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Delaware Courts Continue to Address Appraisal Issues in the Third Quarter of 2017

This quarter, the Delaware courts issued two opinions that related to appraisal valuations. In one, *DFC Global Corporation v. Muirfield Value Partners, L.P.*, the Delaware Supreme Court continued to stress reliance on deal price in determining fair value in appraisal actions absent a problematic sale process, a trend that we discussed in the Summer 2017 Delaware M&A Quarterly, found [here](#). In the opinion by Chief Justice Strine, the Delaware Supreme Court reversed and remanded the Court of Chancery's determination of the fair value of DFC Global Corporation, which had been found to be \$10.30 per share (approximately 8% more than the merger price). Although the court declined to create a presumption that deal price is the best evidence of fair value in arm's-length mergers, it nevertheless found that the Court of Chancery erred in not giving greater weight to the deal price as the most reliable indication of fair value, given the robust sale process. The Delaware Supreme Court also rejected the Court of Chancery's seeming recognition of a "private equity carve out," in which the deal price in a private equity transaction is viewed as an unreliable indication of fair value due to the firm's goal of achieving a specified rate of return. For more, click [here](#).

In the other decision, *ACP Master, Ltd. v. Sprint Corporation* and *ACP Master, Ltd. v. Clearwire Corporation*, Vice Chancellor Laster of the Delaware Court of Chancery appraised the fair value of Clearwire at approximately 57% less than the deal price in the merger between the company and majority stockholder, Sprint, largely because synergies generated by the transaction must be excluded from the appraisal valuation by law. The court also dismissed related fiduciary duty claims, finding that the merger was entirely fair to Clearwire minority stockholders. For the decision, click [here](#).

Delaware Court of Chancery Extends M&F Worldwide Doctrine to Third-Party Transactions with a Selling Controller

Also this quarter, the Delaware Court of Chancery continued to develop the jurisprudence relating to the roadmap set forth in *Kahn v. M&F Worldwide* (discussed [here](#)) for invoking business judgment review in controller buyouts. In *In re Martha Stewart Living Omnimedia, Inc. Stockholder Litigation*, in an opinion by Vice Chancellor Slight, the court extended the *M&F Worldwide* roadmap to third-party transactions where the controller acts as a seller only, but is alleged to have received disparate consideration. The court found that the sale of Martha Stewart Living Omnimedia, Inc. to Sequential Brands Group, Inc. satisfied *M&F Worldwide's* requirements to invoke business judgement

review, and because plaintiffs did not plead a claim for waste, their claims would be dismissed. For more, click [here](#).

Delaware Court of Chancery Dismisses Fiduciary Duty Claims in Single-Bidder Merger Context Advocated by Activist Stockholder

In *In re MeadWestvaco Stockholders Litigation*, the Delaware Court of Chancery dismissed fiduciary duty claims against the directors of MeadWestvaco Corporation relating to the company's merger with Rock-Tenn Company. Even though the MeadWestvaco board pursued a single-bidder strategy in connection with its sale of the company, the court held that the board acted in good faith in connection with the sale of the company by being actively engaged in merger negotiations and was not driven to such transaction by the threat of a proxy contest from an activist investor. For the decision, click [here](#).

Delaware Court of Chancery Permits Challenge to Company Self-Tender Two Years after Consummation in Light of Subsequent Merger at Significant Premium

A recent decision by the Delaware Court of Chancery in *Buttonwood Tree Value Partners, L.P. v. R. L. Polk & Co., Inc.* demonstrates the potential for controllers and directors affiliated with them to face liability in connection with interested transactions, even years after the challenged transaction, when later events bring to light the earlier transaction's unfairness. While no liability was found at this stage of the proceedings, Vice Chancellor Glasscock declined to dismiss breach of fiduciary duty claims, brought against an alleged family control group and affiliated directors, that challenged actions by the alleged control group and directors leading up to the company engaging in a merger at a price that was three times that received by the plaintiffs two years earlier in a self-tender by the company. For the decision, click [here](#).

Delaware Supreme Court Reverses Court of Chancery, Holding That Working Capital True-Up Cannot Be Used to Circumvent Liability Limitations

At the end of the second quarter of 2017, the Delaware Supreme Court reversed the Court of Chancery's ruling in *Chicago Bridge & Iron Co. N.V. v. Westinghouse Electric Co. LLC*, holding that the working capital true-up could not be used to circumvent the liability limitations agreed to in the transactions. Uniquely, Chicago Bridge's sale of a nuclear power plant subsidiary to Westinghouse had a "zero" closing purchase price and contained a liability bar providing that none of the seller's representations and warranties survived closing. The transaction also contained a relatively standard post-closing purchase price adjustment provision based on working capital, which provided that disputes about the final, post-adjustment purchase price were to be submitted to an independent auditor. The net working capital was to be calculated in accordance with generally accepted accounting principles applied on a consistent basis throughout the periods. Westinghouse argued that Chicago Bridge owed it over \$2 billion under the true-up provision and acknowledged that most of this amount was because the target's financials were not GAAP compliant. The Delaware Supreme Court, reversing the Court of Chancery, held that the GAAP compliance claims were not within the purview of the independent auditor, and that Westinghouse's attempt to raise GAAP compliance issues in the true-up proceeding was an improper attempt to circumvent the liability bar (*i.e.*, that Chicago Bridge's representations and warranties (including those relating to its GAAP compliance) did not survive closing). For the decision, click [here](#).

2017 Amendments to the Delaware General Corporation Law

The 2017 amendments to the Delaware General Corporation Law went into effect on August 1, 2017. For a discussion of the amendments, see the Summer 2017 Delaware M&A Quarterly, found [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.

➤ [July 2017](#)

➤ [August 2017](#)

➤ [September 2017](#)

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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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