> (1) *Merge* into a single domestic or foreign corporation or other business entity, which shall be one of the constituent entities; or
>
> (2) *Consolidate* into a single domestic or foreign corporation or other business entity, which shall be a new domestic or foreign corporation or other business entity to be formed pursuant to the consolidation.[3]

Section 903[4] ("Authorization by shareholders") sets forth the minimum shareholder voting requirements for approving a merger. The board of directors of each constituent corporation must adopt and propose to its shareholders a plan of merger or consolidation. The shareholders of each constituent corporation must, in turn, approve the plan by a majority or, in some cases, a two-thirds majority, of all outstanding shares entitled to vote.[5] In certain circumstances, nonvoting shares may vote as a class if

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[Section 89:6]

[1]See Anderson v. International Minerals & Chemical Corporation, 295 N.Y. 343, 349, 67 N.E.2d 573, 576 (1946).

[2]BCL § 901.

[3]BCL § 901(c) (emphasis added).

[4]BCL § 903.

[5]The simple majority minimum is applicable for businesses incorporated after February 22, 1998, or where the corporation's certificate of incorporation

the plan of merger has elements effecting changes set forth in Section 804.[6] If the plan of merger or consolidation adopted by the board of directors contains a provision for abandoning the proposed transaction, Section 903(b) allows the board to abandon the plan despite the shareholders' favorable vote.[7]

The decision of a board of directors to recommend or oppose a merger is the most common source of M&A litigation. As discussed below,[8] shareholders or a third-party potential acquiror may bring suit against the directors challenging their decisions. Litigation counsel should be involved with the board and its other advisors from the outset of their deliberations to ensure that there is an adequate record of board actions and decisions for any subsequent court challenge. The directors will want a record that sustains the exercise of their business judgment for purposes of the business judgment rule, i.e., that the directors were independent (not self-interested in the transaction) and that they exercised due care in fully informing themselves about the matters under consideration.[9] In controlling stockholder situations, counsel should consider structures for approving the merger—including use of a special negotiating committee of independent directors and "majority of the minority" stockholder approval[10]—that may impact the level of judicial scrutiny to be applied in

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so provides. See BCL § 903(a)(2).

[6]BCL § 903(a) (e.g., nonvoting shares may vote as a class if agreement includes proposed amendment to certificate of incorporation that would adversely alter or convert their shares or subordinate their rights as described in § 804).

[7]BCL § 903(b) ("Notwithstanding shareholder authorization and at any time prior to the filing of the certificate of merger or consolidation, the plan of merger or consolidation may be abandoned pursuant to a provision for such abandonment, if any, contained in the plan of merger or consolidation.").

[8]See §§ 89:16 to 89:31; see also Chapter 93, "Shareholder Derivative Actions" (§§ 93:1 et seq.).

[9]See Strine, Documenting the Deal: How Quality Control and Candor Can Improve Boardroom Decision-Making and Reduce the Litigation Target Zone (forthcoming, The Business Lawyer, Vol. 70) (available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2514520); see also Chapter 93, "Shareholder Derivative Actions" (§§ 93:1 et seq.), and Chapter 94, "Director and Officer Liability" (§§ 94:1 et seq.).

[10]"Majority of the minority" approval refers to a vote in favor of the transaction by a majority of the voting shares that are not controlled by the controlling shareholder. See, e.g., In re Kenneth Cole Productions, Inc., Shareholder Litigation, 122 A.D.3d 500, 500, 998 N.Y.S.2d 1, 2 (1st Dep't 2014), leave to appeal granted, 25 N.Y.3d 909, 2015 WL 3605136 (2015) ("the merger in the case at bar required the approval of the majority of the minority (i.e., non-Cole) shareholders.").

later litigation.[11] Counsel should remain cognizant that the Target board may wish to waive attorney-client privilege so that it can demonstrate without reservation that it relied on the advice of counsel in deciding to proceed with the challenged transaction.[12]

§ 89:7 Statutory authorization—Specific business combinations

Other provisions of the New York Business Corporation Law provide procedures and requirements for specific business combinations. Section 905[1] is New York's "short form merger" statute, and allows a parent company to absorb its subsidiary (of whose stock it owns 90% or more) without approval of, or even consultation with, the subsidiary's minority shareholders:

> Any domestic corporation owning at least ninety percent of the outstanding shares of each class of another domestic corporation or corporations may either merge such other corporation or corporations into itself *without the authorization of the shareholders of any such corporation* or merge itself and one or more of such other corporations into one of such other corporations with the authorization of the parent corporation's shareholders in accordance with paragraph (a) of section 903.[2]

Section 907[3] governs mergers of New York and foreign corporations, and allows such combinations "if such merger or consolidation is permitted by the laws of the jurisdiction under which each such foreign corporation is incorporated."[4]

A cash acquisition of assets would fall under Section 909,[5] which governs a corporation's sale, lease, exchange, or other disposition of "all or substantially all" of its assets, but only when such sale is "not made in the usual or regular course of the busi-

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[11]See § 89:22.

