

Roam-Tel Partners v. AT&T Mobility Wireless Operations Holdings, Inc.

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Delaware law has long provided that minority stockholders of a corporation that is undergoing a merger are generally entitled to an appraisal by the Delaware Court of Chancery (“Court”) of the fair value of their shares.¹ The appraisal remedy is intended to provide stockholders of a Delaware corporation who believe the price being paid in a merger is inadequate with an independent judicial determination of the fair value of their shares.

Section 262 of the Delaware General Corporation Law (the “DGCL”) sets forth very specific procedures for stockholders to follow in order to “perfect” or exercise their appraisal rights. In situations where the proposed merger will be submitted for approval at a stockholders meeting – a “long-form” merger – the corporation must notify each stockholder of his appraisal rights at least 20 calendar days prior to the meeting, as well as provide a copy of the appraisal rights statute to each stockholder. Any stockholder electing to demand appraisal must either vote against the merger or refrain from voting on the merger, and must give the corporation a written demand for appraisal of his shares prior to the stockholder vote on the merger. In the context of a “short-form” merger where no stockholder vote is required for the merger to become effective,² one of the constituent corporations or the surviving or resulting corporation must notify the stockholders within 10 days of the effective date of the merger that appraisal rights are available. The stockholders then have 20 days to demand in writing an appraisal of their shares. Within 120 days after the effective date of the merger, the stockholders who properly perfected their appraisal rights may file a petition in the Court demanding a determination of the value of their stock.

In practice, it is not uncommon in the context of a merger for the acquiring corporation to request that the target corporation stockholders waive their appraisal rights in connection with the merger. Waivers are often contained in stockholder agreements, voting agreements, letters of transmittal, or other documents that target company stockholders are asked to sign. While the precise wording of such waivers differs widely, substantively they provide that the stockholders are accepting the merger consideration and agree to forego their rights to an appraisal. Notwithstanding the ubiquitous nature of these waivers, it was unclear whether a waiver of appraisal rights, a right granted by the Delaware legislature, is irrevocable once waived.

On December 17, 2010, the Court issued a memorandum opinion in *Roam-Tel Partners v. AT&T Mobility*, C.A. 5745-VCS (Rel. Ch. December 17, 2010) holding that in a short-form merger, absent prejudice to the company, a stockholder may revoke his prior waiver of appraisal rights as long as he does so within the statutory period prescribed for perfecting those rights. The opinion potentially

changes the way acquiring corporations will view waivers of appraisal rights by essentially making such waivers revocable until the statutory period to perfect such rights has elapsed.

Background

AT&T Mobility arises from a short-form merger in which AT&T Mobility Wireless Operations Holdings, Inc. (“AT&T Mobility”), the parent company of St. Cloud Cellular Telephone Company, Inc. (“St. Cloud”), cashed out St. Cloud’s minority stockholders. As required by §262 of the DGCL, AT&T Mobility sent notice to St. Cloud’s minority stockholders informing them of the completion of the merger and their right to demand an appraisal within 20 days of the mailing of the notice. The notice also instructed the stockholders that if they did not opt to exercise their appraisal rights, they should submit to AT&T Mobility a Letter of Transmittal and their stock certificates in exchange for the merger consideration. The Letter of Transmittal contained, among other things, a waiver of appraisal rights provision.

ARAP Partners (“ARAP”), a minority stockholder of St. Cloud, submitted its signed Letter of Transmittal and stock certificates to AT&T Mobility and received in exchange a check for the amount of the merger consideration. Thereafter, ARAP was informed that other minority stockholders of St. Cloud were planning to file an appraisal action, prompting ARAP to submit a written demand for appraisal and return the uncashed check for the merger consideration to AT&T Mobility.

Roam-Tel Partners, one of 15 minority stockholders who sought appraisal,³ filed an appraisal action in the Court and subsequently filed a motion to determine the members of the appraisal class, seeking to include ARAP in that class. Although AT&T Mobility argued that ARAP had lost its appraisal rights when it delivered the Letter of Transmittal and accepted the check for the merger consideration, the Court nevertheless determined that ARAP was properly included in the appraisal class and, for the reasons discussed below,⁴ was entitled to demand an appraisal of the value of its shares.

