Skadden

Q&A With Delaware Litigation Partner Ed Micheletti

What is the most significant recent development in Delaware, from a litigation standpoint?

The most significant recent development impacting deal litigation in Delaware is the continuing evolution of the *Corwin* doctrine, which was set forth by the Delaware Supreme Court in 2015. The *Corwin* doctrine stands for the proposition that when a merger not subject to entire fairness review (because of a conflicted controlling stockholder) has been approved by a fully informed, uncoerced majority of the disinterested stockholders, the business judgment rule applies, with the only remaining claim being one for waste (which is highly difficult to prove). Since *Corwin* was issued, the Court of Chancery has consistently applied the *Corwin* doctrine to dismiss numerous post-closing deal litigations. Certain decisions also have ruled that when the *Corwin* doctrine applies, the business judgment rule is not "rebuttable" — which, from a practical standpoint and given how hard waste is to prove, essentially ends the case. The Supreme Court also has had occasion to affirm at least three such decisions (including one that applied the concept of the irrebuttable business judgment rule) dismissing actions under the *Corwin* doctrine — *Singh*, *Volcano* and *Comstock* — further entrenching *Corwin* as a solid principle of Delaware law. To my knowledge, there has been only one matter (*Saba Software*) where defendants attempted to dismiss at the pleading phase a post-merger deal litigation under *Corwin*, and were unsuccessful. These issues are addressed in detail in this edition of *Insights: The Delaware Edition*.

What is the latest word on multiforum deal litigation?

As we have explained in prior issues, after *Trulia*, we began seeing a reduction in the historic multiforum litigation dynamic involving breach of fiduciary duty claims relating to a transaction and a quick disclosure settlement before a stockholder vote. Many companies have also adopted forum-selection charter or bylaw provisions picking Delaware as an exclusive forum, which also has helped reduce the number of multiforum litigations.

Does that mean multiforum deal litigation is a thing of the past?

No. We are still seeing multiforum stockholder litigation when deals are announced, though the focus of such cases has typically only been on disclosure claims (as opposed to broader breach of fiduciary duty claims challenging a board's process or the price of the merger). And when faced with a Delaware forum-selection provision, some stockholders have been pursuing these narrower disclosure cases in federal court outside of Delaware under the securities laws. Many of these cases are being resolved on a "mootness" basis, which was acknowledged by the *Trulia* decision as an acceptable manner in which to resolve such claims. In essence, the company issues supplemental disclosures as part of its proxy materials that address plaintiffs' claims, the case is dismissed by the named plaintiff stockholder, and the parties then either negotiate or have the court resolve a mootness fee payment to plaintiffs' counsel. The mootness fee ranges in Delaware post-*Trulia* have trended much lower than the settlement-based fees of the past.

Are there any new trends or issues in the Delaware Court of Chancery to keep an eye on?

We are seeing Section 220 of the Delaware General Corporation Law (DGCL) being used more frequently by stockholders. Section 220 permits stockholders that properly follow the statutory requirements and demonstrate a proper purpose to inspect the corporation's books and records. Stockholders will often use Section 220 in an attempt to inspect books and records for the purpose of "investigating mismanagement," as a precursor to filing a derivative litigation. We discuss some recent examples of this latest trend, and how the court

has addressed such Section 220 demands in litigation, in this edition. Also, the Court of Chancery has had several opportunities now to apply Sections 204 and 205 of the DGCL. These statutes provide mechanisms for a corporation, under certain circumstances, to either unilaterally ratify defective corporate acts (under Section 204) or seek judicial relief to validate a corporate act (under Section 205). Several recent Court of Chancery cases have begun to define how these innovative and still relatively new statutory provisions operate and when they apply.

What about new trends or issues in the Delaware Supreme Court?

It's always interesting and important when the Delaware Supreme Court weighs in on a corporate law issue. There have been two recent Delaware Supreme Court decisions — *Sanchez* and *Sandys* — that have examined the question of director independence. Both of these cases emphasized a close examination of the facts and circumstances, and reached the conclusion that certain directors were not considered independent for demand futility purposes. We examine these cases, as well as a number of Court of Chancery cases that address similar issues with different results, in this edition.

Are you waiting on any big decisions that we should keep an eye out for?

Yes. Over the past few years, we have seen an uptick in appraisal actions under Section 262 of the DGCL, which resulted in several interesting rulings. One of the themes that has developed is the question of whether "merger price" is the best evidence of fair value for purposes of deciding the appraisal award. In 2015, the Court of Chancery issued a number of decisions indicating that the fair value of the shares being appraised was best determined by the per-share merger price (less any merger-related synergies). In 2016, a number of decisions reached the opposite conclusion. There are two appraisal cases currently on appeal — *Dell* and *DFC Global* — that present opportunities for the Delaware Supreme Court to weigh in directly about these recent developments. Practitioners are awaiting these decisions, which have the potential to provide significant guidance to the increasingly important area of appraisal litigation.