[12]See § 89:54.

[Section 89:7]

[1]BCL § 905.

[2]BCL § 905(a) (emphasis added). The New York Court of Appeals has expressly upheld the constitutionality of this provision despite its harsh effects on the subsidiary's minority shareholders. See Beloff v. Consolidated Edison Co. of New York, 300 N.Y. 11, 19, 87 N.E.2d 561, 564 (1949) (stating that a minority shareholder has "no right to stay in the picture, to go along into the merger, or to share in its future benefits. He has no constitutional right to deliberate, consult or vote on the merger . . . or prior opportunity to object thereto. His disabilities in those respects are the result of his status as a member of a minority, and any cure therefore is to be prescribed by the Legislature, if it sees fit.").

[3]BCL § 907.

[4]BCL § 907.

[5]BCL § 909.

ness actually conducted by such corporation."[6] A "non-regular course" transaction must be authorized by the board of directors and approved by two-thirds or, in some cases, a simple majority[7] of the shareholders entitled to vote thereon. These steps are intended to protect shareholders from an unauthorized divestment of their corporation's value.[8] Thus, because a sale that does not affect "all or substantially all" of the company's assets[9] or a sale that is done as part of a company's usual business is unlikely to unfairly prejudice the shareholders, such sales are not subject to the voting and approval requirements of Section 909.[10]

BCL § 913[11] governs share exchanges in which an acquiror obtains all shares of a target corporation in a transaction that is binding on the target's shareholders (e.g., a cash for stock acquisition). Like a traditional merger, target shareholders give up their shares in the target corporation for shares in an acquiror corporation. However, as noted above,[12] the target corporation in a share exchange does not (necessarily) lose its identity; rather it can continue in existence but as a wholly owned subsidiary of the acquiror. The short form rules of Section 905 also apply to share exchanges, so that an acquiror need not submit a share exchange to a vote where it owns 90% or more of the target company's stock.[13]

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[6]BCL § 909(a).

[7]See BCL § 909(a)(3).

[8]Resnick v. Karmax Camp Corp., 149 A.D.2d 709, 710, 540 N.Y.S.2d 503, 504 (2d Dep't 1989) ("The purpose of the [law] was to prevent a corporation from disposing of a major portion of its property without obtaining prior approval of its shareholders"; internal citation omitted).

[9]Story v. Kennecott Copper Corp., 90 Misc. 2d 333, 394 N.Y.S.2d 353 (Sup 1977) (holding that the sale of a subsidiary for $1.2 billion did not trigger Section 909 approval requirements as the company's remaining assets were income-producing and substantial assets remained).

[10]See Soho Gold, Inc. v. 33 Rector Street Ltd., 227 A.D.2d 314, 642 N.Y.S.2d 684 (1st Dep't 1996) (holding that a corporation formed for the purpose of purchasing and selling real property was not required to obtain shareholder authorization under Section 909 to sell a building). The "regular course of business" clause relates to the business the corporation is actually engaged in, rather than the business purpose listed on the certification of incorporation. See BCL § 909(a) (relating to sale, lease, exchange, or other disposition of assets "if not made in the usual or regular course of the business actually conducted" by the corporation).

[11]BCL § 913.

[12]See § 89:6.

[13]See BCL § 913(g).

§ 89:8 Statutory authorization—New York antitakeover provisions

New York has several statutes aimed at limiting the perceived dangers associated with certain takeovers and broadening a target's ability to defend against hostile acquisitions. A key provision of the Business Corporation Law is the Anti-Takeover Statute, BCL § 912.[1] The legislature enacted Section 912 in response to the emergence of perceived abuses such as "greenmail" and related techniques by which an acquiror seeks to acquire a target's shares solely for its own immediate profit, either by reselling its acquired shares to the target's management at a higher price or by immediately dissolving the target.[2] The legislature determined that rather than promoting expansion or growth, these takeover transactions were driven by the immediate returns available to the offerors.[3]

Antitakeover statutes provide boards with increased powers to prevent, impede, or enable a merger. The use of such increased powers also subjects directors to potential litigation. Counsel on both sides of such litigation will try to establish that the directors, in making their decisions, were (or were not) independent (i.e., they did or did not have some personal interest in the transaction, apart from the interest in common with all shareholders),[4] and were (or were not) fully informed (i.e., they did or did not

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[Section 89:8]

[1]BCL § 912 ("Requirements relating to certain business combinations").

