Insights: The Delaware Edition

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This issue focuses on important, developing areas of Delaware corporation law and deal litigation, including a recalibration in how M&A litigation is pursued, developments in Delaware appraisal law and the preclusive effect of demand futility decisions rendered by one court on derivative litigation pending in another forum.

M&A Litigation Developments: Where Do We Go From Here?

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> See page 4 for key takeaways

Over the last few years, three notable Delaware cases — *C&J Energy*, *Corwin* and *Trulia* — have paved the way for a dramatic shift in the deal litigation landscape. In *C&J Energy Services, Inc. v. City of Miami General Employees' and Sanitation Employees' Retirement Trust* (2014), the Delaware Supreme Court indicated (and the Court of Chancery has generally construed the decision to hold) that an injunction should not be issued where there is no alternative bidder and stockholders therefore risk losing the current deal if enjoined. In *Corwin v. KKR Financial Holdings LLC* (2015), the Delaware Supreme Court clarified that, absent a conflicted controller, a fully informed vote of disinterested, uncoerced stockholders will extinguish breach of fiduciary duty claims, leaving only claims for waste. And finally, in *In re Trulia, Inc. Stockholder Litigation* (2016), the Court of Chancery decided that it will no longer approve disclosure-based settlements unless the disclosures are "plainly material," the release is narrowly tailored to the claims brought in the litigation and the claims are sufficiently investigated.

In practical terms, *C&J Energy* and *Trulia* dramatically reduced the injunction practice that had dominated the M&A litigation process in Delaware for nearly three decades. Faced with no meaningful prospect of an injunction in most cases in the wake of *C&J Energy*, and with increased risk in obtaining a successful disclosure (or other therapeutic) settlement as an alternative to an injunction hearing after *Trulia*, plaintiffs have largely stopped pursuing those avenues. As a result, they no longer find themselves with potential access to a preclosing documentary record to draw from when contemplating a money damages action. At nearly the same time, *Corwin* reduced the chances that post-closing breach of fiduciary duty claims for damages would survive past the pleadings stage, a prospect that was exacerbated by the lack of preclosing discovery that used to come from the diminished preclosing injunction and settlement practices. Overall, these three cases (and resulting developments) have resulted in a marked decrease in M&A-related filings in the Delaware Court of Chancery and, in the case of disclosure claims, a marked increase in such claims in federal court. Also, perhaps taking a cue from *Trulia*, mootness resolutions have become the prevalent way to resolve disclosure-based claims in federal court (and to a far lesser extent, in state court), essentially taking the place of disclosure-based settlements.

The current state of play for M&A litigation — which consists largely of quickly mooted federal securities cases and, to a lesser extent, cases pursued post-closing under Delaware law as damages actions — is a departure from the last several decades. Previously, most judicial

guidance to the M&A bar was issued preclosing by the Court of Chancery in connection with a preliminary record, and damages actions were far less frequent and often pursued — if at all — in other jurisdictions. The recent developments and changes have caused both the plaintiffs and defendants that practice M&A litigation to recalibrate their thinking and develop new tactics.

Plaintiffs Recalibrate by Bringing Damages Actions in Federal Court

After *C&J Energy*, *Corwin* and *Trulia*, many plaintiff stockholders began pursuing deal litigation involving Delaware companies under federal law rather than Delaware law, repackaging claims once brought as state claims for breach of fiduciary duty as Sections 14(a) and 20(a) claims under the federal securities laws. The shift away from state law fiduciary duty claims in favor of federal disclosure claims has resulted in large numbers of "mootness" scenarios, in which companies issue supplemental disclosures to "moot" the disclosure claims, and plaintiffs' attorneys then seek fees based on the supposed disclosure "benefit." The economic and financial consulting firm Cornerstone Research's "Securities Class Action Filings 2017 Year in Review" reported increased dismissal rates in securities class action filings, which likely are symptomatic of the mootness phenomenon.

However, in some recent circumstances, plaintiffs have waited to bring their federal securities disclosure claims until immediately prior to or after a stockholder vote so that the claims cannot be mooted. For example, in *Schwartz v. Silver Bay Realty Trust Corp.*, filed in the U.S. District Court for the District of Minnesota, a stockholder plaintiff filed disclosure claims under Section 14(a) of the Securities Exchange Act two days after the transaction closed. Similarly, in *In re First Potomac Realty Trust*, filed in the U.S. District Court for the District of Maryland, a stockholder plaintiff filed Section 14(a) disclosure claims less than 24 hours before the stockholder vote. In each case, the plaintiffs positioned these claims in order to pursue money damages rather than injunctive relief (and presumably a mootness resolution). The *First Potomac* case was voluntarily dismissed in April 2018, and a motion to dismiss is pending in *Silver Bay*. Whether this tactic gains further traction remains to be seen.

In Delaware, Plaintiffs Pursue Statutory Actions in Aid of Discovery

After *C&J Energy*, *Corwin* and *Trulia*, many plaintiffs have complained that they no longer have access to documents or deposition testimony they once received in expedited discovery as part of an injunction application, and that, as a result, it is often difficult to surmount a *Corwin* defense. Therefore, stockholder plaintiffs have gotten creative in efforts to obtain discovery to attack, post-closing, the adequacy of the disclosures issued in connection with a transaction.

In September 2016, stockholder plaintiffs advocated for a new rule at the pleadings stage pursuant to which defendants, when raising a *Corwin* defense, would be required to produce documents to "provide the basis" for the information disclosed in the proxy; according to the plaintiffs, such a rule was necessary to enable them to meaningfully challenge a *Corwin* defense. The Court of Chancery rejected that argument, holding that, notwithstanding any impact *Trulia* has had on stockholder plaintiffs' ability to obtain discovery, plaintiffs continue to bear the initial burden to plead facts, without discovery, making it reasonably conceivable that a disclosure violation occurred and the standard in *Corwin* should not apply.

In reaction, the plaintiffs again switched gears, with some recent success. One increasingly common approach has been to use Section 220 of the Delaware General Corporation Law to obtain company books and records to aid in drafting a complaint that may withstand a *Corwin* defense.

