

Recent Court Rulings in Merger Objection Lawsuits

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Abstract

Merger and Acquisition (M&A) deals, which had already been trending upwards, surged to new heights in 2015. The value of worldwide M&A deals in 2015 is estimated to have exceeded \$4 trillion. Cross-border mergers and acquisitions constituted over one-third of the worldwide M&A deals. In the United States, about 88 % of completed M&A deals in 2015 were litigated in the federal and state courts. The issues involved included disclosure-only settlements, appraisal arbitrage, fair value, fiduciary duties of directors and financial advisors, director independence, standards of review, criteria for determining control, derivative claims, shareholder activism, etc. Merger objection lawsuits constituted a significant segment of the instituted lawsuits. This paper presents a conspectus of some of the most important decisions handed down by the Delaware Supreme Court and the Delaware Court of Chancery from January 2015 to January 2016, in such merger objection lawsuits.

Introduction:

Worldwide Merger and Acquisition (M&A) deals, which had already been trending upwards, surged to new heights in 2015. The value of worldwide M&A deals is estimated to have exceeded \$4 trillion. Of this the value of cross-border M&A was \$1.56 trillion. Ten mega-deals had a value of over \$50 billion each, the highest being Pfizer's \$160 billion acquisition of Allergan. The value of the M&A deals in 2015 constituted more than a 30% rise over the value of such deals in 2014. In the United States, about 88% of completed M&A deals in 2015 were litigated in the federal and state courts.¹ The issues involved included disclosure-only settlements, appraisal arbitration, fair value, fiduciary duties of directors and financial advisors, director independence, standards of review, criteria for determining control, derivative claims, shareholder activism, etc.

As always in matters relating to corporate governance and corporate law, some of the most important decisions in M&A cases were delivered by the Delaware Court of Chancery, the leading corporate trial court in the United States.² Merger objection lawsuits constituted a significant segment of the instituted lawsuits. Merger objection lawsuits are actions initiated by shareholders alleging that the terms of a merger or acquisition are unfavorable to shareholders and therefore should be blocked or rescinded. This paper presents a conspectus of some of the most important decisions issued by the Delaware Supreme Court and the Delaware Court of Chancery from January 2015 to January 2016, in such merger objection lawsuits. The sub-topics covered in this paper are: (i) disclosure-only settlements; (ii) appraisal arbitration; (iii) fair value in appraisal actions; (iv) director liability; and (v) financial advisor liability.

¹ During 2015, 43 merger objection cases were filed in federal courts in the United States. This is apart from the court proceedings initiated by the antitrust agencies of the United States government—namely, the Federal Trade Commission and the Department of Justice—as a result of their aggressive scrutiny of such transactions.

² This is due largely to the widely recognized corporate law expertise of the Delaware Chancery Court judges. This arises at least partly from the volume of corporate litigation adjudicated by the Court of Chancery stemming from the fact that over 50% of the companies traded on the New York Stock Exchange and NASDAQ, including 60% of Fortune 500 companies, having their registered offices in the State of Delaware.

I] Re: Disclosure-Only Settlements:

A preponderant number of M&A deals generate lawsuits, many of them being class action lawsuits. A sizable chunk of such class action lawsuits used to be resolved by what is termed as “disclosure-only” settlements, whereby the defendant company agreed to make supplemental disclosures of information relating to the merger in consideration of a blanket discharge of all potential claims. In many such cases, the principal beneficiaries were the plaintiffs’ lawyers, since the defendant company agreed to pay the lawyers’ fees as part of the settlement. The supplemental information disclosed was often too insubstantial to be of any practical benefit to the shareholders. The year 2015 saw the start of a reluctance on the part of the Delaware Court of Chancery to approve such settlements. The two leading cases that signaled the shift away from a routine approval of disclosure-only settlements are noted below.

- *In Re Riverbed Technology Inc. Stockholders Litigation*.³

This case involved a class action lawsuit instituted by a class of stockholders in the Delaware Court of Chancery challenging the sale of outstanding shares of Riverbed Technology Inc. by Thoma Bravo and Teachers’ Private Capital. The parties entered into a settlement agreement whereby the Defendant made supplemental disclosures, in exchange for a broad release of claims under state and federal laws. The Court noted the complexity of the various issues involved, including the agency problems, the Defendants’ incentives to settle, and the absence of adversarial arguments. On the specific facts of the case, the Court approved the settlement because of “the reasonable reliance of the parties on formerly settled practice in this Court.”⁴ However, the Court added that but for this factor, “the interests of the Class might merit rejection of a settlement encompassing a release that goes far beyond the claims asserted and the results achieved.”⁵

³ Consolidated C.A. No. 10484-VCG, decided by the Court of Chancery of the State of Delaware on September 17, 2015. Memorandum Opinion, Available at: <http://courts.state.de.us/opinions/download.aspx?ID=229930>.

⁴ *Id.*, at internal page 15 of the opinion. The Court, however, reduced the fees sought by the Plaintiffs’ lawyers in the case.