[2]"Greenmail" is also prohibited by BCL § 513(c), which precludes a corporation subject to the provisions of § 912 from purchasing more than 10% of its shares from a shareholder for an amount greater than market value unless the purchase is approved by the board of directors and a majority of all voting shares (unless the corporation's certification of incorporation requires a supermajority vote). Finally, Sections 13(d) and 14(e) of the Williams Act curb greenmail abuses by governing the activities and behavior of potential bidders and potential targets in tender offer situations. See 15 U.S.C.A. §§ 78m(d), 78n(e). These federal restrictions are beyond the scope of this treatise.

[3]See generally Memorandum Accompanying Governor's Program Bill Number 111, 1985 Extraordinary Session ("During the past few years, there has been sharp growth in highly leveraged takeovers by offerors who either are not interested in operating the target companies and seek the opportunity for profit through liquidation of the target, or are compelled by the pressures of the financing of the takeover to effect a total or partial liquidation. These takeovers are often not for the purpose of diversification, expansion or growth, but are financial transactions driven by substantial, immediate returns for the takeover offerors.").

[4]For example, in determining whether directors were or were not independent, courts may consider whether the director had a financial interest in the transaction as well as the director's "personal or other relationships" to the interested party, including previous connections such as attending the same school, sitting on the same boards, and having the same charitable activities.

understand the actions they were taking, the basis for them, and their ramifications).

Section 912[5] limits an acquiror's ability to quickly convert an acquisition of shares to cash. In essence, it prohibits a corporation from engaging in a "business combination" with an "interested shareholder" (that is, a shareholder owning 20% or more of the corporation's stock) for five years from the time the shareholder acquired stock without prior approval of the target's board of directors.

> Notwithstanding anything to the contrary contained in this chapter . . . no domestic corporation shall engage in any business combination with any interested shareholder of such corporation for a period of five years following such interested shareholder's stock acquisition date unless such business combination or the purchase of stock made by such interested shareholder on such interested shareholder's stock acquisition date is approved by the board of directors of such corporation prior to such interested shareholder's stock acquisition date.[6]

Under the statute, a "business combination" includes mergers and consolidations; the sale, lease, exchange, mortgage, pledge, transfer, or other disposition of assets having an aggregate market value equal to 10% or more of the aggregate market value of the corporation's assets, outstanding stock, or net income; a plan of liquidation or dissolution; and the issuance or transfer of 5% or more of the aggregate market value of all the outstanding stock (with certain exceptions).[7]

Even after a period of five years, Section 912(c)[8] prevents a corporation and a hostile shareholder from entering into a business combination unless the shareholders of the target agree to the combination[9] or, in the alternative, the combination provides that all shareholders receive a price that meets the specific requirements of Section 912(c)(3)[10] (the higher of the price paid by the interested shareholder or the market value of the stock, computed as the higher of its value when acquired or when the announcement of the business combination was made).

See In re Oracle Corp. Derivative Litigation, 824 A.2d 917 (Del. Ch. 2003).

[5]BCL § 912.

[6]BCL § 912(b).

[7]BCL § 912(5)(A) to (F).

[8]BCL § 912(c).

[9]Section 912 requires the approval of a majority of the disinterested shareholders, which in practice is difficult to achieve.

[10]BCL § 912(c)(3).

Section 912[11] also describes a board's obligations when faced with an offer by an interested shareholder regarding a potential business combination. If the board of directors receives a written, good faith proposal regarding a business combination, the board of directors must respond, in writing, within 30 days (or shorter as required by the Exchange Act),[12] setting forth the reasons for its decision regarding such proposal. If the written, good-faith offer relates to an interested shareholder's offer to purchase stock, and the board of directors does not respond affirmatively in writing within 30 days, the board is deemed to have rejected the stock purchase.

A corporation can "opt out" of coverage under Section 912.[13] Under Section 912(d)(3), the antitakeover provisions of Section 912 may not apply if, for example, the company's original certificate of incorporation contains a provision "expressly electing" not to be governed by Section 912, or if a majority of disinterested shareholders "expressly elect" to opt out by adopting an amendment to the company's bylaws. In one case, the court found the company "expressly elected" not to be governed by Section 912 by amending its bylaws to create a comprehensive antitakeover regime that conflicted in several respects with the provisions of Section 912.[14]

§ 89:9 Statutory authorization—Poison pill legislation

The goals of Section 912[1] overlap with New York legislation authorizing "poison pill" defensive measures. A "poison pill" is a shareholder rights plan in which the issuer distributes to its shareholders rights to purchase common stock, redeemable at a steeply discounted rate upon the occurrence of a "triggering event." The triggering event will relate to the hostile tender offeror's acquisition of a specified percentage of the shares of the corporation. By allowing shareholders (except the tender offeror)

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[11]BCL § 912.

