Hogan Lovells

2021 securities, shareholder, and M&A litigation

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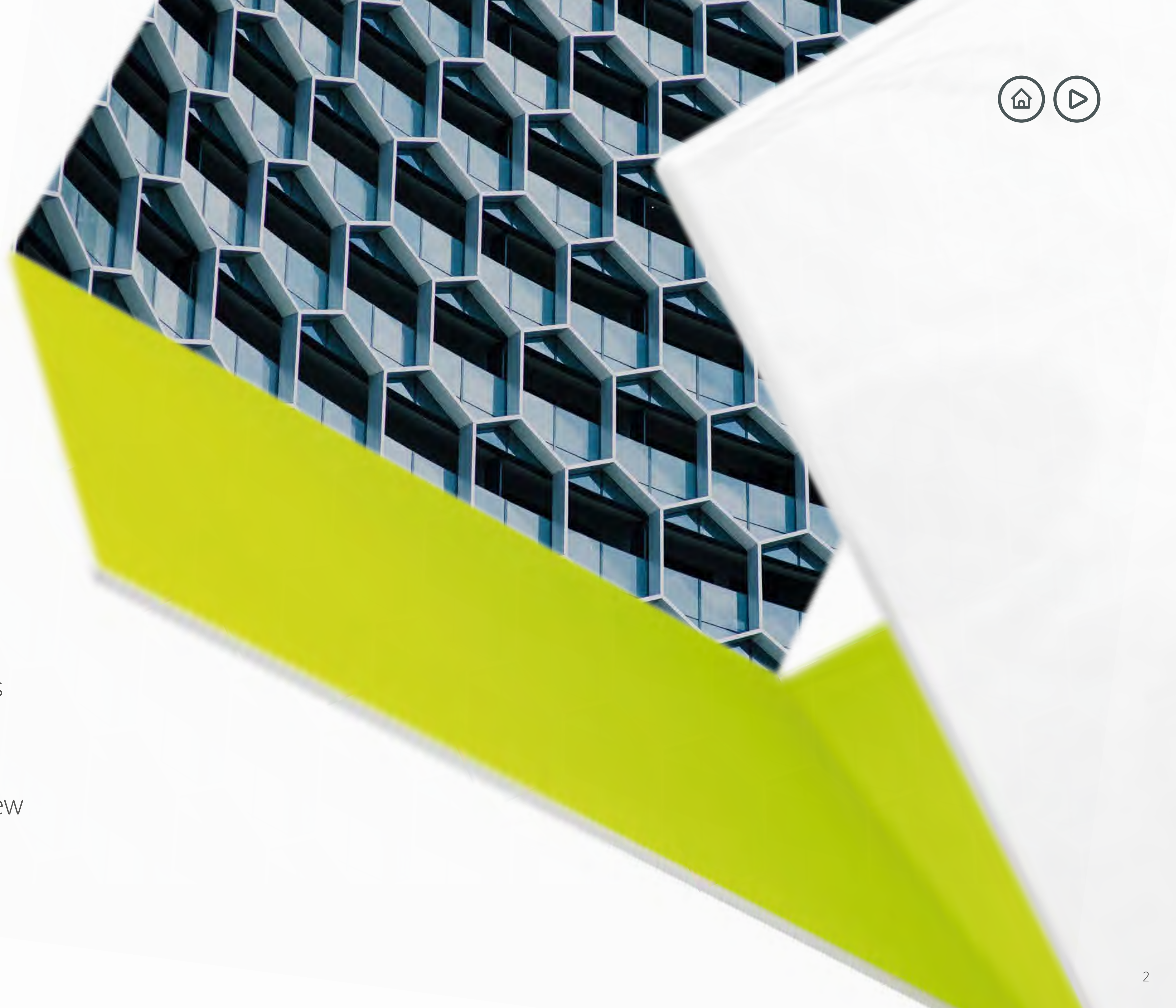
Contents



The outlook for 2021

One year ago, when we were finalizing our outlook for 2020, the world was in the early throes of the COVID-19 pandemic. While we anticipated that 2021 would bring many new challenges, few, if any, of us predicted at the time that we still would be struggling with the pandemic in our daily lives one year later.

Despite the challenges the COVID-19 pandemic presented to the legal profession – including early court closures, the rise of "virtual" legal proceedings, and the financial hardships faced by clients in numerous industry sectors – courts have continued to resolve key corporate governance issues, some familiar and some new.

Our quarterly coverage demonstrates the broad array of topics and issues the courts have dealt with this past year, ranging from the continued impact of *Marchand v. Barnhill* on *Caremark* claims, to the evolution of Section 220 jurisprudence, to the continued refinement of the law governing fiduciary duties in the context of complex M&A transactions. Over the past year, our coverage has highlighted four important trends.