⁵ *Id.*, at internal page 15 of the opinion.

- *In Re Trulia, Inc. Stockholder Litigation*.⁶

The case involved stockholder class action lawsuits filed by shareholders of Trulia, Inc. challenging a stock-for-stock merger transaction whereby Zillow, Inc. acquired Trulia, Inc. The complaints alleged that the directors of Trulia had committed breach of fiduciary duties by approving the merger. The parties agreed to settle the lawsuits on the following basic terms: Trulia, Inc. would make some additional disclosures regarding the merger and pay the legal fees to the plaintiffs' lawyers, in exchange for which the plaintiffs would release claims against the defendants. The Delaware Chancery Court refused to approve the proposed settlement on the footing that the additional information to be disclosed by Trulia did not provide any benefit to Trulia's shareholders and did not justify a release of claims against the defendants. Thus, although the Court had approved the settlement in *In Re Riverbed Technology* on the basis of reliance on past practices, the Court here took a firm stance in disavowing the past practices.⁷

The Court's opinion expressed the view that the historical propensity to approve such disclosure-only settlements needed to be re-examined.⁸ Setting out the principles that will guide the court's opinions in such cases, the Court stated:

“[T]he Court will continue to be increasingly vigilant in applying
Its independent judgment to its case-by-case assessment of
the reasonableness of the “give” and “get” of such
settlements[D]isclosure settlements are likely to be met with

⁶ C.A. No. 10020-CB, decided by the Court of Chancery of the State of Delaware on January 22, 2016. Available at: <http://cases.justia.com/delaware/court-of-chancery/2016-ca-10020-cb.pdf?ts=1453478428>.

⁷ With specific reference to disclosure claims, the Court ventured the view that

“[D]isclosure claims arising in deal litigation optimally should be adjudicated outside the context of a proposed settlement so that the Court's consideration of the merits of the disclosure claims can occur in an adversarial process without the defendants' desire to obtain an often overly broad release hanging in the balance... [T]o the extent that litigants continue to pursue disclosure settlements, they can expect that the Court will be increasingly vigilant in scrutinizing the “give” and the “get” of such settlements to ensure that they are genuinely fair and reasonable to the absent class members.”

(*Id.* at internal page 2 of the opinion.)

⁸ *Id.*, at internal page 19 of the opinion.

continued disfavor in the future unless the supplemental disclosures address a plainly material misrepresentation or omission, and the subject matter of the proposed release is narrowly circumscribed to encompass nothing more than disclosure claims and fiduciary duty claims concerning the sale process, if the record shows that such claims have been investigated sufficiently.”⁹

II] Appraisal Arbitrage:

“Appraisal Arbitrage” refers to a strategy utilized by shareholder activists – usually hedge funds – whereby shares are bought in the target company of an M&A deal after a merger is announced with the specific aim of demanding an appraisal of the fair market value of the shares,¹⁰ in the expectation of getting a premium over the original sale price. A number of important decisions were handed down by the Delaware Court of Chancery between January, 2015 and January, 2016.

⁹ *Id.*, at internal pages 24 and 25 of the opinion.

¹⁰ Appraisal rights are provided for under Section 262 of the Delaware General Corporation Law. Section 262 (a) reads:

Any stockholder of a corporation of this State who holds shares on the date of the making of the demand pursuant to subsection (d) of this section with respect to such shares, who continuously holds such shares through the effective date of the merger or consolidation, who has otherwise complied with subsection (d) of this section and who has neither voted in favor of the merger or consolidation nor consented thereto in writing pursuant to Section 228 of this title shall be entitled to appraisal by the Court of Chancery of the fair value of the stockholder’s shares of stock under the circumstances described in subsections (b) and (c) of this section. As used in this section, the word “stockholder” means a holder of record of stock in a stock corporation and also a member of record of a nonstock corporation; the words “stock” and “share” mean and include what is ordinarily meant by those words and also membership or membership interest of a member of a nonstock corporation; and the words “depository receipt” mean a receipt or other instrument issued by a depository representing an interest in one or more shares, or fractions thereof, solely of stock of a corporation, which stock is deposited with the depository.

- *In Re Appraisal of Ancestry.com, Inc.*¹¹
- *Merion Capital LP v. BMC Software, Inc.*¹²

This was a pair of related cases in which the Delaware Court of Chancery delivered separate opinions on January 5, 2015. The issue in both cases related to the requirement for standing embodied in Section 262 of the Delaware General Corporation Law as amended in 2007. In both cases, the petitioners in the appraisal action purchased shares in the target company of a merger after the record date of the transaction but before the shareholders meeting.

The facts in both cases were only slightly different. In *Ancestry*, the petitioners were beneficial owners who caused the record owner to make an appraisal demand for the shares that they owned. In *Merion Capital v. BMC*, on the other hand, the petitioners were initially the beneficial owners and had sought to cause the record owner to make an appraisal demand on their behalf, which the record holder declined to do on the ground that it was against a revised internal policy of the record holder firm. Thereupon, the petitioners took steps to become the record owners of their purchased shares and then made the appraisal demand in their capacity as the record holders as well as the beneficial owners.

