Court of Chancery Reaffirms Possibility of "Buying Into" an Appraisal Claim

Client Alert
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Over the last several years, there has been a rise in so-called "appraisal arbitrage" - funds buying stock of a target company after announcement of a merger in order to pursue appraisal claims. Resulting litigation has raised the question of whether such "arbitrageurs" have standing to pursue an appraisal claim if they cannot demonstrate that the purchased *shares* were not voted in favor of the merger. Such a tracing requirement would be difficult to fulfill, given that most shares today are held by a stock depository.

On January 5, 2015, the Court of Chancery issued two related opinions addressing the issue. In both *In re Appraisal of Ancestry.com, Inc.* and *Merion Capital LP v. BMC Software, Inc.,* Vice Chancellor Glasscock denied the respondents' motions for summary judgment, each of which asserted that the petitioner lacked standing because it purchased shares after the announcement of the merger and was unable to prove that the purchased shares were not voted in favor of the merger. In doing so, the Court reaffirmed that, under Delaware's appraisal statute, the relevant focus is the action of the *record owner* of the shares (i.e. whether the *owner* voted in favor of the merger), not whether the *specific shares* were voted in favor of the merger. The Court reiterated that there is no requirement that an appraisal petitioner prove that previous owners of the appraisal shares refrained from voting in favor of the merger.

In both *Ancestry* and *BMC*, the petitioner, Merion Capital, purchased shares of a target company after the announcement of a merger and then sought appraisal of those shares. In *Ancestry,* Merion asserted appraisal rights through Cede, the record holder of its shares. In BMC, Merion took steps to become the record holder of its shares and demanded appraisal directly as a stockholder of record. In both cases, shares were purchased on the open market and Merion did not know who the sellers of those shares were or whether the shares were voted in favor of the merger.

The Court refused to impose the so-called "share-tracing" requirement suggested by the respondents. The Court found that the standing requirements of Section 262(a) did not require share-tracing because the plain language of the statute focused on whether the *record stockholder* voted in favor of the merger and not on whether the *shares themselves* were voted in favor of the merger. Thus, in BMC, the Court found that Merion had standing because it was the record

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stockholder and did not vote in favor of the merger. In *Ancestry*, the Court determined that Merion had standing because its record holder, Cede, properly demanded appraisal and, consistent with the Court's holding eight years ago in *In re Appraisal of Transkaryotic Therapies, Inc.,* Cede had at least as many shares not voted in favor of the merger as the number of shares for which demand was made.

The Court also rejected arguments that a 2007 amendment to Section 262(e), which allowed stockholders to obtain from the company a statement "setting forth the aggregate number of shares *not voted in favor of the merger*," indicated a legislative intent or implicit requirement that shares be traced to determine whether or not they were voted in favor of the merger. The Court held that the "information right" in Section 262(e) did not modify the standing requirements of Section 262(a) or impose any additional hurdles for appraisal petitioners.

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