

Appraisal Waivers Are Enforceable Under Delaware Law

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On September 13, the Delaware Supreme Court issued a decision in *Manti Holdings LLC v. Authentix Acquisition Co.*, confirming the enforceability of appraisal waivers by private contract so long as the stockholders agreeing to the waiver are sophisticated, informed, represented by counsel, and have at least some bargaining power. The decision serves as a guidepost for, among others, private equity and venture capital investors whose investments include drag-along rights with appraisal waivers.

Background

This case arose from a merger between Authentix Acquisition Co. and a third-party acquirer. Prior to the merger, Authentix and its stockholders entered into a stockholders agreement, which provided for drag-along rights, requiring the stockholders to consent to a sale of Authentix (whether by merger or stock sale) if such a sale was approved by the holders of at least 50% of Authentix stock. The stockholders agreement also required the stockholders, including the plaintiffs, to refrain from exercising any appraisal rights with such a sale.

After the stockholders agreement was signed, a majority of Authentix stockholders resolved by written consent to sell Authentix to a third party. Despite signing the stockholders agreement, certain nonconsenting stockholders sought to perfect their supposed appraisal rights and brought suit against Authentix, seeking statutory appraisal under Section 262 of the Delaware General Corporation Law (DGCL). The Court of Chancery dismissed the stockholders' petition. The stockholders appealed, and on September 13, the Delaware Supreme Court affirmed.

Specifically, it held that Section 262 does not prohibit sophisticated and informed stockholders, who are represented by counsel and have bargaining power, from voluntarily agreeing to waive their appraisal rights in exchange for valuable consideration. It reasoned that (1) the DGCL is a broad enabling act that allows freedom for private ordering; (2) Section 262 does not contain any language purporting to prevent stockholders from agreeing to an *ex ante* waiver of their appraisal rights; and (3) public policy does not prohibit sophisticated and informed stockholders from waiving their appraisal rights in exchange for valuable consideration.

The Court grounded its holding in both statutory interpretation and Delaware case law. A plain language reading of Section 262, the Court stated, "does not prohibit stockholders from agreeing to waive their appraisal rights" even though appraisal rights are mandatory stockholder rights. Rather, when a common stockholder has the benefit of counsel, is fully informed, and receives bargained-for consideration, a contractual waiver of appraisal rights is enforceable. The Court also found that Delaware case law supported that plain reading.

However, the decision does not directly address the enforceability of other waivers, such as waivers of books and records rights. Indeed, the Court warned that certain rights may be viewed as so fundamental to the corporate form that they cannot be waived, such as “rights designed to police corporate misconduct or to preserve the ability of stockholders to participate in corporate governance.” Nevertheless, the decision provides clarity to private equity and venture capital investors, seeking to use appraisal waivers or drag-along rights in contractual agreements with common stockholders.

Takeaways

Primary takeaways from the decision include:

- Appraisal waivers are enforceable so long as the stockholders agreeing to the waiver are sophisticated, informed, represented by counsel, and have at least some bargaining power.
- Appraisal waivers are enforceable by stockholders agreement.
- Corporations can be parties to and can enforce stockholders agreements.
- Waivers of other rights, such as books and records rights, may or may not be enforceable and should be considered carefully before employed.