The issue before the Delaware Court of Chancery was whether the petitioners had standing to pursue the appraisal actions in light of the amendment to Section 262 (e), of

¹¹ *In re Appraisal of Ancestry.Com. Inc.*, Consolidated C.A. No. 8173-VCG. Decided by the Court of Chancery of the State of Delaware on January 5, 2015. Available at: <http://courts.state.de.us/opinions/download.aspx?ID=217060>.

¹² *Merion Capital LP and Merion Capital II LP v. BMC Software, Inc.* Decided by the Court of Chancery of the State of Delaware on January 5, 2015. Available at: <http://courts.state.de.us/opinions/download.aspx?ID=217070>. The Court succinctly described “appraisal arbitrage” thus:

“Appraisal arbitrage” is a phrase commonly used to denote an investment strategy whereby an investor acquires an equity position in a cash-out merger target with the specific intention of exercising the statutory stockholder appraisal right found in 8 *Del. C. Section* 262; and in the subsequent appraisal action the court awards the appraisal petitioners what the court determines to be the fair value of the target, which, if the target was undervalued in the transaction, represents a positive return on the arbitrage investor’s initial investment.

(Quoted from internal page 2 of the opinion.)

the Delaware statute after the decision in *In re Appraisal of Transkaryotic Therapies, Inc.*¹³

Upon a careful consideration of the scope and ramifications of the amended Section 262, the Court concluded that the amendment had not affected the Court's decision in *Transkaryotic Therapies* except with respect to rights under Section 262(e). Explicating the implications of the decision in *Transkaryotic Therapies*, the Court held that the shares of the Petitioners in the present cases could not be deemed to have been voted in favor of the merger. Further, Section 262 does not require the record holder or the beneficial owner to establish that the shares in respect of which the appraisal rights are being asserted were not voted in favor of the merger by the previous owners of the shares. Thereby, the Court held that the Petitioners in the present cases had the necessary standing to assert appraisal rights.

III] Fair value in appraisal actions:

As stated earlier, Section 262 of the Delaware General Corporation law confers upon stockholders opposing a merger, the right to have their shares appraised and

¹³ A progenitor of the appraisal arbitrage strategy is generally considered to be the 2007 decision of the Court of Chancery of the State of Delaware in *In re Appraisal of Transkaryotic Therapies, Inc.*, Civil Action No. 1554-CC., 2007 WL 1378345. Available at:

<http://corpgov.law.harvard.edu/wp-content/uploads/2007/05/20070505%20Transkaryotic%20Appraisal%20Opinion.pdf>.

The principal upshot of the Court's decision in *Transkaryotic* was that so long as the number of shares that a record owner held which had not voted in favor of a merger were equal to or greater than the number of shares in respect of which appraisal rights were asserted, the requirements of Section 262 of the Delaware was satisfied. The requirement at issue was that the stockholder should not have voted in favor of the merger. The fact that the beneficial owners seeking to assert the appraisal rights in this case had purchased the shares after the record date of the merger was of no consequence. According to the Court's opinion, only a record holder was entitled to assert appraisal rights under the Delaware statute.

the “fair value” of their shares awarded to them.¹⁴ In order to exercise this right, the dissenting stockholder should neither have voted in support of the merger nor should have consented to it in writing. Such appraisal actions have registered a sharp rise in the past few years. A few of the important decisions issued between January 2015 and May 2016 are listed below.

- *Merlin Partners, Inc. v. Autoinfo, Inc.*¹⁵

In this case, the petitioners were stockholders of the Respondent company. They sought an appraisal of their shares pursuant to a merger in which their shares were bought out for cash. The Court evaluated all relevant factors including the evidence supporting the reliability of the merger price, the reliability of other valuation methods, and the adequacy of the sales process. The Court concluded that the merger price was the fair price in the circumstances.

¹⁴ Section 262 (h) of the Delaware General Corporation Law sets out the basis for determining the fair value. Section 262 (h) states:

After the Court determines the stockholders entitled to an appraisal, the appraisal proceeding shall be conducted in accordance with the rules of the Court of Chancery, including any rules specifically governing appraisal proceedings. Through such proceeding the 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. Unless the Court in its discretion determines otherwise for good cause shown, interest from the effective date of the merger through the date of payment of the judgment shall be compounded quarterly and shall accrue at 5% over the Federal Reserve discount rate (including any surcharge) as established from time to time during the period between the effective date of the merger and the date of payment of the judgment. ...

¹⁵ *Merlin Partners LP, and AAMAF, LP v. Autoinfo, Inc.*, C.A. No. 8509-VCN. Decided by the Court of Chancery of the State of Delaware on April 30, 2015. Memorandum Opinion, available at: <http://courts.delaware.gov/opinions/download.aspx?ID=223110>.

