MERGERS AND ACQUISITIONS

CASES AND MATERIALS

WILLIAM J. CARNEY

2006 SUPPLEMENT

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2006 SUPPLEMENT

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NOTE ON IN RE WESTERN NATIONAL CORPORATION SHAREHOLDERS LITIGATION

Similar issues of director loyalty were addressed in In Re Western National Corporation Shareholders Litigation, 2000 Del. Ch. LEXIS 82 (2000). Western National was an insurance company whose directors feared that forthcoming banking regulation would turn is current customers, banks, into competitors selling their own products. A special committee was appointed to consider the sale of the company. Western National's 46% shareholder, American General, which was subject to a standstill agreement, indicated that it wasn't interested in selling its interest. Not surprisingly, the special committee concluded that negotiating a fair merger price with American General represented the best course of action. Negotiations were extended, and ultimately resulted in a merger at a small premium over Western National's market price. The special committee's financial adviser gave its opinion that the terms of the merger were fair, and the special committee and the board approved the terms. Seventy-nine percent of all shares were voted, and approved the merger by 99.98% of those voting. A class action was brought by a dissenting shareholder, challenging the fairness of the merger.

In a loyalty examination, the court found that American General was a passive investor that did not exercise actual control over Western National. Because of the standstill agreement, American General was unable to elect more than two of Western National's eight directors. Turning to the disinterest of the Western National directors, the court found that the disinterest of the special committee members was beyond reproach, although one member had performed consulting work for American General as an accountant seven years before, while a partner at an accounting firm, and another special committee member had engaged in a short consulting job for American General over ten years before. The final member was also a retired partner in an accounting firm that did American General's audits. He had retired five years earlier, and had stepped down as engagement partner over a decade earlier.

The court found that three of the eight directors had relationships that raised triable issues of interest, but none were actively involved in the negotiations. Accordingly, the court dismissed the complaint.

Note on Standards of Review Outside Delaware

Two months after Unocal was decided the previous Delaware standard of review, described in Johnson v. Trueblood, 629 F.2d 287 (3d Cir. 1980), in Chapter Three, Part 2, was employed to review the actions of directors of a New York

corporation, without citation to either Unocal or Johnson v. Trueblood. Turner Broadcasting System, Inc., v. CBS, Inc., 627 F. Supp. 901, 910 (N.D. Ga. 1985). Another decision by the same court applied the business judgment rule to the actions of directors of a Georgia corporation that rejected one bid in favor of another transaction. Bonner v. Law Companies Group, Inc., 964 F. Supp. 341, 343 (N.D. Ga. 1997). The Arkansas Supreme Court cited Unocal in a case that ultimately involved self-dealing by the defendant director - officers, but did not apply its standard of review. Hall v. Staha, 858 S.W.2d 672 (Ark. 1993). Kansas has copied the Delaware statute, so it is not entirely surprising that its courts would follow Unocal. In Burcham v. Unison Bancorp, Inc., 77 P.3d 130 (Kan. 2003), the Kansas Supreme Court reviewed the criticisms and commentary about the Unocal rule before applying it. The court stated: "In addition, we note that despite criticism from outside sources, the Delaware courts, and with rare exceptions other jurisdictions, have continued to apply the *Unocal* test for over 20 years in a variety of fact patterns. A significant body of case law has developed. As our Court of Appeals has noted, "Kansas follows Delaware's basic principles regarding application of the business judgment rule to insulate board decisions from attack." Consequently, we adopt the *Unocal* test as refined by its progeny." 77 P.3d at 149.