This practice was recently condoned by the Court of Chancery in *Lavin v. West Co.* In that books-and-records action, the company's primary defense was that the merger had been approved by a disinterested, fully informed stockholder vote, and *Corwin* therefore would limit any post-closing challenge to waste claims, which were not a stated basis for the Section 220 inspection. The Court of Chancery rejected this argument, ruling that a *Corwin* defense was premature in a books-and-records action and would "invite defendants improperly to draw the court into adjudicating merits defenses to potential underlying claims." More recently, in *In re Tesla Motors, Inc. Stockholder*

Litigation, plaintiff stockholders used the books and records they obtained through Section 220 to successfully plead that Elon Musk, a 22.1 percent stockholder and director of Tesla, exercised control over the company such that a *Corwin* defense was unavailable to the defendants. Notably, the Delaware Supreme Court has made clear that the *Corwin* doctrine is not new law but rather confirmation of "a long-standing body of [Delaware] case law" that stretches back for decades. However, the practical result of the recent Section 220 decisions that permit plaintiffs to obtain merger-related documents pursuant to the lowest possible burden under Delaware law to withstand a *Corwin* defense is that they depart from equally long-standing precedent that required plaintiffs to first state a claim before obtaining discovery relating to a deal.

Stockholders have also sought documents through appraisal proceedings, which have spiked in the past few years. Petitioners that seek appraisal obtain access to liberal discovery, which, in light of recent case law suggesting that deal price is often the best evidence of appraisal value, includes discovery regarding the conduct of fiduciaries during the deal process. As a result, in some instances, appraisal actions have become less a valuation exercise and more a defense of the deal process itself. Petitioners can use such discovery not just in support of appraisal claims but potentially also to amend their pleadings to add breach of fiduciary duty claims on a classwide basis. Thus, some members of the plaintiffs' bar have taken to characterize appraisal actions as the "new Section 220," because it provides petitioners with broad access to discovery that can be used to investigate potential fiduciary wrongdoing. This approach has been somewhat tempered, however, by the Delaware Supreme Court's recent decisions regarding the appraisals of DFC Global and Dell. Those cases may disincentivize plaintiffs from bringing appraisal actions at all in situations involving arm's length transactions with good process, given that both *DFC Global* and *Dell* came out strongly in support of relying on deal price as the best evidence of appraisal value in such circumstances.

Plaintiffs Again Pursue Injunctions

Finally, although injunction applications in Delaware have become less frequent in the recent past, they still remain a possibility. For example, in the Court of Chancery's March 2018, decision in *Brigade Leveraged Capital Structures Fund Ltd. v. Kindred Healthcare, Inc.*, Vice Chancellor Sam Glasscock III denied a stockholder plaintiff's request for an injunction until additional disclosures were issued but agreed with the plaintiffs that the stockholders needed additional time to consider certain supplemental disclosures the company had made regarding the conflict of one director and how that conflict was handled. The court therefore provided the company the option to either postpone the stockholder vote by five days or to hold the vote open for an additional five days to afford stockholders additional time to consider whether to pursue appraisal.

In addition, in April 2018, New York Supreme Court Justice Barry Ostrager issued an order preliminarily enjoining Fujifilm's acquisition of Xerox Corp. in *In re Xerox Corp. Consolidated Shareholder Litigation*. On a preliminary record, the court found that the transaction disproportionately favored Fujifilm, which had presented Xerox's CEO with the opportunity to continue in his role after the merger. The court concluded that the two were aligned in consummating a deal entirely in Fujifilm's favor and so that the CEO could retain his position. In addition, relying on Delaware law, the court issued a mandatory injunction requiring Xerox to waive its advance notice bylaws so that Xerox shareholders could nominate a competing slate of directors at the company's upcoming annual meeting.

Notwithstanding the significant decrease in injunction proceedings in recent years, it is possible that others will follow the *Kindred Healthcare* and *Xerox* plaintiffs and take a chance on pursuing injunctions once again. However, at least in Delaware, this will be tempered by the application of *C&J Energy* in circumstances where no alternative bidder has emerged.

Key Takeaways

As litigants continue to navigate cases like *C&J Energy*, *Corwin* and *Trulia*, the deal litigation landscape continues to develop and evolve.

- In federal court, some plaintiffs have brought post-closing Section 14(a) and Section 20(a) actions for money damages in an effort to put greater litigation pressure on companies, thereby potentially extracting a higher settlement value if their claims survive a motion to dismiss.
- In Delaware, despite the decreased availability of discovery, stockholder plaintiffs continue to see new ways to attack the adequacy of the disclosures issued in connection with a transaction as well as the applicability of defenses like *Corwin*. The increase in books-and-records requests, and the resulting case law that recently has developed in cases such as *Lavin*, show that a *Corwin* defense may not necessarily be a cure-all for merger challenges and in any event will not foreclose stockholder plaintiffs from obtaining access to discovery.
- Although the opportunity to seek broad discovery in appraisal actions has, theoretically, always been available to plaintiffs, the recent uptick in appraisal actions, along with the rise of the defense that deal price is the best indication of appraisal value, has prompted the plaintiffs' bar to use appraisal actions as a vehicle for accessing discovery for the purpose of investigating fiduciary duty based claims. Following the Delaware Supreme Court's decisions in *DFC Global* and *Dell*, which may have the effect of reducing the number of appraisal proceedings, it is unclear whether plaintiffs will recalibrate further and seek discovery in additional ways.
- These developments underscore the importance for companies to carefully assess appropriate disclosures issued in connection with any transaction, even if it appears that serious challenges will not be pursued preclosing, to equip them with their best defenses (including a strong *Corwin*-based defense) in any potential post-closing money damages actions.
- Finally, although it may seem as though injunctions are largely a thing of the past, they are not entirely extinct, and it remains to be seen whether a subset of plaintiffs will step in to take advantage of the clear lack of competition for injunctions, either in Delaware or, as in *Xerox*, in state courts outside of Delaware.

Dell and Fair Value in Statutory Appraisal Actions

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The development of Delaware appraisal law has continued with the Delaware Supreme Court's highly anticipated December 2017 appraisal opinion in *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd*. In *Dell*, the court reiterated many of its August 2017 holdings in *DFC Global Corp. v. Muirfield Value Partners, L.P.* and provided the strongest basis yet for acknowledging that deal price is a reliable indicator of fair value in most cases involving an unhindered, informed and competitive sales process. (See our November 21, 2017, article "Delaware Courts Continue to Define Appropriate Valuation Methodologies for Statutory Appraisal.") Nonetheless, *Dell* reiterates that the Delaware Court of Chancery is statutorily required to consider "all relevant factors" without applying any presumption that favors any one indicator of fair value.