- *Owen v. Cannon*¹⁶

This was a case in which the Delaware Court of Chancery held that the fair price of the stock at issue was higher than the offered merger price. Plaintiff challenged a merger in which he was cashed out at a price that he contended was less than the fair price of the stock he held. The merger price was based on a five-year projection made by the Defendants' financial advisor. Plaintiff accepted the validity of the projection but disputed certain aspects – most significantly, the assumed tax rate – that led to what the Plaintiff contended was an erroneous valuation. After the start of the litigation, Defendants sought to substitute their original projection by a set of ten-year projections which, in their view, constituted a more reliable basis for calculating the fair value. They also sought to disregard certain tax consequences flowing from the status of the Defendant corporation as a Subchapter S corporation. The plaintiff challenged the validity of the revised basis of valuation, too. The Court held that (i) the earlier five-year projection was more reliable and should form the basis for the discounted cash flow analysis, and that (ii) consonant with the Court's precedents, the tax consequences of the Subchapter S status of the Defendant corporation had to be taken into consideration. Principally on that basis, the Court found the fair value of Plaintiff's shares to be higher than the offered merger price.

- *Longpath Capital, LLC v. Ramtron International Corporation*¹⁷

In this case, the Petitioner was an investment company that acquired shares in the Respondent company after the announcement of its merger with another corporation at the merger price of \$ 3.10 per share. Petitioner sought to assert its share appraisal rights. The Petitioner contended that the fair value was \$ 4.96 per share. Petitioner based its contention on a combined discounted cash flow analysis and comparable transactions analysis. After a consideration of all factors, the court concluded that the management projections which constituted the inputs for the discounted cash flow

¹⁶ *Owen v. Cannon*, C.A. No. 8860-CB. Decided by the Court of Chancery on June 17, 2015. Memorandum Opinion, available at: <http://www.courts.state.de.us/opinions/download.aspx?ID=225220>.

¹⁷ *Longpath Capital, LLC v. Ramtron International Corporation*, C.A. No. 8094-VCP. Decided by the Court of Chancery of the State of Delaware on June 30, 2015. Memorandum Opinion, available at: <http://courts.delaware.gov/opinions/download.aspx?ID=226040>.

analysis were not reliable and could not be countenanced.¹⁸ The Court further found that a comparable transaction analysis was also inappropriate for use in the present case as the transactions adduced were of doubtful comparability. Furthermore there was a paucity of data points and the multiples differed greatly. The Court noted that while the acquiring company had spent three months in its bid to acquire the Respondent company, the Respondent company had actively sought other potential buyers. Furthermore, the acquiring company had made several increases in its offered price before the final merger price of \$ 3.10 per share was agreed upon. This sale process was open and elaborate enough to conclude that the merger price was in fact the fair value. Accepting \$ 0.03 per share in synergies as estimated by the petitioner, the court concluded that the fair value in this case was \$ 3.07 per share.

● *Merion Capital LP and Merion Capital II LP v. BMC Software, Inc.*¹⁹

In this case, the petitioners were arbitrageurs who bought shares in the Respondent company after its sale to a group of private equity firms. The petitioners then sought statutory appraisal of the value of their shares. At the outset, the Court reiterated the legal position in Delaware that the Court's fair value analysis must take into consideration "all relevant methodologies and factors, consistent with the appraisal

¹⁸ The Court summarized the reasons for its finding that the inputs were unreliable thus:

"In summary, the Management Projections suffer from numerous flaws. Specifically, they: (1) were prepared by a new management team, (2) in anticipation of future disputes and of shopping the Company to potential white knights, (3) using a new methodology, and (4) were for a significantly longer period of time than previous forecasts.... (5) management's track record at forecasting was questionable even under their standard method of forecasting; (6) the final projections incorporate speculative elements relating to ROHM, (7) rely on distorted base year figures that resulted from customer allocation issues and channel stuffing, and (8) predict growth out of line with historical trends; and finally (9) management itself was providing "more accurate" projections to the Company's bank."

(*Id.*, at internal page 49 of the opinion.)

¹⁹ *Merion Capital LP and Merion Capital II LP v. BMC Software, Inc.*, C.A.No.8900-VCG. Decided by the Court of Chancery of the State of Delaware on October 21, 2015. Memorandum Opinion, available at: <http://courts.delaware.gov/opinions/download.aspx?ID=231290>.

statute.”²⁰ The Court also noted:

Among the techniques that Delaware courts have relied on to determine the fair value of shares are the discounted cash flow approach, the comparable transactions approach, and comparable companies approach. This Court has also relied on the merger price itself as evidence of fair value, so long as the process leading to the transaction is a reliable indicator of value and any merger-specific value in that price is excluded.²¹

On that footing, the relevant factors and methodologies before the Court in the present case were the merger sale price, and the conflicting discounted cash flow (DCF) valuations proffered on behalf of the Petitioners and the Respondent²² Since there was a big discrepancy between the discounted cash flow valuations offered by the Petitioner’s expert and the Respondent’s expert, the Court conducted its own DCF analysis. However, noting the unreliability of the projections on which the analysis had been made, the Court held that DCF analysis was an inappropriate tool for gauging the fair price. On the other hand, the merger price had been arrived at after the Respondent had “conducted a robust, arm’s length sales process, during which the Company conducted two auctions over a period of several months.”²³ On that footing, the Court held that the merger price represented the fair value of the transaction.

