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Delaware Supreme Court Confirms BJR Application After Disinterested Shareholder Approval

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Editor's note: Scott B. Luftglass and Philip Richter are partners at Fried, Frank, Harris, Shriver & Jacobson LLP. This post is based on a Fried Frank publication by Mr. Luftglass, Mr. Richter, Steven Epstein, Warren S. de Wied, Peter L. Simmons, and Gail Weinstein. This post is part of the Delaware law series; links to other posts in the series are available here.

In *Volcano Stockholders Litigation*, the Delaware Supreme Court, on February 9, 2017, in a one-sentence affirmance, upheld the Court of Chancery's decision dismissing the post-closing challenge of the $1.2 billion merger of Volcano Corp. with Philips Holding USA Inc. The plaintiffs claimed that the Volcano board had failed to fully inform stockholders in connection with their vote on the transaction—including with respect to a previous higher offer made by Philips and alleged conflicts of interest of Volcano's financial advisors. The decision is consistent with the Delaware courts' continued expansive interpretation of the seminal 2015 *Corwin* decision, which has resulted in a strong trend of early dismissal of litigation challenging M&A transactions (not involving a "controller"—see below).

Key Points

- **Under *Corwin*, the business judgment rule will apply *irrebuttably* following fully-informed, uncoerced approval of a non-controller transaction by the disinterested stockholders**. In *Corwin*, the Delaware Supreme Court held that, in a post-closing damages action not subject to the entire fairness standard of review, directors' actions would be evaluated under the business judgment rule if the transaction had been approved by the fully-informed, uncoerced vote of the disinterested stockholders. It was unclear at the time, however, whether application of the business judgment rule would be a *rebuttable presumption* or would be *irrebuttable*. The Court of Chancery concluded in *Volcano* (June 30, 2016), in *Larkin v. Shah* (known as "*Auspex*") (Aug. 25, 2016), and in *OM Group* (Oct. 12, 2016) that application of the business judgment rule would be irrebuttable. The Delaware Supreme Court has now confirmed that conclusion.
- **Tendered shares will be treated as the equivalent of a stockholder vote in the *Corwin* context**. The decision also affirms the Court of Chancery's holding that the tender of a majority of the disinterested stockholders' shares into the first-step tender offer of a two-step merger under DGCL Section 251(h) will be treated as the equivalent of a stockholder vote. Therefore, cleansing under *Corwin* will apply to two-step mergers (even though they do not involve a stockholder vote).

We note the following:

Effect of application of the business judgment rule. If the business judgment rule applies, the only basis on which the transaction can be successfully challenged is that it constitutes "corporate waste." The Delaware courts have stated that the "waste" standard likely has no real-world, practical application in the context of transactions approved by fully informed, uncoerced stockholders, as stockholders would not approve a transaction that constituted waste. Most recently, in *Merge Healthcare* (Jan. 30, 2017), Vice Chancellor Glasscock referred to the waste standard as "[l]eaving only … theoretical … liability," and advised that the standard "is best viewed [in this context] as a kind of 'judicial out,' a way around the strictures of the cleansing rule given a fact situation of some undefined level of egregiousness, such that equity would intervene."

Exclusion from *Corwin* "cleansing" of transactions subject to "entire fairness." Corwin established that stockholder approval could not cleanse transactions that are subject to the entire fairness standard of review. It was not clear whether the exclusion applied (i) only to transactions subject to entire fairness due to a controller standing on both sides of the transaction or (ii) also to transactions subject to entire fairness due to a majority of the directors who approved the transaction not having been independent and disinterested. In *Auspex*, Vice Chancellor Slights expressed the view that only controller transactions (i.e., where the controller is a buyer or extracts a personal benefit not available to the other stockholders) would be excluded from cleansing. In *Solera* (Jan. 5, 2017) and Merge Healthcare (Jan. 30, 2017), Chancellor Bouchard and Vice Chancellor Glasscock, respectively, endorsed that view (which is consistent with the view the Chancellor expressed in the Court of Chancery decision in Corwin). We note that the Delaware Supreme Court has not yet addressed this issue.