ALERT MEMORANDUM

2017 Securities and M&A Litigation Mid-Year Review

Overview

As we previewed in our 2016 Year in Review, several significant developments in the federal securities laws occurred during the first half of 2017. The U.S. Supreme Court ruled that the Securities Act's repose period is not subject to class-action tolling, in *California Public Employees' Retirement System v. ANZ Securities, Inc.* In another case addressing the application of statutory time-bars to securities law violations, the Court held in *Kokesh v. Securities and Exchange Commission* that disgorgement in SEC proceedings is subject to the five-year statute of limitations for penalties. The Court also granted petitions for certiorari in two securities cases it will consider next term. One petition concerns liability under Section 10(b) and Rule 10b–5 based on a failure to make disclosures required by SEC regulation. The other petition relates to the appropriate forum for class actions asserting Securities Act claims.

The circuit and district courts also decided numerous significant securities law issues, including the impact of extraterritoriality at the class certification stage, the ascertainability requirement under Federal Rule of Civil Procedure 23, the fraud-on-the-market presumption, extension of class-action tolling to subsequent class actions, liability for opinion statements, indemnification of underwriters, and liability for Rule 144A offerings. We expect the federal courts to address several additional important securities law issues in the months ahead.

With respect to M&A litigation, as anticipated in our 2016 Year in Review, plaintiffs have responded to the Delaware Court of Chancery's *In re Trulia, Inc. Stockholder Litigation* decision by attempting to file disclosure-only lawsuits in other fora including federal court, and defendants have responded by increasingly using supplemental disclosures to moot disclosure claims. Further, the Delaware courts have continued to clarify the application of the business judgment rule to stockholder-approved transactions. And recent decisions in appraisal actions have provided additional guidance on the determination of fair value. We expect the Delaware Supreme Court to provide further guidance in coming months.

Securities Litigation

Effect of Statutes of Repose

On June 26, in *California Public Employees' Retirement System (CalPERS) v. ANZ Securities, Inc.*,[1] the Supreme Court ruled for respondents and held that the statute of repose established by Section 13 of the Securities Act of 1933 is not subject to class-action tolling.[2] Cleary Gottlieb served as counsel to the respondents in this action.

In reaching this holding, the Supreme Court reiterated that statutes of limitations and statutes of repose have distinct purposes and effects.[3] Whereas statutes of limitations are intended "to encourage plaintiffs 'to pursue diligent prosecution of known claims,'" repose statutes "are enacted to give more explicit and certain protection to defendants."[4] The Court explained that Section 13's language, operation, and two-sentence structure, as well as the Securities Act's legislative history, show that its three-year period is a statute of repose.[5] The Court reaffirmed that, in light of the purpose of statutes of repose, they generally are not subject to tolling.[6] For the same reason, repose statutes supersede courts' equitable tolling rules.[7] The Court held that the class-action tolling rule established in *American Pipe & Construction Co. v. Utah*[8] is equitable and consequently does not apply to the three-year statute of repose in Section 13.[9]

CalPERS clarified the duration of potential liability of issuers, underwriters, and corporate officers and directors under the securities laws. Investors now need to come forward and file a separate complaint or motion to intervene within the repose period if they wish to preserve their ability to pursue an individual opt-out action. *CalPERS*'s impact also extends to repose periods in other statutes because its reasoning applies broadly to all statutes of repose. The Third Circuit recently applied *CalPERS* to hold that the repose period in the Securities Exchange Act of 1934 is not subject to class-action tolling, reversing the district court's denial of defendants' motions to dismiss.[10] Cleary Gottlieb filed an amicus brief on behalf of SIFMA in this action.

Statute of Limitations for SEC Disgorgement

On June 5, the Supreme Court unanimously held in *Kokesh v. Securities and Exchange Commission*[11] that the five-year limitations period for enforcement proceedings seeking a "civil fine, penalty, or forfeiture" applies to disgorgement in SEC proceedings because it operates as a penalty.[12] Cleary Gottlieb submitted an amicus brief supporting the petitioner on behalf of the American Investment Council in this action.

