FROM THE CHAIR

By Nat Doliner

The Business Law Section is studying whether to continue meeting at the ABA annual meeting or to hold a separate Section annual meeting in the fall. A third alternative would be for the Section to hold a separate annual meeting in the fall but conduct certain meetings and present some programs at the ABA annual meeting. This issue has arisen because the Section has incurred substantial losses in recent years as a result of the Section’s participation in the ABA annual meeting. If the entire Section continues to meet at the ABA annual meeting, it will be necessary for the Section to make its participation in the ABA annual meeting more financially viable.

The Section is soliciting the opinions of members of the Section as to which alternative they prefer. Therefore, I would like to devote a portion of our Committee meeting in Washington to a discussion of this issue. I would appreciate if you would give some thought to this issue in advance of the meeting. If you do not plan to be at the meeting or if you would like to provide me with your views in writing, please e-mail me at ndoliner@carltonfields.com. The Section will be circulating a written survey at the annual meeting on this issue. If you did not turn in a survey at the Spring meeting, I urge you to fill out a survey and turn it in.
It has been a real honor and privilege for me to serve as chair of the Committee during the last four years. I would like to thank the previous Committee chairs, Pat Garrett, Karl Ege and Vince Garrity for having the collective inspiration to form a committee in the Business Law Section that deals solely with negotiated mergers and acquisitions, and related subjects, and for developing a truly wonderful committee.

I would also like to thank Rick Climan, the incoming Committee chair, for all of his hard work and dedication for many years in the Committee, including Committee publications, institutes and programs. The Committee will be in great hands and will go on to greater heights under Rick’s leadership.

Thanks to the following Task Force and Subcommittee chairs for their great contributions to the Committee of leadership and work during the last four years: Byron Egan, Larry Tafe, John Leopold, Guy Weijer, Karen McDonie, Tom Hyman, Alison Youngman, Vince Garrity, Tom Thompson, Bob Harper, Diane Frankle, Steve Knee, Nelea Absher, Don McKenzie and Keith Flaum. I have tried to acknowledge the contributions of each of these individuals at various times during the last four years but I am confident that I have done so inadequately in all cases.

However, I have really failed to acknowledge an additional person who deserves recognition. While he carries no official title on the Committee, he is, and has been for many years, a leader of the Committee. He has been and continues to be a vital participant on several of the Task Forces. He is a regular panelist at our annual National Institute on Negotiating Business Acquisitions where the audience evaluations consistently place him at the top of the charts. He has tremendous skills as a mergers and acquisitions and corporate lawyer, and many Committee members, including me, have learned a great deal from him over the years. I, for one, am very grateful for his tutelage. Joel Greenberg, thanks for all that you do for our Committee.

I especially want to thank all of the members of the Committee, including the individuals named above, who have devoted countless hours to writing and editing publications, planning and presenting programs and institutes, planning Committee dinners and social events, and recruiting new members and making them feel welcome. Because of your efforts, active involvement in the Committee is one of the most rewarding professional experiences a lawyer can have.

FEATURE ARTICLE

The Odd Couple: Majority of Minority Approval and the Tender Offer

By Donald J. Wolfe, Jr.¹

In at least two recent opinions, the Delaware Court of Chancery has examined the propriety of tender offers by majority stockholders seeking to eliminate the minority equity interest and, in the course of addressing minority stockholder challenges to the fairness of such offers, has seemed to suggest that it is inclined to take some

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considerable comfort from the fact that the offeror has conditioned the closing of its offer upon the acceptance of stockholders holding a majority of the shares constituting the outstanding minority interest. This article is intended primarily to examine the conceptual basis for that view; i.e., whether the majority of the minority concept has meaningful application in the context of a tender offer. In the course of that inquiry, it examines the role of the majority of the minority approval condition in the judicial resolution of challenges to the fairness of parent-subsidiary mergers, and questions the current view that it should be accorded the same evidentiary effect in that context as the approval of an independent special committee charged with negotiating on behalf of the minority. It concludes that, notwithstanding the conventional judicial view that such a condition constitutes material evidence of entire fairness with respect to any merger in which the majority holder stands on both sides, it does not follow that such a condition should be judicially deemed to confer a similarly ameliorating effect in the context of a tender offer by a majority stockholder for the minority shares.

The Majority of Minority Condition and the Interested Merger

Even to the intermittent observer, it is stale news that a majority stockholder is well advised to employ at least one of two now-familiar instrumentalities in order to sustain the burden of establishing entire fairness in context of a merger with its subsidiary: 1) the appointment and empowerment of a special committee of the subsidiary board to negotiate at arm’s length on behalf of the minority holders of the subsidiary before submitting the proposal for what will be inevitable stockholder approval; or 2) the adoption of a condition to consummation that the merger receive the affirmative vote of a majority of the shares owned by holders unaffiliated with the controlling stockholder. Each of these devices has been judicially recognized as sufficient to neutralize the inherent power of a controlling stockholder to structure and unilaterally direct both board and stockholder approval of the challenged transaction.

For reasons that have never been adequately articulated, this exercise in the approximation of arm’s length negotiations has never been deemed to require both a special committee and a majority of the minority vote, a structure that would more closely mirror the twofold approval process that would otherwise apply in a truly arm’s length merger. Be that as it may, the fact remains that, by aping at least one of these two aspects of a traditional arm’s length deal, the Court typically will defer to the resulting terms without scrutinizing them for substantive fairness. This of course falls a little short of the substantive evaluation that the entire fairness test has been traditionally understood to contemplate, particularly with respect to the fair price component of that test. In actual fact, neither of the procedural devices referenced above has anything to do with price, at least in any direct sense. Neither a special committee nor a majority of minority approval will ensure that a price is “fair” in a substantive sense, but only that it was either fairly arrived at or deemed acceptable by a majority of those who do not stand on both sides of the transaction. But this judicial approach is neither accident nor revelation. The Delaware Court of Chancery has never cozied up to the task of conducting a substantive evaluation of fair price, and understandably so. Who among us is prepared to suggest that a court, under any but the most egregious of circumstances, should void a transaction entered into by unaffiliated, willing and fully informed contractual parties on the ground that the price agreed upon fell outside some divinely inspired range of absolute fairness? Fair price is in the end a normative concept, not an absolute one. Whether overtly or otherwise, a sophisticated court is therefore far more likely to concentrate its scrutiny (where scrutiny is indeed required) on the adequacy of the process and, where that is fair, to uphold the transaction. A fair process in turn is merely one that is characterized on both sides by free will, full information and the
realistic opportunity to say no. Where those elements are present, the attempt to secure a subsequent invalidation of a deal is called reneging, not justice. In the context of parent-subsidiary mergers, our courts have identified the participation of independent and independently advised special committees, at the negotiation stage, or a majority of the minority stockholder vote, at the approval stage, as critical indicia of the requisite level of procedural fairness. Although the entire fairness standard continues to apply even where one of these devices is employed, the law is clear that such mechanisms will cause the burden of proof to shift from the controlling stockholder to the plaintiff, who must then prove that the transaction was unfair.

