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Post-Closing Merger Litigation—The Road Ahead

In a recent series of landmark decisions, the Delaware Supreme Court has constructed an orderly doctrinal framework designed to reduce wasteful post-closing merger litigation. These cases recognize that the market's judgment is usually sound and that the costs of intensive litigation regarding transactions approved by informed and self-interested stockholders generally outweigh the benefits. A compelling corporate law question for 2019—and a practical challenge for transaction planners—is how that doctrinal framework will be implemented in the face of sustained attack by the class action plaintiffs' bar.

In *MFW*, the Delaware Supreme Court held that where a controlling stockholder conditions a squeeze-out merger on both the approval of a special committee of independent directors and a majority of the minority holders, the transaction will be subject to business judgment review and presumptively exempt from post-closing challenge. Then, drawing on the common law of ratification, the Delaware Supreme Court held in *Corwin* and cases following it that when a third-party merger is approved by an uncoerced and informed vote of disinterested stockholders, "the business judgment rule standard of review is invoked … and dismissal is typically the result." Even more recently, in *DFC* and *Dell*, the Delaware Supreme Court emphasized that market valuation evidence should be given great weight in appraisal actions claiming that the price of a third-party merger was too low, thus cooling appraisal arbitrage fever.

The common thread in these rulings is the judgment that litigation is unlikely to improve upon the accuracy of market valuations (where reliable market evidence is available) and that, as *Corwin* put it, "[w]hen disinterested equity owners … can easily protect themselves at the ballot box … the utility of a litigation-intrusive standard of review promises more costs to stockholders in the form of litigation rents and inhibitions on risk-taking than it promises in terms of benefits." The evolving doctrine affirms the view that, with sophisticated institutional investors now dominating equity markets, the courts can (and as a matter of efficiency should) avoid extensive litigation-driven second-guessing in the great run of transactional situations.

The salutary result of the developing doctrine should be sounder decision-making and less litigation, as the last word on the merits of a transaction devolves from courts and lawyers to markets and investors. But while less litigation is doubtless a social good in the abstract, some lawyers, and most effectively the class action plaintiffs' bar, have objected to the new obstacles to post-closing

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litigation. In 2018, stockholder plaintiffs persistently attacked the sufficiency of disclosures, raised novel claims that stockholder approvals were "coerced," and sought to expand the definition of controlling stockholder. The objective? To escape *MFW* and *Corwin* by de-legitimizing majority stockholder votes reflecting the considered judgment of large asset managers and institutional investors, often acting with the assistance of specialized proxy advisory firms. And in circumstances that some observers considered surprising, the courts allowed several such cases to survive motions to dismiss and proceed to the discovery stage—where they acquire vast settlement value.

Looking ahead, the question is whether Delaware's market- and investor-facing doctrine will be given full effect despite this concerted opposition. Ultimately, the line of new Delaware case law is sufficiently rooted in today's economic reality that it should withstand attack. Stockholders are now too sophisticated and too engaged to justify, as a matter of routine, the costs of litigating issues that the stockholders themselves have approved. Indeed, in ending the scourge of "disclosure-only" settlements, the Court of Chancery confirmed the often limited utility to stockholders of incremental disclosure.

But transaction planners should expect some unpredictability as the doctrine is ironed out and recognize that it has appropriate limits. As Chancellor Bouchard memorably observed, *Corwin* was never intended to be a "massive eraser" capable of extinguishing liability for conduct far removed from a ratifying vote, and no doctrine can or should confer a litigation benefit on the basis of a vote that was actually coerced or materially uninformed. To achieve the benefit of *Corwin* in this uncertain environment, parties should avoid cross-conditioning related transactions when commercially practical and draft disclosure documents with an eye toward negating the inevitable claims that material information was omitted. Parties seeking the protection of *MFW* should also continue to take care to ensure the proper functioning of any special committee, from inception through negotiation and any final decision.

Delaware law has moved decisively to ensure predictable results that take into account market reality and the shifting composition of public-company equity holders. Because the doctrinal journey is not yet complete, however, dealmakers seeking to reduce post-closing litigation risk should embrace these new and sensible rules of engagement—but be mindful of all the exceptions as well.

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