The Court reasoned that a sanction is a penalty if its purpose is (1) to redress an offense against the state, rather than a private injury, and (2) punishment and deterrence, as opposed to compensation.[13] Applying that standard, the Court explained that disgorgement in SEC proceedings is a penalty because the SEC seeks that remedy to redress harm to the public and deter securities law violations, and its primary purpose is not compensation.[14] In a footnote that has garnered considerable attention, the Court suggested that the authority to order disgorgement in SEC proceedings as well as the application of disgorgement principles in this context also may be subject to challenge.[15]

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[1] 137 S. Ct. 2042 (2017).

[2] *Id.* at 2055.

[3] *Id.* at 2049.

[4] *Id.* (quoting *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182-83 (2014)).

[5] *Id.* at 2049-50.

[6] *Id.* at 2050.

[7] *Id.* at 2051.

[8] 414 U.S. 538 (1974).

[9] *CalPERS*, 137 S. Ct. at 2051-52.

[10] *North Sound Capital LLC v. Merck & Co*, --- F. App'x ----, No. 16–1364, 2017 WL 3278886, at *1 (3d Cir. Aug. 2, 2017).

[11] 137 S. Ct. 1635 (2017).

[12] *Id.* at 1639.

[13] *Id.* at 1642.

[14] *Id.* at 1643-44.

[15] *Id.* at 1642 n.3.

The decision's practical impact may extend beyond those cases that allege stale violations. It may significantly reduce amounts subject to disgorgement, as well as the SEC's leverage in settlement negotiations prior to enforcement actions. In *Kokesh*, for example, the disgorgement amount decreased from nearly $35 million to $5 million because of the application of the five-year limitations period.[16] In other cases, respondents and defendants may use the *Kokesh* decision to argue that the SEC's requested relief either is an impermissible penalty or does not fall within the court's equitable powers. The decision also may encourage the SEC to speed the pace of its investigations and use tolling agreements to delay the running of the statute of limitations, although such tolling agreements will not help the SEC defend against a claim that the requested relief is not authorized.

The Supreme Court Agrees to Hear Two Additional Securities Cases

On March 27, the Supreme Court granted a petition for certiorari in *Leidos, Inc. v. Indiana Public Retirement System* to resolve a circuit split on whether the failure to make a disclosure required by Item 303 of SEC Regulation S-K can give rise to claims under Section 10(b) and Rule 10b–5 of the Exchange Act.[17] Among other things, Item 303 of Regulation S-K requires companies in their periodic SEC reports to "[d]escribe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact."[18] In the decision that is under appeal, the Second Circuit relied on its previous holding that failure to make a disclosure required by Item 303 is an omission that can give rise to a Section 10(b) claim as long as the plaintiff has established the other requirements of such a claim.[19] The Second Circuit's decision conflicts with the Ninth Circuit's *In re NVIDIA Corporation Securities Litigation*[20] decision, which held that a failure to make disclosures required by Item 303 cannot serve as the basis of a Section 10(b) claim including because, unlike Section 11 and 12(a)(2), the text of Section 10(b) does not permit liability based on a failure to make required disclosures.[21] If the Second Circuit's decision stands, its primary effect will be to increase the liability of public companies for omissions and to encourage public companies to make more or premature disclosures that may mitigate litigation exposure but that are not necessarily informative for investors. Cleary Gottlieb filed an amicus brief on behalf of the Society for Corporate Governance in this action.

On June 27, the Supreme Court granted a petition for certiorari in *Cyan, Inc. v. Beaver County Employees Retirement Fund*.[22] District courts have been divided on the effect of amendments made by the Securities Litigation Uniform Standards Act of 1998 (SLUSA) to the Securities Act's removal and jurisdictional provisions. While some courts have held that SLUSA deprives state courts of jurisdiction over class actions asserting Securities Act claims and have permitted such actions to be removed to federal court on that basis,[23] others have held that such cases are not removable or that state courts possess jurisdiction over such suits.[24]

In *Cyan*, the defendants moved for judgment on the pleadings for lack of subject matter jurisdiction, arguing that SLUSA removed state courts' jurisdiction over Securities Act class actions.[25] The California

[16] *Id.* at 1641.