Post-*Dell*, the Court of Chancery has issued two appraisal decisions that both departed from the deal price and returned fair values below the deal price. In the February 15, 2018, case *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, the court determined that the most reliable indicator of fair value was the unaffected market price. The court attributed full weight to this indicator and found that Aruba's fair value at the time it was acquired was equivalent to its 30-day average unaffected market price. This price represented a more than 30 percent discount from the deal price. In *In re Appraisal of AOL Inc.*, decided on February 23, 2018, the court relied on a discounted cash flow (DCF) valuation to fashion its appraisal award but still found that the fair value was below the deal price, which it used as a check on its DCF valuation. The Court of Chancery used a DCF valuation because it had concerns about the sales process and determined that the deal price was not a reliable indicator of fair value. Coining the term "*Dell* compliant," the court determined that the sales process employed by AOL did not meet this new standard, and the court thus could not ascribe fair value solely to the deal price.

Dell and the Continued Importance of Deal Price

In *Dell*, the Delaware Supreme Court rejected as an abuse of discretion the Court of Chancery's findings that deal price should be accorded no weight and that the fair value of the shares of Dell was more than 28 percent above the deal price. In reversing and remanding, the Supreme Court concluded that "the reasoning behind the trial court's decision to give no weight to any market-based measure of fair value runs counter to its own factual findings." The Supreme Court went on to state that the three central premises the Court of Chancery relied on in assigning no weight to the deal price were flawed.

First, the Supreme Court concluded that there was no valid basis to find that there existed a valuation gap between Dell's market value and the company's fundamental value. Notably, the Supreme Court stated that "the Court of Chancery's analysis ignored the efficient market hypothesis long endorsed by this Court." It explained, "[a] market is more likely efficient, or semi-strong efficient, if it has many stockholders; no controlling stockholder; 'highly active trading'; and if information about the company is widely available and easily disseminated to the market." The Supreme Court noted that in this case, the record did not indicate "that Dell lacked a vast and diffuse base of public

stockholders, that information about the Company was sparse or restricted, that there was not an active trading market for Dell's shares, or that Dell had a controlling stockholder — or that the market for its stock lacked any of the hallmarks of an efficient market."

Second, the Supreme Court concluded — consistent with its decision in *DFC* — that the Court of Chancery erred in failing to give weight to the deal price based on the identity of the buyer as a financial sponsor. In the words of the Supreme Court, "[g]iven the objective indicia of the deal price's reliability and our rejection of the notion of a private equity carve out, to the extent that the Court of Chancery chose to disregard Dell's deal price based on the presence of only private equity bidders, its reasoning is not grounded in accepted financial principles."

Third, the Supreme Court held that certain features of a management buyout, while theoretically factors that could undermine the deal price, were not present in this case. Specifically, the record did not support that any structural issues inhibited the effectiveness of the go-shop, that a "winner's curse" was present in this case or that the value of Dell's CEO, Michael Dell, imposed an impediment to rival bidders.

The Supreme Court also concluded that the market-based indicators of Dell's value, its stock price and the deal price, had substantial probative value. It noted that although the Court of Chancery stated that Dell had not established that the deal price was the most reliable evidence of the company's fair value, "[t]here is no requirement that a company prove that the sale process is the *most reliable* evidence of its going concern value in order for the resulting deal price to be granted any weight." The Supreme Court highlighted that it was "not saying that the market is always the best indicator of value, or that it should always be granted some weight." However, "when the evidence of market efficiency, fair play, low barriers to entry, outreach to all logical buyers, and the chance for any topping bidder to have the support of Mr. Dell's own votes is so compelling, then failure to give the resulting price heavy weight because the trial judge believes there was mispricing missed by all the Dell stockholders, analysts, and potential buyers abuses even the wide discretion afforded the Court of Chancery in these difficult cases."

After considering several tax issues, the Supreme Court summed up its discussion of fair value by stating that "[d]espite the sound economic and policy reasons supporting the use of the deal price as the fair value award on remand, we will not give in to the temptation to dictate that result." However, the Supreme Court noted that it was giving the Court of Chancery "the discretion on remand to enter judgment at the deal price if [it] so chooses, with no further proceedings."

Aruba and Unaffected Market Price

The Court of Chancery's recent decision in *Aruba* found that the most reliable indicator of fair value was the 30-day average unaffected trading price of Aruba's stock on the Nasdaq composite — $17.13, below the deal price of $24.67. The court accorded full weight to this indicator and no weight to the deal-price-less-synergies estimate that the court concluded should be $18.20. The Court of Chancery's reasoning relied heavily on the Supreme Court's opinions in *Dell* and *DFC*, both of which it quoted extensively.

The Court of Chancery in *Aruba* held that under *Dell* and *DFC*, "when the subject company's shares are 'widely traded on a public market based upon a rich information base,' then the fair value of a proportionate interest in the company as a going concern would 'likely be best reflected by the prices at which [the] shares were trading as of the merger.'" Put differently, "when the market for a company's shares has the requisite attributes [associated with market efficiency], the stock price is 'likely a possible proxy for fair value.'" Thus, the Court of Chancery reasoned that "[u]nder *Dell* and *DFC*, the critical question is whether the market for the subject company's shares has attributes associated with market efficiency." Because Aruba's stock price exhibited the same requisite attributes of market efficiency as those found sufficient in *Dell* and *DFC*, the court held that "Aruba's market price provides reliable evidence of the going concern value of the firm."

Analyzing the reliability of deal price, the Court of Chancery interpreted *Dell* and *DFC* to hold that a sales process is not "sufficiently bad to warrant discounting the deal price" so long as "the deal in question was an arm's-length transaction," and that a court should not inquire "into whether a different transaction process might have achieved a superior result." In addition, "the key inquiry is whether the dissenters got fair value and were not exploited." Although under *Dell* and *DFC*, the deal price in *Aruba* "has substantial probative value," the court found that "[p]articularly given the inclusion of synergies, there is good reason to think that the deal price exceeded fair value and, if anything, should establish a ceiling for fair value." The court calculated a deal-price-less-synergies value of $18.20.

While finding that the unaffected market price and the deal-price-less-synergies value were the two probative indications of value, the Court of Chancery framed the more difficult question of "how to choose between, weigh, or otherwise exercise my discretion non-abusively when evaluating the two probative valuation indications." The court identified issues in each indication, but it found that the deal-price-less-synergies valuation was more unreliable because, among other uncertainties, it would require excluding both synergies and the value of a reduction in agency costs, which both constituted "value expected from the merger" that must be excluded from fair value. In the Court of Chancery's view, any attempt to estimate an appropriate reduction of deal price would require the same sort of subjective valuation that the Supreme Court had warned against in admonishing the use of DCF analyses.

