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Client Alert

This alert describes two important recent Delaware decisions clarifying the fiduciary duties of directors in connection with tender offers and certain convertible debt issuances.

Recent Delaware Chancery Court Rulings

There have been several recent Delaware Chancery Court decisions of importance to corporate directors.

The most recent decision, *In Re Cox Radio, Inc. Shareholders Litigation* (May 6, 2010), involved a going-private transaction. In this case, the court confirmed that tender offers by controlling stockholders are subject to review under the usual business judgment rule rather than the stricter "entire fairness" standard.

The *Cox* case involved a tender offer by the controlling stockholder of Cox Radio, Inc. for all of the shares of Cox Radio that it did not already own. The plaintiff stockholders argued that the tender offer price was inadequate and that the transaction should be reviewed under the entire fairness standard as was applied by the Delaware Supreme Court in *Kahn v. Lynch Communication Systems, Inc.* The defendant directors argued that, as a tender offer, the transaction was not coercive and should be entitled to the usual deference under the business judgment rule. In ruling for the defendants, the court found that the decision in *Kahn* governs cash-out merger transactions by controlling stockholders and not transactions involving tender offers.

In another recent decision in *Binks v. DSL.net, Inc.* (April 29, 2010), the Delaware Chancery Court ruled



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that the so-called *Revlon* standard of seeking the highest value reasonably available to stockholders applied to a company's issuance of convertible debt where conversion of the debt would result in a change of control of the company.

The *Binks* decision suggests that directors considering any possible change-of-control transaction, including financing transactions, should take extra precautions to ensure that they are independent and well-informed, because a court reviewing their actions may refuse to apply the usual business judgment rule in scrutinizing the directors' actions.

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