IV. Re: Director Liability:

Section 141 (a) of the Delaware General Corporation Law provides : “The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this

²⁰ *Id.*, at internal pages 1 and 2 of the opinion. The court here cited the relevant provision of the Delaware statute and the Delaware Supreme Court’s judgment in *Global GTLP v. Golden Telecom, Inc.*, 11 A.3d 214, 217-218 (Del. 2010).

²¹ *Id.*, at internal page 31 of the opinion.

²² The opinion mentions that a comparable companies analysis was made on behalf of the Respondent but only to check the validity of its discounted cash flow valuation. *Id.*, at internal page 38 of the opinion.

²³ *Id.*, at internal page 38 of the opinion.

chapter or in its certificate of incorporation....” The Delaware Supreme Court has held that certain fiduciary duties are attached to the functions of corporate directors.²⁴

- *Corwin v. KKR Financial Holdings*:²⁵

On October 2, 2015, the Delaware Supreme Court issued its ruling on an appeal from a decision handed down by the Court of Chancery of the State of Delaware on October 14, 2014.²⁶ The case involved a breach of fiduciary duty claim against the directors of a company in respect of a stock-for-stock merger. Upon defendants’ motion, the Court of Chancery dismissed the plaintiffs’ complaint. On appeal, the Delaware Supreme Court upheld the Court of Chancery’s “finding that the voluntary judgment of the disinterested stockholders to approve the merger invoked the business judgment rule standard of review....”²⁷ In considering the facts of the case, the Court explained the rationale for its decision thus: “In circumstances, therefore, where the stockholders have had the voluntary choice to accept or reject a transaction, the business judgment rule standard of review is the presumptively correct one and best facilitates wealth

²⁴ *Guth v. Loft, Inc.* 5 A. 2d, 503 (Delaware Supreme Court, 1939). Depending on the facts of the case, the fulfillment of the fiduciary obligations of directors is evaluated on the basis of four standards of review: (i) The business judgment rule, see, *Aronson v. Lewis*, 473 A.2d 805 (Del.1984); (ii) The entire fairness standard, see *Weinberger v. Lewis*, 457 A.2d 701, 711 (Del.1983), which mandates an inquiry regarding “fair dealing and fair price” ; (iii) the *Unocal* standard of review, see *Unocal Corp. v. Mesa Petroleum Co.*, 493 A. 2d 946 (Del.1985); (iv) the *Revlon* standard of review, see *Revlon v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del.1986). Of the standards of review listed above, the *Weinberger*, *Unocal*, and *Revlon* standards were enunciated by the Courts in the specific context of Mergers & Acquisitions litigation.

²⁵ *Corwin v. KKR Financial Holdings*, decided by the Supreme Court of the State of Delaware on October 2, 2015. Available at: <http://courts.delaware.gov/opinions/download.aspx?ID=230530>.

²⁶ *In re KKR Fin. Holdings LLC S’holder Litig.*, 101 A.3d 980 (Del. Ch. 2014).

²⁷ *Supra* note 25, at internal page 1 of the opinion. The Court further noted that “[f]or sound policy reasons, Delaware corporate law has long been reluctant to second-guess the judgment of a disinterested stockholder majority that determines that a transaction with a party other than a controlling stockholder is in their best interests.” (*Supra* note 25, at internal page 1 of the opinion.)

creation through the corporate form.”²⁸

● *In Re Cornerstone Therapeutics Inc., Stockholder Litigation* and *Leal v. Meeks*:²⁹

Appeals in these two cases were resolved jointly by the Supreme Court of Delaware as they involved a common question of law. The issue related to Section 102(b)(7) of the Delaware General Corporate Law.³⁰ As framed by the Delaware Supreme Court, the issue before the Court was: “[I]n an action for damages against corporate fiduciaries, where the plaintiff challenges an interested transaction that

²⁸ *Supra* note 25, at internal page 13 of the opinion. The business judgment rule was explicated by the Supreme Court of Delaware in the case of *Aronson v. Lewis*, 473 A.2d 805 (1984).

The Court’s opinion, in part, states (at 473 A.2d 805, 812):

The business judgment rule is an acknowledgement of the managerial prerogatives of Delaware directors under Section 141(a). See *Zapata Corp. v. Maldonado*, 430 A.2d at 782. It is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. *Kaplan v. Centex Corp.*, Del.Ch., 284 A.2d 119, 124 (1971); *Robinson v. Pittsburgh Oil Refinery Corp.*, Del.Ch. 126 A. 46 (1924). Absent an abuse of discretion, that judgment will be respected by the courts.

²⁹ *In Re Cornerstone Therapeutics Inc. Stockholder Litigation* and *Leal v. Meeks*, 115 A.3d 1173 (Del. 2015). Slip opinion, available at: <http://courts.delaware.gov/opinions/download.aspx?ID=223540>.