1. Courts addressed the impact of COVID-19 in a variety of legal and factual contexts, with two significant decisions on the impact of COVID-19 on M&A transactions coming just before the end of the year.
2. Delaware courts continued to develop the body of law related to key stockholder rights, including Section 220 books and records demands, and appraisal actions under Section 262.
3. Delaware courts further refined core corporate governance doctrines, with a focus on the rights and responsibilities of minority and controlling stockholders, the role of the board of directors in complex M&A transactions, and the revitalization of duty of oversight claims.
4. Courts in Delaware and California have confirmed the viability of federal forum provisions in company charters.

We hope that you find the remainder of this 2021 outlook a useful tool. We continue to send our best wishes to our clients, friends, and families, and we hope that 2021 will bring a return to some measure of normalcy.

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Executive summary

COVID-19 and M&A transactions

In early 2020, a flurry of lawsuits were filed alleging that a buyer was excused from having to close an M&A transaction on the grounds that COVID-19 caused a material adverse effect (MAE). Most of the COVID-19 MAE cases settled, but in Q4 2020, two significant decisions were issued.

First, in *Travelport v. WEX*, **the English High Court found that the COVID-19 pandemic constituted an MAE** entitling an M&A buyer to back out of its agreement to purchase a payment solutions company for US$1.7 billion. The central question addressed was whether the target company fell within a specific "industry" that had suffered a disproportionate impact from COVID-19, as the MAE clause did not apply if the target company experienced the same impact as its competitors. The court concluded that the proper comparison was the broader "business-to-business payment" industry, rather than the defendant's suggestion of a more specific "travel payments industry," because the term "industry" in the MAE clause was deemed intentionally broad. Notably, the English High Court looked to Delaware law for guidance in dealing with MAE issues due to a lack of relevant English case law.

Second, in *AB Stable*, **the Delaware Court of Chancery found that the impact of the COVID-19 pandemic did not cause an MAE** because, even though the definition of an MAE did not expressly include the term "pandemics," the contract nonetheless contained an exclusion for "natural disasters or calamities." The court also found, however, that the buyer was not required to close on different grounds, namely, that the seller's response to the COVID-19 pandemic violated the seller's covenant to operate the business "in the ordinary course."

We anticipate that courts will continue to deal with COVID-19-related issues into 2021 and potentially beyond.

Contours of statutory stockholder rights

The Delaware General Corporate Law provides and defines a variety of specific stockholder rights. In 2020, the courts dealt with developments in the law governing a number of these rights, including the right to demand inspection of books and records, the right to seek appraisal, and the right to bring derivative suits where a demand on the board is futile or refused.

First, the **Delaware courts issued several decisions on books and records demands.** Delaware courts published 47 opinions on books and records demands, exceeding the average of 34 opinions per year for 2015 to 2019. In *Lebanon County Employees' Retirement Fund v. AmerisourceBergen*, the Court of Chancery, later affirmed by the Delaware Supreme Court, rejected the argument that stockholders who want to investigate mismanagement also must state upfront what they plan to do with the materials sought (the "purpose plus an end" test). Instead, the court held that a plaintiff need only state a proper purpose for demanding access to books and records. The court also held that stockholders seeking records for use in litigation need only present a credible basis to infer possible corporate wrongdoing, and did not need to show *actionable* wrongdoing (the "actionable-wrongdoing" requirement). Delaware courts previously had applied both the "purpose plus an end" and "actionable-wrongdoing" requirements in cases construing Section 220 requests.

The Court of Chancery also granted requests for email and other electronically maintained documents in *Paraflon Investments, Ltd. v. Linkable Networks, Inc.*, confirming that these types of documents may be deemed part of a company's "books and records" where the stockholder demonstrates that necessary documents are likely to exist in the form of email. In *Gilead*, the Court of Chancery permitted the stockholders to obtain documents and awarded attorneys' fees.

Second, in *In re Appraisal of Panera Bread Co.*, **the Court of Chancery found that the deal price minus synergies was the proper way to measure fair value in an appraisal proceeding** and that, even though some aspects of the deal process were "sub-optimal," the sales process was reliable enough because, among other things, the negotiations were arms' length, Panera's board was disinterested and independent, and Panera received no other offers (even after the deal leaked and was signed). Ultimately, the court found that the fair value of the shares was lower than the deal price.

With M&A activity anticipated to increase in 2021, Delaware courts no doubt will continue to decide important cases affecting stockholder's statutory rights.

New developments in core M&A and governance doctrines

Delaware courts constantly are refining the scope of core M&A and governance doctrines to address new fact patterns, novel legal issues, and changing economic landscapes. 2020 was no exception, with Delaware courts addressing, among other things, (1) the obligations of minority and controlling stockholders, (2) the role of the board of directors in complex M&A transactions, and (3) the continued impact of *Marchand v. Barnhill* on *Caremark* claims.