[12]BCL § 912(b). The Business Corporations Law's 30-day requirement should be considered in conjunction with federal statutes governing tender offers. For tender offers in which the bidder would beneficially own 5% or more of a publicly traded equity security upon consummation of the tender, the target company must publicly respond within 10 days of the solicitation by recommending acceptance or rejection, remaining neutral, or stating that it is unable to take a position. See 15 U.S.C.A. § 78n(e).

[13]BCL § 912(d)(3).

[14]Vassell v. Reliance Security Group, PLC, 328 F. Supp. 2d 454, 459–60 (S.D. N.Y. 2004); see also 2004 WL 1274228 (Trial Pleading) Verified Complaint and Jury Demand (Apr. 07, 2004).

[Section 89:9]

[1]BCL § 912. See § 89:8 for discussion of Section 912.

to redeem their rights to purchase additional shares, the hostile offeror's stake in the corporation is diluted and the tender offer will typically fail.[2]

New York first introduced poison pill legislation in 1988 on an experimental basis in response to Irving Bank Corporation's efforts to remain independent of The Bank of New York Company.[3] Prior to 1988, a poison pill was thought to be incompatible with a statutory requirement that each share of a business corporation be treated equally with all others of its class. Since then, and in conjunction with the antitakeover provisions of Section 912[4] and legislation immunizing directors from liability to stockholders, New York has permanently codified poison pill authorization at Section 505(a)(2).[5] Under the current statute, a board of directors' decision to employ a poison pill to defend against a hostile takeover will be subject to judicial review.[6]

Article 9 of the New York Business Corporation Law provides details on notice and filing procedures for a merger or acquisition.[7]

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[2]In the event the target is the surviving corporation in a hostile acquisition, a "flip in" poison pill plan allows the target's shareholders to acquire shares at a bargain. In the event the target is not the surviving corporation, a "flip-over" plan would permit shareholders of the acquired company to purchase shares of the acquiring company on a bargain basis. See, e.g., Henley Group, Inc. v. Santa Fe Southern Pacific Corp., 13 Del. J. Corp. L. 1152, 1988 WL 23945 (Del. Ch. 1988).

[3]See Bank of New York Co., Inc. v. Irving Bank Corp., 139 Misc. 2d 665, 528 N.Y.S.2d 482 (Sup 1988).

[4]BCL § 912.

[5]The poison pill provisions, BCL § 505(a)(2), were made permanent in 1992.

[6]There is only sparse guidance as to what standard of review courts will apply when a stockholder challenges a board's decision to implement a poison pill. One federal court applying New York law has ruled that business judgment deference was not applicable where the company adopted a shareholder rights plan with a trigger below the 20% statutory threshold. See Avon Products, Inc. v. Chartwell Associates L.P., 738 F. Supp. 686 (S.D. N.Y. 1990), order aff'd, 907 F.2d 322, Fed. Sec. L. Rep. (CCH) P 95332 (2d Cir. 1990). At the same time, however, New York has declined to develop a theory of "intermediate review" or "enhanced scrutiny," see § 89:14, and there would seem to be little doctrinal basis or precedent to apply "fairness" review in such situations, § 89:15. Accordingly, the Avon decision is perhaps best considered a simple case of statutory interpretation, rather than an endorsement of heightened judicial scrutiny for the adoption of poison pills generally.

[7]See, e.g., BCL § 902 (board of directors must adopt a plan of merger or consolidation containing certain enumerated information about the proposed transaction); BCL § 904 (if shareholders approve transaction, the company must file a certificate of merger or consolidation with the Department of State).

A dissenting shareholder's appraisal rights are set forth in Sections 623 and 910.[8]

§ 89:10 Director duties

Under New York law, board members have duties of care and loyalty to the corporation and to its shareholders. These duties, long recognized at common law, have been codified in the Business Corporation Law.[1] Broadly speaking, the duty of care refers to the responsibility of a corporate fiduciary to exercise the care that a reasonably prudent person in a similar position would use under similar circumstances,[2] while the duty of loyalty focuses on director "self-dealing" and requires that the director act in furtherance of the corporation's interest and not his own self-interest.[3] Although a full treatment of these fiduciary duties is beyond the scope of this chapter, counsel must consider what these duties require specifically in the context of M&A transactions both in advising the board during the negotiation of the agreement, and in assessing any subsequent litigation.[4]

§ 89:11 Director duties—Duty of care

The duty of care generally obligates directors to act on an informed basis and in good faith. Directors must inform themselves of all relevant information reasonably available to them,

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[8]BCL §§ 623, 910, discussed in § 89:37.