The Court of Chancery reiterated the Supreme Court's precaution that when reliable market evidence is available, "the Court of Chancery should be chary about imposing the hazards that always come when a law-trained judge is forced to make a point estimate of fair value based on widely divergent partisan expert testimony." The Court of Chancery, thus, held that the Supreme Court's "expressed preference in *Dell* and *DFC* for market indicators over discounted cash flow valuations counsels in favor of preferring market indicators over the output of a similarly judgment-laden exercise of backing out synergies." The Court of Chancery accorded full weight to the unaffected market price of $17.13, which it found "provides the more straightforward and reliable method for estimating the value of the entity as a going concern," but noted that its approach "does not elevate 'market value' to the governing standard under the appraisal statute."

Vice Chancellor J. Travis Laster, the author of the *Aruba* decision, has expressed elsewhere that the decision in *Aruba* was not a significant departure from Delaware precedent, especially not from the holdings in *Dell* and *DFC* endorsing the efficient market hypothesis. In a March 7, 2018, order denying a motion to stay proceedings in *In re Appraisal of Columbia Pipeline Group*, the Court of Chancery denied a request to extend the discovery deadline until the resolution of an appeal in *Aruba*, endorsing the respondent's arguments that the opinion in *Aruba* "did not independently break new ground" and noting that "Delaware courts have long considered a company's unaffected stock market price as evidence of fair value in an appraisal proceeding." The Court of Chancery characterized its finding:

> The *Aruba* decision held that, on the facts presented in that case, the company's unaffected market price provided the most reliable evidence of fair value, particularly when the other reliable valuation indicator consisted of a deal price that had to be adjusted to eliminate synergies and other elements of value arising from the accomplishment or expectation of the merger. The *Aruba* decision did not introduce a new valuation methodology or analytical approach. It simply gave exclusive weight to a type of valuation evidence that Delaware courts had long considered and which the Delaware Supreme Court had emphasized in *DFC* and *Dell*.

In a lengthy decision issued on May 21, 2018, the court considered and rejected eight grounds for reargument by petitioners in *Aruba*. Of note, the court rejected an objection to the use of the 30-day average unaffected trading price (as opposed to another time period) as well as a claim that there was information about

the value of the company that had not been incorporated into the market price because those represented new arguments by petitioners that were not cognizable under Court of Chancery Rule 59(f). In addressing petitioners' challenge to the use of market price to determine fair value, the court found that the Delaware Supreme Court did adopt a "semi-strong form of the efficient capital markets hypothesis" in *Dell* and *DFC*, and while that does not require the Court of Chancery to give weight to the unaffected market price, those cases "endorsed the reliability of the unaffected market price as an indicator of value, at least for a widely traded company, without a controlling stockholder, where the market for its shares has attributes consistent with the assumptions underlying the efficient capital markets hypothesis." The court observed that, as a result, "trial courts now can (and often should) place heavier reliance on the unaffected market price."

AOL and Discounted Cash Flow Valuation

While much of the attention paid to Delaware appraisal law has centered on the appropriate weight to give to deal price, the Court of Chancery in *AOL* showed the continued viability of DCF analyses when the court has concerns about the sales process. Notably, following *Dell* and *DFC*, the decision in *AOL* demonstrates that cases employing DCF analyses may not result in a fair value determination above the deal price.

In its decision in *AOL*, the Court of Chancery determined that the fair value of AOL's stock was below the deal price of $50 per share. The court began its opinion by acknowledging the Delaware Supreme Court's recent decisions in *Dell* and *DFC*. Vice Chancellor Sam Glasscock III then stated that those cases, "in distilled form," hold that "where a petitioner is entitled to a determination of the fair value of her stock, the trial judge must consider all relevant factors, and that no presumption in favor of transaction price obtains." But "[w]here, however, transaction price represents an unhindered, informed, and competitive market valuation, the trial judge must give particular and serious consideration to transaction price as evidence of fair value." Furthermore, "[w]here information necessary for participants in the market to make a bid is widely disseminated, and where the terms of the transaction are not structurally prohibitive or unduly limiting to such market participation, the trial court ... must take into consideration the transaction price as set by the market." Vice Chancellor Glasscock referred to transactions compliant with such conditions as "*Dell* compliant" and noted that in such transactions, a competitive market value is "at least first among equals" in determining fair value.

On the facts of the case, the Court of Chancery stated that it was a "close question" as to whether the transaction for AOL was "*Dell* compliant." While finding that many of the indicia of a competitive market process were present, the court determined that certain statements made by AOL's CEO, the lead negotiator of the deal, signaled to the market that there was no other deal to be made and that no topping offers would therefore be successful. The court held that the "unusually preclusive" public statements of the CEO — specifically that he was "committed to doing the deal" and that he had given his "word" to the acquirer that the deal would happen — rendered the deal price unreliable as the sole indicator of fair value when combined with other attributes of the transaction. The court went on to say that because it could not rely on deal price as the sole determinant of fair value, it was unable to find a principled way to assign the deal price any weight in its fair value analysis. Therefore, the court assigned full weight to its own DCF valuation and "relegate[d] transaction price to a role as a check on that DCF valuation. ..." The result of the DCF analysis was $48.70 per share, $1.30 per share below the deal price. Although the deal was not "*Dell* compliant," the court noted that the deal price served as a "check" and did not deviate significantly from the DCF valuation. The court explained that this difference in value could possibly be attributed to synergies that were included in the deal price but that are not properly included in fair value.

Affirmance of *Sprint*

The *AOL* decision is not the only recent appraisal decision showing the continued viability of DCF analyses and demonstrating that cases employing such analyses may result in a fair value determination below the deal price. On April 23, 2018, the Delaware Supreme Court summarily affirmed the Court of Chancery's decision in *ACP Master, Ltd., et al. v. Sprint Corp., et al.* In *Sprint*, the Court of Chancery had determined that the fair value for Clearwire on the date of the merger was $2.13 per share based exclusively on a DCF analysis. Neither party argued for the deal price, and the court explicitly did not consider deal price while finding that the transaction generated considerable synergies, estimated at $1.95 to $2.60 per share. The $2.13 per share fair value determination was less than half the merger price of $5 per share.