Several decisions of note, including *In re Essendant, Salladay v. Lev, Gilbert v. Perlman,* and *77 Charters,* discussed the **roles of minority and controlling stockholders.** While *In re Essendant* served as a reminder of the high standard necessary to claim that a minority stockholder is a controlling stockholder, *Gilbert* found that minority shareholders are not without potential fiduciary duty obligations to other minority shareholders if they form a control group with a controlling shareholder. *Salladay* reinforced the rule that, absent a controlling stockholder on both sides of the transaction, *Corwin* cleansing or the use of a special committee can remove a transaction from entire fairness review. In *77 Charters*, the court held that an individual who controlled an LLC that owned a stake in an operating LLC owed fiduciary duties to the operating LLC's other members as a "second-tier controller", even though he was not himself a member of the operating LLC, because of the control he exerted over the assets of the operating LLC. Finally, *Agspring* permitted fraud claims arising from an agreement to sell a business to proceed against a private equity firm that operated as a controlling shareholder of the business where the private equity firm, among other things, held 98 percent of the company, had three of five board seats, and regularly obtained financial information.

Delaware courts also issued a number of decisions in 2020 addressing different aspects of a **board's duties in approving M&A transactions.** *Nine West* found that sell-side directors may be liable for failing to consider the buyer's post-transaction financial viability. *Mindbody* addressed conflict of interest allegations, dismissing some claims on the basis of the business judgment rule while permitting others to go forward based on allegations that two executives influenced the transaction to serve their own personal financial situation. *Rudd* showed the importance of Section 102(b)(7) exculpatory provisions, which the court applied to dismiss all fiduciary duty claims except those for breach of the duty of loyalty based on allegations that the company's board sold the company for too little due to conflicts of interest, even though enhanced scrutiny was the appropriate standard to apply to the review of the transaction.

Finally, *Inter-Marketing Group USA, Hughes,* and *AmerisourceBergen* showed the Chancery Court **denying motions to dismiss *Caremark* claims** in the wake of *Marchand v. Barnhill* and *In re Clovis Oncology*.

Both 2019 and 2020 produced significant developments in core Delaware M&A and governance law. We anticipate this trend to continue in 2021, both as additional cases arise in these developing areas and as the Delaware courts turn to new areas of law that may be thrust into the spotlight by COVID-19 and other macroeconomic factors.

Federal forum selection provision

Following the Supreme Court's decision in *Cyan*, which reaffirmed the concurrent jurisdiction of state and federal courts over claims brought under the Securities Act of 1933, some companies adopted federal forum provisions (FFPs) requiring '33 Act claims to be brought in federal court. **Delaware courts first addressed FFPs in December 2018** in *Sciabacucchi v. Salzberg*, where the Court of Chancery invalidated the FFPs in the charters of three different companies. The companies in *Sciabacucchi* appealed, and in March 2020, the Delaware Supreme Court reversed the Court of Chancery's decision, finding that FFPs were permissible under the "broad enabling text" of Section 102(b)(1) of the Delaware General Corporation Law. The Delaware Supreme Court specifically noted, however, that other states might reach different decisions based on their own principles.

In the second half of 2020, **two California courts weighed in on the issue** in *Wong v. Restoration Robotics* and *In re Uber Technologies*. The California Superior Courts in San Mateo and San Francisco Counties found that FFPs were permitted under California law and did not violate plaintiffs' due process rights. The court in *Uber* went a step further, finding that the '33 Act claims against a company's underwriters also were subject to the company's FFP because the FFP applied to "any complaint." These rulings are particularly important as many plaintiffs' firms frequently file in California state court. In 2021, we expect that additional courts in other states that often hear '33 Act claims – such as New York, Illinois, New Jersey, and Massachusetts – may weigh in on the issue.

COVID-19 and M&A Transactions

AB Stable VIII LLC v. MAPS Hotels and Resorts One LLC,

No. 2020-0310-JTL (Del. Ch. Nov. 30, 2020)

Why it is important

In *AB Stable VIII LLC v. MAPS Hotels and Resorts One LLC,* the Delaware Court of Chancery issued a 242-page opinion that addressed two issues arising out of the COVID-19 pandemic that are becoming increasingly prevalent in litigations related to corporate mergers and acquisitions. First, the court ruled that the COVID-19 pandemic did not constitute a Material Adverse Event (MAE) that would excuse the buyer from closing because the pandemic was a "calamity" and therefore fell within one of the MAE exclusions in the parties' agreement. Second, the court found that the seller was nonetheless unable to compel a closing because it had not operated its hotel business "in the ordinary course" after making operational changes in response to the pandemic. The decision offers important guidance on how the Delaware courts may apply MAE provisions and ordinary course covenants in future cases.