[17] 137 S. Ct. 1395 (2017).

[18] 17 C.F.R. § 229.303(a)(3)(ii).

[19] *Indiana Pub. Ret. Sys. v. SAIC, Inc.*, 818 F.3d 85, 94 n.7 (2d Cir. 2016).

[20] 768 F.3d 1046 (9th Cir. 2014).

[21] *Id.* at 1055-56.

[22] --- S. Ct. ----, No. 15–1439, 2017 WL 2742854 (June 27, 2017).

[23] *See, e.g.*, *Schwartz v. Concordia Int'l Corp.*, No. 16–CV–6576 (NGG) (CLP), 2017 WL 2559777, at *8 (E.D.N.Y. June 12, 2017).

[24] *See, e.g.*, *Book v. ProNAi Therapeutics, Inc.*, No. 5:16-CV-07408-EJD, 2017 WL 2533664, at *2 (N.D. Cal. June 12, 2017) (granting plaintiffs' motions to remand to state court and denying defendants' motions to stay litigation pending decision by U.S. Supreme Court on petitions for certiorari raising issue).

[25] Brief of Pet'r, *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, No. 15–1439, 2016 WL 3040512 (May 24, 2016), at *10.

Superior Court denied the motion.[26] The defendants appealed to the U.S. Supreme Court after a California appeals court and the California Supreme Court declined to review the decision.

In response to an invitation from the Supreme Court, in May, the Acting Solicitor General filed an amicus brief expressing the federal government's views on the issue, which took a middle-ground position that SLUSA does not strip state courts of jurisdiction over class actions to enforce the Securities Act, but separately allows defendants to remove such actions to federal court.[27] The Supreme Court's decision will provide much needed guidance on SLUSA's effect and resolve the conflict in the district courts. The issue of whether SLUSA made federal courts the exclusive venue for class action litigation under the Securities Act is particularly important because state courts do not strictly apply the procedural protections of the Private Securities Litigation Reform Act of 1995 that apply in federal courts.

Impact of Extraterritoriality at the Class Certification Stage

In a decision with significant consequences for the certification of classes asserting claims concerning securities that do not trade on domestic exchanges, the Second Circuit held in *In re Petrobras Securities*[28] that the district court committed legal error by failing to consider whether individualized questions regarding the location of putative class members' purchases of securities traded over-the-counter defeated the predominance requirement of Rule 23(b)(3).[29] Cleary Gottlieb represented Petrobras on this appeal.

Under Federal Rule of Civil Procedure 23(b)(3), plaintiffs seeking certification of a class must establish that legal or factual questions common to class members predominate over any questions affecting only individual members.[30] In addressing the application of this requirement to questions regarding the extraterritorial scope of the federal securities laws, the Second Circuit stated the district court was required to consider whether (1) the domestic nature of the transactions is material to the class claims and (2) the determination of the nature of the transactions is "susceptible to generalized class-wide proof."[31] The Second Circuit held that the nature of the transactions was material to the class claims and that the district court therefore erred by failing to meaningfully address the second issue.[32] Underscoring that the district court would need to decide the issue in the first instance on remand, the Second Circuit nevertheless observed that based on the current available record, "the investigation of domesticity appears to be an 'individual question.'"[33] The Second Circuit also explained that although district courts may use management strategies to identify class-wide inquiries, such strategies are no substitute for a finding of predominance and the courts' "obligation to take a 'close look' at predominance when assessing" class certification motions.[34]

On the other hand, the Second Circuit decided that the certification of a class of purchasers in "domestic transactions" did not run afoul of the ascertainability requirement, which it held only requires the proposed class to be defined "using objective criteria that establish a membership with definite boundaries."[35] In so ruling, the Second Circuit deepened a circuit split on whether ascertainability imposes a requirement of administrative feasibility.