Implications

Directors and officers of corporations considering a transaction that gives rise to appraisal rights should evaluate the following implications of these recent decisions:

- Delaware courts have increasingly used the deal price minus synergies for a determination of fair value when the sales process and the market for the company's stock exhibit the characteristics identified by the Supreme Court in *Dell* and *DFC*.
  - The *Dell* decision solidifies the benefit in an appraisal proceeding of a robust and competitive sales process, because if the market for the company and its stock was efficient, the merger price is often found to be the most reliable indicator of fair value.
  - While the Supreme Court has now repeatedly refused to hold that there is a judicial presumption in favor of deal price, the *Dell* and *DFC* rulings underscore that deal price is often the best indication of appraisal value, and the Court of Chancery has subsequently recognized in that same vein that a competitive market price is "at least first among equals."
- The Court of Chancery confirmed that a determination that the deal price is not a reliable indicator of fair value does not necessarily result in a fair value determination above deal price.
  - While justifiable concern may persist that the court might find the process inadequate and resort to a DCF valuation, the *AOL* and *Sprint* decisions show that even in such scenarios, the Court of Chancery may still find fair value below the deal price. The Court of Chancery in both *AOL* and *Sprint* attributed some of the difference between deal price and its fair value determination to synergies in the deal, demonstrating that deal synergies (which should be excluded from appraisal value) remain an important consideration.
- The *Dell* decision confirmed that the Delaware Supreme Court has rejected a "carve-out" for private equity buyers. The Supreme Court's reiteration of its holding in *DFC* — that a private equity carve-out is not grounded in economic literature or generally accepted financial principles — means that petitioners will be unable to argue that a deal price is not a reliable indicator of fair value simply based on the buyer's identity as a private equity buyer.
- Recent Delaware opinions finding fair value below deal price may deter some stockholders from seeking appraisal in transactions.

Delaware Appraisal Actions: When Does It Make Sense to Prepay?

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In response to the growing practice of "appraisal arbitrage," in 2016 Delaware's General Assembly amended the state's appraisal statute, Section 262 of the Delaware General Corporation Law. The amendment to Section 262(h) granted corporations the option to "prepay" appraisal claimants an amount of the corporation's choosing in order to stop the accrual of interest. While corporations now have the option to pay, should they? Whether, when and how much to prepay is a complex and nuanced judgment that will vary depending on the particular facts and circumstances of a case.

Background

Prior to the amendment, corporations in an appraisal action had no mechanism (absent settlement of the litigation) to stop the accrual of interest. A corporation could only prepay if the appraisal claimant or claimants agreed. In *Huff Fund Investment Partnership v. CKx, Inc.*, the Delaware Court of Chancery noted that "despite the potential utility of such an approach," forcing an appraisal petitioner to accept prepayment from a corporation "would be incompatible with the General Assembly's intent."

Two years after that 2014 decision, the General Assembly changed the law. Corporations now have the option to prepay any amount at any time to eligible appraisal claimants.

Considerations When Deciding Whether to Prepay

Just because corporations are now allowed to unilaterally prepay an amount to appraisal claimants does not mean that they should. Each appraisal litigation, and the facts and circumstances confronting the respondent corporation (or its successor in interest), is unique. When determining whether to prepay, it is important to consider the following:

1. Prepaying Will Stop the Accrual of Interest and Eliminate Interest Uncertainty

As discussed above, prepaying cuts off an appraisal claimant's ability to accrue interest on the amount prepaid from the date the payment is made. Under Delaware law, petitioners are awarded the Delaware legal rate of interest, which is 5 percent over the Federal Reserve discount rate and generally compounded quarterly. Because appraisal actions can, on average, take two to three years to litigate through trial, the amount of prejudgment interest can end up being significant. As an example, where adjudicated fair value of the corporation implies that the appraisal claimants' shares are worth $25 million, more than $5,000 a day in interest will have accrued on that award. Over the course of two years, the total prejudgment interest on the $25 million would be nearly $3.7 million.

This example also highlights two important (and not immediately apparent) risks in appraisal litigation. First, one cannot know with certainty the "principal" on which the interest rate will accrue until the end of trial. Because of the length of time necessary to litigate appraisal cases, the total amount of interest owed can vary significantly based upon even small differences in the fair value determination. Second, the Delaware legal rate floats with the Federal Reserve

discount rate, so the statutory rate of interest can change throughout the course of the litigation. Moreover, the Federal Reserve has hiked interest rates four times over the past year and has suggested that additional increases may follow in 2018. So, while interest generally accrues daily at the prevailing rate (and thus corporations are not paying a higher rate for interest accrued prior to an interest rate hike), it is possible that the interest rate at the beginning of the litigation may not be the rate by the time the action concludes. Of course, the principle applies to both the risk of an interest rate hike as well as the potential for a drop in rates, and corporations may wish to monitor the statements coming from the government to assess their rate exposure.

2. What Is the Corporation's Cost of Capital and Natural Cash Flow Cycle?

When appraisal claimants perfect their appraisal rights, they are making a decision to forgo the transaction consideration in favor of the Court of Chancery's determination of fair value. Once the transaction closes, they are no longer stockholders of the target corporation. Instead, they become unsecured creditors.[1] In theory, Delaware law compensates appraisal claimants for the risk incurred through the determination of the final appraisal decision by awarding prejudgment interest at the legal rate.

In addition, there is no requirement that the corporation keep escrowed for the duration of litigation the portion of the transaction consideration allocated to appraisal claimants. Nothing in the statute forbids a corporation from using that capital while the litigation is proceeding. Thus, corporations face context-specific considerations in determining whether and when to prepay.

Among other considerations, when determining whether to prepay some amount in an appraisal litigation, a corporation may wish to consider how its cost of capital for unsecured debt compares to the Delaware legal rate of interest. If the corporation's cost of capital is higher, it may wish to reclaim the undistributed merger proceeds from the transfer agent and redeploy them elsewhere within the company. If it is lower, that may factor in favor of prepaying.[2]

Perhaps just as important is determining when to make a prepayment. As noted above, Section 262(h) grants corporations flexibility in determining both the specific timing and amount of any prepayment. Companies in the ordinary course of their business can experience times in which they are flush with cash and times in which they are "cash poor." These cycles occur naturally in certain industries. Companies that experience these cycles may be able to time their prepayment to coincide with a period in the cycle in which they can make the prepayment with cash on hand. This saves the company the added cost of having to borrow funds just to make the prepayment.

