GET IN TOUCH

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QUESTIONS OR COMMENTS?

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Quarterly Corporate / M&A Decisions Update

Below is our Quarterly Corporate / M&A Decisions Update for decisions in Q1 2018 and selected others. This update is designed to highlight selected important M&A, corporate and commercial court decisions on a quarterly basis. Brief summaries of each decision appear below with links to more robust discussions. Please contact us with any questions.

*Please click **HERE** for discussion of key decisions from Q4 2017.*

California State Teachers' Retirement System v. Alvarez, 179 A.3d 824 (Del. 2018).

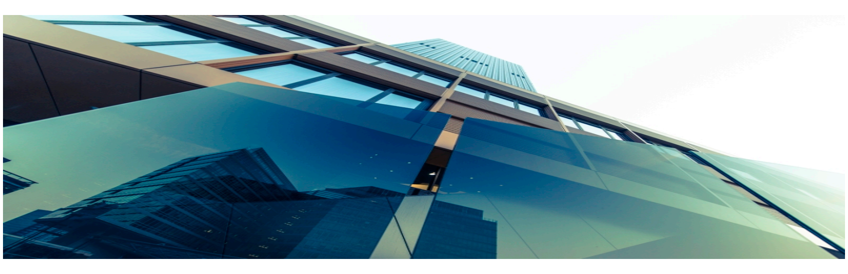
Why is it important

In *California State Teachers' Retirement System v. Alvarez*, the Delaware Supreme Court held that a final judgment finding that a plaintiff failed to plead demand futility – a prerequisite in shareholder derivative actions requiring that a stockholder plead facts demonstrating that the company's board of directors is conflicted or otherwise incapable of impartially evaluating a shareholder demand – may have a preclusive effect on related derivative actions and thus support dismissal. This holding illustrates a potentially powerful defense for companies facing shareholder derivative litigation in multiple jurisdictions.

Summary

The Delaware Supreme Court held that an Arkansas federal court's decision to dismiss shareholder derivative claims based on a failure to plead demand futility had a preclusive effect and thus supported dismissal of similar claims in Delaware. In both actions, the plaintiff shareholders alleged that Walmart's board of directors had breached fiduciary duties owed to the corporation. While the Delaware plaintiffs pursued a books and records demand to obtain documents to support their claims, the Arkansas plaintiffs filed their claims without seeking supporting documents. The Arkansas court dismissed the derivative claims while the Delaware plaintiffs' demand for records still was pending. Subsequently, Walmart argued that the Delaware claims should be dismissed because the Arkansas court already had resolved the issue of demand futility in its favor. Holding that the Delaware plaintiffs were precluded from pursuing their derivative claims, the Delaware Supreme Court found that applying issue preclusion did not violate the plaintiffs' due process rights because the shareholders were in privity with each other and the plaintiffs in the Arkansas action adequately represented the corporation's – and thereby the Delaware plaintiffs' – interests.

*Please click **HERE** for a more detailed discussion of this case.*



Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., C.A. No. 11448-VCL (Del. Ch. Feb. 15, 2018).

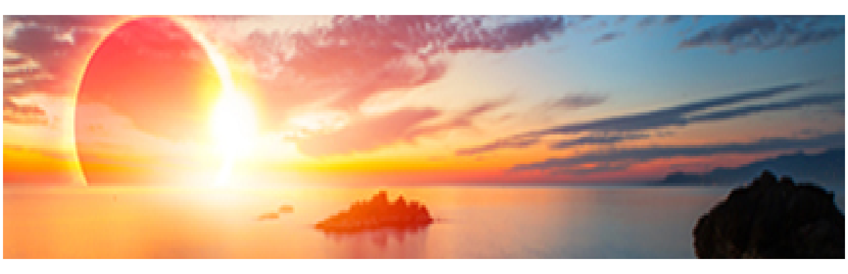
Why is it important

In one of the first cases to apply two significant appraisal decisions by the Delaware Supreme Court, the Court of Chancery held that the stockholders in this appraisal action only were entitled to receive the 30-day average "unaffected market price" of their shares – a value 30 percent below the deal price. The decision is likely to reduce appraisal arbitrage in mergers where stockholders receive a premium over the pre-merger trading price.

