



Boston Concord Hanover Manchester

#### Author

Michael C. Harvell  
Direct dial: 603.627.8133  
Fax: 603.641.2337  
mharvell@sheehan.com

Michael J. Drooff  
Direct dial: 603.627.8167  
Fax: 603.641.2325  
mdrooff@sheehan.com

## Good Company

### Fiduciary Duties of Directors in the Sale of a Business

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The board of directors of a company which is considering a sale of its business is charged with a fiduciary duty to the shareholders to obtain the best value reasonably available to them under the circumstances. A case recently decided by the Hillsborough County Superior Court and summarily affirmed by the New Hampshire Supreme Court, *Miles v. Loon Mountain Recreation Corporation*, No. 01-E-378 & 379 (Lynn, J.), firmly aligns New Hampshire law with fiduciary principles developed in the Delaware courts in the context of a corporate sale.

The case involved the 1998 sale of the privately-held Loon Mountain Ski Resort in Lincoln, New Hampshire to Booth Creek Ski Group. Before the closing of the transaction, a pair of dissident shareholders brought suit seeking an injunction and later money damages against the Loon Mountain board of directors for allegedly breaching their fiduciary duty and against Booth Creek for allegedly aiding and abetting a breach of fiduciary duty. After a trial on the merits of the case, the Superior Court held that the Loon board had fulfilled all relevant fiduciary duties and refused to impose liability on the Loon board or Booth Creek.

#### Basic Fiduciary Duties

Once a board of directors puts a company up for sale, or if a sale of the company becomes inevitable under the circumstances, the board of directors is required to structure and carry out a process which is designed to obtain the best value reasonably available to the shareholders. Under well-established caselaw, so long as the directors fulfill their fiduciary duties of due care and loyalty to the company, they will be protected by the business judgment rule from potential claims of liability to the shareholders. Typically, the duties of due care and loyalty require the board to fully inform themselves of available sale opportunities, carefully review offers and related financing commitments, impartially evaluate competing offers on their merits and abstain from decisions in which they have a material conflict of interest. In carrying out its duty of due care, the board may rely on professional advisers, such as lawyers and investment bankers, within their areas of expertise. Once a board has agreed on a sale transaction, it has a duty to inform the shareholders about the material terms of the transaction, in order to allow them to vote or otherwise decide on the transaction.

#### Cash Versus Seller-Financed Offers

Particularly in the context of a privately-held company, a board has wide latitude to consider and base its decision to sell the company on the structure of a proposed transaction. In the Loon Mountain case, the shareholders had a strong and well-documented preference for a cash transaction, since the shareholders otherwise had few opportunities to liquidate their investment. The dissident shareholders argued that the

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board should have pursued a transaction which offered a nominally higher amount but which was to be paid in the form of promissory notes payable over 30 years. The court held that under a standard present-value analysis, the cash offer was clearly superior to the seller-financed offer, particularly where the creditworthiness of the offeror and its business plan was in doubt.

### **No-Shop Covenants**

In the Loon Mountain case, the Loon board agreed to a no-shop covenant after a long period of “shopping” the company in the relevant industry circles. Equally as important, the Loon board rejected a request that it agree to a no-listen covenant and insisted on including in the no-shop covenant a “fiduciary out,” that is, a provision allowing the company to terminate its no-shop commitment if presented with a superior proposal by another party. The court upheld the board’s decision, based on the substantial period of shopping the company and the board’s determination that the Booth Creek offer was financially fair, coupled with the board’s right to agree to a superior offer if one should present itself.

### **Shareholder Voting Agreements and Other Strong Protective Provisions**

In order to protect the substantial time and expense incurred by an acquirer, it will often ask the seller to agree to one or more protective provisions. In the Loon Mountain case, the Loon board agreed to solicit agreements from a majority of the shareholders under which they committed to vote in favor of the Booth Creek proposal at the planned shareholder meeting to consider the transaction. In the public company context, acquirers often request that the seller agree to a breakup fee or a lockup option designed to impose a financial penalty on a competing proposal. In either event, the goal is to discourage another offeror from taking the transaction away from the intended acquirer. Although these protective provisions are typically subject to a higher fiduciary standard than other sale-related actions by the selling board and receive strict scrutiny by the courts, they will generally be upheld where they are adopted after a substantial sale process which results in the acceptance of a fair offer and where they do not preclude an offeror from later interceding with a clearly superior proposal.

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