Fisher v. State Mutual Insurance Company

290 F.3d 1256 (11th Cir. 2002)

BARKETT, Circuit Judge:

Marvin L. Fisher, Randy J. Cosby, Tom A. Carden, and Philip M. Cavender (for convenience, "Fisher") brought a shareholder derivative suit against State Mutual Insurance Company ("State Mutual"), North American Financial Services, Inc. ("North American"), State Mutual Directors Delos H. Yancey, Jr. and Delos H. Yancey III ("the Yanceys"), a shareholder of North American named Rodney Hale, and the corporate secretary of State Mutual, Ann Rogers (collectively, "Defendants"), alleging that Defendants engaged in improper self-dealing. Specifically, Fisher alleged that, during their tenure with State Mutual, the Yanceys, along with Hale and Rogers, formed a separate shell company to which they sold one of State Mutual's principal assets at an unreasonably low price, generating a substantial loss for State Mutual and correlative profit for the shell company and the other defendants. The trial court granted summary judgment in favor of the Defendants on the basis of Georgia's "safe harbor" law, O.G.C.A. § 14-2-862, which insulates certain self-interested transactions from judicial scrutiny. Fisher now appeals, and we affirm.

BACKGROUND

Delos H. Yancey, Jr. and Delos H. Yancey III were, at times material to this case, directors of State Mutual. Ann Rogers was State Mutual's corporate secretary. In 1993, while working for State Mutual, they formed North American together with Rodney Hale, who was neither an officer nor a director of State Mutual. The Yanceys and Hale served on North American's board of directors and Rogers served as its corporate secretary (thus, the Yanceys were simultaneously directors of both State Mutual and North American).

Prior to the formation of North American, State Mutual bought a company called Atlas Life Insurance Company ("Atlas") for $ 13.9 million. Approximately one year after the formation of North American, State Mutual decided to sell Atlas. Several months into the process, North American expressed an interest in purchasing Atlas, which it ultimately did for approximately $ 8.7 million.[3] State Mutual sustained a loss of $ 5.2 million on the sale. Two years later, North American re-sold Atlas for approximately $ 31.5 million, making a profit of approximately $ 22.6 million.

Fisher brought this derivative suit to recover North American's $ 22.6 million profit, alleging that State Mutual's sale of Atlas to North American was void as an interested transaction. The Defendants responded that the Yanceys had recused themselves from State Mutual's decision to sell Atlas to North American, and, in so doing, had complied with the relevant provisions of Georgia's safe harbor law such that the transaction was valid and immune to judicial review.

In granting summary judgment for the Defendants, the district court found the following facts to be undisputed: In 1995, State Mutual decided to sell a subsidiary called Home Federal, which was expected to generate a significant tax liability. In order to offset this liability, State Mutual considered the possibility of selling Atlas, which was expected to generate a tax loss. Several months into the process, North American formed an interest in purchasing Atlas. Prior to North American's engaging in any negotiations with State Mutual, however, the Yanceys disclosed to State Mutual's Board of Directors their affiliation with North American and their resulting conflict of interest. Thereafter, the Yanceys abstained from any proceedings or negotiations regarding the proposed Atlas transaction.

Following the Yanceys' notice, State Mutual's Board of Directors formed a Special Committee consisting of three disinterested directors to review, evaluate, and negotiate the Atlas transaction. The Board authorized the Special Committee "to retain such advisors as it deems necessary to assist it in determining the value of Atlas, the fairness of the proposed transaction, and compliance with all legal

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[3] The record shows that State Mutual began contemplating the sale of Atlas in approximately January, 1995. Yancey, Jr. testified that North American did not form an interest in purchasing Atlas until late April or early May of that year.

requirements applicable to the proposed transaction." Accordingly, the Committee retained Larry Warnock, an actuarial consultant, Peter Mattingly, an investment banker, and James L. Smith III, an attorney, to assist with the valuation of Atlas, and to provide financial and legal advice regarding the potential transaction. Based upon the report of the retained experts, the Special Committee negotiated a sale of Atlas to North American for $ 8.7 million, which the full State Mutual Board approved. The Yanceys recused themselves from the Board's discussions and vote. In accordance with Georgia law, State Mutual then sought and received approval of the Atlas sale from the Georgia Insurance Commissioner.

Based on these facts, the district court held that the Yanceys had complied with the requirements of the Georgia safe harbor law. Therefore, the court held that the transaction was insulated from judicial review and granted summary judgment in favor of the Defendants. We review the district court's grant of summary judgment de novo, viewing the record and drawing all inferences in favor of the non-moving party.