Summary

On September 10, 2019, a subsidiary of a Chinese conglomerate (the Seller) agreed to sell its interests in Strategic Hotels & Resorts LLC, a company that owns fifteen luxury hotels, to Mirae Asset Financial Group (the Buyer), a Korean financial services company, for US$5.8 billion. Closing was to occur on April 17, 2020, but the Buyer declined to close, asserting that the pandemic constituted an MAE excusing the Buyer from performing and that the Seller had not satisfied its obligation to operate the business in the ordinary course, including because the Seller had taken extraordinary steps, such as shutting down hotels, in response to the pandemic. On April 27, 2020, the Seller sued in an attempt to force the sale, and the Buyer responded by filing for declaratory relief.

The court rejected the Buyer's MAE argument, finding that the pandemic fell within a contractual MAE exclusion for "calamities" even though the exclusion did not cover pandemics expressly. Applying principles of contract interpretation, the court held that a plain reading of the exception for "calamities" encompassed the effects resulting from the COVID-19 pandemic with reference to certain dictionary definitions of the term, among other things. The court agreed with the Buyer, however, on the issue of whether the Seller had operated the target business in the ordinary course. The court found that the Seller had operated the business in an extraordinary manner that was not consistent with the Seller's past practice in response to the pandemic, thus violating the Seller's ordinary course covenant, satisfaction of which was a condition to closing. In so holding, the court rejected the Seller's argument that management must be afforded flexibility to engage in "ordinary responses to extraordinary events[,]" such that management should be deemed to have "operated in the ordinary course of business based on what is ordinary during a pandemic."

The court also found that the Seller was not able to produce clean title insurance, as required in the contract, after failing to disclose numerous pending lawsuits.

Travelport Ltd and others v. WEX Inc; Olding and others v. WEX Inc,

([2020] EWHC 2670 (Comm)) (English High Court, Queen's Bench Division (Commercial Court))

Why it is important

In *Travelport Ltd & Ors v WEX Inc [2020] EWHC 2670*, the English High Court issued a ruling of first impression in that court, finding that the COVID-19 pandemic constituted a material adverse effect (MAE) entitling an M&A buyer to back out of its agreement to purchase a payment solutions company for US$1.7 billion. The MAE clause at issue included an exception for "conditions resulting from … pandemics" having "a disproportionate effect on [the Target], taken as a whole, as compared to other participants in the industries in which [they] operate." The court referenced Delaware law in its analysis due to limited English precedents, and found that the term "industry" in the MAE clause should be construed to mean the broad industry in which the target business operated – which had not experienced substantial adverse effects from the pandemic – rather than the narrower industry sector the target business operated in, which was focused on travel and had been negatively affected by the pandemic. The ruling reinforces that principles of contract interpretation will guide jurisprudence regarding MAE clauses and could lead M&A parties to define industries with greater specificity for purposes of MAE clauses.

Summary

In this case, the first English commercial court dispute which was brought about by the COVID-19 pandemic, the court was asked, at a preliminary hearing, to construe Material Adverse Effect (MAE) provisions in a share purchase agreement (SPA). WEX Inc, a fintech providing corporate payments solutions, entered into an SPA to purchase 100 percent of the shares in eNett Ltd and Optal Ltd (together, the Target) for US$1.7 billion. The Target's business was providing virtual payment solutions, with 97 percent of its client base in the travel industry.

The MAE provisions in the SPA at the center of the dispute operated such that, if conditions resulting from the pandemic caused a disproportionate effect on the Target's financial condition as compared to other participants in the Target's industry, WEX was not obliged to close. WEX alleged that an MAE had occurred due to the COVID-19 pandemic. The sellers, being the shareholders of the Target, alleged otherwise and brought an action seeking specific performance.

The central question at the preliminary hearing was which "industry" the Target should be measured against for purposes of determining if the Target had suffered a disproportionate impact from the COVID-19 pandemic that could constitute an MAE. WEX contended that the term "industry" should be construed as referring to the business-to-business (B2B) payments industry, which is the broad industry the Target operates in. The Sellers contended that it was the travel payments industry (TPI), which comprises participants who deal in B2B payment products in the travel industry and is effectively a sector within the broader B2B payments industry.

The court found that the word "industry" should be given its ordinary and natural meaning because in a heavily negotiated contract the court "must assume that all wording has been carefully scrutinized by lawyers and is used wittingly and advisedly." The court also considered Delaware law, particularly *Akorn Inc v Fresenius Kabi AG*, No. 2018-0300-JTL, 2018 WL 4719347 (Del. Ch. October 1, 2018), for guidance as to the purpose of MAE provisions in M&A agreements, which indicated that they operate to allocate market/industry risk to the buyer, and company-specific risk, to the seller. The court noted that foreign law was informative rather than binding, and that the parties were ultimately at liberty to allocate risks through an MAE clause through the language they chose. Given the dearth of English case law on MAE provisions, this was a significant decision, which illustrates the need for careful drafting of MAE provisions in M&A agreements. In its ruling, the court stated that the term "industry," in a sense, "helped no-one" and that "it may well be that one result of this case is that future drafters will do differently."

