

Applying 'Corwin' to Mergers and Irrebutable Presumption of Business Judgment Rule

By Nathaniel J. Stuhlmiller

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In *Corwin v. KKR Financial Holdings*, 125 A.3d 304 (Del. 2015), the Delaware Supreme Court held that the business judgment rule applies to any merger not subject to entire fairness review that has been approved by a fully informed, uncoerced vote of disinterested stockholders. Following that decision, the Delaware Court of Chancery has applied *Corwin* to a variety of M&A transactions, and practitioners have wrestled with the impact of the landmark ruling on stockholder litigation in Delaware.

On Feb. 9, the Delaware Supreme Court issued a one-page order (*In re Volcano Stockholder Litigation*, No. 372, 2016 (Del. Feb. 9, 2017)), affirming the Court of Chancery's holding in one of the earlier post-*Corwin* decisions, *In re Volcano Stockholder Litigation*, 143 A.3d 727 (Del. Ch. 2016). Although the Supreme Court did not use the order to express any new or additional views on *Corwin*, the fact that the order endorsed the underlying reasoning in *Volcano* without comment still provides much-needed guidance to Delaware corporations and practitioners.

In *Volcano*, the Court of Chancery considered whether to apply *Corwin* to a two-step merger effected under Section 251(h) of the Delaware General Corporation Law (the DGCL), where a majority of the corporation's stockholders had tendered their shares in the first-step tender offer, allowing the back-end merger to be consummated without a vote of stockholders. The court determined to apply *Corwin*, reasoning that a stockholder's decision to tender its shares in the first-step tender offer was the functional equivalent of a vote in favor of adoption of a merger agreement under Section 251(c) of the DGCL. The court further reasoned that, as a matter of public policy, there was no reasonable basis to draw a distinction between a tender and a vote for purposes of applying *Corwin*.

The Supreme Court's affirmance of this aspect of the *Volcano* ruling provides certainty that Delaware corporations taking advantage of Section 251(h) will not have to sacrifice the benefits provided under *Corwin* simply because the statute dispenses with the formal requirement of a stockholder vote. By extending *Corwin* to transactions under Section 251(h), the *Volcano* order indicates that the Supreme Court may also be inclined to apply *Corwin* to transactions outside the traditional M&A setting where a stockholder vote is required. In this regard, it is noteworthy that the Court of Chancery recently held that, based on *Corwin*, the business judgment rule applies to the board of directors' decision to dissolve the corporation. Similar analysis and reasoning could be applied to other corporate matters implicating a stockholder vote, such as asset sales, recapitalizations and charter amendments.

Another important aspect of the Supreme Court's *Volcano* order is the tacit endorsement of the Court of Chancery's analysis of a potential ambiguity in several early post-*Corwin* cases regarding whether the business judgment standard of review under *Corwin* is rebuttable or irrebuttable. Based on its review of the Supreme Court's opinion in *Singh v. Attenborough*, the Court of Chancery concluded that the presumption of the business judgment under *Corwin* is irrebuttable—that is, if a transaction has been approved by a fully informed vote of disinterested stockholders, the transaction will be reviewed under the business judgment rule, regardless of whether the plaintiff

shows that the board had violated its fiduciary duties of care or loyalty. In effect, the Court of Chancery concluded that a plaintiff's only avenue to rebut the presumption in the *Corwin* context would be to show either that the stockholder vote was not in fact fully informed, uncoerced and disinterested, or that the transaction constituted waste.

The Supreme Court's approval of the Chancery Court's reasoning in *Volcano* on this point confirms that a plaintiff's ability to challenge a transaction post-closing is limited. As the Delaware courts have consistently noted, in order to prove a waste claim, a plaintiff would need to show that the transaction cannot be attributed to any rational business purpose. Given the difficulty of making such a showing, a waste claim presumably has little real-world relevance in the context of a transaction approved by a fully informed stockholder vote. Thus, a plaintiff's only realistic opportunity to proceed with a post-closing breach of fiduciary duty suit may be to attempt to undermine the underlying predicates of *Corwin* by challenging a corporation's disclosure regarding the merger.

Nathaniel J. Stuhmiller is an associate of Richards, Layton & Finger where he focuses his practice on transactional matters involving Delaware corporations, including mergers and acquisitions, corporate governance and corporate finance.

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