Absent prepayment, a corporation will be required to satisfy the entire appraisal judgment (plus interest) all at once, and it may have to do so when it is naturally cash poor. The Court of Chancery does not issue opinions to coincide with the natural cash cycles of the respondent company in the litigation. Thus, the timing of the court's decision could force a corporation to borrow to cover the cost of the appraisal judgment. Prepaying allows the company to reduce some of that risk.

3. Prepaying May 'Fund the Litigation' and Reduce Settlement Leverage

Whereas the chief reward for prepaying can be perceived as the elimination of interest accrual, one of the primary concerns for corporations is whether they will be effectively "funding the litigation" for the appraisal claimants. By forgoing the transaction consideration, appraisal claimants are forced to use alternative sources of capital

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[1] *See, e.g., In re Orchard Enters., Inc. Stockholder Litig.* (Del. Ch. Aug. 22, 2014) ("Appraisal claimants forgo the merger consideration, opting through the appraisal election to become unsecured creditors of the respondent corporation for the duration of the appraisal proceeding.").

[2] Corporations may also choose to keep the undistributed capital with the transfer agent for a variety of reasons. By doing so, a company can mitigate the "cash flow" timing risk described in this section.

(or alternative fee arrangements with counsel) to cover the costs of the litigation. Over several years, appraisal litigation can be expensive for both sides. Thus, prepaying can be seen as providing capital the appraisal petitioner can use to prosecute the appraisal case.

Prepaying may also reduce a corporation's settlement leverage. In appraisal actions, the costs incurred early in the case (usually through the conclusion of fact discovery) are very one-sided because the bulk of discovery in nearly all appraisal actions comes from the corporation or third parties that the corporation has agreed to indemnify. One of the few pieces of settlement leverage that corporations possess is that petitioners have voluntarily agreed to forgo the transaction consideration and the appraisal claimant is without that capital for the duration of the litigation.

In addition, some commentators have argued that recent cases from the Delaware Supreme Court and the Court of Chancery have diluted the appeal of "appraisal arbitrage." If true, prepaying any amount may also reduce a corporation's settlement leverage by reducing the amount of money an appraisal claimant has in what it may now view as an undesirable investment. Likewise, prepaying can be seen as reducing settlement leverage by lowering the risk and downside exposure a petitioner would otherwise face during the pendency of a lengthy appraisal litigation.

4. There Is No Statutory 'Refund' Mechanism

Finally, when determining whether and how much to prepay, it is important to note that Section 262(h) does not contain a provision requiring an appraisal claimant to "refund" the difference if the Court of Chancery ultimately determines that fair value is less than what the corporation prepaid. The Court of Chancery has yet to expressly consider whether a target corporation that "overpaid" its prepayment may recoup the difference under other legal theories (for example, unjust enrichment) and what the terms of such recoupment would be, if ordered. For example, would the corporation receive interest on the amount of overpayment?

One way a corporation can mitigate these concerns is by negotiating with appraisal petitioners a "refund" provision as part of a larger stipulation governing the terms of the prepayment. Although Section 262(h) does not require such a stipulation, many petitioners are amenable to it in practice. In cases where a stipulation cannot be reached, the parties may have to raise these issues directly with the Court of Chancery, which results in additional litigation effort and cost.

Corwin Doctrine Ruled Inapplicable in Section 220 Litigation

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Since the Delaware Supreme Court decided *Corwin v. KKR Financial Holdings LLC* more than two years ago, there has been an open question as to whether and to what extent the principles affirmed in that decision apply in the context of a Section 220 demand to inspect books and records. In our November 2017 issue of *Insights: The Delaware Edition*, we discussed *Salberg v. Genworth Financial, Inc.*, a case in which the Delaware Court of Chancery appeared to suggest, but did not explicitly hold, that the *Corwin* doctrine would not prevent a stockholder from obtaining books and records pursuant to Section 220 if the stockholder has stated a proper purpose. In *Lavin v. West Corporation*, the Court of Chancery addressed the question directly and held that it would not consider the *Corwin* doctrine when evaluating whether a stockholder seeking to obtain corporate documents to investigate possible wrongdoing in connection with a merger has met the proper purpose requirement of Section 220.

Takeaways

The *Lavin* opinion has important ramifications. While the *Corwin* doctrine provides an important defense in post-closing merger litigation, the Delaware courts continue to explore its limits. *Lavin* held that *Corwin* does not, as a matter of law, prevent a stockholder who can otherwise articulate a credible basis to investigate corporate wrongdoing from obtaining books and records to support a post-closing damages case. In effect, the Court of Chancery bypassed long-standing authority that declined to permit a plaintiff pursuing post-closing breach of fiduciary duty claims for money damages from obtaining discovery until their pleading withstood a motion to dismiss. Instead, the Court of Chancery favored the body of case law under Section 220 that states that plaintiffs in the derivative context should use "the tools at hand" before filing a complaint. The Court of Chancery recognized that "our courts primarily direct that encouragement (or admonition) to stockholders who intend to file derivative complaints where they will allege demand futility," but it explained that "the direction is equally applicable to stockholders who intend to file class action suits challenging transactions approved by a shareholder vote."

Thus, the court endorsed Section 220 as a vehicle available to stockholders pursuing direct breach of fiduciary duty claims for money damages, to obtain documents in order to bolster their eventual complaint.

Background

In *Corwin*, the Delaware Supreme Court clarified that the business judgment rule standard of review applies to a post-closing challenge to a merger that is not subject to entire fairness review if the merger was approved by a fully informed, uncoerced majority of disinterested stockholders. In July 2017,

the Court of Chancery issued its opinion in *Salberg*, which declined in a Section 220 proceeding to apply the *Corwin* doctrine in an attempt by defendants to avoid having the court determine whether plaintiffs had demonstrated good cause to obtain privileged documents under the so-called *Garner* doctrine. As the court found the plaintiffs failed to demonstrate good cause to obtain privilege documents for reasons unrelated to *Corwin*, *Salberg* did not directly address whether a Delaware corporation could rely on the *Corwin* doctrine to defeat a Section 220 demand. The case, however, led many to predict that the Court of Chancery would decline to apply *Corwin* when evaluating whether a stockholder could state a proper purpose when attempting to obtain books and records to investigate potential wrongdoing in connection with a completed merger.