[26] Order Denying Defendants' Motion for Judgment on the Pleadings, *Beaver Cty. Emps. Ret. Fund v. Cyan, Inc.*, No. CGC-14-538355 (Cal. Super. Oct. 23, 2015).

[27] Brief for the United States as Amicus Curiae, *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, No. 15–1439, 2017 WL 2333893, at *6 (May 23, 2017).

[28] --- F.3d ----, No. 16-1914-cv, 2017 WL 2883874 (2d Cir. July 7, 2017).

[29] *Id.* at *1.

[30] *Id.* at *5.

[31] *Id.* at *14 (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016)).

[32] *Id.*

[33] *Id.*

[34] *Id.* at *16.

[35] *Id.* at *8.

Fraud-on-the-Market Presumption

The Second Circuit also upheld in *Petrobras* the district court's conclusion that empirical data showing that a company's stock price moved in the appropriate direction in response to news (directional event studies) is not always a necessary condition for proving market efficiency.[36] The court held that such evidence was not required at the class certification stage where the plaintiffs submitted other empiric and non-empiric evidence of market efficiency.[37] The court suggested, however, that the standard at the merits stage might be different than that at the class certification stage.[38] Defendants have filed a petition for rehearing.

Two other cases on appeal to the Second Circuit concern the application of the fraud-on-the-market presumption—*Strougo v. Barclays PLC*[39] and *In re Goldman Sachs Group, Inc. Securities Litigation*.[40] In the first, the court will be required to decide whether a plaintiff can satisfy its initial burden with respect to market efficiency without any empiric evidence while in the second the court will evaluate the evidence necessary for a defendant to rebut the plaintiff's initial showing of market efficiency.

Extension of Class-Action Tolling to Subsequent Class Actions

In *Resh v. China Agritech, Inc.*[41] the Ninth Circuit considered whether class-action tolling permits a plaintiff to file a class action asserting Exchange Act claims after the expiration of the applicable statute of limitations. Although other circuits have limited class-action tolling to the filing of subsequent individual actions, the Ninth Circuit held that class claims could also benefit from tolling.[42] The Ninth Circuit dismissed concerns that the decision would encourage abusive filings of repetitive class actions, by positing that plaintiffs would not file suits that are clearly unviable as class actions because of the related financial risks.[43] The court further assumed that principles of preclusion and comity would discourage plaintiffs from re-litigating frivolous class claims.[44]

By allowing tolling to extend to subsequent class actions, *Resh* threatens to permit plaintiffs to file serial class actions and to re-litigate adverse decisions on a motion to dismiss or class certification motion, which could expose defendants to protracted liability.

Liability for Statements of Opinion

In *City of Dearborn Heights Act 345 Police & Fire Retirement System v. Align Technology, Inc.*,[45] the Ninth Circuit applied the standards for pleading the falsity of a statement of opinion that the Supreme Court set forth in its 2015 *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*[46] decision to affirm the dismissal of the action.[47] The Ninth Circuit's decision is notable both because it joined the Second Circuit in extending *Omnicare*, which involved a Section 11 claim, to Section 10(b) claims, and because it recognized that *Omnicare* overruled the court's prior standard that permitted plaintiffs to plead the falsity of opinion statements by alleging that "there is no reasonable basis" for the opinion.[48]

The Ninth Circuit's application of *Omnicare* demonstrates the decision's continued impact in limiting liability for opinion statements.

[36] *Id.* at *19.

[37] *Id.* at *20.

[38] *Id.*

[39] No. 16–1912–cv.

[40] No. 16–250–cv.

[41] 857 F.3d 994 (9th Cir. 2017).

[42] *Id.* at 996.

[43] *Id.* at 1004-05.

[44] *Id.* at 1005.

[45] 856 F.3d 605 (9th Cir. 2017).

[46] 135 S. Ct. 1318 (2015).

