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Expansion of the BJR to Stockholder Approval of "Medium Form" Mergers

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Editor's note: Scott A. Barshay is partner and Global Head of the Mergers & Acquisitions Practice at Paul, Weiss, Rifkind, Wharton & Garrison LLP. This post is based on a Paul Weiss memorandum by Mr. Barshay, Ariel J. Deckelbaum, Ross A. Fieldston, Justin G. Hamill, Stephen P. Lamb, and Jeffrey D. Marell. This post is part of the Delaware law series; links to other posts in the series are available here.

In *In re Volcano Corporation Stockholder Litigation*, the Delaware Court of Chancery held that the acceptance of a first-step tender offer by fully informed, disinterested, uncoerced stockholders representing a majority of a corporation's outstanding shares in a two-step merger under Section 251(h) of the Delaware General Corporation Law ("DGCL") had the same cleansing effect as a fully informed, uncoerced vote of a majority of the disinterested stockholders of a target corporation in a merger. Upon the receipt of the required tendered shares, the business judgment rule "irrebuttably" applied to the merger and the plaintiff could only challenge it on the basis that it constituted waste.

In rendering its decision, the Court relied on, and extended to so-called "medium form" mergers under Section 251(h), two recent Delaware Supreme Court rulings regarding the cleansing effect of a fully informed, uncoerced *vote* of a majority of a target corporation's disinterested stockholders. First, in *Corwin* v. *KKR Financial Holdings LLC*, the Supreme Court held that in situations where entire fairness review does not apply, such a vote will invoke the business judgment rule. For more, click here. Second, in *Singh* v. *Attenborough*, the Supreme Court clarified that where such a vote has occurred and the business judgment rule is invoked, a plaintiff can only challenge the merger on the basis that it constitutes waste. Thus, "dismissal is typically the result" because stockholders are unlikely to approve a wasteful transaction. For more, click here.

Despite arguments from plaintiffs to the contrary, the Court found no basis to distinguish the first-step tender offer in a two-step merger under Section 251(h) from a statutorily required stockholder vote. It explained that the target board's role in negotiating a two-step merger subject to a first-step tender offer under Section 251(h) is substantially similar to its role in a merger subject to a stockholder vote under Section 251(c) of the DGCL. Moreover, it found that the requirements of Section 251(h) alleviate "the coercion that stockholders might otherwise be subject to in a tender offer because (1) the first-step tender offer must be for all of the target company's outstanding stock, (2) the second-step merger must 'be effected as soon as practicable following the consummation of the' first-step tender offer, (3) the consideration paid in the second-step merger must be of 'the same amount and kind' as that paid in the first-step tender offer, and (4) appraisal rights are available in all Section 251(h) mergers."