Contours of statutory stockholders rights

Lebanon Cty. Emps.' Ret. Fund v. AmerisourceBergen Corp.,

C.A. No. 2019-0527-JTL (Del. Ch. Jan. 13, 2020)

Why it is important

In this decision, the Delaware Court of Chancery ruled that a stockholder of AmerisourceBergen Corp. (AmerisourceBergen) was permitted to access books and records of the company pursuant to Section 220 of the Delaware General Corporate Law in order to investigate potential wrongdoing in connection with the distribution of opioids. In so ruling, the court rejected numerous arguments advanced by AmerisourceBergen that arguably have been endorsed by recent Delaware precedent, including that stockholders who want to investigate mismanagement also must state upfront what they plan to do with the materials sought (the "purpose plus an end" test), and that stockholders must also present evidence of demonstrating a credible basis to infer actionable wrongdoing (the "actionable-wrongdoing" requirement). By rejecting these lines of authority, the court teed up a potential conflict in Section 220 jurisprudence that it subsequently certified for interlocutory review by the Delaware Supreme Court. In its February 12, 2020 decision certifying the decision for interlocutory review, the court (Laster, J.) held that its rejection of these additional requirements for Section 220 inspection, as well as its holding that a trial court may permit discovery to determine the scope of a permitted inspection, raise "substantial issues of material importance for purposes of actions to obtain books and records pursuant to Section 220." On March 5, 2020, the Delaware Supreme Court accepted the case for interlocutory review. Together with the appeal recently heard by the Delaware Supreme Court in another Section 220 decision, *High River Limited Partnership, et al. v. Occidental Petroleum Corp.* (prior coverage here), the Delaware Supreme Court's decision in this case can be expected to shape future Section 220 demands and litigation, including those seeking books and records to investigate potential *Caremark* duty-of-oversight claims reinvigorated by recent Delaware precedent.

Summary

AmerisourceBergen Corp. (AmerisourceBergen), one of the three largest pharmaceutical wholesale distributors in America, is a defendant in multidistrict litigation brought by consumers and state attorneys general and is the target of several congressional investigations relating to the opioid epidemic. Some of these investigations have determined that AmerisourceBergen may have violated settlement agreements with the Drug Enforcement Agency requiring that it properly oversee its distribution of opioids to prevent them from being improperly diverted. Analysts have predicted that resolving all of the litigation will collectively cost AmerisourceBergen and the other opioid distributors roughly US$100 billion.

In light of this "corporate trauma," certain shareholders of AmerisourceBergen launched an investigation into whether the company engaged in wrongdoing in connection with the distribution of opioids. As part of this investigation, stockholders demanded access to AmerisourceBergen's books and records under Section 220 of the Delaware General Corporation Law relating to the company's handling of opioid distribution and the board of directors' oversight of those efforts since 2010. AmerisourceBergen rejected the demands in their entireties, contending that the plaintiffs lacked a proper purpose for their demands and that the stated purposes were overly broad. The plaintiffs brought suit to enforce their rights.

The Court of Chancery agreed with the plaintiffs, compelled AmerisourceBergen to turn over books and records from board meetings, and permitted the plaintiffs to take a Rule 30(b)(6) deposition to determine what books and records existed and in what form. The court held that the findings from the congressional probes and the allegations in the lawsuits were sufficient to show that there was a credible basis to infer corporate wrongdoing on the part of AmerisourceBergen and therefore a "proper purpose" supporting the plaintiffs' Section 220 demand.

The court also rejected AmerisourceBergen's argument that the request was improper because it only sought records for litigation, finding that other Court of Chancery rulings requiring that shareholders show a "purpose-plus-an-end" were either distinguishable based on their facts or at odds with the statutory language in Section 220. Instead, the court found that a plaintiff need only state a proper purpose for demanding access to books and records, not for the ultimate use of the materials demanded. The court also rejected AmerisourceBergen's related claim that if litigation is envisioned in the demand, a plaintiff must show a credible basis to suspect actionable wrongdoing on the part of the company. The court held that a plaintiff need only show a credible basis for inferring possible corporate wrongdoing – not that the wrongdoing must also be actionable.

Acknowledging that its ruling appeared to conflict with recent Court of Chancery precedent, the Court of Chancery granted AmerisourceBergen's request to permit an interlocutory appeal to the Delaware Supreme Court, which accepted the case for interlocutory review on March 5, 2020.