The majority of the minority instrumentality appears to be enjoying something of a renaissance of late. In a recent article addressing a number of perceived anomalies in the existing Delaware precedent, two sitting members of the Delaware Court of Chancery and one highly respected former Chancellor jointly offer the view that existing Delaware law fails to fully appreciate the curative effect of a majority of the minority shareholder approval condition, and proposed that it be accorded enhanced evidentiary effect going forward.

In today’s environment there is insufficient justification for giving less than full cleansing effect to a self-interested merger that is conditioned on approval of a majority of the minority stockholders.

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At the very least, the burden-shifting rule of Rosenblatt[2] and Lynch should be altered in the case of self-interested mergers that are conditioned expressly on “majority of the minority” shareholder approval.4 These highly distinguished authors point out that there are inherent dangers in according such deference in connection with transactions that rely solely on the special disinterested committee process, noting that suspicions over structural bias might justify the current view that the business judgment rule is inapplicable to transactions approved in this fashion. They acknowledge no such defect with respect to majority of the minority stockholder approval, however.

“Majority of the minority” shareholder approval, on the other hand, stands on a different footing, because by definition minority stockholders are not “conflicted” and their approval of an interested merger could not be challenged on that ground. The only basis to challenge the integrity of such a stockholder vote is by attacking the sufficiency of the proxy disclosures or by showing that the vote was coerced. If the disclosures were faulty or the voters were coerced, then the shareholder vote should create no standard-of-review-changing benefit. If, however, the vote is uncoerced and is fully informed, there is no reason why the shareholder vote should not be given that effect, particularly given the Supreme Court’s rightful emphasis on the importance of the shareholder franchise and its exercise. Under current law, however, entire fairness remains the standard of


review, and the only benefit of “majority of the minority” stockholder approval is to shift the burden of proof (to show unfairness) to the plaintiffs.

* * * * *

The better policy, we think, is to afford business judgment review treatment to self-interested mergers that are approved by either an effective independent director committee or by a majority of the minority stockholder vote. At a minimum, that treatment should be afforded to approval by an informed “majority of the minority” of the shareholders.5

Maybe. Some of this may simply be chalked up to the Chancery Court’s increasingly obvious and entirely understandable disdain for the legal analysis that requires it to second-guess the substantive “fairness” of a price deemed acceptable to both sides through a process that assures full information and freedom from coercion. This is a point of view worthy of consideration. We continue to await the case, after all, in which fair dealing is demonstrated through the equitable employment of either of these two instrumentalities only to have the Court conclude that the resulting price is unfair. And we are likely to be waiting for such a case for quite a long time.6

But in the end the suggestion that majority of minority approval and special committee negotiation are functionally equivalent, much less that the former is a more effective indicator of fairness than the latter, simply does not bear scrutiny. In a society that regards majority rule as the indispensable lubricant of civil process, it may amount to sacrilege to suggest as much, but it would seem that, as between the two, the majority of the minority device is the weaker method of assuring the fairness of a parent-subsidiary merger.

As any average golfer can attest, there comes a point in every round when one must decide whether to pitch out of the woods and into the fairway or to try to hit it through that unfortunately placed tree that stands between you and the green. As you ponder your dilemma, one of your playing partners can be counted on to offer the following familiar bit of advice: “They say that trees are 90% air.” True enough, but so is a screen door, and I doubt “they” would recommend trying to hit your ball through that. Trees and screen doors are at once similar and very different. And so it is with majority of the minority approval and the special committee. Both may broadly be said to give important voice to the minority’s point of view in a way that would otherwise be sadly lacking in an interested transaction of this sort. Both may be said to neutralize the majority stockholder’s otherwise absolute capacity to structure and effect the transaction on its own terms. But while one offers the opportunity to shape the transaction and to take advantage of an array of alternative bargaining options on an equally broad array of deal points, the other offers an all or nothing dilemma. While one equips the representatives of the minority with the power to pursue discrete trade-offs in the pursuit of an equitable compromise, the other is by its very nature the antithesis of compromise, presenting only stark choice between taking or leaving the deal unilaterally prepackaged by the interested offeror. It is the difference between a Swiss Army knife and a meat ax.

There is irony in the suggestion that the limited power to veto the transaction through a

5 Id., 26 Del. J. Corp. L. at 881, 882 (footnotes omitted).

stockholder vote is sufficient to level the playing field given the steady evolution of the case law away from that very conclusion with respect to the special committee. In the years immediately following *Weinberger v. UOP, Inc.* 7, which gave birth to the special committee process in a footnote, the Delaware courts seemed content to accept the participation of a special committee as sufficient evidence of fair dealing even if its powers were strictly limited to either an endorsement or a flat veto of the transaction proposed by the majority holder. Most Delaware practitioners will tell you today, however, that this is probably not enough. Delaware law now seems to require that the committee be fully empowered to represent the interests of the minority actively in connection with the structuring and pricing of the deal and that its members diligently pursue those responsibilities. Any less than this is highly likely to result in a judicial refusal to afford the committee process any of the hoped-for cleansing effect on the otherwise interested transaction. 8 In light of the trend toward requiring broader participation on the part of special committees, it is counterintuitive to suggest that majority of the minority approval, which is merely a simple veto mechanism that mimics the primitive and outmoded special committee model, should be judicially regarded not merely as the evidentiary equivalent of, but as functionally superior to a special committee in connection with the judicial evaluation of the entire fairness of an interested merger.

