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In *Mercier v. Inter-Tel*, 2007 WL 2332454 (Del. Ch., August 14, 2007), independent directors of Inter-Tel approved a 25-day delay in a special meeting called to approve a third-party acquisition of the company by cash merger and reset the related record date. They did so because it was clear that shareholders were not going to approve the merger on the original meeting date. During the delay, additional information relating to a competing leveraged recap transaction proposed by a former insider came to light and Institutional Shareholder Services reversed its previous recommendation against the merger. After shareholders approved the merger at the delayed meeting, a disgruntled shareholder sued in the Delaware Court of Chancery to enjoin it on grounds that the directors had violated their duties under *Blasius Industries v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988).

In *Blasius*, Chancellor William Allen held that board action having the primary purpose of interfering with shareholder voting violates director fiduciary duties unless directors prove a "compelling justification". Over the years, plaintiffs have invoked *Blasius* in a variety of situations, including board decisions to delay or recess shareholder meetings, change record dates or appoint directors to fill vacancies after commencement of a consent solicitation. Analysis by Delaware courts has focused on whether the particular board action was really for the primary purpose of interfering with shareholder voting. The courts have frequently found *Blasius* did *not* apply (because the primary purpose was *not* to interfere) and, consequently, that the board action should be assessed under the business judgment rule or some other standard of review. In every case in the past where *Blasius* was found to apply, however, directors were unsuccessful in proving compelling justification. In other words, the compelling justification standard has been more the announcement of a result than the basis for analysis.

In *Mercier*, Vice Chancellor Leo Strine reasoned that the *Blasius* standard should be recast to provide a better analytical framework and not just announce a result. The analytical framework, Strine reasoned, ought to be "consistent with the *Unocal* standard" applied by Delaware courts to board decisions to implement or maintain a takeover defence, *i.e.*, where a shareholder alleges that a board action is primarily for the purpose of interfering with shareholder voting, directors should bear the burden of proving that their action: (1) serves, and is motivated by, a legitimate corporate objective; and (2) is reasonable in relation to this legitimate objective and not preclusive or coercive with respect to shareholder voting. Strine concluded that Inter-Tel directors had met this revamped standard – even though they clearly delayed the meeting because they knew the vote would otherwise fail and did not include that fact in the press release announcing the delay – because:

- Independent directors believed in good faith the merger was in the best interests of shareholders and the buyer would walk and stock prices plummet if it was voted down;
- Independent directors believed in good faith that additional communication and genuinely new information regarding the merger and the competing leveraged recap would sway shareholder voting; they were not just delaying to beat the bushes for additional votes;
- There was no real question raised regarding the independence of the directors making the decision (all of whom would be gone if the merger were done);
- The delay was only for 25 days; and
- Nothing otherwise precluded or coerced shareholder voting on the delayed date, and the merger was overwhelmingly approved.

Because the Delaware Supreme Court has already embraced the "compelling justification" version of *Blasius* in *MM Cos v. Liquid Audio*, 813 A.2d 1118 (Del. 2003), Vice Chancellor Strine went on to conclude that the Inter-Tel directors had met their burden of proof under that standard – if applicable – as well, based on the same factors he cited in his revamped legitimate-objective-reasonable-relationship analysis. So, technically, the *Mercier* case is now the first one in history in which the *Blasius* standard has applied and directors have met their burden of proof of compelling justification.

Time will tell whether the Strine recasting of *Blasius* becomes the new analytical framework for these types of cases, but it seems likely. Whether or not one agrees that this type of board action should be subject to an enhanced standard of review at all, Strines decision in *Mercier* has improved the quality of that enhanced standard and brought it more in line with the rule-of-reason approach Delaware courts are now applying in *Unocal* and *Revlon* cases.

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