DISCUSSION

Fisher first contends that the district court erred in finding that the Yanceys complied with the requirements of the safe harbor, O.C.G.A § 14-2-862, and therefore, that the Atlas transaction was immune to judicial review. Second, Fisher argues that the plain language of O.C.G.A § 14-2-861(b) only shields from judicial scrutiny transactions that are challenged "on the ground of an interest in the transaction of the director," whereas his complaint challenges the Atlas transaction on grounds other than "an interest in the transaction of the director," specifically, corporate waste, fraud, usurpation of corporate opportunity, and breach of fiduciary duty. We first consider the language of O.C.G.A § 14-2-861(b) and O.C.G.A § 14-2-862, which together constitute the safe harbor.

O.C.G.A § 14-2-861(b), provides in relevant part:

> (b) A director's conflicting interest transaction may not be enjoined, set aside, or give rise to an award of damages or other sanctions, in an action by a shareholder or by or in the right of the corporation, on the ground of an interest in the transaction of the director or any person with whom or which he has a personal, economic, or other association, if:
>
> (1) Directors' action respecting the transaction was at any time taken in compliance with Code Section 14-2-862;
>
> ***; or
>
> (3) The transaction, judged in the circumstances at the time of commitment, is established to have been fair to the corporation.

Id. (emphases added).

O.G.C.A. § 14-2-862, in turn, provides:

> (a) Directors' action respecting a transaction is effective for purposes of paragraph (1) of subsection (b) of Code Section 14-2-861 if the transaction received the affirmative vote of a majority (but not less than two) of those qualified directors on the board of directors or on a duly empowered committee thereof who voted on the transaction after either required disclosure* to them (to the extent the information was not known by them) or compliance with subsection (b) of this Code section.
>
> (b) If a director has a conflicting interest respecting a transaction, but neither he nor a related person of the director specified in subparagraph (a) of paragraph (3) of Code Section 14-2-860 is a party thereto, and if the director has a duty under law or a professional cannon, or a duty of confidentiality to another person, respecting information relating to the transaction such that the director cannot, consistent with that duty, make the disclosure contemplated by Subparagraph (B) of paragraph (4) of Code Section 14-2-860 [required disclosure], then disclosure is sufficient for purposes of subsection (a) of this Code section if the director:
>
> > (1) Discloses to the directors voting on the transaction the existence and nature of his conflicting interest and informs them of the character of and limitations imposed by that duty prior to their vote on the transactions; and
> >
> > (2) Plays no part, directly or indirectly in their deliberations or vote.

Id.

Under these provisions, the Yanceys were required either (a) to disclose to State Mutual any and all knowledge that they may have had regarding the Atlas transaction as a result of their affiliation with North American, or, (b) if they had a conflicting fiduciary duty to North American, to advise State Mutual's disinterested directors of the existence and nature of their conflicting interest (and the character of, and limitations imposed upon them by, that conflicting interest), and then to refrain from playing any part, directly or indirectly, in State Mutual's deliberations and vote on the Atlas sale.

The district court accepted the Defendants' contentions that § 14-2-862(a) was inapplicable because they had a fiduciary duty to North American, and, therefore, that they had to comply with the safe harbor by giving notice to State

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* "Required disclosure" is defined in O.C.G.A. §14-2-860(4) as "disclosure by the director who has a conflicting interest of (A) the existence and nature of his conflicting interest, and (B) all facts known to him respecting the subject matter of the transaction that an ordinarily prudent person would reasonably believe to be material to a judgment as to whether or not to proceed with the transaction." - Ed.

Mutual of their conflicting interest and abstaining from participating in the Atlas transaction, on behalf of State Mutual, thereafter. The court then held that Defendants had complied with O.G.C.A. § 14-2-862(b)(1) and (2) by advising the disinterested directors of State Mutual that they were directors of North American and recusing themselves from direct or indirect participation in State Mutual's decision to sell Atlas to North American.[4] Fisher contends that the Yanceys should have complied with § 14-2-862(a) because they did not actually have a fiduciary duty to North American that prevented them from making any disclosures required by O.G.C.A. § 14-2-862(a); they merely had a "fabricated" fiduciary duty which they themselves created (by forming North American) for the sole purpose of "getting around" the disclosure requirement. Alternatively, Fisher argues, even assuming the Yanceys did have a genuine fiduciary duty to North American, the district court erred in finding that the Yanceys abstained from direct or indirect participation in the proceedings because, Fisher claims, the Yanceys "orchestrated" the entire Atlas sale from behind the scenes.