It is true of course that because special committees are composed of directors who have and presumably will be required to interact with their fellow interested directors when the transaction is done and that their decision is therefore open to the possibility of structural bias - i.e. that the committee members will be influenced indirectly by the inclination to accommodate conflicted friends and colleagues on the board at the expense of the committee’s fiduciary responsibilities to the minority. It is also true that this mild form of cronyism is not susceptible of easy proof. But this hardly seems a persuasive basis on which to conclude that the committee process is a less reliable one than the ratifying vote of an otherwise unrepresented minority. That which has been said of structural bias can be said as well with respect to the concept of domination and control of the board by an interested minority of directors – it is in fact much the same thing writ small -- yet we seem content to subject the latter allegation of board room influence to a rather rigid test of proof without apparent apprehension that such an approach has permitted the rampant domination of directors to go undetected in America’s board rooms. The problem with the suggestion that we should simply accept that structural bias is a given and embrace majority of the minority approval as a preferable indicator of fair dealing is that it is a theory that runs directly counter to another presumption that is far more fundamental to our law – namely the presumption that directors act in good faith and in the honest belief that their decisions serve the best interests of the corporation. That presumption, the bedrock of the business judgment rule, requires that the law refuse to assume dishonesty or unfaithfulness or bias on the part of directors -- indeed that it

7 457 A.2d 701 (Del. 1983).

8 Compare in this regard the holding of *In re First Boston, Inc. Shareholders Litigation*, Del. Ch., C.A. No. 10338, Allen, C. (June 7, 1990) (finding that a decision by an allegedly hamstrung special committee should be upheld because it nonetheless retained “the critical power: the power to say no. It is that power and the recognition of the responsibility it implies by committees of disinterested directors, that gives utility to the device of special board committees in charge of control transactions.”), with Chancellor Allen’s analysis in *Independent Directors In MBO Transactions: Are They Fact or Fantasy? 45 Bus L. 2055* (August, 1990) and the language of the Delaware Supreme Court on this subject *Kahn v. Tremont Corp.*, 694 A.2d 422 (Del. 1997).
presume precisely the opposite— in the absence of
no little showing to the contrary. Until we choose
no longer to indulge that presumption, a prospect
that may be happily regarded as remote, the
expressed concern over structural bias should
prompt little worry. To say that it is not the
subject of judicial presumption is not to say that it
cannot be accounted for or that the Delaware
courts, skilled in perceiving subtle conflicts of
interests, are not capable of dealing with it in the
context of the existing analytical framework.

But we digress. Regardless of the view of
either author or reader as to the relative
evidentiary value that should be accorded majority
of minority approval in the interested merger
context, the central question to be considered here
is whether such a deal condition should be
 accorded equivalent evidentiary effect in the
judicial assessment of the “fairness” of a tender
offer by a controlling stockholder for the minority
shares. There are a few recent decisions that
suggest that the Court of Chancery believes that
 the answer to this question is yes. Those decisions
are examined below.

The Relevant Precedent

Prior to 2001, there had been little judicial
occasion to address the effect of a majority of
the minority condition upon the fairness of a tender
offer by a controlling stockholder for the shares it
did not own. Surely, as addressed above, there
had been much discussion of the effect of such a
condition on a parent-subsidiary merger subject to
 analysis pursuant to the entire fairness test, but the
question whether such a condition enhanced the
fairness of an otherwise non-coercive tender offer
seems not to have been resolved or squarely
presented even during the 1980’s, when tender
offer mania and attending litigation raged.

The existing precedent did contain a
smattering of casual references to the issue,
though, most of which seems to offer vague
support for the proposition that the tender by the

holders of a majority of the minority shares should
be viewed as a functional equivalent of a fully-
informed, disinterested vote in the context of an
interested merger. By way of example, the
Delaware Supreme Court considered the validity
of a two step cash-out transaction by a controlling
shareholder under the entire fairness test in Kahn
v. Lynch Communication Systems, Inc.9 Upholding
the finding below of fair dealing, including
adequate disclosure, the court concluded that the
case was one in which the issue of price should be
the preponderant consideration in resolving the
fairness issue. Convinced that the record reflected
a sufficient showing to satisfy the burden of proof
borne by the acquirer, the Court observed in a
related aside that, “although the merger was not
conditioned on a majority of the minority vote, we
note that more than 94 percent of the shares were
 tendered in response to Alcatel’s [first step tender]
offer.”10

The Delaware Supreme Court went a little
further in Cinerama, Inc. v. Technicolor, Inc.11.
That decision also upheld the Court of Chancery’s
determination that the two-stage acquisition
comprising a tender offer and a second-step, cash-
out merger satisfied the entire fairness test.

9 638 A.2d 1110 (Del. 1994).
10 669 A.2d 79, 89 (Del. 1995).
11 663 A.2d 1156, 1176 (Del. 1995) (citations
omitted). See also Lowenschuss v. Option
Clearing Corp., Del Ch., C.A. No. 7922, Brown,
C. (March 27, 1985) (taking solace in the fact that
“the shareholders have indirectly been given an
opportunity to pass on the propriety of the
exchange offer by being given the option to tender
or refuse to tender their shares after disclosure in
the exchange material of the increase in long term
debt and the decrease in shareholder equity that
will remain following the exchange, and the
record indicates that over 90% of all shares have
been tendered.”)
Dutifully making its way through the various components of the fair dealing analysis, the court satisfied itself as to the adequacy of the timing, initiation, negotiation, structure and disclosure of the transaction. In the course of this discussion, it also addressed the method by which the approval of shareholders had been approved. Again, as in Kahn, the shareholder vote on the second stage merger had not been conditioned on majority of the minority approval. The Court nonetheless found unquantified reassurance in the strong response to the first-step tender offer.