[Section 89:10]

[1]See generally Alpert v. 28 Williams Street Corp., 63 N.Y.2d 557, 568, 483 N.Y.S.2d 667, 673–674, 473 N.E.2d 19, 25 (1984); BCL §§ 701 to 727; see also Harger v. Price, 204 F. Supp. 2d 699, 707 (S.D. N.Y. 2002) ("Corporate directors . . . are held to the extreme measure of candor, unselfishness, and good faith"; internal quotation marks omitted); Chapter 94, "Director and Officer Liability" (§§ 94:1 et seq.).

[2]BCL § 717(a) ("A director shall perform his duties as a director . . . in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances."); Syracuse Television, Inc. v. Channel 9, Syracuse, Inc., 51 Misc. 2d 188, 196, 273 N.Y.S.2d 16, 26 (Sup 1966).

[3]BCL § 713(c) (describing procedures where director is interested); Limmer v. Medallion Group, Inc., 75 A.D.2d 299, 303, 428 N.Y.S.2d 961, 963 (1st Dep't 1980) ("These directors and officers are bound by their duty of undivided and unqualified loyalty to their corporations, a duty which encompasses good faith efforts to insure that their personal profit is not at the expense of their corporations."); see Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F.2d 264, 273, Fed. Sec. L. Rep. (CCH) P 92418 (2d Cir. 1986) (applying New York law).

[4]For further treatment of corporate directors' fiduciary duties, see Chapter 94, "Director and Officer Liability" (§§ 94:1 et seq.).

and consider the interests of the company.[1] Assuming the directors act on an informed basis, their disinterested decision to take a particular corporate action is generally shielded from judicial scrutiny under the business judgment rule.[2]

To fulfill this duty in the context of an M&A transaction, the board should inform itself of the material terms of a potential transaction and carefully consider the corporation's alternatives. In addition to considering the interests of shareholders, New York directors are specifically empowered to consider the interests of additional constituencies, including employees, creditors and the communities in which the corporation does business, including when taking an action that may involve a change in corporate control.[3] In doing so, the board is entitled to rely on employees, retained advisors, or special board committees designated to consider the merits of the transaction.[4] Failure to consider key information, or serving passively as a "rubber stamp" for an interested director or controlling shareholder, may lead to a finding that the business judgment rule does not apply (and, potentially, a finding of breach of a fiduciary duty).[5]

Under § 402(b) of the BCL, the company may eliminate personal liability for a director found to be in breach of duty, unless the breach involves bad faith, intentional wrongdoing or violation of the law, or a personal gain to the director.[6] Thus, where the company has adopted a § 402(b) provision, a claim for

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[Section 89:11]

[1]Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F.2d 264, 274–75, Fed. Sec. L. Rep. (CCH) P 92418 (2d Cir. 1986) (applying New York law) ("Directors may be liable to shareholders for failing reasonably to obtain material information or to make a reasonable inquiry into material matters.").

[2]Higgins v. New York Stock Exchange, Inc., 10 Misc. 3d 257, 283, 806 N.Y.S.2d 339 (Sup 2005). For further discussion of the business judgment rule, see § 89:14 and Chapter 94, "Director and Officer Liability" (§§ 94:1 et seq.).

[3]BCL § 717(b); cf. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, Fed. Sec. L. Rep. (CCH) P 92525, 66 A.L.R.4th 157 (Del. 1986) (in which Delaware, unlike New York, requires directors to consider only stockholder value maximization in most cash acquisition transactions).

[4]BCL § 717(a).

[5]See, e.g., Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F.2d 264, 274–75, Fed. Sec. L. Rep. (CCH) P 92418 (2d Cir. 1986) (applying New York law); Higgins v. New York Stock Exchange, Inc., 10 Misc. 3d 257, 285, 806 N.Y.S.2d 339, 362 (Sup 2005); Barr v. Wackman, 36 N.Y.2d 371, 380, 368 N.Y.S.2d 497, 329 N.E.2d 180, 187, 99 A.L.R.3d 1023 (1975). See also Chapter 94, "Director and Officer Liability" (§§ 94:1 et seq.).