With respect to his first claim, Fisher argues that the Yanceys were under no "real" duty to North American because North American (1) "had no confidential information or competitive secrets"; (2) "conducted no business prior to its acquisition of Atlas Life"; and (3) was a "mere shell corporation." We find that none of these characteristics demonstrates that the Yanceys did not owe a fiduciary duty to North American. Georgia law clearly establishes, without exception, that as directors of North American, the Yanceys owed duties of confidentiality and loyalty to that company irrespective of its specific characteristics or history. See O.C.G.A. § 14-2-830; Quinn v. Cardiovascular Physicians, P.C., 254 Ga. 216, 217, 326 S.E.2d 460, 463 (Ga. 1985) ("It is settled law that corporate officers and directors occupy a fiduciary relationship to the corporation and its shareholders, and are held to the standard of utmost good faith and loyalty."). Accordingly, the commentary to the alternative disclosure provision of § 14-2-862(b) specifically recognizes that "the most frequent use of subsection (b) . . . will undoubtedly be in connection with common directors who find themselves in a position of dual fiduciary obligations that clash." See O.C.G.A. § 14-2-862, cmt. Fisher has not pointed to anything in Georgia law that establishes an exception to the normal fiduciary rule for "shell corporations" or corporations that have not transacted business prior to the occasion in question. Instead, the safe harbor unambiguously

---

[4] The Defendants do not concede that subsection O.G.C.A. § 14-2-861(b) (3), which immunizes transactions from judicial review if "the transaction, judged in the circumstances at the time of commitment, is established to have been fair to the corporation," is inapplicable to them. Rather, they argue that it was unnecessary to demonstrate fairness under O.G.C.A. § 14-2-861(b) (3) because their undisputed proof showed compliance with subsection (1), which allowed for safe harbor compliance through notice and non-participation.

provides that if a director has a fiduciary duty to another corporation, he or she may comply with that provision through the notice-plus-non-participation procedures of O.C.G.A. § 14-2-862(b). The only exception listed by the statute exists where the director himself or a "related person" is actually a party to the transaction, and it is undisputed that the exception does not apply here because none of the individual defendants was a party to the Atlas sale, which was between State Mutual and North American. [5] In any event, the Yanceys testified in their depositions that they do not recall any facts concerning Atlas that they could have disclosed to State Mutual, but did not, and Fisher has not produced any evidence to the contrary.

In sum, because Georgia law clearly establishes that the Yanceys, as directors of a bona fide corporation (i.e., North American), were subject to a fiduciary duty that conflicted with their duty to State Mutual, the district court did not err in holding that Defendants were obligated to comply with the safe harbor by giving notice of their conflicting interest and abstaining thereafter from all participation on behalf of State Mutual in the Atlas transaction.

Because it is undisputed that the Yanceys notified State Mutual of their conflict of interest, we turn to Fisher's argument that the Yanceys failed to comply with § 14-2-862(b)(1) and (2) because they did not in fact abstain from all participation in the Atlas transaction, but rather "orchestrated" it behind the scenes. We must reject this contention because there is insufficient record evidence to support it. Fisher asserts that the evidence of direct involvement can first be found in Yancey, Jr.'s participation in choosing the members of the Special Committee. Although Yancey, Jr. did chair the May 8, 1995 meeting at which three disinterested directors were selected to constitute the Special Committee, and may have cast a vote selecting them, there is no indication that he exerted any improper or special influence over this selection. First, the minutes do not list the individual votes of directors, stating only that the three Special Committee members had been approved. Nor do the minutes specifically indicate that Yancey, Jr. abstained from the vote. Thus, it is not clear whether Yancey, Jr. participated or not. Regardless, Georgia does not require that a corporate special committee be selected wholly by disinterested directors. See 2 Model Bus. Corp. Act. (3d ed. 1985), 8-488 ("Georgia has adopted 8.62 with the exception that it does not require the members of a committee to be qualified directors or appointed by qualified directors."). Thus, Yancey, Jr.'s vote does not affect the applicability of O.G.C.A. § 14-2-862(b)(2).