In *Lavin*, the Court of Chancery dispelled any lingering questions regarding the application of *Corwin* in the Section 220 context. The case arose out of a merger between West Corp. and affiliates of Apollo Global Management, wherein Apollo sought to acquire West's outstanding stock for $23.50 per share in cash. Before the West stockholder vote, several lawsuits were filed in federal court alleging that the proxy disclosures that West issued in connection with the merger violated the federal securities laws. Ultimately, West mooted the cases by issuing additional disclosures in a supplemental proxy statement. More than 85 percent of the company's shares thereafter voted in favor of the merger. Shortly before the stockholder vote, West stockholder Lavin made a Section 220 demand to inspect West's books and records to investigate whether "wrongdoing and mismanagement had taken place" in connection with the merger, and also to investigate the "independence and disinterestedness" of the West board. West rejected Lavin's demand, he filed suit and the case went to trial after the merger had closed.

West's primary justification for denying Lavin's Section 220 demand was that Lavin could not demonstrate a credible basis of wrongdoing because the "stockholder vote 'cleansed' any purported breaches of fiduciary duty." West argued that because the merger was approved following a disinterested, fully informed uncoerced stockholder vote, the *Corwin* doctrine would limit any post-closing challenges except for waste claims (which Lavin had not stated as a basis for the inspection). Thus, West argued that since its directors would be successful in a fiduciary duty action obtaining dismissal based on a *Corwin* stockholder ratification theory, Lavin could not state a proper purpose for inspection.

In its post-trial decision, the Court of Chancery unequivocally rejected that argument. Instead, the court ruled that "as a matter of law," *Corwin* will not "stand as an impediment to an otherwise properly supported demand for inspection under Section 220." The court held that doing so "would invite defendants improperly to draw the court into adjudicating merits defenses to potential underlying claims" and would require the court to "prematurely adjudicate a *Corwin* defense when to do so might deprive a putative stockholder plaintiff of the ability to use Section 220 as a means to enhance the quality of his pleading in a circumstance where precise pleading, under our law, is at a premium." The Court of Chancery further noted that "it would be naïve to believe, in most instances, that the stockholder plaintiff will not face significant challenges to meet her pleading burden in anticipation of a *Corwin* defense if all she has in hand to prepare her complaint are the public filings of the company whose board of directors she proposes to sue. ... [T]his court should encourage stockholders, if feasible, to demand books and records before filing their complaints [in class action deal litigation] when they have a credible basis to suspect wrongdoing in connection with a stockholder-approved transaction and good reason to predict that a *Corwin* defense is forthcoming."

After declining to consider the *Corwin* doctrine, the Court of Chancery found that, "[w]ith the low Section 220 evidentiary threshold very much in my mind," the plaintiff provided "'some evidence' that West's directors and officers may have breached their *Revlon* duties [for example, by improperly favoring a sale of the entire company, as opposed to a separate sale of its business segments], possibly in bad faith"; he also stated a proper purpose of wanting to investigate the independence of West's board members. However, the Court of Chancery reduced the categories of documents for production from the 13 demanded to five and noted that, "[w]hen measured against the Proxy, the documents [ordered for production] may also offer some insight into whether the stockholder vote was fully informed as Lavin attempts to meet his pleading burden in anticipation of a *Corwin* defense."

Implications of *Walmart* on Preclusive Effect of Demand Futility Decisions

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> See page 18 for key takeaways

In the recent opinion *California State Teachers' Retirement System v. Alvarez* (*Walmart*), the Delaware Supreme Court addressed the preclusive effect of demand futility decisions rendered by one court on derivative litigation pending in another forum. After careful consideration of applicable Arkansas and federal law, the court determined that the Arkansas district court's ruling — which failed to find that demand had been excused — would preclude plaintiffs in the Delaware Court of Chancery from relitigating demand futility, and dismissed the suit.

Issue Preclusion in Derivative Actions

Issue preclusion prohibits a party that litigated an issue in one forum from later relitigating the same issue in another forum. While the law governing issue preclusion differs somewhat by jurisdiction, the factors are similar, and a key inquiry is usually whether the prior action was between the same parties or others in "privity" with those parties.

In a derivative action, the question of whether stockholder plaintiffs are the same or in privity with one another is complicated. That is because a stockholder plaintiff in a derivative action does not sue on his or her own behalf but rather on behalf of the corporation. A finding of privity between derivative plaintiffs therefore can present serious problems for stockholders who engage different counsel, file in different courts, employ different litigation strategies and reach judicial resolutions at different times.

Court of Chancery Finds Arkansas Ruling Preclusive, Urges Adoption of New Rule

Derivative plaintiffs in the *Walmart* action faced that very problem. In 2012, following a *New York Times* article regarding an alleged bribery scheme at Walmart's Mexican unit, multiple Walmart stockholders filed derivative lawsuits in both the U.S. District Court for the Western District of Arkansas and the Delaware Court of Chancery. Prior to filing their derivative complaint, the plaintiffs in Delaware — unlike those in Arkansas — made a demand for books and records pursuant to Section 220 of the Delaware General Corporation Law. That books-and-records litigation took more than three years to resolve, during which time the Arkansas federal court dismissed the Arkansas derivative litigation for failure to adequately allege demand futility. The Delaware plaintiffs were aware of the pending Arkansas decision and the risk for issue preclusion as a result — indeed, they requested expedition in Delaware on that very basis.

In its initial ruling, the Court of Chancery held that the Delaware plaintiffs were precluded from relitigating demand futility because the plaintiffs in the federal action had adequately represented other Walmart stockholders who were not parties in that action. The plaintiffs appealed, arguing, among other things, that the Court of Chancery had violated their due process rights. In January 2017, the Delaware Supreme Court issued an order directing the Court of Chancery to consider its opinion in light of due process concerns, which the Court of Chancery had not explicitly addressed.

On remand, the Court of Chancery noted that it was bound by controlling law, which would likely find that the Arkansas dismissal precluded the Delaware plaintiffs, but recommended that the Supreme Court adopt a new rule, as endorsed in a prior Court of Chancery decision in *In re EZCORP Inc. Consulting Agreement Derivative Litigation*. That decision stated in *dicta* that a derivative plaintiff may not bind a later derivative plaintiff unless and until the first derivative plaintiff survives a motion to dismiss, or the board of directors has declined to oppose the suit. In particular, the Court of Chancery expressed concern about penalizing the more diligent Delaware plaintiffs, noting that "Delaware courts have long encouraged stockholders contemplating derivative actions to use the 'tools at hand'" by seeking books and records under Section 220.