[47] *City of Dearborn Heights*, 856 F.3d at 610.

[48] *Id.* at 616.

Indemnification of Underwriters

The Southern District of New York held in *Perry v. Duoyuan Printing, Inc.*[49] that underwriters' settlement of Securities Act claims precluded their claim for contractual indemnity against the issuer for the legal fees the underwriters incurred in the litigation.[50] In so ruling, the court stated that the Southern District of New York has refused to enforce provisions indemnifying "a party who settles securities law claims without admitting fault, unless that party actually demonstrates that it is without fault."[51] Although the court was considering the issue on a motion to dismiss, the court also pointed out that the underwriters had "produced no evidence in relation to this motion to demonstrate they were without fault," nor was it clear how they could prove this.[52] In the same vein, the court stated that its denial of the underwriters' motion to dismiss the underlying securities claims "weighs against a finding that they successfully demonstrated their lack of fault."[53]

Perry sets a high bar for underwriters to enforce indemnification provisions. Under *Perry*'s standard, settling underwriters likely will be unable to show they were without fault and thus entitled to indemnification. The decision highlights the benefits of settling claims on a global basis.

Liability for Rule 144A Offerings

Ruling on a motion to dismiss, the District of New Jersey in *In re Valeant Pharmaceuticals International, Inc. Securities Litigation*[54] held that securities sold in compliance with SEC Rule 144A cannot give rise to liability under Section 12(a)(2) of the Securities Act.[55] Cleary Gottlieb submitted an amicus brief on behalf of SIFMA in this action.

The court took note of a split among district courts and adopted the approach taken by the majority of district courts to rule on the issue, including the Southern District of New York.[56] In particular, the court accepted that Section 12(a)(2) does not apply to Rule 144A offerings because such offerings are non-public by definition, and Section 12(a)(2) liability is limited to public offerings.[57] The court thus declined plaintiffs' invitation to undertake a fact-specific inquiry into the public or private nature of the Rule 144A offering.[58]

M&A Litigation

The Continued Decline of Disclosure-Only Settlements

The number of lawsuits filed in the Delaware Court of Chancery challenging mergers has sharply declined since Chancellor Bouchard's opinion in *In re Trulia, Inc. Stockholder Litigation*[59] made it clear that the court would no longer approve disclosure-only settlements unless the supplemental disclosures were "plainly material."[60] During 2016, only 73 percent of all public deals valued at over $100 million faced litigation,[61] the lowest rate since 2009.[62]

Plaintiffs have responded to *Trulia* in several ways. First, some plaintiffs have attempted to file suits in other fora that they hope will be more receptive to approving disclosure-only settlements. Certain state courts have indicated that they will adopt *Trulia*'s

[49] No. 10 Civ. 7235 (GBD), 2017 WL 532467 (S.D.N.Y. Feb. 3, 2017).

[50] *Id.* at *3-5.

[51] *Id.* at *3 (quoting *Credit Suisse First Boston, LLC v. Intershop Commc'ns AG*, 407 F. Supp. 2d 541, 547 (S.D.N.Y. 2006)).

[52] *Id.* at *4.

[53] *Id.*

[54] No. CV 15–7658 (MAS) (LHG), 2017 WL 1658822 (D.N.J. Apr. 28, 2017).

[55] *Id.* at *15.

[56] *Id.*

[57] *See id.*

[58] *Id.*

[59] 129 A.3d 884 (Del. Ch. 2016).

[60] *Id.* at 898.

[61] Matthew D. Cain, et al., *The Shifting Tides of Merger Litigation*, Vand. L. Rev., at 5-6, 18 (Mar. 13, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2922121.

