

Significant Delaware Supreme Court Decisions

01.05.18



(Article from *Securities Law Alert*, Year in Review 2017)

For more information, please visit the [Securities Law Alert Resource Center](#)

Delaware Supreme Court: Business Judgment Rule Applies to Two-Step Section 251(h) Mergers If the Target Corporation's Fully-Informed, Uncoerced Stockholders Tender a Majority of the Company's Shares in a First-Step Tender Offer

On February 9, 2017, the Delaware Supreme Court adopted the Chancery Court's reasoning in affirming a June 2016 Chancery Court decision holding that the business judgment rule applies to two-step Section 251(h) mergers if the target corporation's fully informed, uncoerced stockholders tender a majority of the company's shares in a first-step tender offer.^[1] *In re Volcano Corp. Stockholder Litig.*, 2017 WL 563187 (Del. 2017). The Chancery Court found that "the acceptance of a first-step tender offer by fully informed, disinterested, uncoerced stockholders representing a majority of a corporation's outstanding shares in a two-step merger under Section 251(h) has the same cleansing effect under" the Delaware Supreme Court's decision in *Corwin v. KKR Fin. Holdings*, 125 A.3d 304 (Del. 2015)^[2] "as a vote in favor of a merger by a fully informed, disinterested, uncoerced stockholder majority." *In re Volcano Corp. Stockholder Litig.*, 143 A.3d 727 (Del. Ch. 2016).

Delaware Supreme Court: "Commercially Reasonable Efforts" Clause in a Merger Agreement Imposes an Affirmative Obligation on the Parties to Take All Reasonable Steps to Ensure Performance

On March 23, 2017, the Delaware Supreme Court held that a "commercially reasonable efforts" clause in a merger agreement "placed an affirmative obligation on the parties to take all reasonable steps to" satisfy the condition precedent. *Williams Cos. v. Energy Transfer Equity*, 159 A.3d 264 (Del. 2017).

The Delaware Supreme Court found the Chancery Court had erroneously interpreted the "commercially reasonable efforts" clause at issue "as imposing only a negative duty not to thwart or obstruct performance ... rather than an affirmative duty to help ensure performance." The Delaware Supreme Court explained that in *Hexion Specialty Chemicals v. Huntsman Corp.*, 965 A.2d 715 (Del. Ch. 2008), the Chancery Court recognized that such covenants "impose obligations to take all reasonable steps to solve problems and consummate the transaction."

Delaware Supreme Court: Directors Have No Obligation to Disclose Details About Offers the Directors Deemed Not Worth Pursuing

On March 23, 2017, the Delaware Supreme Court affirmed a Chancery Court decision holding that a company's board of directors had no obligation to provide shareholders with details concerning possible bidders whose potential offers the directors did not consider. *City of Miami Gen. Employees' and Sanitation Employees' Ret. Trust*, 2017 WL 1093185 (Del. 2017). The Chancery Court found that "Delaware law does not require disclosure of a play-by-play of negotiations leading to a transaction or of potential offers that a board has determined were not worth pursuing." *City of Miami Gen. Employees' and Sanitation Employees' Ret. Trust v. Comstock*, 2016 WL 4464156 (Del. Ch. 2016).

Delaware Supreme Court: (1) Deal Price "Will Often Be" the Best Evidence of Fair Value in an Arm's-Length Transaction Following a "Robust" Sale Process, and (2) There Is No Basis for a "Private Equity Carve Out" to Reliance on the Merger Price

On August 1, 2017, the Delaware Supreme Court stated that "the sale value resulting from a robust market check will often be the most reliable evidence of fair value, and that second-guessing the value arrived upon by the collective views of many sophisticated parties with a real stake in the matter is hazardous." *DFC Global Corp. v. Muirfield Value Partners*, 172 A.3d 346 (Del. 2017). However, the court did not adopt a presumption that the sale price is the best evidence of fair value "in certain cases involving arm's-length mergers" because it found that 8 Del. C. § 262(h),^[3] the Delaware appraisal statute, vests the Chancery Court with discretion to determine fair value "in the first instance."

Significantly, the Delaware Supreme Court rejected two arguments frequently used to challenge reliance on the merger price. First, the court held that market forces can adequately account for regulatory risk. The court reasoned that "the market's assessment of [a company's] future cash flows necessarily takes regulatory risk into account as it does with all the other reasonable uncertain factors that affect a company's future." Second, the court found no basis in the "economic literature" or the record for the imposition of a "private equity carve out" ... in which the deal price resulting in a transaction won by a private equity buyer is not a reliable indication of fair value."

Delaware Supreme Court: Chancery Court Abused Its Discretion in Placing No Weight on the Deal Price in a Transaction Resulting From a Robust Sales Process

On December 14, 2017, the Delaware Supreme Court reversed and remanded a widely covered appraisal decision in which the Chancery Court placed no weight on either the stock price or the deal price, but instead relied on its own discounted cash flow ("DCF") analysis to arrive at a fair value substantially higher than the deal price. *Dell v. Magnetar Global Event Driven Master Fund Ltd.*, 2017 WL 6375829 (Del. 2017). Based on the record before it, the Delaware Supreme Court found "the deal price deserved heavy, if not dispositive, weight."

The Delaware Supreme Court found that there was "compelling" "evidence of market efficiency, fair play, low barriers to entry, outreach to all logical buyers, and the chance for any topping bidder to have the support of [the CEO's] own votes." Under these circumstances, the Delaware Supreme Court found the Chancery Court's decision to place no weight on the market price "abuse[d] even the wide discretion afforded the Court of Chancery in these difficult cases."

Although the Delaware Supreme Court did not hold "that the market is always the best indicator of value, or that it should always be granted some weight," its opinion—particularly when read in conjunction with its earlier guidance in *DFC Global Corp. v. Muirfield Value Partners*—signals that greater deference should be given to the deal price resulting from an appropriate sale process.

The Delaware Supreme Court instructed that on remand, the Chancery Court may "enter judgment at the deal price ... with no further proceedings." If the Chancery Court instead "chooses to weigh a variety of factors in arriving at fair value," the court must "explain that weighting based on reasoning that is consistent with the record and with relevant, accepted financial principles."

^[1] Pursuant to Section 251(h) of the Delaware General Corporation Law, companies may complete two-step mergers without a target company stockholder vote

if the acquiring corporation consummates a first-step tender offer.

[2] Please [click here](#) to read our prior discussion of the Delaware Supreme Court’s decision in *Corwin*.

[3] Delaware’s appraisal statute provides in relevant part as follows:

[T]he Court shall determine the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation, together with interest, if any, to be paid upon the amount determined to be the fair value. In determining such fair value, the Court shall take into account all relevant factors.

8 Del. C. § 262(h).

Authors and Contacts

Paul Gluckow
Partner and General Counsel
pgluckow@stblaw.com
+1-212-455-2653

Jonathan Youngwood
Partner
jyoungwood@stblaw.com
1-212-455-3539

Peter Kazanoff
Partner
pkazanoff@stblaw.com
+1-212-455-3525

