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Securities Law Alert

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2017

Supreme Court: SEC Claims for Disgorgement in Enforcement Actions Are Subject to Section 2462's Five-Year Statute of Limitations

On June 5, 2017, the Supreme Court unanimously held that disgorgement in an SEC enforcement action for violation of the securities laws is a "penalty" subject to Section 2462's five-year statute of limitations.[1] *Kokesh v. SEC*, 137 S. Ct. 1635 (2017).

The Court found that disgorgement redresses a public wrong; it is a violation against the United States, not a particular individual. The Court also concluded that disgorgement is imposed primarily as a deterrent. The Court observed that there is no statutory requirement that courts distribute disgorged funds to a defendant's victims, and courts infrequently do so. Accordingly, the Court held that disgorgement "bears all the hallmarks of a penalty" and "[t]he 5-year statute of limitations in § 2462 therefore applies when the SEC seeks disgorgement."

1. Section 2462 states: "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued."

Supreme Court: *American Pipe* Tolling Is Inapplicable to Section 13's Three-Year Statute of Repose, Which Governs Claims Under Sections 11 and 12 of the Securities Act

On June 26, 2017, the Supreme Court held that *American Pipe* tolling does not apply to the three-year statute of repose set forth in Section 13 of the Securities Act of 1933, which governs claims brought under Sections 11 and 12 of that Act.[2] *California Public Employees Ret. Sys. v. ANZ Securities*, 137 S. Ct. 2042 (2017).

The Court first reaffirmed that Section 13's three-year bar sets forth a statute of repose. The Court reasoned that the statutory language "admits of no exception and on its face creates a fixed bar against future liability." The Court emphasized that "[t]he purpose of a statute of repose is to create 'an absolute bar on a defendant's temporal liability'" that "is in general not subject to tolling." *Id.* (quoting *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014)). With this framework, the Court held that "the *American Pipe* tolling rule does not apply to the 3-year bar mandated in § 13." The Court explained that "the object of a statute of repose, to grant complete peace to defendants, supersedes the application of a tolling rule based in equity" such as the *American Pipe* tolling doctrine.

2. Section 13 establishes a one-year statute of limitations and a three-year statute of repose for claims under Sections 11 and 12. The statute provides in relevant part that "[i]n no event shall any ... action be brought to enforce a liability created under [Section 11] or [Section 12(a)(1)] ... more than three years after the security was bona fide offered to the public, or under [Section 12(a)(2)] ... more than three years after the sale." 15 U.S.C. § 77m.

Circuit Court Decisions Addressing Class Certification in Securities Fraud Actions

Second Circuit: (1) Individual *Morrison* Determinations May Preclude Class Certification Where the Securities Were Not Traded on a Domestic Exchange; and (2) Ascertainability Does Not Require a Showing of Administrative Feasibility

On July 7, 2017, the Second Circuit relied on *Morrison v. National Australia Bank*, 561 U.S. 247 (2010)[3] to vacate certification of two classes to the extent they included purchasers of notes that were not traded on a domestic exchange. *In re Petrobras Securities*, 862 F.3d 250 (2d Cir. 2017). The Second Circuit held that the district court "erred in conducting its predominance analysis without considering the need for individualized *Morrison* inquiries" as to the "domesticity" of each note purchase.

The Second Circuit explained that "a plaintiff may demonstrate the domesticity of a particular transaction by producing evidence 'including, but not limited to, facts concerning the formation of the contracts, the placement of purchase orders, the passing of title, or the exchange of money.'" *Id.* (quoting *Absolute Activist Value Master Fund v. Ficeto*, 677 F.3d 60 (2d Cir. 2012)). The Second Circuit held that "the potential for variation across putative class members—who sold them the relevant securities, how those transactions were effectuated, and what forms of documentation might be offered in support of domesticity" would likely "generate a set of individualized inquiries that must be considered within the framework of Rule 23(b)(3)'s predominance requirement."[4]

The Second Circuit further held that Rule 23's implied ascertainability requirement[5] does

3. Please click here to read our prior discussion of the Supreme Court's decision in *Morrison*.

4. Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members."