In re. Appraisal of Panera Bread Co.,

C.A. No. 2017-0593-MTZ (Del. Ch. Jan. 31, 2020)

Why it is important

In another appraisal valuation decision following the Delaware Supreme Court's ruling in *Dell v. Magnetar Global Event Driven Master Fund Ltd.*, the Court of Chancery found that deal price minus synergies was the proper way to measure the fair value of Panera Bread Company's (Panera) shares. The court rejected the plaintiffs' arguments that the company was worth more than the buyer paid based on comparables or a discounted cash flow analysis, finding that, although some aspects of the sale process were "sub-optimal," the sale process nonetheless contained sufficient indicia of reliability, including because (1) the parties negotiated at arm's length; (2) Panera's board consisted of disinterested and independent directors with "deep knowledge of the market and of Panera's value"; (3) the buyer had conducted extensive due diligence and repeatedly raised its offer during negotiations; (4) Panera had approached all other logical buyers; and (5) Panera received no other offers, either after news of the planned deal leaked or after the merger agreement was signed. After subtracting synergies, the court concluded that the fair value was lower than the deal price, and that Panera therefore had overpaid the plaintiffs when it pre-paid the deal price to cut off statutory interest as permitted by a recent amendment to Section 262(h) of the Delaware General Corporate Law. As a matter of first impression, the court held that Panera was not entitled to a refund because the appraisal statute does not authorize a refund and because Panera did not negotiate a clawback (or refund) provision with the plaintiffs as part of a larger prepayment stipulation, as some other companies have done. Therefore, in instances where prepayment is considered, companies may be more likely to pursue clawback agreements in the wake of this decision, which otherwise reinforces the importance of a documented, robust sale process.

Summary

This appraisal action followed the acquisition of Panera Bread Company (Panera) by a buyer in July 2017. The buyer acquired Panera for US$315 per share, and 97 percent of the 80.26 percent of outstanding shares that voted approved the acquisition. Dissenting shareholders brought separate lawsuits under the Delaware appraisal statute, and those actions were subsequently consolidated. After Panera prepaid the sale price and statutory interest through the prepayment date, certain shareholders withdrew their demands. The remaining petitioners held a total of 785,108 common shares of Panera, and argued for a valuation of US$361 per share based on a discounted cash flow or comparable sale valuation methodology. The court disagreed and held, after a six day trial, that the deal price minus synergies was the best evidence of fair value.

The court based its ruling on objective indicia that the sale process was reliable. It was an arm's length transaction, directed by an independent board without conflicts of interest. In addition, Panera was able to increase the buyer's bid beyond its stated price ceiling, thereby achieving substantially greater value for its shareholders, and no other potential bidders emerged following a pre-signing leak of the potential deal or in the three month post-signing process, which the court emphasized as a particularly important fact in light of what the court found to be the board's "impeccable knowledge" of the company and solicitation of all logical alternate buyers. Other elements of the deal, such as a three percent termination fee with a fiduciary out, matching rights, and contingency fee payments for the financial advisor on the deal, were all considered routine and unremarkable.

In so holding, the court rejected several arguments plaintiffs raised for why the deal price was not a reliable indicator of fair value, including: (1) a rushed process with no market check; (2) a lack of an independent valuation of the company until the day before the board accepted the offer; (3) allegations that Morgan Stanley, the Board's financial advisor for the deal, was conflicted, particularly because the buyer's coverage banker was involved in certain deal-related communications; and (4) allegations that the CEO's desire to retire from his role led him to cede value. Although the court found that the amount Panera had prepaid to plaintiffs – which was based on the deal price – was greater than the fair value of their shares, in an issue of first impression, the court ruled that the company could not recoup the difference between the sale price and the court's valuation. Panera had not negotiated a clawback provision as part of a broader prepayment stipulation with the plaintiffs and, absent such agreement, recoupment was not authorized by the Delaware appraisal statute.

Elburn v. Albanese, et al.,

C.A. No. 2019-0774-JRS (Del. Ch. April 21, 2020)

Why it is important

In this ruling, the Delaware Court of Chancery clarified the pleading standard required to allege "particularized facts" in a derivative action brought under Rule 23.1. While the court noted that pleading under Rule 23.1 requires more than notice pleading under Rule 8(a), the court found it would be inappropriate to require that a derivative plaintiff meet the heightened Rule 9(b) requirements for pleading fraud in order to satisfy Rule 23.1. Thus, this case makes clear that plaintiffs bringing derivative actions will not be required to plead "newspaper facts" – that is, "who, what, where, when and how" – given that their position as stockholders often prohibits that level of insight. Ultimately, the court held that the plaintiff's allegations of a quid pro quo regarding compensation awards were sufficient to state a claim under Rule 23.1 and denied the defendants' motion to dismiss.

Summary

In 2015, Investors Bancorp, Inc., adopted an equity incentive plan (EIP) pursuant to which the board had discretion to make awards to board members. The shareholders of Investors Bancorp approved the EIP and, shortly thereafter, the board voted to approve approximately US$51.6 million worth of restricted stock awards and stock options for board member compensation. The decision was not presented to stockholders for ratification.

In 2016, stockholders challenged the awards, alleging that the board breached its fiduciary duties by approving the unfair and excessive award. The Court of Chancery granted the board's motion to dismiss, but on appeal, the Delaware Supreme Court reversed and remanded.

