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LEGAL ALERT

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Georgia Courts Reaffirm Exclusivity of Appraisal Remedy for Dissatisfied Shareholders in Corporate Mergers

In a series of recent decisions, Georgia courts have again — and resoundingly — refused the requests of shareholder plaintiffs to interfere with proposed corporate mergers. Because the Georgia Business Corporation Code allows shareholders to dissent from a merger and obtain payment for the fair value of their shares in an appraisal proceeding,[1] these courts have recognized that disgruntled shareholders have an adequate remedy at law after the merger takes place. And because the Georgia General Assembly has "emphasize[d] the exclusive nature of the appraisal remedy under the Code,"[2] Georgia courts have repeatedly denied shareholder motions for expedited proceedings and preliminary injunctive relief in the merger context. In August 2011, this trend culminated in four defense victories, including the dismissal of a plaintiff's claims for breach of fiduciary duty in their entirety.

Background

Georgia's dissenter's rights statute, like similar laws throughout the country, provides that a "record shareholder of the corporation is entitled to dissent from, and obtain payment of the fair value of his or her shares in the event of" a corporate merger.[3] According to the Georgia Court of Appeals, the "general purpose behind the statutory scheme for appraisal of dissenting shareholders' stock is to provide an orderly and fair method to evaluate the ownership interests of shareholders who are forced from the corporation."[4] In this respect, Georgia's corporate law is similar to that of many other states, including Delaware.[5]

Unlike Delaware, however, Georgia has adopted the following exclusivity provision:

> *A shareholder entitled to dissent* and obtain payment for his or her shares under this article *may not challenge the corporate action* creating his or her entitlement unless the corporate action fails to comply with procedural requirements of this chapter or the articles of incorporation or bylaws of the corporation or the vote required to obtain

[1] O.C.G.A. § 14-2-1302(a).

[2] *Id.* § 14-2-1302 note to 1989 amendment.

[3] *Id.* § 14-2-1302(a). The dissenter's rights statute also applies to certain other transactions, including share exchanges and the sale of substantially all corporate assets. *Id.*

[4] *Atl. States Constr., Inc. v. Beavers*, 314 S.E.2d 245, 249 (Ga. Ct. App. 1984).

[5] *See* 8 Del. C. § 262 ("Appraisal rights"); *Cede & Co. v. Technicolor, Inc.*, 684 A.2d 289, 298 (Del. 1996) ("The underlying assumption in an appraisal valuation is that the dissenting shareholders would be willing to maintain their investment position had the merger not occurred.").

> approval of the corporate action was obtained by fraudulent and deceptive means, *regardless of whether the shareholder has exercised dissenter's rights*.[6]

The most important decision interpreting this provision is *Grace Brothers, Ltd. v. Farley Industries, Inc.*, in which the Georgia Supreme Court held explicitly that the "statutory appraisal remedy is exclusive."[7] The plaintiffs in that case were minority shareholders who claimed that the corporation's officers and directors had breached fiduciary duties by failing to seek the consummation of a merger on more favorable terms. On appeal, the court rejected that claim as "nothing more than a complaint about stock price."[8] Because the dissenter's rights statute "preempts any other remedy where the claim is essentially one regarding the price the shareholder is to receive for his shares," the court explained, "a claim that 'a fiduciary has acted unfairly' cannot be used 'to litigate valuation issues that are appropriately disposed of in appraisal proceedings.'"[9]

Grace Brothers — along with the Georgia Supreme Court's previous holding that the dissenter's rights statute "provide[s] an adequate remedy at law"[10] — establishes a general rule that the availability of the appraisal remedy prevents shareholders from using claims about the value of their shares to challenge a merger. The statute's official commentary makes the upshot of this rule clear: "[T]he fact that a merger might be argued to be unlawful as a breach of the directors' duty of care is not ground for equitable relief at the instance of a shareholder."[11]

Recent Developments

Notwithstanding the *Grace Brothers* decision, shareholder plaintiffs continue to challenge proposed mergers on the theory that claims for breach of fiduciary duty fall outside the scope of the dissenter's rights statute. But in a series of decisions, including several within the past month, Georgia courts have soundly rejected that approach.[12]

In December 2005 and January 2006, for example, the Superior Court of Fulton County denied motions for expedited discovery in two separate cases involving attempts to block proposed mergers. Although one case involved a proxy contest and the other involved a tender offer, the presiding judges in both

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[6] O.C.G.A. § 14-2-1302(b) (emphasis added). The exceptions described in this provision apply only if the proposed transaction violates the requirements of the Georgia Business Corporation Code or if the vote to approve the transaction was procured by actual fraud. *Id.* § 14-2-1302 comment, note to 1989 amendment.

[7] 450 S.E.2d 814, 817 (Ga. 1994).

[8] *Id.* at 817.

[9] *Id.* at 817 & n.11 (quoting O.C.G.A. § 14-2-1302 note to 1989 amendment).

[10] *Long v. Atlanta & W. Point R.R.*, 320 S.E.2d 530, 534 (Ga. 1984).

[11] O.C.G.A. § 14-2-1302 comment.

