

## Delaware Chancery Court: Involvement of a Special Committee Can Cleanse a Transaction Involving a Conflicted Board Only If the Special Committee Is Engaged Before the Commencement of Substantive Economic Negotiations

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On February 27, 2020, the Delaware Chancery Court held that the entire fairness standard of review applied to a conflicted board transaction despite the engagement of a special committee because substantive economic negotiations took place prior to the special committee's involvement. *Salladay v. Lev*, 2020 WL 954032 (Del. Ch. 2020) (Glasscock, V.C.).

The court stated that “a fully-empowered, independent special committee can potentially cleanse [a] transaction” involving a conflicted board. However, the court found that the cleansing effect applies only if the special committee is “sufficiently constituted and authorized *ab initio*.” The court held that “this requires the committee’s empowerment prior to substantive economic negotiations, which include valuation and price discussions if such discussions set the field of play for the economic negotiations to come.” The court reasoned that “[i]nsiders in particular, standing on both sides of the transaction, may [otherwise] be tempted to exercise the opportunity and influence their positions afford them to move the transaction favorably toward their own interests” prior to the special committee’s involvement.

Here, plaintiffs alleged that by the time the special committee became involved, the parties had already established “a price collar that set the field of play for the economic negotiations to come.” The court held the complaint “raises a pleading-stage inference that these discussions deprived the [special] [c]ommittee of the full negotiating power sufficient to invoke the business judgment rule.”

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