

KIRKLAND M&A UPDATE

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No Eruption – Delaware Supreme Court Upholds *Volcano* Decision Applying *Corwin* Doctrine to 251(h) Tender Offers

The Delaware Supreme Court's decision in Volcano has provided welcome guidance on the broad application of its Corwin doctrine on the cleansing effects of fully informed shareholder approval.

The Delaware Supreme Court in a [one-sentence decision](#) upholding the Chancery decision in *Volcano* provided welcome clarity on Delaware's *Corwin* doctrine. In *Corwin*, the Supreme Court decided that the deferential business judgment rule should be the standard of review in post-closing damages cases in mergers (other than those subject to entire fairness review) that have been approved by a fully informed majority of disinterested stockholders.

In *Volcano*, the Chancery Court for the first time addressed the question of whether the *Corwin* doctrine applied to transactions completed under Delaware's 251(h) tender offer structure or whether it was limited to so-called "one-step" mergers involving a stockholder vote. The Chancery Court held that a tender by the majority of *Volcano*'s stockholders was the equivalent of a majority vote of stockholders for purposes of the cleansing effect embodied by *Corwin* (a holding repeated in a subsequent Chancery decision in *Auspex*).

In affirming this ruling, the Supreme Court provides dealmakers with confidence that choosing a tender offer structure, which may be favored by parties because of potential speed advantages, will not deprive the target board of the litigation benefits of a fully informed approval by stockholders.

In addition, the plaintiffs on appeal challenged VC Montgomery Reeves' broad characterization of the *Corwin* doctrine. She held that, assuming the informed stockholder approval, "the business judgment rule standard of review irrebuttably applies to the plaintiffs' allegations and insulates the merger from a challenge on any ground other than waste." A similar characterization appeared in the *Auspex* decision. The appeal argued that the business judgment rule was merely a burden-shifting presumption as opposed to "burden-deletive" irrebuttable protection. The Supreme Court's upholding of the Chancery decision suggests that the Supreme Court is comfortable with the characterization of the business judgment rule presumption as "irrebuttable" in these circumstances.

The *Corwin* doctrine has quickly become one of the most significant Delaware developments in recent years, facilitating a focus on full disclosure to stockholders as a means to avoid vexatious post-closing fiduciary duty litigation. The Supreme Court's decision in *Volcano* helpfully extends these benefits to transactions completed under a tender offer structure and upholds the broad characterization of the business judgment rule as "irrebuttable" in these circumstances.

If you have any questions about the matters addressed in this *M&A Update*, please contact the following Kirkland author or your regular Kirkland contact.

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