5. Rule 23 includes "an implicit threshold requirement that members of a proposed class be readily identifiable, often characterized as an ascertainability requirement." *Petrobras*, 862 F.3d 250.

not demand "a showing of administrative feasibility at the class certification stage." The court rejected the Third Circuit's "heightened" two-part ascertainability test, pursuant to which "plaintiffs must not only show that 'the class is defined with reference to objective criteria,' but also that 'there is a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'" *Id.* (quoting *Byrd v. Aaron's*, 784 F.3d 154 (3d Cir. 2015)). The Second Circuit joined the Sixth, Seventh, Eighth and Ninth Circuits in so holding.

Second Circuit: (1) *Affiliated Ute* Presumption of Reliance Does Not Apply If Plaintiffs' Claims Are "Primarily Based on Misstatements," and (2) Plaintiffs May Be Able to Establish Market Efficiency Without Direct Evidence of Price Impact

On November 6, 2017, the Second Circuit held that the presumption of reliance established in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972) for omission-based Section 10(b) claims "does not apply" if plaintiffs' claims "are primarily based on misstatements."[6] *Waggoner v. Barclays*, 875 F.3d 79 (2d Cir. 2017). The court underscored that "[t]he *Affiliated Ute* presumption does not apply to earlier misrepresentations made more misleading by subsequent omissions, or to what has been described as 'half-truths,' nor does it apply to misstatements whose only omission is the truth that the statement misrepresents."

The Second Circuit further held that "direct evidence of price impact is not always necessary to demonstrate market efficiency." In addition, the court ruled that "defendants seeking to rebut" the presumption of reliance established in *Basic v. Levinson*, 485 U.S. 224 (1988) "must do so by a preponderance of the evidence."

Circuit Court Decisions Applying the Supreme Court's Decision in *Omnicare*

Ninth Circuit: *Omnicare*'s Pleading Standards for Opinion-Based Section 11 Claims Apply to Claims Alleging Misstatements of Opinion Under Section 10(b) and Rule 10b-5

On May 5, 2017, the Ninth Circuit held that the pleading standards for alleging a Section 11 claim based on a misstatement of opinion set forth in *Omnicare v. Laborers Dist. Council Const. Industry Pension Fund*, 135 S. Ct. 1318 (2015),[7] apply to opinion-based claims brought under Section 10(b) and Rule 10b-5. *City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Technology*, 856 F.3d 605 (9th Cir. 2017).

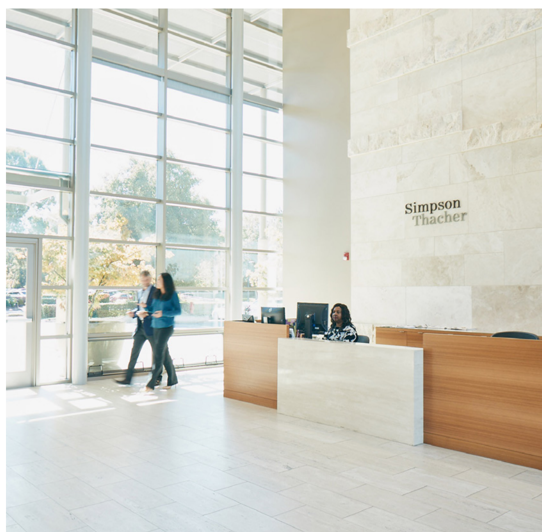
The Ninth Circuit determined that *Omnicare* overruled its prior decision in *Reese v. Malone*, 747 F.3d 557 (9th Cir. 2014)[8] to the extent that *Reese* permitted plaintiffs to allege the falsity of a statement of opinion by

6. The Second Circuit explained that *Affiliated Ute* "allows the element of reliance to be presumed in cases involving primarily omissions, rather than affirmative misstatements, because proving reliance in such cases is, in many situations, virtually impossible." *Waggoner*, 875 F.3d 79.