The record reflects that ‘more than seventy-five percent of [Technicolor’s] shares were tendered in the transaction’ to MAF. …. Generally, ‘where a majority of fully informed stockholders ratify action of even interested directors, an attack on the ratified transaction must fail.’ Accordingly, in the absence of a disclosure violation, the Court of Chancery properly found the tender by an overwhelming majority of Technicolor’s stockholders to be tacit approval and, therefore, constituted substantial evidence of fairness.

More recently, in Kohls v. Duthie12, the Court of Chancery refused to enjoin a management buy-out of Kenetech Corporation in which the company’s CEO, who owned 35% of the common, participated in the buy-out with a third party venture capital fund. The two-step acquisition, negotiated and approved by a special committee of the target board, included a first step tender offer that was conditioned on the tender of 85% of the shares owned by stockholders unaffiliated with the buyers. Defendants argued that this factor alone was sufficient to invoke the business judgment rule because the minimum tender condition should be given the same legal effect as a ratifying vote by disinterested stockholders. The Court focused instead on the special committee, finding that its activities were likely to give rise to a business judgment standard of review. The Court went on to observe, however, that the fact that the transaction was conditioned on the fully-informed approval of a majority of the unaffiliated stockholders, who therefore had been given the power to approve or disapprove the transaction as a group, gave rise to a forceful argument that such a tender should be accorded the same effect as a ratifying stockholder vote.

These decisions, most issued in the context of a challenge to the back-end of a two step acquisition, merely hinted at the legal effect that a Delaware Court might accord to the inclusion of a majority of the minority condition in a tender offer pursued by a conflicted fiduciary. In two recent decisions issued approximately six months apart, however, the Delaware Court of Chancery addressed the question more directly.

Siliconix13

The representatives of Vishay were stymied. They had been charged with striking a deal with the board of Siliconix, Vishay’s 80% subsidiary to acquire the publicly held minority interest in Siliconix and bring it in house in order to stop the financial bleeding. They had honored conventional wisdom, tried and true, by urging the Siliconix board to appoint a special committee to negotiate on behalf of the public minority the terms of Vishay’s tender offer for the minority shares. They had thereafter offered what they believed to be a fair price and had engaged in arduous negotiations with the Siliconix Special Committee with regard to a variety of deal terms.

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13 In re Siliconix Incorporated Shareholders Litigation, Del. Ch., C.A. No. 18700, Noble, V.C. (June 21, 2001). Mr. Wolfe’s firm represented the special committee in the Siliconix matter. The discussion of that action here is limited in its entirety to matters of public record.
Yet there had been precious little progress to evidence their efforts.

It may be safely observed that such a committee seldom adopts an utterly obstructionist posture or even credibly attempts to threaten to scuttle the transaction proposed for its consideration. No matter how hard-fought the negotiations, or how tenaciously the committee members may cleave to their fiduciary obligations, the practicalities dictate an implicit assumption by all parties that a deal ultimately will be done, an assumption that is often absent, and critically so, from the transactional negotiations between unaffiliated corporations. Those who prefer majority of the minority to special committees in the merger context may well find support in this often-unacknowledged fact. But whether one refers to it as structural bias or simply an implicit acknowledgment of the inevitable, the likelihood that a committee of this sort will simply say “no, thank you,” and shut the process down is quite low in the typical parent-subsidiary merger discussions. The Siliconix Special Committee, however, seemed oblivious to this subtle reality.

In February of 2001, Vishay, interested in hastening the consummation of a deal, had announced an all-cash tender offer for the Siliconix shares that it did not already own at a price that reflected a 10% premium over the existing market price. This announcement was accompanied by Vishay’s request that it be extended the opportunity to discuss the terms of the offer with an independent special committee of the Siliconix Board. The Board complied by designating its two most independent directors to serve on the committee, which thereupon retained its own legal and financial advisors. The committee then set about the task of negotiating improvements in the terms of the original Vishay offer.

But market forces soon intruded on the negotiations. The price of Siliconix stock crept above the original tender offer price. In response to the Committee’s resulting expressions of concern, Vishay, unwilling to pay a higher price in cash, proposed a stock-for-stock merger. The negotiations stretched into May. Increasingly frustrated at the slow pace of the negotiations, and mindful of the continuing potential for the deterioration of the Siliconix business prospects, Vishay decided that it needed to act unilaterally. In late May, it announced an exchange offer pursuant to which it proposed to exchange 1.5 shares of Vishay for each tendered share of Siliconix common. The exchange ratio no longer reflected the original premium over the market price of Siliconix stock, but instead merely mirrored the ratio between the per share market prices of the two stocks as of the date of the announcement by Vishay of the original tender offer. The Special Committee was not offered the opportunity to evaluate or comment on the offer in advance. The offer stated that it was irrevocably conditioned on the tender of a majority of the outstanding minority shares, a condition that, if satisfied, would result in the ownership by Vishay of in excess of 90% of the outstanding Siliconix shares and the attending option to conclude a short-form merger under Section 253 of the Delaware General Corporation Law. In early June, Siliconix filed its Schedule 14D-9 in response to this offer. It announced that the Committee would take no position with respect to the offer and that it would offer no recommendation to stockholders as to its fairness.

In the ensuing (some might say inevitable) legal challenge, those representing the Siliconix minority asserted with some heat and no lack of hyperbole that the fiduciary responsibilities of fairness owed by Vishay as the majority stockholder of Siliconix had been reduced to tatters by its unilateral emasculation of the negotiation process, that its blatant brutalization of the minority was subject to the entire fairness standard and that Vishay could not meet its burden pursuant to that test either with respect to its fair dealing obligation or its duty to offer a fair price under such circumstances. In dealing with
plaintiff’s motion for preliminary injunction with respect to the consummation of the exchange offer, the Court addressed the issue in a somewhat less breathless fashion.