[62] Ravi Sinha, Cornerstone Research, *Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2015 and 1H 2016 M&A Litigation* 1 (2016), https://www.cornerstone.com/Publications/Reports/Shareholder-Litigation-Involving-Acquisitions-2016.pdf.

enhanced scrutiny of such settlements,[63] but the response has been mixed.[64] These attempts have been hampered by exclusive forum bylaws, which have been widely adopted by corporations and require challenges to mergers and acquisitions to be brought in a designated forum.[65] Although some observers speculated that certain corporations may be willing to waive an exclusive forum bylaw in the hope of securing a quick, disclosure-only settlement in another forum, early research has found no evidence of such willingness thus far.[66]

Second, some plaintiffs have attempted to file claims in federal court under the Exchange Act. Consequently, the number of securities class actions alleging federal disclosure violations skyrocketed in 2016, and this trend continued in the first half of 2017.[67] Exclusive forum bylaws cannot require the filing of these claims in the Court of Chancery because the claims are based on federal law. Federal courts ultimately may not be more receptive to disclosure-only settlements, however. A recent decision from the Seventh Circuit was highly critical of disclosure-only settlements and endorsed the "plainly material" standard set forth in *Trulia*,[68] and at least one federal court has cited that case in expressing disapproval of a disclosure-only settlement.[69] These developments have encouraged plaintiffs to agree to a quick dismissal of their individual claims in exchange for supplemental disclosures and the payment of a small mootness fee to plaintiffs' counsel.

The *Corwin* and *MFW* Doctrines

The Delaware courts continue to underscore the deference afforded to merger transactions approved by an informed, disinterested, and uncoerced stockholder vote. Relying on long-standing principles that the Delaware Supreme Court recently rearticulated in *Corwin v. KKR Financial Holdings*[70] and *Singh v. Attenborough*,[71] the Court of Chancery has repeatedly applied the business judgment rule and dismissed at early stages of litigation post-closing challenges to non-controlling stockholder-approved transactions.[72] The Delaware courts have also extended this highly

[63] *See, e.g.*, *Stein v. UIL Holdings Corp.*, No. X08FSTCV156025536S, 2017 WL 1656891, at *3 (Conn. Super. Ct. Apr. 10, 2017); *In re Newbridge Bancorp S'holder Litig.*, No. 15 CVS 10047, 2016 WL 6885882, at *1 (N.C. Super. Ct. Nov. 22, 2016); *Drulias v. 1st Century Bancshares, Inc.*, No. 16-CV-294673 (Cal. Super. Ct. Nov. 18, 2016); *Vergiev v. Aguero*, No. L-2276-15 (N.J. Sup. Ct. June 6, 2016).

[64] *See, e.g.*, *Gordon v. Verizon Commc'ns, Inc.*, 148 A.D.3d 146 (N.Y. App. Div. 2017) (refusing to apply *Trulia* and reversing rejection of disclosure settlement); *see also Roth v. Phoenix Cos., Inc.*, 50 N.Y.S.3d 835, 838 n.4 (N.Y. Sup. Ct. 2017) (noting that the New York test "cannot be viewed as anything other than an outright rejection of *Trulia*'s 'plainly material' standard").

[65] Roberta Romano & Sarath Sanga, *The Private Ordering Solution to Multiforum Shareholder Litigation* (Jan. 10, 2016), http://www.law.nyu.edu/sites/default/files/upload_documents/2015-12_24-Roberta-Romano-Forum-Clauses.pdf (finding that nearly 750 U.S. public corporations had adopted such bylaws).

[66] Cain, *supra* note 61, at 5-6, 29-30, 34 (finding no evidence of this behavior).

[67] Stefan Boettrich & Svetlana Starykh, NERA, *Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review* (Jan. 23, 2017), http://www.nera.com/content/dam/nera/publications/2017/PUB_2016_Securities_Year-End_Trends_Report_0117.pdf; *see also* Cornerstone Research, *Securities Class Action Filings: 2017 Midyear Assessment* (2017), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2017-Midyear-Assessment.

[68] *In re Walgreen Co. S'holder Litig.*, 832 F.3d 718 (7th Cir. 2016). There are also other challenges for plaintiffs attempting to file such claims in federal court. *See* Jill E. Fisch, et al., *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 Tex. L. Rev. 557, 597 (2015), http://www.texaslrev.com/wp-content/uploads/2015/08/Fischetal-93-3.pdf (noting that disclosure claims in federal court are subject to safeguards against frivolous litigation).