[12] One exception to the courts' general refusal to entertain non-appraisal claims in the merger context is *Johnston v. Baran Group, Ltd.*, No. 2004CV89313 (Fulton County Super. Ct. May 20, 2005) (Glanville, J.). The *Johnston* plaintiffs were minority shareholders seeking damages because the controlling shareholders had allegedly engaged in self-serving conduct during a previous merger. The court denied the defendants' motions for judgment on the pleadings without discussing the dissenter's rights statute — which the parties apparently had not raised.

cases agreed that statutory appraisal was the plaintiffs' exclusive remedy.[13] And in a companion case to the tender-offer dispute, the court refused to issue a preliminary injunction for the same reason.[14]

Decisions over the past year have reinforced this trend. In September 2010, the Superior Court of Cobb County refused the plaintiffs' requests for expedited discovery and a preliminary injunction in a case involving a two-step merger with a tender offer.[15] Although the court did not specifically cite Georgia's dissenter's rights statute, it based its decision, in part, on the availability of "post-closing monetary damages."[16]

More significantly, in August 2011, Georgia courts issued no fewer than four decisions relying on the dissenter's rights statute to deny shareholder motions for expedited discovery and injunctive relief.[17] Although the details of the plaintiffs' claims varied, each case was a putative class action in which shareholders of the target corporation alleged breaches of fiduciary duty by the target's directors in connection with a tender offer and proposed merger. The plaintiffs also asserted claims for aiding and abetting breaches of fiduciary duty against the companies trying to acquire the targets. In each case, the plaintiffs alleged that the director defendants had agreed to unfair deal terms and failed to disclose material information to the target's shareholders.

In all four cases, the courts concluded that the availability of an exclusive and adequate remedy at law — in the form of a post-acquisition appraisal — precluded the expedited proceedings and injunctive relief sought by the plaintiffs. Specifically, the courts denied motions for expedited discovery in three cases[18] and denied a motion for a preliminary injunction in the fourth.[19] Moreover, in one of the expedited-discovery decisions, the court went further by granting a motion to dismiss the plaintiff's claims altogether.[20]

Practical Implications

Georgia's dissenter's rights statute, as interpreted by the Georgia Supreme Court in *Grace Brothers*, establishes an exclusive remedy for shareholders dissatisfied with a proposed merger. Despite plaintiffs' efforts to frame shareholder complaints in terms of the directors' fiduciary duties, Georgia trial courts have repeatedly rejected fairness- and disclosure-related claims as barred by the availability of the appraisal remedy.

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[13] *In re Scientific-Atlanta, Inc. S'holder Litig.*, No. 2005-cv-109014 (Fulton County Super. Ct. Jan. 25, 2006) (Schwall, J.) (proxy contest); *Simon v. Georgia-Pacific Corp.*, No. 2005CV108796 (Fulton County Super. Ct. Dec. 5, 2005) (Baxter, J.) (tender offer).

[14] *Ind. State Dist. Council of Laborers & Hod Carriers Pension Fund v. Balloun*, No. 2005-CV-109450 (Fulton County Super. Ct. Dec. 14, 2005) (Baxter, J.).

[15] *In re Bluelinx Holdings Inc. S'holder Litig.*, No. 10-1-7435-48 (Cobb County Super. Ct. Sept. 1, 2010) (Schuster, J.).

[16] *Id.*, slip op. at 2.

[17] *Shaev v. EMS Techs., Inc.*, No. 2011CV203036 (Fulton County Super. Ct. Aug. 25, 2011) (Bonner, J.); *Schorsch v. Immucor, Inc.*, No. 11-A-7776-1 (Gwinnett County Super. Ct. Aug. 16, 2011) (Ray, J.); *Kramer v. Immucor, Inc.*, No. 2011CV203124 (Fulton County Super. Ct. Aug 12, 2011) (Goger, J.); *In re Radiant Sys., Inc. S'holder Litig.*, No. 2011-CV-203228 (Fulton County Super. Ct. Aug 10, 2011) (Long, J.).

[18] *Shaev*, No. 2011CV203036; *Kramer*, No. 2011CV203124; *Radiant*, No. 2011-CV-203228.

[19] *Schorsch*, No. 11-A-7776-1.

[20] *Shaev*, No. 2011CV203036.

In this respect, Georgia may be a more favorable jurisdiction for incorporation than Delaware, which, despite its often-perceived advantages, lacks an appraisal remedy that is exclusive. Georgia's exclusivity rule both prevents individual shareholders from holding a merger hostage with an injunction[21] and saves corporations from the distraction and expense associated with the expedited proceedings sometimes available under Delaware law.[22]

Because relatively few cases in this context produce appeals with reported decisions, trends in the trial courts are especially important. And the trend in Georgia courts is clear: Shareholders who disapprove of a proposed merger must pursue their claims — including claims for breach of fiduciary duty — in an appraisal proceeding after the merger takes place.

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[21] *Cf. In re Del Monte Foods Co. S'holders Litig.*, 2011 Del. Ch. LEXIS 30 (Del. Ch. Feb. 14, 2011) (temporarily enjoining a shareholder vote to approve a proposed merger because the plaintiffs had established a reasonable probability of success on the merits of their claims for breach of fiduciary duty).

[22] *Cf. Giammargo v. Snapple Beverage Corp.*, 1994 Del. Ch. LEXIS 199 (Del Ch. Nov. 15, 1994) ("The question presented is . . . whether in the circumstances the plaintiff has articulated a sufficiently colorable claim and shown a sufficient possibility of a threatened irreparable injury, as would justify imposing on the defendants and the public the extra (and sometimes substantial) costs of an expedited preliminary injunction proceeding. This court traditionally has acted with a certain solicitude for plaintiffs in this procedural setting and thus has followed the practice of erring on the side of more hearings rather than fewer.").