If the tender offer was free of improper coercion, and was the subject of full disclosure, the Court observed, stockholders were free to accept or reject that offer, each pursuant to his or her individual investment objectives. By the same token, the offeror, even though a majority stockholder subject to fiduciary duties, was under no duty to offer a fair price to the minority as that term is employed and understood in entire fairness analyses applicable in parent-subsidiary mergers. Rather, the Court stated, it is within the unfettered discretion of each individual stockholder in such a circumstance to decide what is or is not “fair” and whether or not to accept or reject the offer, free of improper coercion and armed with all information material to that decision. Where full disclosure is present and no inequitable coercion is applied by the interested fiduciary, the question as to the fairness of the transaction is a matter best left to traditional market forces and to the prospective intersection of the personal interests of the buyer and the seller.

This seems pretty solid stuff. Anyone finding such an analysis surprising has simply failed to grasp the critical conceptual distinction between a tender offer and a merger. To explain why the fiduciary responsibility obligation to offer a fair price and to engage in fair dealing have no application in the context of a non-coercive, fully disclosed tender offer, the Court invoked and relied upon the thoughtful analysis of Chancellor Allen in the T.W. Services decision, in the course of which the Chancellor observed:


Public tender offers are, or rather can be, change in control transactions that are functionally similar to merger transactions with respect to the critical question of control over the corporate enterprise. Yet, under the corporation law, a board of directors which is given the critical role of initiating and recommending a merger to the shareholders … traditionally has been accorded no statutory role whatsoever with respect to a public tender offer for even a controlling number of shares. This distinctive treatment of board power with respect to merger and tender offers is not satisfactorily explained by the observation that the corporation law statutes were basically designed in a period when large scale public tender offers were rarities; our statutes are too constantly and carefully massaged for such an explanation to account for much of the story. More likely, one would suppose, is that conceptual notion that tender offers essentially represent the sale of shareholders’ separate property and such sales — even aggregated into a single change in control transaction — require no “corporate” action and do not involve distinctively “corporate” interests.15

It was this important distinction, the Court held, that differentiated this case from McMullin v. Siliconix, supra. See also, the ensuing holding of the Delaware Supreme Court to much the same effect in Solomon v. Pathe Communications Corp., 672 A.2d 35, 39-40 (Del. 1996) (“In the case of totally voluntary tender offers … courts do not impose any right of the shareholders to receive a particular price …. [I]n the absence of coercion or disclosure violations, the adequacy of the price in a voluntary tender offer cannot be an issue.”)

15 T.W. Services, mem. op. at 28-30, quoted in Siliconix, supra.
Beran and similar precedents of recent vintage that had recognized the fiduciary responsibilities of both majority stockholders and subsidiary boards to protect the minority in the context of mergers supported by a controlling stockholder. The Court in Siliconix accordingly declined not only to recognize the application of the entire fairness test with respect to the exchange offer, but also refused to find that the Siliconix Special Committee had breached its duties in failing to take a position with respect to the Vishay exchange offer. It was in connection with this latter holding, and in its attempt to further distinguish the decisions that found the entire fairness test applicable to interested mergers, that the Court made the following observation:

In addition, the minority shareholders in McMullin were powerless; the parent was voting for the merger and it did not matter how they voted. Here, the Siliconix minority shareholders have the power to thwart the tender offer because it will go forward only if a majority of the minority shares are tendered. Accordingly, I conclude that McMullin cannot be read to require application of the entire fairness test to evaluate the proposed transaction.17

This holding marks the point at which the majority of the minority condition first began to creep into the court’s substantive analysis of tender offers by majority shareholders.

Aquila18

There were no members of the board of Aquila who were not subject to material conflicts of interest with respect to any transaction between Aquila and Utilicorp United, Inc., Aquila’s 80% stockholder. As a result, when UtiliCorp announced its tender offer for the 20% minority interest of Aquila that UtiliCorp did not already own, the Aquila board was simply not in a position to engage in arm’s length negotiations, whether by way of the typical special committee process or otherwise, nor was it able objectively to recommend a course of action to its shareholders in response to that offer. The offer to exchange each tendered share of Aquila for approximately .7 of a share of UtiliCorp therefore came essentially unvarnished to the Aquila shareholders. The opinion states that, in light of the conflicts of each of its members, “the Aquila Board remained neutral and made no recommendation to Aquila’s stockholders on whether to tender their shares in the exchange offer.” While the Board’s Schedule 14D-9 contained an analysis by an independent financial advisor of historical stock price performance, and other typical valuation techniques that tended to show the price at the low end of the fairness range, the board did not request a fairness opinion.

In disposing of the motion for preliminary injunction brought on in the name of the Aquila minority, the Court began with the observation that “Delaware law does not impose a duty of entire fairness on controlling stockholders making a non-coercive tender or exchange offer to acquire shares directly from the minority holders,” citing Siliconix and Solomon v. Pathe Communications

16765 A.2d 910 (Del. 2000).

17 Siliconix, mem. op. at 24.

18 In re Aquila Inc. Shareholders Litigation, Del. Ch., C.A. No.19237, Lamb, V.C. (Jan 2, 2002). Mr. Wolfe’s firm represented Aquila and its directors in the Aquila matter. The discussion of that action here is limited in its entirety to matters of public record.
The Court found the offer to be a voluntary one. It buttressed this conclusion with reference to the fact that the offer contained a majority of the minority condition, which required that at least a majority of Aquila’s shares had to be tendered for the offer to succeed. As in Siliconix, satisfaction of this condition would place UtiliCorp in a position to accomplish the promised short form merger. The Court described this provision as an “important safeguard” that helped to ensure that the offer would not be coercive for Aquila shareholders. “The offer is clearly a voluntary one,” the Vice Chancellor observed, “because the terms and conditions of the exchange offer are structured so that the decision whether or not to accept the offer is firmly entrusted to a majority of the minority stockholders.” Having thus found the offer to be free of coercion, largely by reference to the existence of the majority of the minority condition, and there being no claims of inadequate disclosure, the Vice Chancellor had little trouble finding that neither the absence of any pretense of “fair dealing” in connection with the fashioning of the terms and price of the offer nor the fact that all of the members of the Aquila board suffered material conflicts of interest by reason of their material affiliations with UtiliCorp had any impact on its analysis.