³⁰ Delaware Code Title 8, Section 102 sets out the provisions relating to the certificate of incorporation. The relevant portion of Section 102 (b)(7) states:

(b) In addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section, the certificate of incorporation may also contain any or all of the following matters:

....

(7) A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of director’s duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve any intentional misconduct or a knowing violation of law; (iii) under Section 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit. ...

is presumptively subject to entire fairness review, must the plaintiff plead a non-exculpated claim against the disinterested, independent directors to survive a motion to dismiss by those directors?”³¹ The lawsuits filed in each of these cases arose out of mergers in which the controlling shareholders acquired the shares that they did not own. In each case, the controlling shareholder had representatives on the board of directors. The mergers were negotiated by special committees of disinterested directors and were for prices that were much higher than the market prices before the merger announcements. In each case the merger was approved by a majority of the minority shareholders. The plaintiffs were minority shareholders who sought monetary damages on the ground that by approving the mergers, the directors had breached their fiduciary duty. In both cases, the entire fairness standard for evaluating the directors’ conduct was presumed to apply since the procedures established by the court’s precedent for invoking the business judgment standard of review had not been followed by the companies.³² The directors in both cases were protected from liability by exculpatory clauses in the certificates of incorporation. The defendants consisted of the controlling shareholders, the directors affiliated to the controlling shareholders, and also the independent directors. In resolving the issue raised by these cases, the Delaware Supreme Court clarified the correct legal position set out in the Court’s precedents and held that “plaintiffs must plead a non-exculpated claim for breach of fiduciary duty against an independent director protected by an exculpatory charter provision, or that director will be entitled to be dismissed from the suit. That rule applies regardless of the underlying standard of review.”³³ The Court’s basic rationale

³¹ *Supra*, note 29, at internal page 1 of the slip opinion.

³² *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014). In this case, the Delaware Supreme Court specified the conditions necessary for the application of the business judgment rule in cases involving freezeout mergers. The conditions as stated in the Court’s opinion are:

- (i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders;
- (ii) the Special Committee is independent
- (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively;
- (iv) the Special Committee meets its duty of care in negotiating a fair price;
- (v) the vote of the minority is informed; and
- (vi) there is no coercion of the minority.

(88 A.3d 635, at page 645).

³³ *Supra* note 29, at internal page 8 of the slip opinion.

for its decision was that it would best serve the interests of the minority shareholders.³⁴

Besides these, the Court of Chancery of the State of Delaware issued two significant decisions relating to the fiduciary duties of directors: (i) *Caspian Select Credit Master Fund Limited v. Gohl*³⁵; and *In Re Zale Corporation Stockholders Litigation*.³⁶ Further, the Supreme Court issued an opinion on an appeal from the decision of the Delaware Court of Chancery in *Delaware County Employees Retirement Fund v. Sanchez*.³⁷

³⁴ *Supra* note 29, at internal pages 14 and 15 of the slip opinion, the Court's opinion states:

For more than a generation, our law has recognized that the diligent negotiating efforts of independent directors can help to secure transactions with controlling stockholders that are favorable to the minority. Indeed, respected scholars have found evidence that interested transactions subject to special committee approval are often priced on terms that are attractive to minority stockholders. We decline to adopt an approach that would create incentives for independent directors to avoid serving as special committee members, or to reject transactions solely because their role in negotiating on behalf of the stockholders would cause them to remain as defendants until the end of any litigation challenging the transaction.

(Internal citations omitted.)

Further, in explaining the rationale for the legal provision regarding the exculpatory clause, the Court added:

[T]he fear that directors who faced personal liability for potentially value-maximizing business decisions might be dissuaded from making such decisions is why Section 102(b)(7) was adopted in the first place.... The purpose of Section 102(b)(7) was to "free[] up directors to take business risks without worrying about negligence lawsuits." Establishing that all directors must remain as parties in litigation involving a transaction with a controlling stockholder would thus reduce the benefits that the General Assembly anticipated in adopting Section 102(b)(7).

(Internal citations omitted.)

(*Id.*, at internal pages 15 and 16 of the slip opinion.)

³⁵ *Caspian Select Credit Master Fund Limited v. Gohl*, C.A. No. 10244-VCN, decided by the Court of Chancery of the State of Delaware on September 28, 2015. Available at: <http://courts.delaware.gov/opinions/download.aspx?ID=230340>.

³⁶ *In Re Zale Corporation Stockholders Litigation*. C.A. No. 9388-VCP, decided by the Court of Chancery of the State of Delaware on October 1, 2015. Available at: <http://courts.delaware.gov/opinions/download.aspx?ID=230480>.

³⁷ *Delaware County Employees Retirement Fund v. Sanchez*. No. 702, 2014. Decided by the Supreme Court of the State of Delaware on October 2, 2015. Available at: <http://courts.delaware.gov/opinions/download.aspx?ID=230540>.

V. Financial Advisor Liability:

The Delaware Courts issued a number of important rulings regarding the duties of financial advisors in respect of merger and acquisition transactions.