[6]BCL § 402(b). For further discussion of BCL § 402(b), see Chapter 93, "Shareholder Derivative Actions" (§§ 93:1 et seq.) and Chapter 94, "Director and Officer Liability" (§§ 94:1 et seq.).

damages alleging no more than a breach of the duty of care is subject to dismissal as a matter of law.[7]

§ 89:12 Director duties—Duty of loyalty

Directors owe the corporation their undivided loyalty.[1] Accordingly, directors are not permitted to profit personally at the expense of the corporation. Moreover, directors must discharge their duties independently, taking care to advance the corporate interest and not any self-interest they may have.[2]

Shareholder complaints commonly include allegations that directors have breached their fiduciary duty of loyalty. Unlike claims for breach of the duty of care, duty of loyalty claims are not subject to the charter provisions eliminating director liability under § 402(b) of the BCL.[3] Moreover, because actions in breach of the duty of loyalty are not protected by the business judgment rule, well-pleaded breach of loyalty claims are often not easily amenable to pre-discovery dismissal.[4]

Common situations where such claims arise may involve transactions where one or more director stands to obtain a

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[7]See, e.g., Teachers' Retirement System of Louisiana v. Welch, 244 A.D.2d 231, 232, 664 N.Y.S.2d 38, 39 (1st Dep't 1997); Bildstein v. Atwater, 222 A.D.2d 545, 546, 635 N.Y.S.2d 88, 89 (2d Dep't 1995) ("Supreme Court properly found that the plaintiff's claim was barred by section 6 of GE's certificate of incorporation."). For a recent case applying the analogous provision of Delaware law, see, e.g., In re Morton's Restaurant Group, Inc. Shareholders Litigation, 74 A.3d 656, 663–64 (Del. Ch. 2013).

[Section 89:12]

[1]See, e.g., Berlinghof v. Long Island Fiber Exchange, Inc., 43 Misc. 3d 1232(A), 993 N.Y.S.2d 643 (Sup 2014) ("Officers and directors of a corporation stand in a fiduciary relationship to the corporation and owe their undivided and unqualified loyalty to the corporation.").

[2]See Marx v. Akers, 88 N.Y.2d 189, 200, 644 N.Y.S.2d 121, 666 N.E.2d 1034, 1041 (1996) ("Director interest may either be self-interest in the transaction at issue, or a loss of independence because a director with no direct interest in a transaction is 'controlled' " by another with an interest in the transaction) (citations omitted). See also BCL § 713, "Interested directors."

[3]See, e.g., Hamilton Partners, L.P. v. Englard, 11 A.3d 1180, 1211 (Del. Ch. 2010) (applying New York law) (Section 402 provision "does not protect the Director Defendants against a loyalty claim."). See § 89:11 for discussion of BCL § 402(b).

[4]See Gray & Associates, LLC v. Speltz & Weis LLC, 22 Misc. 3d 1124(A), 880 N.Y.S.2d 223 (Sup 2009) ("while defendants rely on the business judgment rule, that rule does not protect corporate officials who engage in fraud or self-dealing or corporate fiduciaries when they make decisions affected by inherent conflict of interest"); but cf. In re Kenneth Cole Productions, Inc., Shareholder Litigation, 122 A.D.3d 500, 998 N.Y.S.2d 1 (1st Dep't 2014), leave to appeal granted, 25 N.Y.3d 909, 2015 WL 3605136 (2015). Of course, conclusory allegations of wrongdoing will not suffice. See, e.g., Fischbein v. Beitzel, 281 A.D.2d 167, 721 N.Y.S.2d 515 (1st Dep't 2001).

personal gain or profit not shared equally by the stockholders,[5] or controlling shareholder transactions, where a controlling shareholder stands on both sides of a transaction by virtue of its majority share ownership.[6] These situations are examined further below.[7]

§ 89:13 Standards of review

Under New York law, a board's discharge of its fiduciary duty is generally reviewed under one of two standards: business judgment deference or fairness review.[1]

In anticipating and evaluating potential litigation arising from an M&A transaction, counsel must take into account what standard of review is likely to apply, as the applicable standard may have a significant impact on the course of the litigation, including its probable length and cost, which party bears the burden of proof, and the ultimate likelihood of the success of the claims alleged.

Indeed, because application of the business judgment rule is generally case dispositive in favor of board members, company counsel should advise the board during the course of negotiations concerning potential deal structures that either ensure or make more likely the eventual application of business judgment deference.[2]

§ 89:14 Standards of review—Business judgment rule

In general, New York's "business judgment rule" bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate

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[5]See, e.g., Higgins v. New York Stock Exchange, Inc., 10 Misc. 3d 257, 278, 806 N.Y.S.2d 339, 357 (Sup 2005) (CEO held large stake in investment bank that, in turn, held a large stake in merger partner); Alpert v. Nat'l Ass'n of Sec. Dealers, LLC, 7 Misc. 3d 1010(A), 801 N.Y.S.2d 229 (Sup 2004) (director with roles on both sides of transaction stood to earn $1 million bonus for consummating transaction).