7. Please click here to read our prior discussion of the Court's decision in *Omnicare*.

8. Please click here to read our prior discussion of the Ninth Circuit's decision in *Reese*.

pleading that the speaker had "no reasonable basis for the belief" expressed. *Id.* (quoting *Reese*, 747 F.3d 557). The Ninth Circuit stated that under *Omnicare*, "pleading falsity by alleging that 'there is no reasonable basis for the belief' is permissible only under an omissions theory of liability." To assert an omission-based claim after *Omnicare*, a plaintiff must "'call into question the issuer's basis for offering the opinion'" by alleging "'facts about the inquiry the [issuer] did or did not conduct or the knowledge it did or did not have.'" *Id.* (quoting *Omnicare*, 135 S. Ct. 1318). The Ninth Circuit found *Reese*'s "no reasonable basis for the belief" standard "clearly irreconcilable" with *Omnicare*.



Ninth Circuit: Expressing a Favorable Opinion Concerning FDA Clearance May Be Misleading If the Speaker Does Not Disclose Relevant Adverse FDA Developments

On August 18, 2017, the Ninth Circuit reversed dismissal of securities fraud claims where defendants allegedly represented that "FDA clearance risk has been achieved" without disclosing that the company had not obtained clearance for one of the key products discussed. *In re Atossa Genetics Sec. Litig.*, 868 F.3d 784 (9th Cir. 2017).

The Ninth Circuit found the statement at issue to constitute an opinion, rather than a statement of fact, but found plaintiffs adequately alleged that the opinion did not "fairly align[ ] with the information in [the company's] possession at the time" under the standard set forth in *Omnicare*. The court observed that "the omitted facts [were] strikingly similar to [the] hypothetical the Supreme Court offered in *Omnicare*" of "an issuer [who] publicly stated, 'we believe our conduct is lawful,' but did not disclose the issuer's knowledge that the Federal Government took the opposite view."

Circuit Court Decisions Addressing Actionable Misrepresentations

D.C. Circuit: (1) Distributing a Statement Authored and Approved by a Superior Does Not Constitute "Making" a Statement Under *Janus*, But (2) Liability Under Rules 10b-5(a) and (c) Is Not Limited to "Makers" of Statements

On September 29, 2017, the D.C. Circuit held that a broker who had copied, pasted, and distributed false statements that his boss authored could not be liable under Rule 10b-5(b) as a "maker" of those statements within the meaning of the Supreme Court's decision in *Janus Capital Group v. First Derivative Traders*, 564 U.S. 135 (2011).[9] *Lorenzo v. SEC*, 872 F.3d 578 (D.C. Cir. 2017). The D.C. Circuit deemed it significant that the broker's boss had "approved the messages for distribution." The court found this demonstrated the boss's "ultimate authority over the substance and distribution of the emails."

The D.C. Circuit further held that the broker could nevertheless be liable under Rules 10b-5(a) and (c) and Section 17(a)(1)[10] because those sections "do not speak in terms of an individual's 'making' a false statement." The D.C. Circuit stated that "Rules 10b-5(a) and (c), as well as Sections 10(b) and 17(a)(1),

9. In *Janus*, 564 U.S. 135, the Supreme Court held that "the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." Please click here to read our prior discussion of the Court's decision in *Janus*.

10. Under Rule 10b-5(a), it is unlawful to "employ any device, scheme, or artifice to defraud ... in connection with the purchase or sale of any security." Rule 10b-5(c) prohibits individuals and entities from "engag[ing] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person ... in connection with the purchase or sale of any security." Section 17(a)(1) renders it "unlawful for any person in the offer or sale of any securities ... to employ any device, scheme, or artifice to defraud."

may encompass certain conduct involving the dissemination of false statements even if the same conduct lies beyond the reach of Rule 10b-5(b)."

Ninth Circuit: CEO's Failure to Comply with "Aspirational" Corporate Ethics Code Does Not Give Rise to a Claim for Securities Fraud Under Section 10(b) and Rule 10b-5

On January 19, 2017, the Ninth Circuit held that a CEO's violation of the company's ethics code did not give rise to a claim for securities fraud under Section 10(b) and Rule 10b-5 on the grounds that corporate ethics codes are "inherently aspirational." *Retail Wholesale & Dep't Store Union Local 338 Ret. Fund v. Hewlett-Packard*, 845 F.3d 1268 (9th Cir. 2017). The court explained that "a code of conduct … expresses opinions as to what actions are preferable, as opposed to implying that all staff, directors, and officers always adhere to its aspirations."