Before trial, the parties negotiated a settlement that rescinded the CEO's and COO's awards and substantially reduced the non-executive members' awards. Before the court approved the settlement, Investors Bancorp disclosed in its 2019 proxy statement that the board was considering issuing new awards to the CEO and COO. A month later, the board approved the new awards, which were substantially similar to the awards that would be revoked by the settlement.

After the announcement, stockholders brought the current action alleging that the board breached its fiduciary duties by engaging in self-dealing in order to obtain approval of the new awards. Specifically, the complaint alleged that the CEO and COO entered into a quid pro quo arrangement with the non-employee directors wherein the executive directors agreed to forfeit their awards in the settlement agreement if the non-employee directors would commit to approving new replacement awards after the settlement was negotiated. The stockholders alleged that the new awards were intended to circumvent the settlement agreement and again award the board members unfair and excessive compensation.

The board moved to dismiss the complaint under Rule 23.1 for failure to plead demand futility with particularity. The defendants argued that the term "with particularity" in Rule 23.1 must be construed in line with the same language in Rule 9(b). The court noted that under Rule 9(b), plaintiffs must plead "so-called 'newspaper facts' – who, what, when, where and how." The stockholders argued that because of the information asymmetry inherent in a derivative action, such construction would create an impossibly high bar for plaintiffs, even with documents obtained under Section 220.

The court agreed with the plaintiffs, finding that the "better paradigm in which to assess particularity in the Rule 23.1 context is the one in which courts contextually evaluate allegations of fraudulent omission. Where the plaintiff alleges fraud by omission, courts generally 'relax Rule 9(b)'s fraud pleading requirement.'" The court found that while Rule 23.1 pleadings are "held to a higher standard" than pleadings under Rule 8(a) "courts have interpreted the 'with particularity' standard as requiring only that a plaintiff allege the circumstances of the fraud with detail sufficient to apprise the defendant of the basis for the claim."

The Court of Chancery found that allegations that a quid pro quo agreement between the executive and non-employee board members had been made at some point during settlement negotiations were sufficient. The court reiterated that the standard required only "detail sufficient to apprise the defendant of the basis for the claim" and denied the board's motion to dismiss the well-pleaded complaint.

Riker v. Teucrium Trading, LLC,

C.A. No. 2019-0314-AGB (Del. Ch. May 12, 2020)

Paraflon Investments, Ltd. v. Linkable Networks, Inc.,

C.A. No. 2017-0611-JRS (Del. Ch. April 3, 2020)

Section 220 cases continue in record numbers

This quarter, the Delaware Court of Chancery continued to issue several opinions in connection with Section 220 books and records demands. In the first six months of 2020, there were 19 published opinions concerning Section 220 demands, which put 2020 on track to exceed the average of 34 opinions per year between 2015 and 2019. In two of the latest opinions, the Court of Chancery has continued to shape the contours of Section 220.

In a continuing trend, the Court of Chancery in *Paraflon Investments, Ltd. v. Linkable Networks, Inc.* ordered the production of emails and electronic documents. In *Paraflon*, the plaintiff made a Section 220 demand after Linkable was sold for “pennies on the dollar,” alleging several theories of mismanagement and wrongdoing. The Court of Chancery agreed partially with the plaintiff, ordering the production of records related to Linkable’s decision to abandon certain financing. The Court of Chancery specifically noted that responsive information on that topic could include emails and electronic documents. In addition, the court denied the plaintiff certain contracts because those contracts were not specifically included in the demand, demonstrating the Court of Chancery’s insistence that a plaintiff follow all form and manner requirements set forth in Section 220.

Riker v. Teucrium Trading, LLC, addressed Section 220’s sister statute for LLCs, Section 18-305 of the Delaware LLC Act, which is interpreted consistent with Section 220 case law absent a contractual modification. As the Court of Chancery noted, although most books and records matters are resolved on an expedited schedule, such litigation can drag on. In *Riker*, the parties engaged in a pre-trial mediation, followed by trial and post-trial briefing. As a result, the decision was issued over a year after the plaintiff first filed his complaint. Ultimately, the court granted the request in part. The court found the plaintiff’s desire to value his interest to be a proper purpose and ordered the production of certain documents. The court rejected the plaintiff’s other stated purpose – to investigate wrongdoing – because the trial testimony and post-trial briefing demonstrated that there was no credible basis to infer mismanagement.

These cases, both individually, and as part of the continued flow of Section 220 decisions, demonstrate the growing importance of Section 220 as a pre-litigation battleground.

Murfey, et al. v. WHC Ventures, LLC, et al.,

No. 294, 2019 (Del. Super. July 13, 2020) (en banc)

Why it is important

In *Murfey et al. v. WHC Ventures, LLC, et al.*, the Delaware Supreme Court sitting *en banc* held in a 3-2 ruling that limited partners seeking books and records pursuant to contractual inspection rights did not need to demonstrate that the records were "necessary and essential" to the asserted purpose of their inspection. The court found that although the "necessary and essential" requirement was well-established under Section 220 jurisprudence, it was error for the Court of Chancery to read the requirement into the inspection provisions of the partnership agreements at issue. In so holding, the court provided valuable guidance regarding when implied contractual obligations, including those established by statute, may be read into alternative entity agreements. This guidance may prompt entities such as partnerships and limited liability companies to revisit their operating agreements to ensure that desired limitations on inspection rights are clearly delineated.