Next Fisher claims that Yancey, Jr. participated in Special Committee

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[5] O.G.C.A. § 14-2-860(3) specifically defines the category of "related persons." Though Fisher attempts to characterize North American itself as a "related person" (because in his view, it is just a shell corporation for the Yanceys), the company does not fall within the defined category.

meetings on June 1 and 9, 1995. However, the Committee notes show that Yancey, Jr. participated in these meetings as a representative of North American. Having tendered the required notice to State Mutual under the safe harbor law, Yancey, Jr. was legally entitled to do this, and to negotiate against the State Mutual Special Committee. As Defendants point out, this is the very purpose of the Safe Harbor law, and it is not this Court's function to question its wisdom or efficacy.

Fisher also contends that Yancey, Jr. participated in State Mutual Board meetings that occurred on June 9 and 12, 1995, the latter of which included the final vote by the full State Mutual Board (excluding the Yanceys) approving the Atlas sale. The record reflects that although Yancey, Jr. did attend these meetings, his participation was limited to calling the meetings to order, and then asking Special Committee member Charles Braun to take over as Chairman. While Yancey, Jr. remained present during the meetings, nothing in the minutes reveals that he participated in any manner. In fact, the minutes specifically indicate that, along with Yancey III, Yancey, Jr. left the June 9 and 12 meetings to allow discussion of the Atlas sale by the disinterested members of the State Mutual Board and to allow the qualified Board members to vote on resolutions finally approving the transaction.

* * *

CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment in favor of the Defendants is

AFFIRMED

QUESTIONS

1. Can you think of any arguments plaintiffs could have made that would have evaded the "conflicting fiduciary duties" argument of the Yanceys? Would it matter if the Yanceys owned 100% of the stock of North American? Would it matter if the Yanceys had capitalized North American at a nominal amount, pending the closing of the purchase?
2. If North American was only a shell corporation, what information could it have possessed that the Yanceys would be obligated to keep confidential?
3. Suppose the Yanceys had been aware of the potential to sell Atlas at approximately $31.5 million within the next two years. To whom would they owe this information under the court's decision?
4. The provisions of Georgia law quoted in the opinion are virtually identical to Revised Model Business Corporation Act §§ 8.61 and 8.62. The court's opinion indicates it expresses no opinion about the wisdom of these

provisions. What do you think?

Add after the questions on page 138:

Campbell v. Potash Corporation of Saskatchewan, Inc.

238 F.3d 792 (6th Cir. 2001)

BOGGS, Circuit Judge. The Potash Corporation of Saskatchewan, Inc. ("PCS") appeals from the district court's partial grant of summary judgment and its judgment after trial in favor of plaintiffs-appellees J. D. Campbell, Peter Kesser, and Alfred Williams, Jr., all former executives of the Arcadian Corporation. Campbell (the former President and CEO), Kesser (the former Vice-President and General Counsel), and Williams (the former Vice-President and CFO) sued PCS for breach of contract approximately two months after its successful March 6, 1997 merger with Arcadian, because PCS refused to make severance payments to the executives triggered under those executives' employment agreements[1] by the change in corporate control of Arcadian and additional "good cause."

* * *

Having received cross-motions for summary judgment, the district court granted partial summary judgment to plaintiffs on August 13, 1998, rejecting PCS's arguments that the severance agreements were void for lacking consideration and for contravening public policy, and holding that the contracts were enforceable against PCS. At the bench trial that began August 17, the court heard testimony regarding the proper construction of the multiplier clause in the severance agreements. The court then rendered a November 18 judgment that accepted the plaintiffs' interpretation of most aspects of the multiplier clause, and it ordered PCS to pay plaintiffs' attorney's fees and tax penalties. * * * We agree with the district court's judgment concerning the contract consideration and public policy issues; however, we disagree slightly with its damage calculation. Therefore, we will affirm the district court in part, reverse it in part, and remand the case for revisions in the calculation of damages.

