Goodmans LLP Update

Corporate Securities Law

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Ontario Court Comments on Fairness Opinions in Corporate Arrangements

A recent decision of the Ontario Superior Court of Justice may have important implications for how corporate arrangements are done and, in particular, for the manner in which fairness opinions for arrangements are drafted.

In *Re Champion Iron Mines Limited* Justice Brown granted a final order approving a plan of arrangement under the *Business Corporations Act* (Ontario) pursuant to which Mamba Minerals Limited acquired Champion Iron Mines Limited. In his reasons, Justice Brown reiterated the legal test that must be met for plan approval. The court must be satisfied that: (i) the statutory procedures have been met; (ii) the application has been advanced in good faith; and (iii) the arrangement is fair and reasonable. Although the Court in *Re Champion* had the benefit of ample evidence to conclude that the proposed arrangement satisfied all three requirements, Justice Brown focused on the evidentiary role of fairness opinions and, more generally, the role of the courts in approving plans of arrangement.

As is commonplace in plans of arrangement, Champion's financial advisor provided a fairness opinion to the company's board, which was reproduced in the proxy circular distributed to Champion's shareholders. The opinion stated that, from a financial point of view, the consideration to be received by Champion shareholders under the arrangement was fair. Justice Brown noted, however, that although the opinion described the financial advisor's engagement, its credentials, its independence, the scope of its review, the assumptions and limitations to its analysis and its approach to fairness, the financial advisor did not disclose in the opinion any details of the analysis performed.

Justice Brown held that the form of fairness opinion filed by Champion was a "cookie cutter" form of opinion, void of any "number crunching" and lacking sufficient substance to inform shareholders on whether the consideration offered for Champion's shares was, in fact, fair.

Moreover, the Court held that the opinion was not admissible to assist the court in determining whether the arrangement was "fair and reasonable," because it did not satisfy the civil procedure requirement that opinion evidence adduced through a qualified expert witness report contain the reasons for the expert's opinion. Justice Brown cautioned that fairness opinions lacking substantive supportive reasoning should be generally inadmissible from an evidentiary perspective by courts considering applications for arrangement approval.

Justice Brown also reminded corporate lawyers that courts are not simply "rubber stamps" in the plan of arrangement process. Justice Brown objected to the very short time frame provided to the court to review the evidence before the final hearing. This caution could affect the scheduling for time-sensitive transactions.

While Justice Brown ultimately approved the arrangement, his cautionary language is an important reminder that courts still play an important adjudicative role in the approval of plans of arrangement. Lawyers and financial advisors may be well advised to consider the substance of fairness opinions drafted in support of plans of arrangement (along with the level of disclosure accompanying fairness opinions) to ensure that courts will rely on them as evidence in a fairness hearing. Careful consideration should also be given to the court process and scheduling in light of Justice Brown's comments.

Please contact any member of our Corporate Securities Group to discuss these latest developments.

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