

May 1, 2017

Outer Boundaries of *Corwin*, and When a Stockholder Vote Will Cleanse Post-Merger Claims, Are Taking Shape

The Delaware Supreme Court's decision in *Corwin v. KKR Financial Holdings LLC* set a high bar for plaintiff stockholders seeking to challenge public company mergers. Assuming a transaction that is not subject to entire fairness review was approved by a fully informed, uncoerced, disinterested vote of a majority of the stockholders of a target corporation, the business judgment rule applies to post-closing damage suits and, as further clarified by the Supreme Court decision in *Singh v. Attenborough*, a plaintiff could only challenge such a merger on the basis that it constituted waste. The decision in *Corwin* was later extended to "medium form" mergers under Section 251(h) of the Delaware General Corporation Law in *In re Volcano Corporation Stockholder Litigation*. Thus, recent decisions, taken together, altogether changed the contours of merger related litigation.

Attorneys
Paul S. Scrivano
Sarah Young

However, two decisions of the Delaware Court of Chancery issued in April 2017 illustrate how the outer boundaries of *Corwin* are further taking shape.

In *In re Saba Software, Inc. Stockholder Litigation*, Vice Chancellor Joseph Slight of the Delaware Court of Chancery declined to apply *Corwin* to dismiss post-merger claims against directors of the target corporation where plaintiffs' complaint pled "facts that allow a reasonable inference that the stockholder vote approving the transaction was neither fully informed nor uncoerced." *Saba* involved a target corporation that was embroiled in an accounting restatement and resulting SEC investigation due to financial fraud, and whose stock registration was revoked by the SEC shortly after signing the merger agreement. The Court concluded that certain material omissions in the proxy statement distributed to *Saba* stockholders regarding the circumstances that prevented the Company from restating its financials and other available alternatives for the Company did not permit *Saba* stockholders to make a "fully informed" decision and, therefore benefit from the cleansing effect of the stockholder vote under *Corwin*. Moreover, as a result of the deregistration of *Saba* common stock, the stockholder vote was accelerated beyond what was typically normal for a Delaware corporation. The Court concluded that the forced timing of the merger, together with the material omissions in the merger proxy, were "situationally coercive factors" that effectively deprived *Saba* stockholders, then holding "recently-deregistered, illiquid stock," of free choice and forced them to vote in favor of the deal. Accordingly, and because the plaintiffs pled non-exculpated claims of bad faith, the court declined to apply *Corwin* as a bar to the litigation.

Conversely, in *In re Paramount Gold and Silver Corp. Stockholders Litigation*, Chancellor Andre Bouchard of the Delaware Court of Chancery found that the merger vote was both fully informed and uncoerced, despite allegations by the plaintiff that the failure to include additional information concerning analyst price targets and investment bankers' involvement resulted in an uninformed vote and that a royalty fee and termination fee rendered the stockholders' vote coerced. However, in doing so, the court highlighted, but did not resolve, the apparent conflict between a fully informed, uncoerced, disinterested stockholder cleansing vote under *Corwin* and the Delaware Supreme Court's earlier holding in *In re Santa Fe Pacific Corporation Shareholder Litigation* that a fully informed stockholder vote does not preclude a post-closing *Unocal* claim with respect to deal protection measures.

While the facts in *Saba* were somewhat unique, the ruling does stand as an example of the types of disclosure omissions and imposed time pressure that will result in a court declining to apply to bar imposed by *Corwin*,

regardless of any extenuating circumstances. At the other end of the spectrum, *Paramount Gold* should provide comfort that the failure to include immaterial disclosure will not be usable by plaintiff stockholders as a means to continue spurious claims beyond the motion to dismiss stage. The clear guidance from the Delaware Supreme Court would seem to dictate that there be more decisions like *Paramount Gold* and fewer like *Saba*.