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DEVELOPMENTS IN M&A LITIGATION

The authors begin their article by discussing three Delaware decisions that have largely brought an end to multi-jurisdictional M & A litigation, sharply limited Revlon*-based preliminary injunctions, and disapproved most disclosure-only settlements. The result has been to shift most new M & A lawsuits to the federal courts, although these cases are almost always settled without litigation. The authors then turn to cases that continue to be litigated in Delaware state court, notably post-closing damages claims, cases involving controlling stockholders, books and records actions, and appraisal actions. They close by discussing examples of Delaware M & A litigation not brought by stockholder plaintiffs, namely "broken deal" litigation and the recent CBS/Redstone case.*

By Meredith Kotler and Mark McDonald *

Much has changed in M&A litigation over the last few years. Many of these changes were the result of Delaware judicial decisions responding to perceived abuses in the way M&A litigation proceeded in the past, including the pattern of plaintiffs quickly filing lawsuits in multiple jurisdictions once a deal was announced and then agreeing to resolve those suits by entering into "disclosure-only" settlements, with no apparent benefit to anyone other than fees for the plaintiffs' lawyers and broad releases for the defendants. The immediate result of these recent Delaware decisions, however, appears to have been simply to shift this type of litigation to the federal courts, where they continue to be filed in large numbers.

That is not to say that M&A litigation in Delaware has gone away. To be sure, recent decisions, including *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd.*[1] and *DFC Global Corporation v. Muirfield Value Partners, L.P.*,[2] which held that the deal price is entitled to substantial weight in determining "fair value" in an appraisal case, have substantially cut down on appraisal filings in Delaware. And decisions such as *Corwin v. KKR Financial Holdings LLC*[3] – which held that, in cases that do not involve a controlling stockholder, a fully informed and uncoerced vote of a majority of the disinterested stockholders invokes the business judgement rule – have made it more difficult for stockholder plaintiffs to successfully allege that the board breached its fiduciary duties in approving a merger. But recent Delaware decisions rejecting defendants' *Corwin* defense at the motion-to-dismiss stage have started to show limits of that precedent. In addition, more and more Section 220 "books and records" actions are filed as a means for stockholders to obtain pre-lawsuit discovery in order to plead a

[1] 177 A.3d 1 (Del. 2017).

[2] 172 A.3d 346 (Del. 2017).

[3] 125 A.3d 304 (Del. 2015)

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