I

PCS, a Saskatchewan fertilizer corporation, approached Arcadian, a Tennessee fertilizer corporation, about a possible merger in August 1996. The Arcadian board decided to pursue the overture on August 27, and heard a

[1] This opinion will follow the district court in using the terms "employment agreements" and "severance agreements" interchangeably to refer to the executives' agreement with Arcadian.

presentation on proposed severance plans at that time. Over Labor Day weekend, Arcadian and PCS negotiated the terms of the merger and the severance agreements. PCS's Executive Committee and the Arcadian board approved and executed the merger agreement at respective board meetings on September 2. After approving the agreement, the Arcadian board approved employment agreements for nine senior executives that included so-called golden parachutes. Campbell, Kesser, and Williams signed employment agreements containing these parachutes three days later. The "golden parachute" portion of the severance package provided a formula to compensate senior executives in case of a change in corporate control accompanied by a material change in the executive's position at the new company. In such a circumstance, the executive could leave the company and receive an aggregate payment in one lump sum within 30 days of termination, totaling:

> an amount equal to the sum of (A) three (3) times Executive's Base Salary in effect at the time of [the Executive's] termination . . .,(B) three (3) times the average of all bonus, profit sharing and other incentive payments made by the Company to Executive in respect of the two (2) calendar years immediately preceding such termination, and © the pro-rata share of Executive's target bonus, profit sharing and other incentive payments for the calendar year in which such termination occurred . . . .

P4.3(c)(1)(ii) of the Employment Agreement.

Arcadian's compensation system historically emphasized incentives, enhancing an industry median base salary with supplemental incentive payments for meeting performance targets as well as profit-sharing payments and additional bonuses. * * *

At PCS's insistence during the Labor Day weekend discussions, Arcadian reduced the number of secondary events that could trigger the golden parachutes following a change in corporate control, and devised a formula based on actual compensation for the two calendar years preceding termination rather than on expected compensation for the two years following termination. * * * PCS also requested that the multiplier be limited to salary and bonuses, but Arcadian indicated that its pay structure was too incentive-laden for that to be feasible. [Part of the dispute was over whether the contracts as finally drafted covered incentive payments such as shares of the current year's profit-sharing or bonuses.] * * * Lance [an Arcadian executive] sent PCS copies of all Arcadian benefit plans for due diligence purposes.

* * *

In early November, Lance contacted his counterpart at PCS to call attention to the much higher severance benefit costs that would be entailed by a 1997 closing. Shortly thereafter, PCS told Lance it thought the severance packages should be limited to three times cash compensation, but Lance said that was inconsistent with both his understanding of the terms reached and the language of the employment

agreements.

The agreements also contained a provision requiring Arcadian to obtain an assumption agreement from any "direct or indirect" successor agreeing "to expressly assume and agree to perform, by a written agreement in form and substance satisfactory to Executive, all of the obligations of the Company [Arcadian] under this Agreement." Failure by Arcadian to obtain such an agreement from a successor automatically triggered the golden parachutes upon a change in control. PCS and Arcadian filed a Joint Proxy Statement with the SEC on January 28, 1997, laying out the severance formula, including incentive payments, lump-sum pension benefits, and the tax gross-up feature whereby the company increased the golden parachutes to cover related taxes.

PCS continued to resist Arcadian's inclusion of long-term incentives in the formula. Plaintiffs' counsel thus recommended that plaintiffs engage Arthur Anderson to produce a report justifying plaintiffs' interpretation of the golden parachutes, to defend against a possible challenge by PCS. The audit confirmed that the employment agreements were "well within competitive practice." The compensation committee heard the report on February 24, but took no action. Then Arcadian's chairman refused to hear a report to the full board, stating that it was part of PCS's due diligence and "whatever it costs, it costs."

