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BEHIND THE NEWS

Smulyan has **dual roles**, complicating buyout bid

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The most interesting line in the press release announcing Jeff Smulyan's proposal to buy out other **Emmis** Communications Corp. shareholders and take the company private didn't appear until the second page. "[Smulyan] advised **Emmis'** board that [he] will not agree to any other transaction involving **Emmis** or his shares of **Emmis**," the statement read.

The unequivocal message to buyout firms and rival radio companies: Don't bother making a bid to buy my company. If you do, you're wasting your time.

Such are the intriguing dynamics of the bid the 59-year-old Smulyan unveiled May 8 to purchase the 83 percent of the company he doesn't already own.

Under **Emmis'** corporate charter, Smulyan's shares have extra voting power, except when he's voting on his own buyout proposal. Otherwise, his voting control is 67 percent-giving him the means to swat down other offers, even if they're higher than the \$15.25-a-share proposal he's dangling.

But would he really shoot down a higher offer, and should he? In addition to serving as CEO, Smulyan is chairman of the board. Directors have a fiduciary duty to look out for the interests of all shareholders, not just themselves.

"This is an area of law that's ripe for litigation because it is unclear when someone is wearing two hats what their obligations are," said Thomas Hartman, a corporate attorney with the law firm Foley & Lardner LLP in Detroit.

Indeed, Smulyan and the company's board already are facing a legal challenge. A shareholder suit-filed by Indianapolis attorney James Knauer just hours after Smulyan announced his bid-charges the offer shortchanges shareholders. It implores the board to "take all appropriate steps to effectively expose **Emmis** to the marketplace to create an active auction for **Emmis**."

The company said in its press release that the board has formed a committee of independent directors to consider Smulyan's offer. **Emmis** officials declined to identify directors on the committee or to make other comments about Smulyan's proposal.

Pressure already is mounting on Smulyan to do better, however. His offer, which valued the entire company at \$567 million, represents a 13.6-percent premium to the stock's closing price on the previous business day. But it's 38 percent below the stock's 52-week high reached eight months ago.

The investment community is so confident Smulyan will up the ante that it has pushed the price of **Emmis** shares beyond Smulyan's offer. The shares hit a high for the week of \$16.65, then settled at around \$16.15. Based on what other broadcasting companies have sold for, **Emmis** should fetch from \$16.25 a share to \$18.75 a share, according to Bear Stearns analyst Victor Miller IV.

If Smulyan ultimately offers a big enough price, talk that he's scooping up the company for a steal will subside, of course. And a rich price would go a long way toward beating back Knauer's lawsuit or others that might be filed.

Under Indiana statute, controlling shareholders have the leeway to do what they deem appropriate if they are using reasonable business judgment, attorneys who practice corporate law say.

"Whatever fiduciary duties they have would be litigated over a question of value," one attorney added. "If the minority shareholders receive adequate value, the action itself really can't be stopped."

But if shareholders don't think they're getting a sweet enough deal, they could challenge a company on multiple fronts. They could assert, for instance, that the independent directors who blessed a deal weren't truly independent, said Hartman, the Detroit lawyer.

"It is not just, 'Is someone independent from an economic point of view,' but what type of social or other ties are there that might make it difficult for directors who are otherwise purportedly independent to truly act independently?"

Such questions could yet surface at **Emmis**. Under NASDAQ rules, six of the eight directors qualify as independent. But one of those, Greg Nathanson, served as president of **Emmis**' TV division from 1998 to 2000, working closely with Smulyan during that span.

Another, Susan Bayh, received \$250,000 from the company from 1998 to 2002 to help it develop plans for charitable giving. In addition, Smulyan is an unabashed supporter of her husband, U.S. Sen. Evan Bayh. Smulyan and **Emmis** have contributed tens of thousands of dollars to help elect Bayh and other Democrats to Congress.

Conseco's next CEO

William Kirsch isn't stepping down as Conseco Inc. CEO until May 23. But Wall Street already is handicapping who will replace him, and the odds-on favorite is James Hohmann.

Hohmann, 50, joined the company in December 2004 as chief administrative officer. He previously was CEO of XL Life and Annuity, a U.S.-based unit of Bermuda's XL Capital Ltd.

Conseco's board already may be tipping its hand. In the same press release reporting Kirsch's departure, it announced Hohmann's appointment as acting CEO.

"We believe ... Jim Hohmann is the lead candidate to replace Mr. Kirsch, and we expect and hope the board names him permanent CEO," Keefe Bruyette & Woods analyst Jukka Lipponen said in a report.

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