The Odd Couple

The cases above conclude, quite soundly in the author’s view, that a majority stockholder has no fiduciary responsibility to offer a fair price or to engage in fair dealing in connection with a fully disclosed and otherwise non-coercive tender offer for the shares of the minority. In light of this, of what conceivable relevance is it to the court’s analysis that the offer is conditioned upon acceptance of a majority of the shares not already owned by the offeror? In the context of an interested merger, where the controlling stockholder stands on both sides of the transaction, there is every reason for the courts to presume that the approved transaction will favor the majority and to impose fairness where necessary. In such a context, the majority of the minority condition is intended to alleviate the Court’s concern that the transaction is one-sided, and to approximate instead an arm’s length merger by eliminating the power of the controlling party to ensure the approval of the deal. This is deemed to be strong evidence of compliance with the controlling stockholder’s fiduciary duty to engage in fair dealing and, where the condition is satisfied, suggestive of the conclusion that the price is, if not substantively fair, at least acceptable to most, thus eliminating the need for the need for judicial intervention to ensure fairness.

But a tender offer by its nature is a very different transactional vehicle. It is not a collective judgment that can be approved solely by the act of an interested majority, but an assemblage of individual transactions in which each individual stockholder is free to apply its own definition of fairness and to accept or reject the offer accordingly. Unlike a merger, the decision of its fellow stockholders is of absolutely no consequence to that decision, unless the offeror (or the courts) insist on making it so. Unlike an interested merger, the controlling stockholder is in no position to control or influence those individual decisions by virtue of its controlling interest in the

19 672 A.2d 35 (Del. 1996).

20 This raises the question, yet to be addressed by the Delaware courts, whether the fact that a special committee actively negotiates with the controlling stockholder and ultimately approves the terms of a tender offer takes the transaction out of the Siliconix analysis and instead subjects the offer to an entire fairness analysis. Cf. Hartley v. Peapod, Inc., Del. Ch., C.A. No. 19025, Tr. at 4-7, Lamb, V.C. (Feb. 27, 2002) (Hearing) (Court suggesting in a settlement hearing that a negotiated tender offer transaction between a majority stockholder and a special committee of the subsidiary board that was not conditioned on acceptance by the majority of the stockholders would be an entire fairness case).
corporate entity (at least in the absence of inequitable coercion or outright fraud) because the power to control a collective decision is simply irrelevant. This neutralization of the power of the majority stockholder to control both sides of the transaction is not the result of legalistic artifice. It is the necessary effect of the tender offer vehicle itself.

What inherent inequity is addressed by a majority of the minority condition in such a context? The reason that a majority stockholder has no fiduciary duty to engage in fair dealing or to offer a fair price in such a circumstance, the reason that the entire fairness test simply has no application and that there is no burden of proof for the offeror to satisfy is that there is no inherent power to control both sides of the transaction. The offending power to effect the outcome, and the attending presumption that it will do so in a way that favors its own interests to the detriment of the minority is no longer present and no longer worthy of judicial suspicion or attention. So long as all material information is made available and stockholders are left to their individual discretion, free of inequitable coercion, there is no longer present and no longer worthy of judicial suspicion or attention. So long as all material information is made available and stockholders are left to their individual discretion, free of inequitable coercion, there is nothing more that need be shown to warrant judicial deference to the holder’s voluntary decision. Reference to a tally of the outcome of the other individual and voluntary decisions appears particularly unhelpful. It follows that there is no reason to require offerors to employ or to contort our legal analysis by inviting reliance upon the existence of artifices that were created for the very purpose of establishing that nonexistent duties have been satisfied.

Some might suggest that the presence of such a condition is relevant to the applicable judicial analysis not because it constitutes evidence of procedural fairness but because it evidences the absence of coercion, a condition that serves as an essential premise for the foregoing discussion in its entirety. Certainly no one would argue that a coercive tender offer by a majority shareholder should be freed of judicial scrutiny or rendered invulnerable to invalidation, for such coercion replicates, albeit indirectly, the potentially abusive power of the controlling stockholder to ensure the approval of its own transaction. But is it true that acceptance by a majority of the minority is conclusive or even persuasive evidence of a lack of coercion? To the contrary, it can be argued with at least equal force that such approval is as likely to constitute conclusive evidence of coercion as it is to its absence — the higher the level of acceptance, the more successfully coercive the offer. In all events, there are far more reliable ways to detect the existence of inequitable coercion, most prominent among them an examination of the structure of the deal and of the adequacy of the disclosures. Simply counting the number of people who accepted the offer provides little assurance that the decision to accept was voluntary. Majority of the minority approval is a symptom of coercion, not a mechanism for protecting against it.

The fact is that majority of minority approval is monumentally irrelevant to the legal analysis that our courts have quite correctly identified as applicable to the judicial review of majority stockholder tender offers. It is an inapt analogy drawn from the very different legal analysis applicable to parent subsidiary mergers. Taking comfort in the presence of such a mechanism in an otherwise voluntary tender offer is not unlike insisting on the participation and approval of an independent special committee of directors in connection with an arm’s length merger — it is utterly unnecessary and justifies no alteration of the otherwise applicable judicial standard of review of the board’s conduct as fiduciaries.

It is probably fair to say that the inclusion of this factor in the judicial analysis of the parent/offeror’s conduct threatens no significant harm to the policy of the law; that is unless, like some, you regard clarity of analysis as among the most useful characteristics of corporate common law, particularly Delaware corporate common law, and regard its much vaunted predictability as
undermined by any institutionalization of untidy legal analysis. That may not be the stuff that emergencies or impending disasters are made of – by no means – but it is worth noting that, for the corporate practitioner, this highly valuable predictability derives directly from clarity of judicial analysis and the resulting ability to analogize existing precedent to problems of first impression. This in turn depends upon the precision of the precedent from which the analogy is to be drawn. Refashioning the judicial calculus to eliminate reliance upon a majority of minority condition in the context of parent tender offers would serve that purpose.