[6]See, e.g., Alpert v. 28 Williams Street Corp., 63 N.Y.2d 557, 483 N.Y.S.2d 667, 473 N.E.2d 19 (1984); In re Kenneth Cole Productions, Inc., Shareholder Litigation, 122 A.D.3d 500, 998 N.Y.S.2d 1 (1st Dep't 2014), leave to appeal granted, 25 N.Y.3d 909, 2015 WL 3605136 (2015).

[7]See §§ 89:21 to 89:22.

[Section 89:13]

[1]See §§ 89:14 to 89:15 (examining each standard).

[2]See § 89:4 (discussing role of litigation counsel as advisor).

furtherance of corporate purposes.[1] The rule is designed to avoid judicial second-guessing of corporate decision-making, and to provide protection where a decision is made in good faith and after reasonable investigation.[2]

> Questions of policy management, expediency of contracts or action, adequacy of consideration, lawful appropriation of corporate funds to advance corporate interests, are left solely to their honest and unselfish decision, for their powers therein are without limitation and free from restraint, and the exercise of them for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient.[3]

The protections of the business judgment rule will extend to protect the actions and decisions of directors in corporate control transactions, including the board's decisions in favor of or in opposition to tender offers or other corporate transactions.[4] Delaware courts, by contrast, differ on this point and have created an "enhanced" duty in the context of a cash sale and in connection with many common merger terms.[5]

The New York Business Corporation Law expands manage-

[Section 89:14]

[1]See Auerbach v. Bennett, 47 N.Y.2d 619, 629, 419 N.Y.S.2d 920, 926, 393 N.E.2d 994, 1000 (1979) (holding that there was no basis shown to warrant a judicial inquiry as to the disinterested independence of the members of a special litigation committee or as to the appropriateness and sufficiency of investigative procedures chosen and pursued by the committee and, thus, the business judgment rule shielded from judicial scrutiny the decision of the committee not to prosecute the shareholder's derivative action). See also Chapter 94, "Director and Officer Liability" (§§ 94:1 et seq.), for additional discussions of the business judgment rule.

[2]See Shapiro v. Rockville Country Club, Inc., 2 Misc. 3d 1002(A), 784 N.Y.S.2d 924 (Sup 2004) (holding that the business judgment rule shielded the directors from the minority shareholders' claims that the directors breached their fiduciary duties).

[3]Pollitz v. Wabash R. Co., 207 N.Y. 113, 100 N.E. 721 (1912).

[4]Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F.2d 264, 273, Fed. Sec. L. Rep. (CCH) P 92418 (2d Cir. 1986) (applying New York law) ("in duty of care analysis, a presumption of propriety inures to the benefit of directors; absent a prima facie showing to the contrary, directors enjoy 'wide latitude in devising strategies to resist unfriendly [takeover] advances' under the business judgment rule.").

[5]See Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, Fed. Sec. L. Rep. (CCH) P 92525, 66 A.L.R.4th 157 (Del. 1986) (directors faced with potential sale of company have duty to obtain the highest possible price on behalf of shareholders) and Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954, Fed. Sec. L. Rep. (CCH) P 92046, Fed. Sec. L. Rep. (CCH) P 92077 (Del. 1985) (where board has implemented defensive measures against possible takeover, directors must show threat from a potential takeover existed and that response to threat was reasonable).

ment discretion under the business judgment rule. Section 717(b)[6] provides that in a change of control or potential change of control context, directors may consider both the short- *and* long-term effects of their decisions on nonshareholder groups, such as current and former employees, customers, creditors, and the communities in which the corporation operates. New York amended Section 717(b)[7] in large part in reaction to the 1985 Delaware Supreme Court decision of *Smith v. Van Gorkom*,[8] in which the court found that the board of directors was not entitled to rely on the business judgment rule if the board acted with gross negligence. The New York legislature adopted a more relaxed perspective on business judgment in order to "improve the business climate so that more qualified persons would be willing to serve on corporate boards and to make it easier for corporations to obtain insurance policies indemnifying their directors."[9] New York adopted this more flexible approach to provide greater protection to its domestic corporations from hostile takeovers and ensure that directors have the ability to consider the broader corporate and social interest in making change-in-control decisions.[10]

A federal court applying New York law found that a target corporation's refusal to fully entertain another bidder's potentially higher offer was permissible under New York's formulation of the business judgment rule.[11] In that case, Astoria Financial Corporation ("Astoria") was negotiating to acquire Greater New York Savings Bank ("Greater New York") when North Fork Bancorporation ("North Fork") expressed its interest in acquiring Greater New York. Both Astoria and North Fork eventually offered approximately $19 per share for each share of Greater New York. Greater New York negotiated with Astoria, and allowed Astoria to conduct due diligence, but precluded North Fork from conducting due diligence despite the fact that, if allowed to investigate Greater New York, North Fork might have raised its bid.

