

Delaware Clarifies That Statutory Appraisal Rights Can Be Waived

WRITTEN BY

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Controlling stockholders sometimes seek to limit the ability of new investors in their company to interfere with future exit transactions. They may do this by requiring the new investors to agree to vote in favor of a transaction proposed by the controlling stockholder (a “drag-along agreement”) or to expressly waive any appraisal rights because those rights can create uncertainty for an exit transaction. These arrangements are frequently found in private equity-sponsored companies when there are new equity investments, but until recently there has been uncertainty as to whether they are effective.

In *Manti Holdings, LLC v. Authentix Acquisition Company, Inc.*,^[1] the Delaware Supreme Court, in a 4 to 1 decision, held that an express agreement in advance by a sophisticated and informed stockholder for consideration to refrain from asserting appraisal rights under section 262 of the Delaware General Corporation Law (the “DGCL”) in connection with a merger of the corporation was valid notwithstanding the statutory grant of appraisal rights. In *Manti*, the Court was faced with investors who sold their company to a private equity firm and, in connection with rolling over merger consideration into a minority common stock interest in the acquiring company, agreed to refrain from asserting appraisal rights in a subsequent sale of that company. Those investors now sought to disclaim their agreement as invalid so that their exercise of statutory appraisal right would be recognized. The Court would have none of it, and held the “sophisticated and informed” investors to their contractual commitment. In doing so, the Court found that appraisal rights are not so fundamental a feature of the DGCL that they cannot be waived in advance, at least in the circumstances of this case.

In a bench ruling in another case addressing waiver of appraisal rights, *In re Altor Bioscience Corp.*,^[2] the Court of Chancery, in upholding a covenant not to sue in an agreement that bound only some of the stockholders, ruled that the covenant was not a waiver of appraisal rights because a waiver of a statutory right must be express. In doing so, the court implied that an express waiver could have been valid. Although not addressed by the court, the implication of the court’s ruling is that a drag-along provision also could be valid notwithstanding that voting the shares in favor of the transaction creating appraisal rights would prevent the exercise of those rights. Presumably, in those situations the analysis in *Manti* regarding the nature of the affected stockholders would be applicable in determining whether the agreement to vote in favor and forgo appraisal rights would be given effect.

Key Lessons

The *Manti* decision now clarifies that in the right circumstances a drag-along agreement and an express waiver of appraisal rights will be given effect, notwithstanding the statutory grant of appraisal rights. While *Manti* provides some insight as to what those circumstances might be and when appraisal rights cannot be denied, the

parameters of when a waiver of appraisal rights will be effective remains to be further defined.

[1] 2021 WL 4165159 (Del. Sept. 13, 2021), reargument denied on Oct. 1, 2021. The Delaware Supreme Court affirmed the decision of the Delaware Court of Chancery in 2019 WL 3814453 (Del. Ch. Aug. 14, 2019), which denied reargument of 2018 WL 4698255 (Del. Ch. Oct. 1, 2018).

[2] Tr. of Record, C.A. No. 0466-JRS (Del. Ch. May 15, 2019).

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