DELAWARE BUSINESS COURT INSIDER

**October 18, 2017**

An ALM Website

COMMENTARY

# The Virtue of Predictability: Delaware's Place in M&A Practice

**By Brian M. Lutz and Colin B. Davis**

As has been widely reported, for the first time in 15 years, Delaware has been dethroned as the nation's top court system according to a recent survey, which sought to explore "how fair and reasonable the states' liability systems are perceived to be by U.S. businesses." According to respondents, South Dakota's court system now occupies the top spot, and Delaware has fallen to 11th.

The results of this survey, conducted for the Institute for Legal Reform by Harris Poll, do not, in our view, reflect the most significant virtue of Delaware's court system, at least in the area of mergers and acquisitions practice: ***predictability***. This attribute has been showcased in recent years by several landmark decisions from the Delaware Supreme Court and Court of Chancery, which confirm for corporations and M&A practitioners that, where transacting parties follow a proper process and avoid conflicts of interest, transactions generally will be protected from serious challenge in Delaware courts. Thus, we see little risk to Delaware's position as the preeminent—and most predictable—jurisdiction of business incorporation.

*Courtesy photos*

Colin Davis, left, and Brian Lutz, right, of Gibson, Dunn & Crutcher.

First, the Delaware courts have enhanced predictability for M&A practitioners by clamping down on the knee-jerk merger objection lawsuits that used to follow the announcement of virtually any public transaction. Just a few years ago in 2014, over 90 percent of transactions involving a publicly traded target and valued at more than $100 million prompted at least one stockholder lawsuit, according to data compiled by Cornerstone Research. Most of these cases resulted in quick "disclosure-only" settlements with broad releases of liability, in exchange for a payment of plaintiffs' counsel's attorney fees. Then, in 2016, the Court of Chancery issued its seminal decision in *In re Trulia Stockholder Litigation*, announcing that the Court of Chancery only will approve future disclosure-only settlements if the disclosures "address a plainly material misrepresentation or omission," and the releases granted in connection with the settlement are limited to disclosure claims. The court made clear that "plainly material" is a high bar. The message in *Trulia* was delivered, and its effect almost was instantaneous. Following *Trulia*,

the percentage of M&A transactions challenged through litigation has fallen precipitously. As a result, corporations have renewed confidence that transactions will be immune from wasteful legal challenges that typically result in the payment of a "deal tax" in the form of a disclosure-only settlement.

Second, the Delaware courts have made post-closing merger litigation far more predictable and difficult to bring successfully through the decisions in *Corwin v. KKR Financial Holdings* and its progeny. In *Corwin*, the Delaware Supreme Court affirmed a ruling by the Court of Chancery that the "legal effect of a fully informed stockholder vote of a transaction with a noncontrolling stockholder is that the business judgment rule applies and insulates the transaction from all attacks other than on grounds of waste." Since then, Delaware courts have repeatedly applied *Corwin* to dismiss post-closing damages claims, even when those claims appeared otherwise viable, such as in *In re Columbia Pipeline Group Stockholder Litigation*. And *Corwin*'s reach has been extended beyond the stockholder vote context, including to tender offers. Thus, in most cases, M&A practitioners and their clients can now rest assured that Delaware courts will apply the business judgment rule to post-closing damages claims, as long as all material information is disclosed and there is no coercion of stockholders.

Third, the Delaware courts have brought some semblance of predictability to appraisal litigation, which until recently was perhaps the most unpredictable form of Delaware M&A litigation. In a series of decisions beginning in 2015, the Court of Chancery has repeatedly held that the merger price provides the best evidence of an acquired company's "fair value" where the merger resulted from a robust transactional process that is free from conflicts of interest. Moreover, in two decisions this year—*In re Appraisal of SWS Group* and *ACP Master v. Sprint*—the Court of Chancery has even demonstrated its willingness to determine that a company's fair value is below the merger price under appropriate circumstances, including in instances in which the merger price includes synergies from the combination. And although the Delaware Supreme Court has declined to adopt a rule requiring deference to the merger price, it has signaled a willingness to consider market evidence in addition to traditional valuation methodologies. Thus, although the outcome of any appraisal litigation remains far from certain, the Delaware courts at least have provided a blueprint for corporations and deal makers to follow in hopes of obtaining a predictable outcome in any appraisal challenge.

These and other decisions, which by now are well known inside the boardroom and among M&A practitioners, have enhanced business and investor confidence that value-creating transactions consummated under Delaware law will be protected from serious challenge, and present a counterpoint to any questions about Delaware's liability system reflected in the Institute for Legal Reform survey results.

***Colin B. Davis*** *is an associate in the Orange County office of Gibson, Dunn & Crutcher where he practices in the firm's Litigation Department.*

***Brian M. Lutz*** *is a litigation partner in the San Francisco and New York offices of the firm. He serves as a co-chair the firm's national securities litigation practice group.*

Reprinted with permission from the October 18, 2017 edition of DELAWARE BUSINESS COURT INSIDER © 2017 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com. # 203-10-17-01