THE REVIEW OF
SECURITIES & COMMODITIES REGULATION
AN ANALYSIS OF CURRENT LAWS AND REGULATIONS AFFECTING THE SECURITIES AND FUTURES INDUSTRIES

Vol. 55 No. 6 March 23, 2022

RECENT DEVELOPMENTS IN DELAWARE M&A DISCLOSURE

In recent years, the Delaware courts have seemed more reluctant than they have been to dismiss M&A challenges under Corwin or MFW at the pleading stage. In this article the authors address this "swinging back of the Corwin-MFW pendulum." They begin with a review of disclosure obligations under Delaware law and the increased focus on disclosure. They then turn to the emboldening of stockholder-plaintiffs in Section 220 books and records litigation, the amplification of directors' oversight responsibility, and the liability of officers – and the potential liability of buyers – for flawed disclosures. They close with notes on preliminary injunctions and general practice points for M&A disclosure.

By Gail Weinstein, Scott B. Luftglass, Steve Epstein, and Phil Richter *

Possibly the most important trend in Delaware law in recent years has been the courts' increased emphasis on deference to stockholder approval. Sale process flaws will occur but, under *Corwin* and *MFW*,[1] a "fully informed" stockholder vote generally "cleanses" alleged fiduciary breaches. Under *Corwin*, it was established that a transaction otherwise subject to review under *Revlon*-enhanced scrutiny would be reviewed instead under the deferential business judgment rule if the transaction was approved by the stockholders in a "fully informed" and uncoerced vote. *MFW* established that business judgment rule review would apply even to a conflicted transaction if (among other prerequisites) the transaction was approved by a majority of the minority stockholders in a "fully informed" and uncoerced vote.[2]

[1] *Corwin v. KKR Fin. Hldgs. LLC*, 125 A.3d 304 (Del. 2015); *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014).

[2] Further, *Singh* established that when business judgement review applies, claims challenging an M&A transaction will be dismissed at the pleading stage of litigation, because the transaction can only be attacked on grounds of "corporate waste" — a standard that cannot in reality ever be met because stockholders would not have approved a transaction they considered wasteful. *Singh v. Attenborough*, 137 A.3d 151, 152 (Del. 2016). Accordingly, based on *Corwin* and *Singh*, a post-closing challenge to an M&A transaction will be dismissed at the pleading stage unless the plaintiffs demonstrate that the vote of the stockholders either was not fully informed due to materially flawed disclosure by the target company or was coerced (or that the transaction in fact is subject to entire

* *GAIL WEINSTEIN is Senior Counsel, and previously was a partner in the Corporate Department, at Fried, Frank, Harris, Shriver & Jacobson LLP. SCOTT B. LUFTGLASS is a partner in the Litigation Department and Co-Head of the Securities and Shareholder Litigation Practice at Fried Frank. STEVEN EPSTEIN and PHILIP RICHTER are partners in the Corporate Department and Co-Heads of the M&A Practice at Fried Frank. Each of them is a resident in the New York City office. Their e-mail addresses are: gail.weinstein@friedfrank.com; scott.luftglass@friedfrank.com; and.steven.epstein@friedfrank.com.*