The Ninth Circuit held that corporate ethics statements cannot constitute affirmative misrepresentations for Rule 10b-5 purposes. The court reasoned that a "contrary interpretation" would be "simply untenable" because it would allow plaintiffs to frame virtually any claim of corporate wrongdoing as a securities fraud violation.

Ninth Circuit: (1) PSLRA's Safe Harbor Does Not Protect Non-Forward-Looking Representations Included in a Forward-Looking Statement, and (2) Cautionary Language Must Specifically Address the Possible Inaccuracy of Such Non-Forward-Looking Representations

On July 28, 2017, the Ninth Circuit held that "a defendant may not transform non-forward-looking statements into forward-looking statements that are protected by the safe harbor provisions of the" Private Securities Litigation Reform Act ("PSLRA") "by combining non-forward-looking statements about past or current facts with forward-looking statements about projected revenues and earnings." *In re Quality Sys. Sec. Litig.*, 865 F.3d 1130 (9th Cir. 2017). The court reasoned that "[t]he mere fact that a statement contains some reference to a projection of future events cannot sensibly bring the statement within the safe harbor if the allegation of falsehood relates to non-forward-looking aspects of the statement." *Id.* (quoting *In re Stone & Webster Sec. Litig.*, 414 F.3d 187 (1st Cir. 2005)). The Ninth Circuit joined the First, Second, Third, Fifth, and Seventh Circuits in so holding.

The Ninth Circuit further stated that in order "[f]or cautionary language accompanying a forward-looking portion of a mixed statement to be adequate under the PSLRA, that language must accurately convey appropriate, meaningful information about not only the forward-looking statement but also the non-forward-looking statement." The court underscored that "[i]f the non-forward-looking statement is materially false or misleading, it is likely that no cautionary language—short of an outright admission of the false or misleading nature of the non-forward-looking statement—would be 'sufficiently meaningful' to qualify the statement for the safe harbor."

Circuit Court Decisions Addressing Scienter

First Circuit: Alleging Defendants' Knowledge of Undisclosed Facts Is Insufficient to Plead Scienter; Plaintiffs Must Also Allege Defendants Knew or Should Have Known the Omissions Would Mislead Investors

On April 7, 2017, the First Circuit held that defendants' alleged knowledge of undisclosed facts is not sufficient, standing alone, to

raise an inference of scienter. *Brennan v. Zafgen*, 853 F.3d 606 (1st Cir. 2017). Rather, plaintiffs must also allege that defendants "knew or should have known that their failure to disclose those facts risked misleading investors."

Fourth Circuit: Allegations Sufficient to Raise an Inference of the Speaker's Knowledge of a Statement's Falsity Do Not, Standing Alone, Satisfy the Scienter Pleading Requirement

On November 15, 2017, the Fourth Circuit held that allegations raising an inference of a CEO's knowledge of a statement's falsity were not "sufficient to show that [the CEO] acted intentionally or recklessly to deceive, manipulate, or defraud." *Maguire Fin. v. PowerSecure Int'l*, 876 F.3d 541 (4th Cir. 2017). The Fourth Circuit reasoned that "scienter and knowledge with respect to misrepresentation are distinct components of the requisite analytical framework." The court stated that "[t]o conflate the two … would read the scienter element out of the analysis in contravention of the … exacting pleading standard" established by the PSLRA.

Circuit Court Decisions Addressing ERISA Actions

Fourth and Sixth Circuits: ERISA Fiduciaries May Rely on the Market Price of a Publicly-Traded Stock as an Assessment of the Stock's Riskiness

In April 2017, both the Fourth and Sixth Circuits applied the Supreme Court's decision in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014)[11] to hold that an ERISA fiduciary may rely on the market price of a publicly-traded stock as an assessment of the stock's riskiness.

