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## Delaware Courts Provide Guidance on Standard of Review in Merger-Related Actions: *Corwin*, *Zale*, *Tibco* and *RBC Capital Markets (Rural/Metro)*

In the third quarter of 2015, both the Delaware Court of Chancery and the Delaware Supreme Court issued important decisions on the application of various standards of review in merger-related litigation. Starting with *Corwin v. KKR Financial Holdings LLC*, the Delaware Supreme Court clarified that, in situations where entire fairness review does not apply (e.g., a merger without a controlling stockholder), a transaction that is approved by a fully informed, uncoerced vote of disinterested stockholders, even where statutorily required, will invoke the business judgment rule, to the exclusion of other heightened standards of review, such as *Revlon* or *Unocal*. For more, click [here](#).

The Delaware Court of Chancery then had the opportunity to apply and clarify the *Corwin* decision in *In re Zale Corporation Stockholders Litigation* and *In re Tibco Software Inc. Stockholders Litigation*. In *In re Zale*, the court applied the heightened pleading standard required by the application of the business judgment rule (i.e., gross negligence, not waste) to post-closing claims against both the board of directors and alleged aiders and abettors, such as financial advisors. The Court ruled that the plaintiff had not adequately alleged a predicate breach of fiduciary duty by the directors, and therefore there could be no aiding and abetting liability on the part of the corporation's financial advisor. For more, click [here](#).<sup>1</sup> Conversely, in *In re Tibco*, the Court ruled that where a plaintiff had adequately alleged a breach of the duty of care by the directors of a corporation, such breach, even if it is exculpated, is a sufficient predicate for post-closing third-party aiding and abetting liability.

Finally, in *RBC Capital Markets v. Jervis*, the Delaware Supreme Court affirmed all of the principal holdings of the Delaware Court of Chancery's series of decisions in *In re Rural/Metro Corp. S'holder Litig.* Key takeaways from the Delaware Supreme Court's opinion include the following:

- Where a fully-informed stockholder vote is not present, enhanced scrutiny under *Revlon* will continue to apply. Further, when the directors' conduct is evaluated under *Revlon* and they breach their fiduciary duties by engaging in conduct outside the range of reasonableness, such breach is a sufficient predicate for post-closing third-party aiding and abetting liability, even if the underlying breach would not result in monetary liability for directors.

- Consistent with existing law, the *Revlon* standard of review begins to apply from the time that a board initiates a sale process to the exclusion of other strategic alternatives.
- A board may consent to using a conflicted financial advisor, but it must then be “especially diligent” in overseeing such advisor in the sale process. Further, a board’s consent to a conflict does not give the advisor a “free pass” to act in its self-interest or to the detriment of its client.”
- Although a financial advisor must be wary of creating an “informational vacuum” that leads to a board’s breach of its fiduciary duties, the advisor does not have to act as a “gatekeeper” for the board.

For more, click [here](#).

### **Delaware Supreme Court Refines Director Independence Analysis**

In *Delaware County Employees Retirement Fund v. Sanchez*, the Delaware Supreme Court held that stockholder plaintiffs in a derivative action adequately alleged facts to support a pleading-stage inference that a director was not independent from an interested director due to their close, 50-year friendship and significant business relationships consistent with that friendship. The court thus reversed the Delaware Court of Chancery’s holding on the defendants’ motion to dismiss that the plaintiffs had failed to adequately plead demand excusal. The court emphasized that Delaware courts must analyze all the particularized facts pled by the plaintiffs “in their totality and not in isolation from each other.” For more, click [here](#).

### **Delaware Court of Chancery Holds There is No *Per Se* Rule That All Management Inputs to Financial Advisor Valuations Must Be Disclosed**

In *Nguyen v. Barrett*, the Delaware Court of Chancery denied a motion for a certification of an interlocutory appeal, holding that where financial advisors derived their own unlevered, after-tax free cash flow analysis, rather than relying on management projections alone, the inputs on which they rely are not per se subject to disclosure. For more, click [here](#).

### **Other Notable Cases**

In *Espinoza v. Zuckerberg*, the Delaware Court of Chancery clarified that only a formal vote or written consent of the majority of disinterested stockholders that complies with the technical requirements for stockholder action under the Delaware General Corporation Law will be effective to shift the judicial standard of review. For more, click [here](#).

In *Prairie Capital III v. Double E Holding Corp.*, the Delaware Court of Chancery held that the anti-reliance and integration clauses in a stock purchase agreement barred the purchaser’s claim for fraud to the extent based on extra-contractual representations or omissions during the course of negotiations. For more, click [here](#).

In *In re Vaalco Energy Stockholder Litigation*, the Delaware Court of Chancery invalidated provisions of the charter and bylaws of a corporation that purported to require that directors could only be removed “for cause”, but which otherwise did not have a classified board or cumulative voting. The corporation’s charter had previously been amended to declassify its board, but provisions with respect to removal for cause only remained. After a stockholder ran a consent solicitation to

remove directors without cause, the corporation argued the consents were invalid. The Court disagreed and invalidated the charter and bylaw provisions. For the transcript ruling, click [here](#).

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## M&A Markets

The following issues of M&A at a Glance, our monthly newsletter on trends in the M&A marketplace and the structural and legal issues that arise in M&A transactions, were published this quarter. Each issue can be accessed by clicking on the date of each publication below.

- [October 2015](#)
- [November 2015](#)
- [December 2015](#)

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<sup>1</sup> We note that *In re Zale* is currently being appealed to the Delaware Supreme Court.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:



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