Summary

Following Hewlett-Packard's 2015 acquisition of Aruba for US$24.67 per share, several hedge funds that had purchased Aruba stock post-announcement of the merger sought appraisal. Relying heavily on the Delaware Supreme Court's recent decisions in *Dell* and *DFC*, the court analyzed two different market-based valuation methodologies in determining Aruba's fair value: unaffected market price and adjusted deal price. Although the court considered both methodologies to be potentially appropriate ways to measure the target's fair value, the court found that the deal price was flawed because it included the value of certain efficiencies created by the merger, which must be excluded from fair value in an appraisal action. Thus, the court concluded that the company's 30-day average unaffected market price – US$17.13, a value 30 percent below the deal price – was the best indicator of the company's fair value. In reaching this result, the court emphasized that significant weight should be afforded to market-based valuation methodologies where reliable market data is available, and found that an acquired company's appraisal value should exclude the value of synergies resulting from a strategic merger as well as the value of any reduction in agency costs. The case highlights that stockholders of publicly traded companies acquired in arm's length transactions may receive less than the deal price in an appraisal action where the merger values the company's shares at a premium over the pre-deal market price.

*Please click **HERE** for a more detailed discussion of this case.*



In Re Appraisal of AOL Inc., C.A. No. 11204-VCG (Del. Ch. Feb. 23, 2018).

Why is it important

In its second shareholder appraisal ruling since the Delaware Supreme Court's landmark 2017 decisions in *DFC Global Corp. v. Muirfield Value Partners, L.P.*, and *Dell, Inc. v. Magnetar Global Event Driver Master Fund Ltd.*, the Delaware Court of Chancery again held that fair value was below the transaction price. Coming just a week after the court's appraisal decision in *Aruba Networks* (discussed previously), the court relied on a discounted cash flow analysis rather than the pre-transaction market price of the stock. The decision demonstrates that even where a holdover stockholder in an appraisal proceeding can convince the court that the deal price should not be afforded any weight in the court's determination of fair value (perhaps with evidence that potential acquirers may have been deterred from bidding on the acquired company during the sales process), the court nonetheless may conclude that the deal price represented a premium over the company's fair value.

Summary

In 2015, Verizon acquired AOL for US$50.00 per share, representing a total deal value of US$4.4 billion. Certain stockholders sought appraisal. The Court of Chancery first analyzed whether the transaction was "*Dell* Compliant," *i.e.,* whether the sales process was a third-party, arm's length transaction such that the deal price can be used as evidence of fair value. The court found that the transaction was not *Dell* Compliant and declined to assign any weight to the transaction price in determining AOL's fair value because of "unusually preclusive statements by the CEO" and certain deal protections. Instead, the court conducted its own discounted cash flow analysis, and ultimately determined that the fair value of AOL's common shares was US$48.70 – US$1.30 (or 3 percent) below the deal price.

*Please click **HERE** for a more detailed discussion of this case.*

In re Rouse Properties, Inc. Fiduciary Litig., C.A. No. 12194-VCS (Del. Ch. Mar. 9, 2018).

Why is it important

In *In re Rouse Properties*, the Delaware Court of Chancery held that the affirmative vote of stockholders, in conformance with the Delaware Supreme Court's *Corwin* decision, supports dismissal of a stockholder complaint challenging a transaction involving a large minority stockholder provided the minority stockholder does not exercise actual control over either the specific transaction or the company's general business affairs.

Summary

Plaintiffs, two shareholders of Rouse Properties Inc. ("Rouse"), brought claims alleging that the directors of Rouse and Rouse's 33.3 percent shareholder, a group of companies related to Brookfield Asset Management (collectively, "Brookfield"), breached fiduciary duties in connection with Brookfield's acquisition of Rouse's outstanding shares. The Court of Chancery dismissed the plaintiffs' claims, finding that the transaction had been cleansed by stockholder ratification in conformance with *Corwin*. In finding that *Corwin* applied, the Court of Chancery rejected the plaintiffs' arguments that Brookfield was a controlling stockholder as well as arguments that the shareholder vote was coerced and not fully informed.

*Please click **HERE** for a more detailed discussion of this case.*