

Comment on Goshen, Hamdani & Lund, Fixing *MFW*: Fairness and Vision in Controller Self-Dealing

Gen Goto

University of Tokyo

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東京大学
大学院法学政治学研究科・法学部
GRADUATE SCHOOLS FOR LAW AND POLITICS
FACULTY OF LAW
THE UNIVERSITY OF TOKYO

Summary of Goshen, Hamdani & Lund

- Inability of courts to evaluate the idiosyncratic vision of an entrepreneur/CEO
- Flaws of *Tornetta* and *In re Tesla*
- Flaws of *MFW* and of the revised DGCL Section 144 after SB21
- Proposed modification of the *MFW* condition covering all self-dealing transactions
 - Cleansing power of a MoM decision is stronger than that of a special committee
 - MoM alone should be considered as strong evidence of the fairness of the transaction
 - Flaws in disclosure re special committee could support injunctive relief before MoM but should not taint the validity of MoM ex post

Overview

- Very timely contribution after the adoption of SB21
 - Not only for the US, but also for other jurisdictions that look to Delaware for a model on how to regulate M&A and related-party transactions
- Persuasive:
 - Courts' inability to reliably value the idiosyncratic vision of an entrepreneur/CEO
 - Criticism on *Tornetta*
- Questionable:
 - Applying its proposed cleansing standard to self-dealings that do not involve idiosyncratic views (e.g. freezeout)

Is negotiation by a special committee really unnecessary in all self-dealing transactions?

- Pros and cons of the two pillars of *MFW*
 - Special committee: negotiation +, independence -
 - MoM: independence +, negotiation –
- Can pressure from institutional investors and proxy advisors fully substitute for negotiation by a special committee?
 - Cf. Rock (2019)

Is negotiation by a special committee really unnecessary in all self-dealing transactions?

- A possible better explanation for cases that involve the idiosyncratic vision of entrepreneur/CEO
 - Controller-CEO's compensation or acquisition of a company important for the controller's vision
 - Adversarial negotiation may be unrealistic due to the lack of alternative options
 - Thus, a special committee may be dispensable
- This may not be the case when the idiosyncratic vision is not in question and the minority SHs are on the seller's side
 - There may be third-party acquirers, making adversarial negotiation by a special committee more realistic

Minor questions

- What aspect of special committees do Goshen, Hamadani & Lund value?
 - While GHL seemingly do not trust special committees that much, they still maintain it as a cleansing mechanism
 - Why not require MoM always?
 - Or, why not allow the business judgment rule with MoM only?
 - Or improve the independence of special committees by requiring MoM for the appointment of independent directors (Pacces 2019)?

Minor questions

- Did the acquisition of SolarCity really involve an idiosyncratic vision of Musk to the same extent as *Tornetta*?
 - Were there no other companies uncontrolled by Musk with similar technology?
 - Were there other companies trying to acquire SolarCity?
 - Was it just another form of compensation for Musk?
- Is *Tornetta* an exception? Any other recent Delaware cases influenced by hindsight bias?