The Delaware Supreme Court Declines to Make New Law

After the Court of Chancery's remand opinion, the Delaware Supreme Court once again took up the issue. In determining whether the Arkansas court's decision on demand futility was preclusive in the Delaware action, the Supreme Court was confronted with the "troubling" nature of the case. On one hand, the Supreme Court has repeatedly admonished stockholder plaintiffs to use the "tools at hand" to obtain books and records before filing a derivative complaint — which the Delaware plaintiffs did, but the Arkansas plaintiffs did not. On the other hand, the court recognized the importance of full faith and credit, which implicates principles of comity and respect for judgment.

Ultimately, the Supreme Court affirmed the Court of Chancery's original opinion and "decline[d] to embrace [the Court of Chancery's] suggestion that the *EZCORP* approach become the law governing the preclusive effect of prior determinations of demand futility." Specifically, the Supreme Court applied a two-part test to determine if issue preclusion applied — that is, it considered whether all elements of issue preclusion were present and due process was satisfied. The court recognized four elements required of collateral estoppel: (1) the issue must be the same as that in the prior litigation; (2) the issue must actually have been litigated; (3) the issue must have been determined by a valid and final judgment; and (4) the determination must have been essential to the judgment. The court also assumed two additional elements: (1) privity between the parties; and (2) adequacy of prior representation.

The Delaware Supreme Court looked to prior Arkansas Supreme Court authority, concluding that privity "exists when two parties are so identified with one another that they represent the same legal right," which is a "flexible and practical inquiry." Analyzing the nature of a derivative suit, the court found that the corporation is always the real party in interest. When multiple derivative actions are filed, the plaintiffs share an identity of interest in seeking to prosecute claims by and in the right of the real party in interest — the corporation. The court concluded that "[t]hough not a formal 'representative' of other stockholders at this stage because the real party in interest is the corporation, differing groups of stockholders who seek to control the corporation's cause of action share the same interest and therefore are in privity."

The Supreme Court then addressed the adequacy of representation requirement as part of the federal due process overlay. It remarked that "the record makes clear that both sets of plaintiffs understood that a judgment in their case could impact the other stockholders. ... The Delaware Plaintiffs acknowledged the likelihood [of preclusive effect of an Arkansas judgment] and expressed concern to both the Delaware Court of Chancery and the Delaware Supreme Court about the 'severe risk' that an Arkansas judgment on demand futility would precede a Delaware ruling, and the Arkansas judgment would have preclusive effect." Moreover, the court pointed out that the Arkansas court "took care to protect the interests of the nonparty Delaware plaintiffs by granting a stay while they pursued their Section 220 litigation in Delaware" (though the Arkansas district court initially granted the stay, while the Section 220 action was pending the U.S. Court of Appeals for the Eighth Circuit vacated the ruling out of concern for the stalled Section 14(a) claim) and that, while federal courts have "signaled" that derivative suits are not ones in which notice is required to bind absent parties, "[w]e need not resolve that issue as it is undisputed that the Delaware Plaintiffs had notice of the Arkansas action in this instance."

The Supreme Court concluded that the Arkansas plaintiffs' failure to pursue and obtain books and records did not render them "grossly deficient." Notably, this was not a case where the Arkansas plaintiffs lacked access to any internal corporate documents before filing their complaint. They had access to internal company documents, published by *The New York Times*, suggesting that the board knew about the alleged misconduct, and thus determined that additional Section 220 documents were not required. The court found that "[t]he Arkansas Plaintiffs' decision to forego a Section 220 demand *in this instance* does not rise to the level of constitutional inadequacy" (emphasis in original).

Takeaways

The Delaware Supreme Court's decision in *Walmart* has a number of important implications.

Ability to Participate in Prior Action

The Delaware Supreme Court expressly recognized that the Delaware plaintiffs not only had knowledge of the Arkansas litigation but also recognized the potential for collateral estoppel. One of the bases for the court's decision that due process was satisfied was its determination that the Delaware plaintiffs knew of the Arkansas litigation and its potential preclusive effect, and that the Arkansas court at least initially stayed its hand so that the Delaware plaintiffs could prosecute their Section 220 action, thus taking care to protect the interests of nonparty Delaware plaintiffs. While the Supreme Court found there was no obligation for Delaware plaintiffs to intervene in the Arkansas action, it suggested on multiple occasions that the Delaware plaintiffs should have intervened or taken other action in Arkansas to protect their rights. The court "note[d] that the Delaware Plaintiffs' awareness of the potential for collateral estoppel, combined with their failure to coordinate with the Arkansas Plaintiffs and failure to express their concerns to the Arkansas court, suggests that all the equities may not favor the Delaware plaintiffs here." It is unclear how much persuasive effect this equitable argument had on the court, and whether the due process analysis would be the same if the plaintiffs were unaware of the parallel or prior litigation.

Preclusion Law in Other Jurisdictions

Because the Arkansas complaint asserted diversity, federal question and supplemental jurisdiction, the Delaware Supreme Court considered both state and federal authority on issue preclusion. The Arkansas Supreme Court has expressly recognized that the corporation is the real party in interest in a derivative case, and Arkansas federal courts have repeatedly held or presumed that collateral estoppel prevents the issue of presuit demand futility from being relitigated. While it appears that the great weight of state and federal court authority, as well as the Restatement, holds the same view, the possibility remains that certain states' collateral estoppel law differ. A future plaintiff attempting to distinguish *Walmart* could assert that state law precludes a finding of collateral estoppel between derivative plaintiffs. Notably, in Delaware, Court of Chancery Rule 15(aaa) permits the Court of Chancery to dismiss derivative suits as to the named plaintiff only.

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Failure to Obtain Books and Records Under Section 220

As part of its exposé, *The New York Times* published a number of internal Walmart documents, which the Arkansas plaintiffs incorporated into their complaint. Had such documents not been publicly available, it is not clear whether the Supreme Court's analysis would have been the same. The court emphasized that in this instance the Arkansas plaintiffs' tactical decision to proceed without using Section 220 did not render them constitutionally inadequate representatives. That leaves open the suggestion that failure to pursue books and records pursuant to Section 220 could, in different situations — such as when there are not publicly available facts or documents relating to board-level knowledge — render a plaintiff inadequate for collateral estoppel purposes.

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