Other than price, there were two key differences between the bids: Astoria, the winning bidder, had offered a major role for

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[6]BCL § 717(b). See Chapter 94, "Director and Officer Liability" (§§ 94:1 et seq.).

[7]BCL § 717(b).

[8]Smith v. Van Gorkom, 488 A.2d 858, Fed. Sec. L. Rep. (CCH) P 91921, 46 A.L.R.4th 821 (Del. 1985) (overruled on other grounds by, Gantler v. Stephens, 965 A.2d 695 (Del. 2009))).

[9]Kantrowitz and Slutsky, White on New York Business Entities § 717.02 (14th ed. 2008) at 7-227.

[10]Kantrowitz and Slutsky, White on New York Business Entities § 717.02 (14th ed. 2008) at 7-227.

[11]See Minzer v. Keegan, 218 F.3d 144, Fed. Sec. L. Rep. (CCH) P 91009, Fed. Sec. L. Rep. (CCH) P 91053 (2d Cir. 2000) (applying New York law).

Greater New York's Chief Executive Officer in the merged company. North Fork, on the other hand, had clearly stated that the CEO would have a lesser role or no role in the new company. In addition, Astoria shared with Greater New York "the same strategic focus on the customer and ethnic communities in both Queens and Brooklyn and some parts of Long Island."[12] North Fork's vision, on the other hand, involved a "very different approach to fee generation and service expansion, and sometimes the community focus suffer[ed] because of it."[13]

The district court found, and the Second Circuit affirmed, that Greater New York's actions were permissible business judgments. The district court noted that Greater New York's "decision to prefer a community oriented bank was [not] so beyond the pale of corporate decision-making as to be an invalid business judgment."[14] Indeed, Section 717(b)(2)(v)[15] specifically authorizes a board to take into consideration the impact of any change in control of the corporation on the "communities in which it does business." The Second Circuit noted that despite the fact that continued employment for Greater New York's CEO was *one* reason Greater New York did not negotiate with North Fork, there existed "no case law that would enable shareholders to compel Greater New York's board to negotiate with North Fork."[16]

Minzer[17] provides a thorough discussion of the scope of the New York business judgment rule by a federal court interpreting New York law. Practitioners should be aware, however, of an earlier Court of Appeals dictum suggesting that "corporate directors have a fiduciary obligation to present higher offers to their shareholders."[18] Accordingly, while the statute and the caselaw are clear that there is no requirement that a board accept a merger proposal on the basis of price and to the exclusion of other considerations, this area of the law is complex and judg-

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[12]Minzer v. Keegan, 218 F.3d 144, Fed. Sec. L. Rep. (CCH) P 91009, Fed. Sec. L. Rep. (CCH) P 91053 (2d Cir. 2000).

[13]Minzer v. Keegan, 218 F.3d 144, Fed. Sec. L. Rep. (CCH) P 91009, Fed. Sec. L. Rep. (CCH) P 91053 (2d Cir. 2000).

[14]Minzer v. Keegan, 218 F.3d 144, Fed. Sec. L. Rep. (CCH) P 91009, Fed. Sec. L. Rep. (CCH) P 91053 (2d Cir. 2000).

[15]BCL § 717(b)(2)(v).

[16]Minzer v. Keegan, 218 F.3d 144, 150, Fed. Sec. L. Rep. (CCH) P 91009, Fed. Sec. L. Rep. (CCH) P 91053 (2d Cir. 2000); see also Dynamics Corp. of America v. WHX Corp., 967 F. Supp. 59, 64 (D. Conn. 1997) (noting that New York law, unlike Delaware law, does not apply heightened scrutiny to antitakeover defensive measures).

[17]Minzer v. Keegan, 218 F.3d 144, Fed. Sec. L. Rep. (CCH) P 91009, Fed. Sec. L. Rep. (CCH) P 91053 (2d Cir. 2000).

[18]NBT Bancorp Inc. v. Fleet/Norstar Financial Group, Inc., 87 N.Y.2d 614, 623, 641 N.Y.S.2d 581, 586, 664 N.E.2d 492, 497 (1996).