Two days before the March 6, 1997 closing, Kesser demanded that PCS and PCS Nitrogen expressly assume the golden parachute severance agreements signed by plaintiffs. PCS Senior Vice-President and General Counsel John Hampton refused, saying PCS was not the successor to Arcadian's business or assets. Kesser threatened to delay closing on March 6, causing Hampton to have Barry Humphreys, PCS's Senior Vice-President for Finance, sign the assumption agreement on behalf of PCS to avoid delaying closing and incurring difficulties with merger financing. Hampton himself signed on behalf of PCS Nitrogen as its Secretary.

Prior to closing, Campbell and Williams were offered jobs at PCS Nitrogen materially different from their previous ones with Arcadian, so both terminated at closing for good cause. Hampton released Kesser from the new company's employ at the closing. Though PCS acknowledged that it owed some amounts to Campbell, Kesser and Williams, it refused to pay even the undisputed portions of their severance packages within the allotted thirty days, thereby precipitating this suit.

* * *

IV

PCS next argues that the golden parachutes violate public policy, and

therefore that the assumption agreement promising them is void.[4] PCS advances this argument even though it offers golden parachutes to its own top managers. Hypocrisy aside, PCS cites no circuit case law supporting its proposition. At most this court has frowned on golden parachutes in past dicta, but we have never held that such severance packages are per se unlawful. Nor does PCS provide much reason to equate this type of executive compensation with contracts prohibited by public policy, such as ones to perform illegal acts. PCS cites a Congressional committee report saying that golden parachutes should be discouraged and notes that there is a heavy excise tax on parachutes over a certain value (exceeded here), but, as Plaintiffs point out, Congress taxed golden parachutes, it did not prohibit them. PCS further argues that these particular golden parachutes violate public policy because they are excessive and have a gross-up feature to compensate the recipient for any tax penalty. These features do not make the golden parachutes violative of public policy, and parachutes with such features have been upheld.

PCS further argues that these golden parachutes violate public policy because they were approved after the merger had been approved, and therefore served no legitimate corporate purpose. [5] Though adopted after the merger was approved, these golden parachutes were authorized later in the same meeting at which the approval occurred. Thus, PCS's argument that their adoption violated public policy because it came after approval of the merger is somewhat misleading. Moreover, the timing of the adoption of the golden parachute provision fits with

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[4] There is a rich, albeit somewhat dated, secondary literature discussing the pros and cons of golden parachutes. Whatever else might be gleaned from this material, golden parachutes are not uniformly condemned as offensive to public policy. See, e.g., Kenneth Johnson, Note, Golden Parachutes and the Business Judgment Rule: Toward a Proper Standard of Review, 94 Yale L.J. 909 (1985); John C. Coffee, Jr., Shareholders Versus Managers: The Strain in the Corporate Web, 85 Mich. L. Rev. 1, 76 (1986); Ann Marie Hanrahan, Note, Koenings v. Joseph Schlitz Brewing Co., 126 Wis. 2d 349, 377 N.W.2d 593: The Wisconsin Supreme Court Addresses Executive Termination Benefits in a Golden Parachute Contract, 1987 Wis. L. Rev. 823; Richard P. Bress, Comment, Golden Parachutes: Untangling the Ripcords, 39 Stan. L. Rev. 955 (1987); Drew H. Campbell, Note, Golden Parachutes: Common Sense From the Common Law, 51 Ohio St. L.J. 279 (1990).

[5] Commentators originally objected to the use of golden parachutes as anti-takeover devices where they were crafted as poison pills and triggered automatically by the single trigger of a change in corporate control. More recently, commentators have noted the potential moral hazard entailed by golden parachutes, inasmuch as they may encourage inefficient management to induce a takeover that is lucrative for departing managers. The golden parachutes here were adopted after approval of the merger, so neither of these objections can be made against them. Moreover, they required two triggering events, as termination or a role reduction had to accompany a change in control before the golden parachutes could be demanded. Thus, activation of the parachutes was within PCS's control.