- *In Re Zale Corporation Stockholders Litigation*³⁸
- Re: *In Re Zale Corporation Stockholders Litigation* (On Motion for Reargument)³⁹

This case stemmed from a merger between Zale Corporation and Signet Jewelers Limited. Certain Zale stockholders challenged the merger alleging breach of fiduciary duties on the part of the directors and the aiding and abetting of those breaches of fiduciary duties by Signet Jewelers and the financial advisors to Zale Corporation. On the defendants' motion, the Delaware Court of Chancery dismissed all claims except those against the financial advisors. The Court applied the more exacting *Revlon* standard of review rather than the business judgment rule, holding that "where, as here, the merger consideration paid to the target company's stockholders is cash, *Revlon* enhanced scrutiny applies, even after the merger has been approved by a fully informed, disinterested majority of stockholders."⁴⁰ Based on the application of the enhanced *Revlon* standard the Court concluded that the directors had committed a

³⁸ *In Re Zale Corporation Stockholders Litigation*. Consolidated C.A. No. 9388-VCP. Decided by the Court of Chancery of the State of Delaware on October 1, 2015. 2015 WL 5853693. Available at:

<http://courts.delaware.gov/opinions/download.aspx?ID=230480>.

³⁹ Re: *In Re Zale Corporation Stockholders Litigation* (Motion for reargument). Decided by the Court of Chancery of the State of Delaware on October 29, 2015. Available at: <http://courts.delaware.gov/opinions/download.aspx?ID=231670>.

⁴⁰ *Supra* note 38, at internal page 26 of the opinion. The Court also recapitulated the essential gist of the *Revlon* standard as gleaned from the Court's precedents thus:

Corporate directors have "an unyielding fiduciary duty to protect the interests of the corporation and to act in the best interests of its shareholders." When directors have commenced a transaction process that will result in a change of control, a reviewing court will examine whether the board has reasonably performed its fiduciary duties "in the service of a specific objective; maximizing the sale price of the enterprise." So-called *Revlon* duties are only specific applications of directors' traditional fiduciary duties of care and loyalty in the context of control transactions.

(Internal citations omitted.)

(*Supra* note 38, at internal pages 26 and 27 of the opinion.)

breach of their fiduciary duty of care. The directors were protected from liability on the basis of a 102 (b)(7) exculpatory clause, but the breach could serve as a predicate for an aiding and abetting claim against the financial advisors.

Based on precedent, the Court set out the elements of a claim for aiding and abetting, stating that “a plaintiff must allege: (1) the existence of a fiduciary relationship; (2) a breach of the fiduciary duty; (3) knowing participation in the breach by the defendants; and (4) damages proximately caused by the breach.”⁴¹ Upon a consideration of the facts of the case, the court concluded that the allegations set out in the complaint satisfied the requirements of an aiding and abetting action against the financial advisors to Zale Corporation.

However, later in the month, the Delaware Court of Chancery reconsidered the question based on a motion for reargument filed by the financial advisors. The day after the Delaware Court’s opinion, the Delaware Supreme Court issued an opinion in a different case.⁴² The Delaware Supreme Court’s holding in that case as explained by the Delaware Court of Chancery in its opinion on the motion for reargument was as follows:

[A]lthough the entire fairness standard of review generally would apply to a merger where a majority of the corporation’s directors were not independent, BJR applies when the merger is approved by a majority of disinterested, fully informed stockholders, even if that vote is statutorily required as opposed to voluntarily sought by the directors.⁴³

(Internal citations omitted.)

Based on the Delaware Supreme Court’s ruling, the Chancery Court accepted that the business judgment rule, rather than Revlon, was the proper standard of review in this case. Applying the different standard, the Court concluded that the plaintiffs’ complaint did not sufficiently allege breach of fiduciary duty on the part of the directors of the company, and consequently there could be no aiding and abetting of a breach of fiduciary duty on the part of the financial advisors.

⁴¹ *Supra* note 38, at internal page 54 of the opinion. [Internal citation omitted.]

⁴² The Supreme Court of the State of Delaware issued its opinion in the case of *In re KKR Financial Holdings LLC Shareholder Litigation* on October 2, 2015.

⁴³ *Supra* note 39, at internal pages 3 and 4 of the opinion.

- *In Re Tibco Software Inc. Stockholders Litigation*⁴⁴

The plaintiff in this case was a stockholder of Tibco Corporation. The plaintiff challenged the price paid per share pursuant to a sale of Tibco Corporation to a private equity firm. The price per share had been arrived at on the basis of erroneous information. The plaintiff alleged breaches of fiduciary duty on the part of the directors and aiding and abetting of the directors' fiduciary duty on the part of the financial advisors. The Court concluded that the allegations in the complaint could sustain a breach of the duty of care on the part of the directors. Although the directors were insulated from liability by an exculpatory clause in the corporate charter, the directors' breach of the duty of care could serve as the basis for an aiding and abetting claim against the financial advisors. On that footing, the Court declined to dismiss the aiding and abetting claim against the financial advisors.