Absent Prejudice, Waiver Of Appraisal Rights Can Be Revoked Within The Statutory Period

AT&T Mobility argued that ARAP had waived its appraisal rights because it had executed and delivered the Letter of Transmittal and had received the check in exchange for surrendering its stock certificates.⁵ In response, ARAP argued that its initial waiver of appraisal rights was revocable. ARAP analogized its initial decision to accept the merger consideration to that of submitting a proxy or a written consent, both of which are freely revocable at any time before the action authorized in the proxy or written consent becomes effective. The Court found that while ARAP may have initially waived its appraisal rights, ARAP was entitled to revoke such waiver absent any detriment or prejudice to AT&T Mobility, noting that courts “will look to whether the non-waiving party has been prejudiced by the waiving party’s attempt to rescind its prior waiver.” The Court found that AT&T Mobility’s only detriment was “the disappointment of seeing an appraisal class grow,” which was insufficient to justify “denying a stockholder the chance to change its mind within the 20 day statutory election period.” The Court did state, however, that if ARAP had “cashed or further negotiated the check, or had AT&T Mobility initially given ARAP cash instead of a check, AT&T Mobility would have a claim that it had relied to its detriment on ARAP’s waiver, thereby precluding ARAP from rescinding it.”

The Letter of Transmittal was not a valid contract

The Court also rejected AT&T Mobility’s argument that the Letter of Transmittal constituted a binding and enforceable contract requiring ARAP to accept the merger consideration in lieu of a demand for an appraisal of the fair value of ARAP’s shares. The Court found that the Letter of Transmittal, although

signed and delivered by ARAP, did not form a valid contract between AT&T Mobility and ARAP because no consideration was given to ARAP for its waiver. The Court focused on the fact that AT&T Mobility was legally obligated to give minority stockholders the chance to demand an appraisal. Thus, the Court noted, AT&T Mobility did not “offer” anything to ARAP by simply informing ARAP of its statutory rights. The Court contrasted ARAP’s situation from a prior case, *Shell Petroleum, Inc. v. Smith*,⁶ where a stockholder was offered an additional \$2.00 per share if he waived his right to seek an appraisal; in *Shell*, the Court found that a valid contract was formed due to the additional \$2.00 of consideration.

Comparison to long-form mergers

The Court’s holding in *AT&T Mobility* should come as no surprise to followers of Delaware law. As the Court mentions in its opinion, Delaware courts have long treated stockholders to the more common long-form mergers in a similar fashion. While *AT&T Mobility* arises in the context of a short-form merger, the Court analogizes the 20-day statutory election period to the time preceding a stockholder vote on a long-form merger, where a stockholder is allowed to change its proxy or consent from “yes” to “no” as long as it is changed before the final stockholder vote.

Comparing stockholder’s rights in a long-form merger transaction to the context of a short-form merger, the Court noted that a minority stockholder in a short-form merger “is only informed of the merger after it has been effected and only then is asked to decide whether he will seek an appraisal of his shares.” The Court found that the limited rights given to minority stockholders in a short-form merger weighed in favor of granting them the full 20-day period to decide whether to seek appraisal, just as stockholders in a long-form merger may change their minds prior to the final vote of stockholders to approve the merger.

Conclusion

Under *AT&T Mobility*, a minority stockholder who initially waives his appraisal rights may revoke his waiver and demand appraisal provided that (i) the stockholder’s appraisal rights are perfected within the statutory election period, (ii) the buyer does not suffer prejudice as a result of any such rescission of his waiver, and (iii) the stockholder never exercised dominion or control over any merger consideration that he may have received in exchange for his shares. The opinion also signals that waivers of appraisal rights contained in a Letter of Transmittal or other document may be more closely scrutinized to determine the validity and enforceability of any such waivers.

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- ¹ Not all mergers give rise to appraisal rights. For example, mergers between related subsidiary corporations do not afford appraisal rights to the constituent corporations' stockholders. See § 262(b) and §251(g) of the Delaware General Corporation Law ("DGCL"). In addition, target company stockholders who receive solely shares of a publicly-traded company in exchange for their target shares are generally not entitled to appraisal rights. See §262(b)(2)b. of the DGCL.
 - ² See §253 of the DGCL.
 - ³ Only the inclusion of ARAP in the appraisal class was contested.
 - ⁴ The Court also discussed AT&T Mobility's argument that because ARAP surrendered its stock certificates it no longer had standing as a valid stockholder; this argument was dismissed.
 - ⁵ The Letter of Transmittal provided that "[b]y execution hereof, the undersigned...hereby elects to receive the [m]erger [c]onsideration in lieu of a demand for an appraisal of the fair value of the [s]hares."
 - ⁶ *Shell Petroleum Inc. v. Smith*, 606 A.2d 112, 113 (Del. 1992).