Delaware Court of Chancery Holds That Proposed Conversion Did Not Trigger a Blocking Right Covering Charter Repeals

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In *Gunderson v. The Trade Desk, Inc.*, the Delaware Court of Chancery held that a charter provision requiring supermajority stockholder approval to amend or repeal The Trade Desk, Inc.'s (Trade Desk) charter was not triggered by a proposed conversion from a Delaware corporation to a Nevada corporation, despite the conversion effectively resulting in a repeal of Trade Desk's charter. The court based its decision on longstanding case law applying the doctrine of independent legal significance.

Background

Trade Desk's board proposed a conversion under Section 266 of the Delaware General Corporation Law (DGCL), which requires approval of a majority of the outstanding shares of stock of the corporation entitled to vote. According to the court, given that Trade Desk's CEO controlled roughly 49% of the outstanding voting power, this voting threshold was easily obtainable. A plaintiff stockholder subsequently sought to enjoin the conversion, arguing that Article X of Trade Desk's charter required 66 2/3% of the outstanding voting power of Trade Desk's stock to approve the conversion. Under Article X of Trade Desk's charter, a 66 2/3% vote would be required "to amend or repeal, or adopt any provision" of the charter inconsistent with certain specified articles of the charter. According to the plaintiff, the conversion would result in a repeal of the charter sufficient to trigger the supermajority right. Trade Desk argued that Article X's supermajority provisions applied only to direct charter amendments under Section 242 of the DGCL, not to amendments accomplished through other provisions of the DGCL.

Analysis

According to the court, under the doctrine of independent legal significance, "action authorized under one section of the [DGCL] is not invalid because it causes a result that would not be achievable if pursued through other action under other provisions of the statute." The court held that the language of Article X (*i.e.*, "amend or repeal, or adopt any provision) applied to amending or repealing a charter provision under Section 242 of the DGCL, but not to a conversion under Section 266 of the DGCL that had the effect of amending or repealing the charter. As part of its analysis, the court noted that drafters of corporate documents governed by Delaware law are presumed to be aware of the doctrine of independent legal significance and that if they intend to prohibit certain actions with a supermajority blocking right, then they would need to be specific when drafting such a right. In so doing, the court detailed the history of the doctrine of independent legal significance and highlighted the Delaware Supreme Court's prior guidance to drafters of corporate charters in the context of mergers that result in charter

amendments: "The path for future drafters to follow in articulating class vote provisions is clear. When a certificate … grants only the right to vote on an amendment, alteration or repeal, the preferred have no class vote in a merger. When a certificate adds the terms "whether by merger, consolidation or otherwise" and a merger results in an amendment, alteration or repeal …, there would be a class vote." Accordingly, because Article X did not specify conversions within its ambit, the court denied the plaintiff's injunction.

Takeaway

The case serves as a reminder that drafters should not assume that broad language granting protective rights will apply in all intended instances. Instead, drafters should specify the types of transactions that apply within a protective provision's scope to avoid circumvention of those rights through other types of transactions accomplishing the same end.

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