[69] *See Malone v. CST Brands, Inc.*, No. SA–16–CA–0955–FB, 2016 WL 8258791, at *6 (W.D. Tex. Nov. 10, 2016) ("the public interest is not served by a strike suit designed to obtain a disclosure only settlement").

[70] 125 A.3d 304 (Del. 2015).

[71] 137 A.3d 151, 151-52 & n.3 (Del. 2016).

[72] *See, e.g.*, *In re Cyan, Inc. S'holders Litig.*, C.A. No. 11027–CB, 2017 WL 1956955 (Del. Ch. May 11, 2017); *In re Paramount Gold & Silver Corp. S'holders Litig.*, C.A. No. 10499–CB, 2017 WL 1372659 (Del. Ch. Apr. 13, 2017); *In re Columbia Pipeline Grp., Inc. S'holder Litig.*, C.A. No. 12152–VCL (Del. Ch. Mar. 7, 2017) (ORDER); *In re Merge Healthcare Inc. S'holders Litig.*, C.A. No. 11388–VCG, 2017 WL 395981 (Del. Ch. Jan. 30, 2017); *In re Solera Holdings, Inc. S'holder Litig.*, C.A. No. 11524–CB, 2017 WL 57839 (Del. Ch. Jan. 5, 2017).

deferential standard of review to transactions "approved" by fully informed, uncoerced stockholders tendering a majority of shares in a two-step merger pursuant to Section 251(h).[73] Because the first-step tender offer in such a merger "essentially replicates a statutorily required stockholder vote in favor of a merger," the court reasoned that it should be treated no differently in post-closing damages actions.[74]

The Court of Chancery has cautioned, however, that the safe harbor of stockholder approval will apply only when the vote is not coerced and is fully informed.[75] It has also cautioned that not all conduct may be cleansed by a stockholder vote: "The policy underlying *Corwin* . . . was never intended to serve as a massive eraser, exonerating corporate fiduciaries for any and all of their actions or inactions preceding their decision to undertake a transaction for which stockholder approval is obtained."[76] We expect that future cases will continue to develop a framework for determining whether any disclosed acts or omissions are so problematic that they cannot be cleansed through approval by fully-informed stockholders.

Additionally, the Delaware Supreme Court recently affirmed *In re Books-A-Million, Inc. Stockholders Litigation*,[77] which determined that a transaction was subject to the business judgment standard of review because the controlling stockholder's proposal to take a company private had complied with the conditions set forth in *Kahn v. M&F Worldwide Corp.*[78] ("*MFW*"). The case demonstrated that defendants may prevail on a motion to dismiss, even where the transaction involves a controlling stockholder, and thus avoid costly and time-consuming discovery and a trial.

The Rise of Appraisal Actions

In response to the developments in *Trulia*, *Corwin*, and *MFW*, plaintiffs have increasingly relied on appraisal actions as a backstop for pricing imperfections.[79] In the context of such actions, there has been significant debate about the weight that should be given to deal price when determining fair value: the Court of Chancery relied on merger price as the best indicator of fair value in several recent cases,[80] found that fair value was higher than the merger price in the appraisal actions for DFC and Dell,[81] and decided that fair value was actually lower than the merger price in two other cases.[82] The Delaware Supreme Court recently weighed in on the issue and concluded that in the appraisal action for DFC, the Court of Chancery's failure to accord the deal price greater weight was not supported by the record, which showed that the deal

[73] *In re Volcano Corp. S'holder Litig.*, 143 A.3d 727 (Del. Ch. 2016), *aff'd*, 2017 WL 563187 (Del. Feb. 9, 2017) (TABLE).

[74] *Id.* at 744.