On April 28, 2017, the Fourth Circuit held that a prudent fiduciary may consider public information concerning a stock's riskiness when determining whether to divest. *Tatum v. RJR Pension Investment Committee*, 855 F.3d 553 (4th Cir. 2017). The court held that "in an efficient market, a fiduciary can rely on the market price to reflect the public information about risk of loss, even if, in the beneficiaries' view, the market valuation is not properly accounting for the true risk of loss." The court further found that ERISA does not require "a more compelling reason for divestment decisions than for investment decisions."

On April 7, 2017, the Sixth Circuit ruled that a fiduciary's failure to investigate the accuracy of a publicly-traded company's stock price is not a "special circumstance" within the meaning of the *Fifth Third* decision. *Saumer v. Cliffs Natural Resources*, 853 F.3d 855 (6th Cir. 2017). The court explained that *Fifth Third* "plainly holds that a fiduciary may rely on market price as an unbiased assessment of a security's value," including its riskiness. The court found "that even if the special-circumstances exception encompasses more than market inefficiency, it doesn't include a fiduciary's failure to independently verify the accuracy of the market's pricing."

Tenth Circuit: Plaintiffs Asserting ERISA Breach of Fiduciary Duty Claims Bear the Burden of Proving Loss Causation

On June 5, 2017, the Tenth Circuit held that the burden to prove loss causation in an ERISA breach of fiduciary duty action "falls squarely on the plaintiff." *Pioneer Ctrs. Holding Co. Employee Stock Ownership Plan and Tr. v. Alerus Fin.*, 858 F.3d 1324 (10th Cir. 2017).

Pursuant to 29 U.S.C. § 1109(a), "a fiduciary who breaches its duties under ERISA shall be personally liable for 'any losses to the plan resulting from each such breach.'" *Id.* (quoting 29 U.S.C. § 1109(a)). The court noted that "the statute is silent as to who bears the burden of proving a resulting loss." The Tenth Circuit explained that "[w]here a statute is silent on burden allocation, 'the ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims.'" *Id.* (quoting *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005)). The Tenth Circuit determined that none of the exceptions to the default rule apply to ERISA breach of fiduciary duty claims. Moreover, the court found that adopting a "burden-shifting framework could result in removing an important check on the otherwise sweeping liability of fiduciaries

11. Please click here to read our prior discussion of the Court's decision in *Fifth Third*.

under ERISA." The Tenth Circuit's decision deepened a circuit split on this issue.

Circuit Court Decisions Addressing the Scope of Insider Trading Liability

First Circuit: Country Club Member Expected to Receive a "Personal Benefit" for Tipping a Fellow Club Member

On February 24, 2017, the First Circuit affirmed the insider trading conviction of a country club member (the "tippee") who received a tip about an upcoming bank acquisition from a fellow country club member. *United States v. Bray*, 853 F.3d 18 (1st Cir. 2017). The court found that evidence of a friendship between the tipper and the tippee, together with the tipper's testimony that he believed the tip would enhance his reputation with the tippee, provided a reasonable basis for the jury to conclude that the tipper expected to receive a "personal benefit" for his tip as required under the Supreme Court's decision in *Dirks v. SEC*, 463 U.S. 646 (1983).

Second Circuit: Supreme Court's Decision in *Salman* Abrogated *Newman*'s "Meaningfully Close Personal Relationship" Test for Tipping Liability

On August 23, 2017, the Second Circuit held that the "meaningfully close personal relationship" test established in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014)[12] for the personal benefit requirement for tipping liability "is no longer good law" in view of the Supreme Court's decision in *Salman v. United States*, 137 S. Ct. 420 (2016).[13] *United States v. Martoma*, 869 F.3d 58 (2d Cir. 2017).

"[I]n light of *Salman*," the *Martoma* court held that "an insider or tipper personally benefits from a disclosure of inside information whenever the information was disclosed 'with the expectation that the recipient' would trade on it, and the disclosure resembles trading by the insider followed by a gift of the profits to the recipient, whether or not there was a 'meaningfully close personal relationship' between the tipper and the tippee."

