

**DELAWARE COURT OF CHANCERY UPHOLDS INDEPENDENT DIRECTORS'  
DECISION TO POSTPONE STOCKHOLDER MEETING TO VOTE ON MERGER**

In an August 14, 2007 opinion, Vice Chancellor Leo E. Strine, Jr. of the Delaware Court of Chancery upheld the decision by a disinterested special committee to postpone for a short duration a stockholders' meeting called to approve the sale of the company because the committee knew that if not postponed the merger would be voted down.

The Court held that well-motivated, independent directors may reschedule an imminent special meeting at which the stockholders are to consider an all-cash, all-shares offer from a third-party acquiror when the directors:

- (1) believe that the merger is in the best interests of the stockholders;
- (2) know that if the meeting proceeds the stockholders will vote down the merger;
- (3) reasonably fear that in the wake of the merger's rejection, the acquiror will walk away from the deal and the corporation's stock price will plummet;
- (4) want more time to communicate with and provide information to the stockholders before the stockholders vote on the merger and risk the irrevocable loss of the pending offer; and
- (5) reschedule the meeting within a reasonable time period and do not preclude or coerce the stockholders from freely deciding to reject the merger.

*Mercier v. Inter-Tel, (Delaware) Incorporated*, 2007 WL 2332454 (Del. Ch. 2007), at \*1.

**Background**

*Inter-Tel* arose as a stockholder class action suit to enjoin the consummation of a stockholder-approved merger in which Inter-Tel was to sell itself to a third-party acquiror in an all-cash, all-shares merger. Following a determination by Inter-Tel's Special Committee, which had been established to consider various expressions of interest in the company, that obtaining an affirmative vote on the merger at the scheduled stockholders' meeting was not possible, the decision was made to postpone the special meeting and establish a new record date.

The Special Committee considered several factors in arriving at its decision to postpone the special meeting and establish a new, prospective record date, including:

- a desire to give stockholders the opportunity to consider, among other things, the company's disappointing sales numbers, the softening M&A market, and the lack of any prospect of a higher-priced offer; and

- a desire to ensure that the electorate more closely reflected the actual ownership of the company's shares as of the time of the vote, and enable new investors who believed that the merger was attractive in light of the company's future prospects to buy shares before the new record date and vote on the merger.

Plaintiff's arguments were based on plaintiff's view that the Special Committee's motivations for seeking to delay the stockholders' special meeting were inequitable. As a result, the issue for the Court was whether the Special Committee was able to justify in equity its actions.

### Decision

In *Inter-Tel*, Vice Chancellor Strine suggests that the stringent "compelling justification" standard established in *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988) should be reserved for director conduct that affects either an election of directors or election contests having consequences for corporate control. *Inter-Tel*, at \*20-21. More specifically, an important distinction for the Court was between those cases wherein directors manipulate the election process for the purposes of entrenching themselves and those cases wherein directors exercised proper control of the election process for good faith reasons.

The Court applied a "reasonableness" standard consistent with the standard established in *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985), since director elections and board entrenchment were not at issue. The form of reasonableness review applied requires directors to:

- bear the burden of identifying the proper corporate objectives served by their actions; and
- demonstrate that their actions were reasonable in relationship to their legitimate objectives and did not preclude stockholders from exercising their right to vote or coerce them into voting a particular way.

*Inter-Tel*, at \*19 and \*21.

In applying the "reasonableness" standard to the facts before it, the Court found that:

- the Special Committee was motivated by a good faith concern that the contemplated merger was in the best interest of stockholders and a failure to vote in favor of the merger would result in an irretrievable loss of the benefits of the merger; and
- the short delay and new record date were both reasonable, and did not force or coerce the stockholders into changing their vote.

As a predicate to these conclusions, the Court importantly determined that the Special Committee was independent and trying to do what the committee members thought best for the stockholders, even if their decisions in hindsight were not perfect.

Following the determination that Inter-Tel's Special Committee had satisfied the *Unocal*-style requirements, the Court undertook to subject the actions of the directors to the *Blasius* "compelling justification" standard. Reasoning "backwards," the Vice Chancellor concluded that the *Blasius* standard would not apply because he found that the Special Committee's non-preclusive, non-coercive action did not have the primary purpose of disenfranchisement, in part because none of the committee members had been promised any position following the merger and all expected to lose their board seats. Nonetheless, the Court assessed whether the directors had indeed established a "compelling justification" for their actions. The Court found that the independent directors had met this standard by demonstrating that:

- stockholders were about to reject a third-party merger proposal that the independent directors believed to be in their best interest;
- information useful to the stockholders' decision-making process had not been adequately considered or had not yet been publicly disclosed; and
- if the stockholders had voted no, the acquiror would have walked away without making a higher bid and the opportunity to receive that bid would have been lost.

*Id.*, at \*26.

Finally, the Court criticized the press release issued by the Special Committee in which it announced the reasons for delaying the vote and changing the record date. Specifically, the Court emphasized that the company's press release should have been more candid in informing the market that (1) the reason for the delayed vote was because it appeared the merger would not be approved, and (2) the reason for the change in record date was to allow arbitrageurs and hedge funds to buy additional shares at below the merger price and vote such shares.

### **Implication**

The *Inter-Tel* decision represents the first time a Delaware court has found the exacting "compelling justification" standard of *Blasius* to have been satisfied. *Id.*, at \*21. In so doing, Vice Chancellor Strine has demonstrated that well-reasoned, proactive decisions by independent directors aimed at advancing the best interests of stockholders should be upheld. Although the Court applied the *Blasius* test to the Special Committee's actions, the Court expressed its view that a *Unocal*-style "reasonableness" standard was the appropriate standard and that *Blasius* should be reserved largely for circumstances where directors have unfairly manipulated the electoral process to entrench themselves. It remains to be seen whether the Delaware Supreme Court will agree. Finally, Vice Chancellor Strine urged that communications with stockholders be candid and forthright.

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