

Delaware Supreme Court Holds Novel Pre-Closing Dividend Transaction Structure Does Not Thwart Appraisal Remedy

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In [*In re GGP Stockholder Litigation*](#), 2022 WL 2815820 (Del. July 19, 2022), an M&A transaction split the merger consideration into two parts: an oversized pre-closing dividend totaling over \$9 billion, followed by a nominal post-closing payment of about 31 cents a share. In this case, a majority of the [Delaware Supreme Court](#) concluded that divvying up merger consideration in this manner does not defeat a dissenting stockholder's appraisal rights. The majority held that a pre-closing dividend (at least one dependent upon the consummation of the transaction) is part and parcel of the total "merger consideration," and therefore will be taken into account when determining the fair value of a stockholder's shares prior to the transaction. However, the Court added, the proxy materials must be clear that the merger consideration subject to an appraisal action includes not only the post-closing per share payment, but also any pre-closing dividend—no matter how large it might be. Otherwise, a stockholder could (incorrectly) believe that the fair value of her shares will be appraised only *after* deducting the padded dividend from the value of the company, thus depleting the fair value of her shares and making the pursuit of an appraisal action highly unsavory. Here, the Court held that the proxy statement was less than clear in this regard, and upheld plaintiffs' breach of fiduciary duty claims on a motion to dismiss. In reaching its decision, the Delaware Supreme Court provides important guidance to practitioners structuring deals with an eye towards diminishing the usual deluge of appraisal actions—shoehorning the lion's share of merger compensation into a pre-closing dividend will not do the trick, nor can the accompanying proxy materials make that suggestion (no matter how subtly or perhaps unintentionally).

Appraisal under [Section 262](#) of the Delaware General Corporation Law is a remedy available to certain stockholders of Delaware corporations who do not agree to an M&A transaction. Assuming the merger is consummated, a dissenting stockholder may file an action to force the company to pay the pre-transaction "fair value" of her shares as determined by a Delaware court. And, at least before 2015, Delaware courts would more often than not find the "fair value" of the dissenting stockholder's shares to exceed the merger consideration offered by the company. Though much of the practice of "appraisal arbitrage" has been curbed by the Delaware Supreme Court in recent years, practitioners continue to seek ways to deter appraisal actions.

GGP, Inc. ("GGP") was a publicly traded real estate investment company. Brookfield Property

Partners, L.P. (with its affiliates, “Acquirer”) was a large minority stockholder in GGP, holding about 35% of GGP’s stock and three seats on the GGP Board of Directors. GGP’s stock had been trading low on the market such that, in the words of GGP’s CEO, “the sum of the parts is far greater than GGP’s current stock price.” Acquirer was interested in a transaction with GGP, and after months of negotiation between Acquirer and GGP’s special committee, the parties executed a merger agreement on March 25, 2018.

In negotiating the merger agreement, Acquirer wanted to include a closing condition that no more than 10% of the stockholders could dissent and exercise their appraisal rights (the “Appraisal Condition”). The GGP special committee fought against the Appraisal Condition and prevailed—the executed merger agreement did not contain the Appraisal Condition. Instead, as alleged by plaintiffs, the GGP special committee and Acquirer included a provision entitling GGP stockholders to two payments: (i) a pre-closing dividend of \$23.30 per share funded by Acquirer and payable after GGP adopted various charter amendments to facilitate the transaction, and (ii) closing consideration ultimately valued at about 31 cents per share. The proxy statement issued to stockholders distinguished these two payments and, in plaintiffs’ view, led stockholders to believe that appraisal would only apply to the 31 cent per share closing consideration and not to the much larger \$9 billion pre-closing dividend. In other words, a reasonable stockholder reading the proxy statement could have incorrectly concluded that should she choose to pursue an appraisal action (instead of approving the merger), the value of her shares pre-merger would be calculated only after deducting the \$9 billion pre-closing dividend from the company’s bottom line. Stockholder approval came on July 26, 2018, the pre-closing dividend was issued on August 27, 2018, and the transaction closed the following day.

Plaintiffs filed a quasi-appraisal action in the [Delaware Court of Chancery](#) against the GGP Board and Acquirer, alleging, in part, that the Board designed the large pre-closing dividend to eviscerate GGP stockholder appraisal rights, and breached their duty of loyalty by failing to provide GGP stockholders with a fair summary of their appraisal rights in the proxy statement. In an [opinion](#) by Vice Chancellor Slight, the Court of Chancery dismissed all causes of action, finding that, contrary to plaintiffs’ claims, the appraisal remedy remained intact, and the disclosures regarding the scope of appraisal rights were not materially misleading.

The Delaware Supreme Court reversed in part. The Court largely agreed with the Court of Chancery’s finding that the transaction structure did not violate Section 262: the payment of a pre-closing dividend does not eviscerate the appraisal remedy because in an appraisal action, the Court of Chancery is obligated under Section 262 to consider all relevant factors with respect to the fair value per share—including both the pre- and post-closing aspects of the merger consideration. The Court expressly stated that the appraised share price includes the pre-closing dividend *as if it were not issued*. In this case, that meant the \$9 billion pre-closing dividend would be added back into the pot in determining the fair value of a dissenting stockholder’s shares.

However, the majority disagreed with the Court of Chancery with respect to the appraisal rights disclosures, holding that plaintiffs had stated a non-exculpated claim for breach of fiduciary duty because there is a rational inference (as pled) that the defendant directors intended to deceive the stockholders into not pursuing their appraisal rights. The majority described the proxy statement as a “deeply challenging read,” and concluded that there were several instances that implied appraisal would *not* include the pre-closing dividend amount. The majority took particular issue with the appraisal rights notice, which identified the “merger consideration” as the 31-cent closing payment (without mention of the pre-closing dividend), closely linking the fair value determination to that limited consideration.

Sophisticated transaction parties continue to test the boundaries of Delaware law to curb post-transaction appraisal actions. Indeed, last year, in [*Manti Holdings, LLC v. Authentix Acquisition Co.*](#), 261 A.3d 1199 (Del. 2021), the Delaware Supreme Court facially permitted one structure where a Delaware corporation could require its stockholders to refrain from exercising dissenters rights via a stockholders agreement. As for the large pre-closing dividend merger compensation structure in *GGP*, it does not thwart stockholder appraisal rights under Section 262.

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