Significant Delaware Supreme Court Decisions

Delaware Supreme Court: Business Judgment Rule Applies to Two-Step Section 251(h) Mergers If the Target Corporation's Fully-Informed, Uncoerced Stockholders Tender a Majority of the Company's Shares in a First-Step Tender Offer

On February 9, 2017, the Delaware Supreme Court adopted the Chancery Court's reasoning in affirming a June 2016 Chancery Court decision holding that the business judgment rule applies to two-step Section 251(h) mergers if the target corporation's fully informed, uncoerced stockholders tender a majority of the company's shares in a first-step tender offer.[14] *In re Volcano Corp. Stockholder Litig.*, 2017 WL 563187 (Del. 2017). The Chancery Court found 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

12. Please click here to read our prior discussion of the Second Circuit's decision in *Newman*.

13. Please click here to read our prior discussion of the Supreme Court's decision in *Salman*.

14. Pursuant to Section 251(h) of the Delaware General Corporation Law, companies may complete two-step mergers without a target company stockholder vote if the acquiring corporation consummates a first-step tender offer.

two-step merger under Section 251(h) has the same cleansing effect under" the Delaware Supreme Court's decision in *Corwin v. KKR Fin. Holdings*, 125 A.3d 304 (Del. 2015)[15] "as a vote in favor of a merger by a fully informed, disinterested, uncoerced stockholder majority." *In re Volcano Corp. Stockholder Litig.*, 143 A.3d 727 (Del. Ch. 2016).

Delaware Supreme Court: "Commercially Reasonable Efforts" Clause in a Merger Agreement Imposes an Affirmative Obligation on the Parties to Take All Reasonable Steps to Ensure Performance

On March 23, 2017, the Delaware Supreme Court held that a "commercially reasonable efforts" clause in a merger agreement "placed an affirmative obligation on the parties to take all reasonable steps to" satisfy the condition precedent. *Williams Cos. v. Energy Transfer Equity*, 159 A.3d 264 (Del. 2017).

The Delaware Supreme Court found the Chancery Court had erroneously interpreted the "commercially reasonable efforts" clause at issue "as imposing only a negative duty not to thwart or obstruct performance … rather than an affirmative duty to help ensure performance." The Delaware Supreme Court explained that in *Hexion Specialty Chemicals v. Huntsman Corp.*, 965 A.2d 715 (Del. Ch. 2008), the Chancery Court recognized that such covenants "impose obligations to take all reasonable steps to solve problems and consummate the transaction."

Delaware Supreme Court: Directors Have No Obligation to Disclose Details About Offers the Directors Deemed Not Worth Pursuing

On March 23, 2017, the Delaware Supreme Court affirmed a Chancery Court decision holding that a company's board of directors had no obligation to provide shareholders with details concerning possible bidders whose potential offers the directors did not consider. *City of Miami Gen. Employees' and Sanitation Employees' Ret. Trust*, 2017 WL 1093185 (Del. 2017). The Chancery Court found that "Delaware law does not require disclosure of a play-by-play of negotiations leading to a transaction or of potential offers that a board has determined were not worth pursuing." *City of Miami Gen. Employees' and Sanitation Employees' Ret. Trust v. Comstock*, 2016 WL 4464156 (Del. Ch. 2016).

Delaware Supreme Court: (1) Deal Price "Will Often Be" the Best Evidence of Fair Value in an Arm's-Length Transaction Following a "Robust" Sale Process, and (2) There Is No Basis for a "Private Equity Carve Out" to Reliance on the Merger Price

On August 1, 2017, the Delaware Supreme Court stated that "the sale value resulting from a robust market check will often be the most reliable evidence of fair value, and that second-guessing the value arrived upon by the collective views of many sophisticated parties with a real stake in the matter is hazardous." *DFC Global Corp. v. Muirfield Value Partners*, 172 A.3d 346 (Del. 2017). However, the court did not adopt a presumption that the sale price is the best evidence of fair value "in certain cases involving arm's-length mergers" because it found that 8 Del. C. § 262(h),[16] the Delaware appraisal statute, vests the Chancery Court with discretion to determine fair value "in the first instance."

