



June 2018

Follow @Paul_Hastings



Delaware Court Holds that Takeover Structure Eliminates Appraisal Rights: Is the Past Prologue?

By [David Shine](#), [Darcy White](#) & [Russell Franklin](#)

In a recent decision by the Delaware Court of Chancery (*North Miami Beach Employees Retirement Plan v. Dr Pepper Snapple Group*), the court held that, due to how the transaction was structured, stockholders of Dr Pepper are not entitled to appraisal rights in connection with the acquisition of Dr Pepper by Keurig Green Mountain. The decision is of interest for two reasons. First, the acquisition seems, on the surface, to be the type of transaction where appraisal rights typically apply—stockholders of Dr Pepper transferring control of Dr Pepper in exchange for a cash payment. Second, the decision has takeover practitioners asking whether the structure utilized will become a regular tool for avoiding appraisal risk.

Structure. The transaction is structured so that:

- Keurig will merge with a newly formed subsidiary of Dr Pepper and so become a wholly-owned subsidiary of Dr Pepper;
- The stockholders of Dr Pepper will receive \$103.75 in cash per share through a special dividend;
- The owner of Keurig will be issued Dr Pepper shares in an amount such that it will own 87% of Dr Pepper, and the existing Dr Pepper stockholders will, due to such issuance, be diluted to a 13% ownership interest in Dr Pepper; and
- No merger vote will be required from the Dr Pepper stockholders—only a vote to approve the cash dividend and to approve the additional shares needed for the issuance to Keurig.

Dr Pepper's Position. The principal argument presented to the court by Dr Pepper was that the transaction does not allow for appraisal rights because, as structured, the transaction fails to meet two key requirements of the appraisal statute. These requirements are (1) that appraisal only applies to shares of stock of a constituent corporation in a merger and (2) that appraisal only applies when in the merger stockholders are required to accept certain specified types of consideration for their shares. In the transaction as described above, (1) there is no merger involving Dr Pepper itself (only a subsidiary of Dr Pepper) and (2) Dr Pepper stockholders retain their shares—the transaction does not require that they give them up (although they are being deeply diluted).



Plaintiff's Claim. The plaintiff's principal claim was that since the stockholders are giving up control of Dr Pepper for cash and a diluted piece of stub equity, based on the economic/practical reality of the transaction, they should be entitled to appraisal rights. The court disagreed based on the "plain reading" of the appraisal statute provisions noted above, saying to do otherwise would introduce undue uncertainty.

Our view is that, while the Dr Pepper structure has the apparent effect of avoiding appraisal rights, for several reasons it is not likely to become a structure utilized primarily for this purpose. First, it is complicated and so makes the transaction harder to explain to the target stockholders (whose vote is still required) and harder to use in a competitive situation. Second, it does not result in a 100% acquisition but leaves the target stockholders with meaningful stub equity (which, granted, could later be squeezed out for cash, but any such squeeze out would raise additional legal issues/complications). Third, the appraisal risk in Delaware appears to be meaningfully lower than in the past in light of recent decisions finding that the deal price is often the best proxy for fair value for appraisal purposes. Fourth, because the structure results in the "acquirer" becoming a wholly-owned subsidiary of the "target," there may be substantive issues regarding acquirer (not just target) change of control provisions, and time and expense required to diligence this issue. Fifth, the structure is not new (as the court noted) yet is not often used.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

David N. Shine
1.212.318.6484
davidshine@paulhastings.com

Darcy R. White
1.404.815.2525
darcywhite@paulhastings.com

Russell M. Franklin
1.212.318.6012
russellfranklin@paulhastings.com

Paul Hastings LLP

Stay Current is published solely for the interests of friends and clients of Paul Hastings LLP and should in no way be relied upon or construed as legal advice. The views expressed in this publication reflect those of the authors and not necessarily the views of Paul Hastings. For specific information on recent developments or particular factual situations, the opinion of legal counsel should be sought. These materials may be considered ATTORNEY ADVERTISING in some jurisdictions. Paul Hastings is a limited liability partnership. Copyright © 2018 Paul Hastings LLP.