TASK FORCE REPORTS

Acquisitions Of Public Companies Task Force

We had a great meeting in Boston at the Marriott. Attendance was as follows: Steve Knee (Co-Chair), Diane Frankle (Co-Chair), Rick Alexander, P. Blake Allen, Jay Bothwich, David Bronner, Bruce Chatham, Rick Climan, Nat Doliner, Andrew Doyle, Byron Egan, Drew Fuller, Joel Greenberg, Bob Hart, Margaret Inouye, David Katz, Edward Kerwin, Hal Leibowitz, Henry Lesser, Mark Morton, Eliot Robinson, Franziska Ruf, Darrel Rice, Phil Stamatakos, Lorna Telfer and Scott Whittaker attended. Steve Bigler, Bryan Davis, Pat Leddy and Eileen Nugent joined by teleconference. The next Task Force meeting will be in Washington, DC, on Saturday, August 10, 2002, from 9:00 a.m. to 12:00 noon. There was overwhelming support for a meeting in Chicago on Saturday, November 16. Phil Stamatakos and Chris Bartoli of Baker & McKenzie have graciously agreed to host our meeting. We would propose a 9:00 a.m. – noon meeting. Please mark your calendars. More details later. The Committee is meeting in Paris in October. Our standalone Task Force meeting will be in Wilmington, Delaware, on Saturday, January 11, 2003.

Diane Frankle and Rick Alexander reviewed a recent transaction in which a publicly-traded company party to a negotiated merger agreement received an unsolicited bid, and the issues presented under the no shop fiduciary out and termination provisions. Henry Lesser and Bruce Chatham reported on the Federal Regulation of Securities Subcommittee on Proxy Statements and Business Combinations, chaired by Chuck Nathan. They reported that the SEC Staff is objecting substantively to conditions to tender offers that are deemed to be satisfied in the discretion of the offeror without objective criteria discernible to investors. The SEC Staff indicated that in the event that a parent company proceeds with a tender offer and short form merger under Siliconix, the target company may not need to be a filer under the related Schedule 13E-3. Tender offers are not being used by buyers where the transaction requires employment or severance arrangements to be negotiated with key management, due to the risk of litigation under Rule 14d-10 (best price rule); however, the Staff is not intending to pursue any initiatives to solve the problem caused by the litigation in the next several months. Some investment banks are concerned that the dealer manager may be an underwriter in an exchange offer.

We then turned to a discussion of Joel's representations and warranties and reviewed comments through Section 2.16. Joel will provide a redraft for our meeting in Washington, DC reflecting the consensus. We agreed that the intellectual property representation would be replaced by a more generic version, which David Bronner agreed to provide. Keith Flaum agreed to provide a revised version of the current representations, to be included in the commentary as a sample of an industry specific representation. Eileen Nugent and Joel agreed to provide additional sample industry specific representation.
We also agreed to review the "specialist" representations and to use a cross-reference sheet for all definitions. Joel Greenberg agreed to produce for our meeting in Washington, DC a list of defined terms so that we could assign definitions and related commentary. Joel also agreed to provide commentary for the definition of material adverse effect. We decided to leave the forward-looking component of that concept [e.g., "could reasonably be expected to have"] in the individual representations and other provisions and to eliminate the same from the definition itself. We then turned to the revised commentary prepared by the sub task force working on the termination provisions. We decided that we would be clear in the introduction that leverage and specific factual settings would dictate negotiations in any particular transaction and that, although we provided one buyer's proposed draft, with variations and some possible seller responses, there was a wide range of acceptable buyer's and seller's positions. We concluded that we would not offer a complete seller's markup but only provide in commentary some sample seller responses with the rationale, and possible buyer responses in some cases. The termination provisions' sub task force (well represented by Drew Fuller, Bryan Davis and Darrel Rice) agreed to turn a draft for the next meeting in Washington, DC.

We then discussed Article I, and determined that the reverse triangular merger created under Delaware law created only a right to receive shares. We discussed the impact on the acquiror's capitalization. The sub task force for Article I agreed to provide a draft commentary for the Washington, DC meeting. Keith Flaum agreed to provide a draft of the commentary for the no shop and meeting covenants sections (including related definitions). The covenants sub task force agreed to have a draft for the Washington, DC meeting.

Diane Holt Frankle and Stephen H. Knee, Co-Chairs

International Transactions Task Force

The International Transactions Task Force met in Boston and covered a number of different subjects at its meeting.

The first part of the meeting dealt with the private company stock overview. John Grossbauer, the Chair of the Editorial Committee dealing with the responses from the various jurisdictions, reported that the questionnaire has been tested in a few countries and has now been rolled out to approximately 25 countries. It was agreed that we should cover the same countries we covered in the asset purchase project and possibly add a few others. We also agreed that as part of our effort to market the product on a stand alone basis to non-US lawyers, we would add the United States as one of the jurisdictions to be covered in the responses.

Robert Hogan of Stikeman Elliott provided a presentation on tax efficient ways of structuring acquisitions, focusing mainly on US acquirors buying Canadian entities. The presentation produced a very interactive and interesting exchange among those present.

On the program front, it was decided that our task force would produce a program at the annual meeting on preliminary agreements. The program would provide a comparative of the differences between various jurisdictions and be interactive based on some form of fact pattern. It was agreed that we should try to use this program as a primer for future programs of the task force that would focus on either the model stock purchase agreement or the model asset purchase agreement. Finally, the task force discussed the current project consisting of a public company stock acquisition in a number of jurisdictions. It was agreed that the proposed European takeover directive if adopted could have a significant impact on many countries. Given the uncertainty over the timing of the
European directive, it was decided not to delay or slow down the questionnaire responses. We briefly discussed part of the questionnaire and agreed to target the completion of the questionnaire portion of the project by no later than the Spring meeting of next year.

John W. Leopold  
Guy-Martial A.X. Weijer  
Co-Chairs

**Joint Venture Agreements Task Force**

At the full meeting of the Task Force in Boston, we reviewed and signed off on the text of the Joint Venture Agreement after lively discussion and input from the full Task Force. In terms of the actual agreement, the work on the text is now complete (subject only to any necessary changes that emerge during discussion on the commentary) and work has begun in earnest on the commentary.

We also had a good editorial committee meeting in Boston and are now definitely in the pre-publication phase of our agreement and need to put our shoulders to the wheel to get the project finished and into publication.