[75] *Sciabacucchi v. Liberty Broadband Corp.*, C.A. No. 11418–VCG, 2017 WL 2352152, at *2 (Del. Ch. May 31, 2017) (determining that plaintiff adequately pleaded that a vote was structurally coercive, and refusing to dismiss); *In re Saba Software, Inc. S'holder Litig.*, C.A. No. 10697–VCS, 2017 WL 1201108, at *8, 14 (Del. Ch. Mar. 31, 2017), *as revised* (Apr. 11, 2017) (determining that plaintiff adequately pleaded that a vote was coerced and was not fully informed, and refusing to dismiss).

[76] *In re Massey Energy Co. Derivative & Class Action Litig.*, C.A. No. 5430–CB, 2017 WL 1739201, at *20 (Del. Ch. May 4, 2017).

[77] No. 515, 2016, 2017 WL 2290066 (Del. May 22, 2017).

[78] 88 A.3d 635 (Del. 2014).

[79] Cain, *supra* note 61, at 18 (finding that "[b]oth 2015 and 2016 were record years with respect to both the number of deals challenged and number of petitions filed").

[80] *See, e.g.*, *In re Appraisal of PetSmart, Inc.*, C.A. No. 10782–VCS, 2017 WL 2303599 (Del. Ch. May 26, 2017) (deferring to deal value where deal price was the product of a process reasonably designed and appropriately implemented to achieve a fair value).

[81] *In re Appraisal of DFC Global Corp.*, C.A. No. 10107–CB, 2016 WL 3753123, at *1 (Del. Ch. July 8, 2016) (asserting that merger price "is reliable only when the market conditions leading to the transaction are conducive to achieving a fair price"), *rev'd sub nom. DFC Global Corp. v. Muirfield Value Partners, L.P.*, No. 518, 2016, 2017 WL 3261190 (Del. Aug. 1, 2017); *In re Appraisal of Dell Inc.*, C.A. No. 9322–VCL, 2016 WL 3186538 (Del. Ch. May 31, 2016) (finding that even where merger process would pass a traditional fiduciary duty analysis, deal price still may not be the best measure of value).

[82] *In re Appraisal of SWS Grp., Inc.*, C.A. No. 10554–VCG, 2017 WL 2334852 (Del. Ch. May 30, 2017); *ACP Master, Ltd. v. Sprint Corp.*, C.A. No. 8508-VCL, 2017 WL 3105858 (Del. Ch. July 21, 2017).

price was the result of a robust, conflict-free process.[83] In the opinion, Chief Justice Strine also clarified that the mere fact that a private equity buyer won the transaction does not make the deal price any less reliable an indication of fair value.[84] The Delaware Supreme Court declined nonetheless to establish a bright-line rule in favor of deferring to deal price in arm's-length mergers.[85] We expect the Delaware Supreme Court will address this issue further in coming months.[86]

Looking Ahead

In the coming months, we expect decisions by:

The Supreme Court on SLUSA's effect on class actions under the Securities Act and liability for securities fraud based on a failure to make disclosures required by SEC regulation.

The Second Circuit in *Strougo* and *Goldman* regarding the fraud-on-the-market presumption.

Federal and state courts regarding disclosure-only settlements.

The Delaware Supreme Court on appraisal rights.

[83] *DFC Global Corp. v. Muirfield Value Partners, L.P.*, No. 518, 2016, 2017 WL 3261190, at *3, 23 (Del. Aug. 1, 2017) (reversing and remanding, and instructing the Court of Chancery to "reassess the weight he chooses to afford various factors potentially relevant to fair value").

[84] *Id.* at *2.

[85] *Id.* at *15.

[86] One consideration is the inclusion of a closing condition in certain transactions so that the acquiror is not required to close if appraisal rights are exercised by more than a specified percentage of the outstanding shares. *See* Victor Lewkow & Rob Gruszecki, *Negotiating Appraisal Conditions in Public M&A Transactions*, Cleary M&A and Corporate Governance Watch Blog (Oct. 26, 2016), http://www.clearymawatch.com/2016/10/negotiating-appraisal-conditions-public-ma-transactions/.