- *RBC Capital Markets, LLC v. Jervis*⁴⁵

On November 30, 2015, the Delaware Supreme Court issued its opinion in appeals filed against decisions of the Delaware Court of Chancery issued in 2014 in the case of *In Re Rural/Metro Corp. Shareholders Litigation*.⁴⁶ The case involved a merger of Rural/Metro Corporation to a private equity firm. The plaintiffs filed this action claiming breaches of fiduciary duty on the part of the directors in connection with the sale and the aiding and abetting of the breaches on the part of the financial advisors. Pursuant to settlements vis-à-vis the directors a secondary financial advisor, the case went to trial against the primary financial advisor, RBC. After determining that *Revlon* was the appropriate standard of review, the Chancery Court found breaches of fiduciary duty of care on the part of the directors, inter alia, in its laxity in supervising the actions of the financial advisor. Specifically, the financial advisor had a conflict of interest inasmuch as it sought to take advantage of its involvement in this transaction to get buyer's side business in related industry transactions – something that the board of directors did not take meaningful steps to be fully cognizant of. Further, the financial advisor

⁴⁴ *In Re Tibco Software Inc. Stockholders Litigation*. Consolidated C.A. No. 10319-CB. Decided by the Court of Chancery of the State of Delaware on October 20, 2015. Available at: <http://courts.delaware.gov/opinions/download.aspx?ID=231150>.

⁴⁵ *RBC Capital Markets, LLC v. Jervis*, No. 140, 2015. Decided by the Supreme Court of the State of Delaware on November 30, 2015.

⁴⁶ *In Re Rural/Metro Corporation Shareholders Litigation*, Consolidated C.A. No. 6350-VCL.

had furnished a defective financial analysis to the board of directors shortly before the board's approval of the sale. Although the directors were exculpated from liability by a charter provision – and furthermore, had settled – the Court held the financial advisor RBC liable for aiding and abetting the directors' fiduciary duty breaches. The Delaware Supreme Court affirmed the judgment of the Court of Chancery. The Supreme Court, however, disagreed with one strand of the Chancery Court's opinion. The Chancery Court had described the financial advisor's opinion as that of a "gatekeeper" on a near-equal footing with that of a director in respect of a sale transaction. According to the Delaware Supreme Court's opinion, the financial advisor's role is defined by the terms of its contract with the corporation.

Conclusion:

The stellar reputation for corporate law expertise enjoyed by the Delaware Court of Chancery and Supreme Court has contributed greatly in making Delaware the favored state of incorporation for an overwhelming number of companies in the United States. In 2015, the Delaware Courts continued to extend their influential role in the shaping of U.S. corporate law, with particular reference to mergers and acquisitions.⁴⁷

⁴⁷ Apart from the cases mentioned in this paper, the Delaware Courts also issued important decisions in numerous other cases. See, for example: *Fortis Advisors LLC v. Dialog Semiconductor PLC*. C.A. No. 9522-CB, decided by the Court of Chancery of the State of Delaware on January 30, 2015. Available at: [http://courts.delaware.gov/opinions/\(1nwswx45eocieo45fxqykg55\)/download.aspx?ID=218560](http://courts.delaware.gov/opinions/(1nwswx45eocieo45fxqykg55)/download.aspx?ID=218560); *Halpin v. Riverstone National, Inc.* C.A. No. 9796-VCG, decided by the Court of Chancery of the State of Delaware on February 26, 2015. Available at: <http://courts.delaware.gov/opinions/download.aspx?ID=219900>; *Lazard Technology Partners v. Qinetiq North America Operations*. C.A. No. 6815, decided by the Supreme Court of the State of Delaware on April 23, 2015. Available at: <http://courts.delaware.gov/opinions/download.aspx?ID=222690>; *Kurt Fox v. CDX Holdings, Inc.* C.A. No. 8031-VCL, decided by the Court of Chancery of the State of Delaware on July 28, 2015. Available at: <http://courts.delaware.gov/opinions/download.aspx?ID=227330>.

合併異議訴訟における近年の裁判所判決

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要 約

合併と買収 (M&A)取引は、もともと上昇傾向にあったが、2015年に極みに至った。2015の世界におけるM&A取引の価値は、4兆ドルを超えたと推定される。

国境を越えた企業の合併と買収は、世界のM&A取引の3分の1以上にもなる。アメリカ合衆国では、2015年に行われたM&A取引の約88%が、連邦および州の裁判所で訴訟を起こした。ここで出された問題は、disclosure-only和解、評価鞘取、公正価格、取締役と投資顧問受託者責任、取締役独立、再審理基準、コントロール決定における判断基準、派生的な請求、株主行動主義、その他を含むものであった。そこで合併異議訴訟は起こされた訴訟の重要な一部であった。この論文では、2015年1月から2016年1月までの、そのような合併異議訴訟における、デラウェア最高裁判所とデラウェア大法官府裁判所の最も重要な決定のいくつかの概観を述べている。