We agreed in Boston that the best way to do this is to cut the various tasks into smaller chunks and to target June 30 to have the commentary to the agreement finished. One of the challenges we had set for ourselves was that the commentary should not just contain the collective thoughts of the Task Force members but that each topic should be researched and we would like to include any relevant seminal case law or articles on the issues. We are also developing a bibliography to be included with the publication. We have made significant progress on this effort although there is still some material outstanding on the commentary. The research part of the task is proving more daunting and we would be very grateful for any assistance that might be volunteered from other members of the Task Force or the Committee.

We intend to commence discussion of the commentary as a Full Task Force at the Annual Meeting in Washington so we look forward to seeing as many of you there as can make it.

At the Boston meeting our Task Force also put on a program on Joint Ventures - Negotiating the Rapids. We had great attendance and some lively discussion from the attendees at the end of the program.

Tom Hyman and Alison Youngman  
Co-Chairs, Joint Venture Task Force

**Manual on Acquisition Practice and Process Task Force**

At the Boston Spring Business Meeting, the Task Force continued the process of reviewing and refining topic outlines prepared by Task Force members. The Task Force discussed outlines developed by George Taylor on "Closings and the Closings Process," Tom Van Dyke on "Finding an Acquisition Partner," Jack Kennedy on "Other Stakeholders," Dan Minkus on "Structure Negotiation," Bill Payne on "The Purchase Agreement and Related Documentation," Dave Gavsie on "The Acquisition Team," Bob Copeland on "Difficult Counsel on the Other Side," Neal Brockmeyer on "Auctions" and Bill Payne on "Your Own Firm or Law Department Team." We discussed format and scope of the Manual and eliminating overlaps in the outlines.

The Task Force has received approval from the ABA Publications Committee to submit the Manual for publication with a target of 2004 for publication. To reach that aggressive target, the Task Force hopes to complete all topic outlines by
the end of this year and commence drafting text for the Manual.

Tom Thompson
Vince Garrity
Co-Chairs

REVISIONS TO THE MODEL STOCK PURCHASE AGREEMENT

Our Task Force will be meeting during the ABA Annual Meeting in Washington, DC on Sunday, August 11, 2002. The Working Group on Revisions to the Model Stock Purchase Agreement will meet from 8:00 AM to 11:00 AM and the Working Group on the Seller’s Response to the Model Stock Purchase Agreement from 12:00 noon to 3:00 PM. It is also anticipated that time will be set aside for Murray Perelman, Chair of the Working Group on Ancillary Documents, to speak to each of the other working groups and seek volunteers for taking on specific assignments relating to revisions to the ancillary documents.

At our meetings, Sam Friedman, David Albin and Murray Perelman will summarize the work accomplished at the Spring Meeting in Boston. The Working Groups will review all drafts of material prepared for the meeting and address project assignments. If you are currently working on a drafting assignment, please notify Sam, David or Murray of your progress as soon as possible so that arrangements can be made for distributing your work product at the Annual Meeting.

Following the meeting of our Task Force at the Spring Meeting in Boston, the Chairs of the Working Groups met to establish a timetable for our project. The Chairs are hopeful that a complete draft of the work product of each Working Group will be available for distribution to the Task Force Editorial Committee by the end of 2004. While we recognize that this is an ambitious schedule, we must keep in mind that the original Model Stock Purchase Agreement will be ten years old in 2005.

In order for us to meet this ambitious schedule, each Working Group is looking for volunteers to take on unassigned projects. Please consider signing up for an assignment or be thinking about lawyers in your firm or other colleagues who would be willing to take on work assignments for this project.

I look forward to seeing everyone in Washington, DC. If you have any questions, please send me an email at rtharper@klettrooney.com

Committee Forum Subcommittee

The Committee Forum for the Annual Meeting in Washington, D.C. will be moderated by Mark Morton (Wilmington, DE)

Title: “So what does THAT mean – interpreting preferred stock terms in the transactional setting"

Moderator: Mark A. Morton (a partner in the Wilmington, Delaware office of Potter Anderson & Corroon LLP)

Panelists: Diane Frankle (a partner in the Palo Alto, California office of Gray Cary Ware & Freidenrich LLP)
Patricia O. Vella (an associate in the Wilmington, Delaware office of Morris Nichols Arsht & Tunnell)
David A. Bronner (a partner in the Chicago, Illinois office of Jenner & Block LLC)
John F. Grossbauer (a partner in the Wilmington, Delaware office of Potter Anderson & Corroon LLP)
Description: Mark Morton will lead a discussion of the complex interpretational issues that frequently exist when a company with outstanding preferred stock engages in a merger or other business transaction. Depending upon how the preferred stock terms are interpreted, a company may face significant hurdles to accomplishing the transaction.

Keith A. Flaum, Chair

Programs Subcommittee

At the Annual Meeting, on Sunday, August 11, 2002, from 10:30 a.m. to 12:30 p.m., the Committee will be co-sponsoring, with the International Business Law Committee, a program entitled “Starting Off on the Right Foot – Preliminary Agreements in Multi-National M&A.” Saul Feibogen and Daniel Rosenberg are co-chairing the program. The program location has been moved and now will take place in the Yorktown room at the Hyatt Regency. Additional programs are being worked on for the Spring meeting of the Business Law Section to be held in Los Angeles, CA.

We continue to look for the program ideas for future meetings, as well as speakers for scheduled programs. Please contact me at (615) 742-4529 or at dmckenzie@sherrardroe.com if you have any ideas for programs or if you would be interested in participating as a speaker.

Donald I.N. McKenzie, Chair

The Negotiated Acquisitions Committee Newsletter is published approximately three times a year by the American Bar Association, Section of Business Law, Negotiated Acquisitions Committee. The views expressed in the Negotiated Acquisitions Committee Newsletter are the authors’ only and not necessarily those of the American Bar Association, the Section of Business Law or the Negotiated Acquisitions Committee. If you wish to comment on the contents, please write to the Negotiated Acquisitions Committee, Section of Business Law, American Bar Association, 750 North Lake Shore Drive, Chicago, Illinois, 60611.