

August 28, 1998

Delaware Corporations Should Eliminate “Dead Hand” Provisions

As we noted in our memorandum dated August 11, 1998, in Carmody v. Toll Brothers, the Delaware Chancery Court recently indicated that “dead hand” provisions in rights plans in their “pure” form -- those that deny the winner of a proxy fight the ability to redeem a rights plan for an indefinite period after control of the board of directors changes -- will be found invalid under Delaware law. In light of this decision, we understand that plaintiff law firms that pursue stockholder litigation are considering targeting Delaware corporations who have rights plans with dead hand provisions. If stockholder litigation is commenced and the rights plan is subsequently amended, the plaintiffs in the stockholder litigation may claim that they are entitled to receive compensation for causing the amendment.

Therefore, we recommend that any Delaware corporation that has a dead hand provision in its rights plan proactively amend the plan to eliminate the dead hand provision before stockholder litigation arises. In Toll Brothers, the Chancery Court limited its ruling to pure dead hand provisions, thereby suggesting that dead hand provisions with a limited time period could be valid. However, we recommend that any limited dead hand provision be adopted only in response to a specific threat to the ability of the corporation to obtain the best available deal for its stockholders.

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