



Client Alert

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VOLUNTARILY ASSUMED DUTIES

When undertaking certain types of transactions such as a merger, or a sale or exchange of all or substantially all of its assets, a corporation is required under state corporation laws to obtain the approval of its stockholders. What consents or approvals are needed, and what level of consent or approval will suffice, to authorize a transaction also may be provided for in the corporation's bylaws, a shareholders agreement or investor rights agreement among some or all of the corporation's stockholders or other contracts of the corporation. Partnerships, limited liability companies, and other business entities are often subject to similar statutory and contractual requirements. Transactional lawyers are sometimes asked by clients considering these sorts of transactions whether the clients should go above and beyond the minimum statutory or contractual requirements in connection with the transaction in order to enhance the perceived fairness of the transaction or for other reasons. A decision rendered late last year by the Delaware Court of Chancery serves as a reminder of the possible adverse consequences of undertaking more than is legally required in the circumstances.

The decision, in *In re Cencom Cable Income Partners, L.P. Litigation*, CA No. 14634-VCN (Del. Ch. Nov. 26, 2008), involved a lawsuit initiated against a Delaware limited partnership and its general partner by representatives of the limited partners of the partnership. The partnership owned several cable television systems that the general partner agreed to sell to affiliates of the general partner pursuant to authority conferred by the partnership's partnership agreement and, ostensibly, in accordance with a specific appraisal process set out in the partnership agreement. The general partner retained the law firm to act as special outside counsel on behalf of the limited partners in connection with the sale, even though it was not required to do so by the partnership agreement. The general partner represented in a disclosure statement to the limited partners that the law firm would deliver an opinion to the limited partners vouching that the appraisal process, the partnership's solicitation of limited partner consents, and the sale of the assets were completed in compliance with the partnership agreement.

In their lawsuit, the limited partners' representatives alleged that, in retaining the law firm, the general partner assumed a duty to the limited partners to set up an *independent evaluation* of the *fairness* of the sale process. The representatives further alleged that the general partner breached this duty, because the opinion by the law firm did not satisfy this obligation to the limited partners.

In denying a motion for summary judgment by the general partner and other defendants, the court ruled that the general partner, by volunteering to deliver an opinion by the law firm to the limited partners, undertook fiduciary duties to the limited partners in connection with the opinion that otherwise would not have existed.

The lesson to be learned from this decision is to think twice before volunteering to do more for constituent parties or contracting parties than is legally required.