Significantly, the Delaware Supreme Court rejected two arguments frequently used to challenge reliance on the merger price. First, the court held that market forces can adequately account for regulatory risk. The court reasoned that "the market's assessment of [a company's] future cash flows necessarily takes regulatory risk into account as it does with all the other reasonable uncertain factors that affect a company's future." Second, the court found no basis in the "economic literature" or the record for the imposition of a "'private equity carve out' … in which the deal price resulting in a transaction won by a private equity buyer is not a reliable indication of fair value."

15. Please click here to read our prior discussion of the Delaware Supreme Court's decision in *Corwin*.

16. Delaware's appraisal statute provides in relevant part as follows:

> [T]he Court shall determine the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation, together with interest, if any, to be paid upon the amount determined to be the fair value. In determining such fair value, the Court shall take into account all relevant factors.

8 Del. C.§ 262(h).

Delaware Supreme Court: Chancery Court Abused Its Discretion in Placing No Weight on the Deal Price in a Transaction Resulting From a Robust Sales Process

On December 14, 2017, the Delaware Supreme Court reversed and remanded a widely covered appraisal decision in which the Chancery Court placed no weight on either the stock price or the deal price, but instead relied on its own discounted cash flow ("DCF") analysis to arrive at a fair value substantially higher than the deal price. *Dell v. Magnetar Global Event Driven Master Fund Ltd.*, 2017 WL 6375829 (Del. 2017). Based on the record before it, the Delaware Supreme Court found "the deal price deserved heavy, if not dispositive, weight."

The Delaware Supreme Court found that there was "compelling" "evidence of market efficiency, fair play, low barriers to entry, outreach to all logical buyers, and the chance for any topping bidder to have the support of [the CEO's] own votes." Under these circumstances, the Delaware Supreme Court found the Chancery Court's decision to place no weight on the market price "abuse[d] even the wide discretion afforded the Court of Chancery in these difficult cases."

Although the Delaware Supreme Court did not hold "that the market is always the best indicator of value, or that it should always be granted some weight," its opinion—particularly when read in conjunction with its earlier guidance in *DFC Global Corp. v. Muirfield Value Partners*—signals that greater deference should be given to the deal price resulting from an appropriate sale process.

The Delaware Supreme Court instructed that on remand, the Chancery Court may "enter judgment at the deal price ... with no further proceedings." If the Chancery Court instead "chooses to weigh a variety of factors in arriving at fair value," the court must "explain that weighting based on reasoning that is consistent with the record and with relevant, accepted financial principles."

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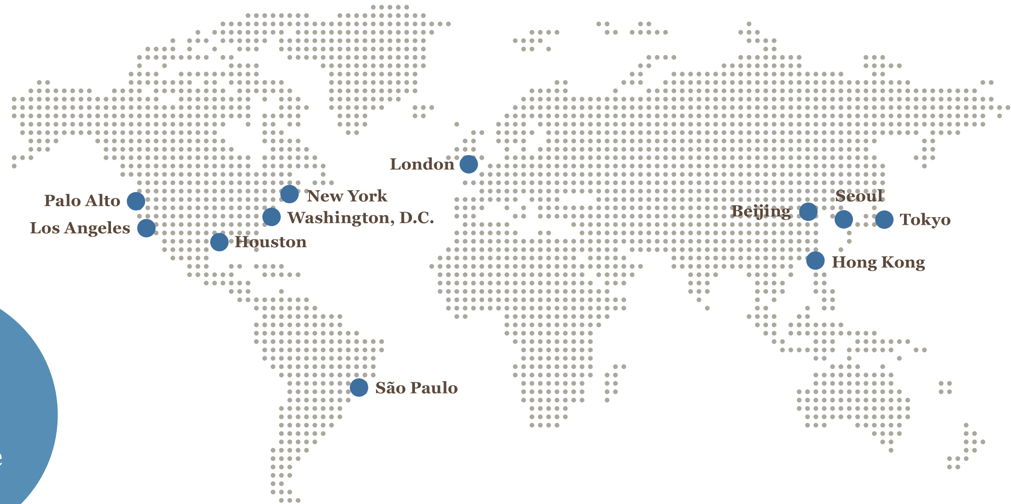

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