Summary

This action arose in connection with a books and records demand seeking access to partnership records under both 6 Del. C. § 17-305 (Section 305), the Delaware statute governing partnership records demands, and the partnerships' respective partnership agreements. The parties agreed that certain records would be produced, but the partnerships insisted that K-1 tax records be produced on a "professionals' eyes-only" basis such that only the plaintiffs' expert could review the K-1s, but not the plaintiffs themselves. The Court of Chancery determined that the plaintiffs' records demand was for a proper purpose – valuing the plaintiffs' ownership interests – but found that the plaintiffs failed to establish a credible basis for suspected wrongdoing. The Court of Chancery then applied the standard adopted from case law governing books and records requests on corporations to hold that the plaintiffs were not entitled to the K-1s because they were not "necessary and essential" to the plaintiffs' stated purpose for seeking the records. In so holding, the Court of Chancery rejected the plaintiffs' arguments that Section 220's "necessary and essential" requirement for corporate inspection requests should not be read into the statute governing partnership records requests or into the plaintiffs' separate contractual inspection rights under the relevant partnership agreements.

A divided *en banc* court reversed and remanded to the Court of Chancery, finding that the partnership agreements at issue did not contain language limiting access to books and records that were "necessary and essential" to the purpose of the demand, and that the plaintiffs therefore had a contractual right to the K-1s. The court held that implying terms into a written contract should be a "cautious enterprise." Because the partnership agreements specifically listed "federal, state and local income tax or information returns or reports" as information limited partners were entitled to, and did not include the "necessary and essential" limiting language, the court concluded that the plaintiffs were entitled to the requested records. The court further held that, as a practical matter, it did not make sense to prohibit the plaintiffs' advisors from discussing the K-1 information with the plaintiffs in order to advise them. The court expressly declined to rule on whether Section 220's "necessary and essential" requirement for corporate inspection requests should be read into the statute governing partnership records requests.

The dissent pointed to the similarity of the language in the partnership agreements to Section 305 and the fact that case law has often interpreted Section 305 in reference to Section 220. They argued that where contract language intentionally mirrors a statute, it should be interpreted in the same manner as that statute. The majority disagreed, emphasizing that the language of the agreements controls.

Pettry v. Gilead Sciences, Inc.,

C.A. No. 2020-0173-KSJM (Del. Ch. Nov. 24, 2020)

Why it is important

In this ruling, the Delaware Court of Chancery found that Section 220 of the Delaware General Corporation Law may be used to grant pre-complaint discovery to stockholders contemplating a derivative suit against the company. In a detailed opinion, the court rejected Gilead's arguments, including that inspection should be limited to formal board materials. Instead, the court ordered the company to produce multiple categories of documents that it held were "necessary and essential to the plaintiffs' stated purposes," and granted the plaintiffs' leave to seek their attorney fees. In contrast to prior decisions, this decision reinforces the low burden to obtain Section 220 discovery and also signals that companies resisting Section 220 demands face a risk of an attorneys' fees award to the plaintiff.

Summary

In 2001, Gilead received FDA approval for a life-saving HIV drug, Viread® (tenofovir disoproxil fumarate (TDF)). In late 2019 and early 2020, four sets of plaintiffs sent Gilead books and records demands under Section 220 of the Delaware General Corporate Law. The demands alleged that Gilead sought to protect the market for TDF by delaying market entry of generic versions of TDF and delaying the development of a safer substitute of TDF, tenofovir alafenamide (TAF). The plaintiffs sought to inspect documents relating to these allegations.

After Gilead declined to provide documents in response to the demands, each of the plaintiffs filed suit. Gilead answered the complaints and requested that the court order the plaintiffs to coordinate their efforts, which the parties subsequently stipulated to do. Gilead moved for a protective order against discovery requests directed at it, which the court denied. The court held a trial on June 23, 2020 and the parties completed post-trial briefing on August 26, 2020.

Based on all the evidence before it, the court ordered that Gilead produce certain categories of documents and pay the plaintiffs' attorneys fees. In Delaware, "[w]hen a stockholder seeks inspection for the purpose of investigating wrongdoing, the stockholder must demonstrate a credible basis to suspect possible wrongdoing." The "credible basis" standard imposes "the lowest possible burden of proof," which does not require a stockholder to prove that the wrongdoing "actually occurred," or "to show by a preponderance of the evidence that wrongdoing is probable." The court concluded that the plaintiffs met this standard, rejecting all of Gilead's arguments, which the court characterized as largely going to the merits of the dispute. Ultimately, the court found that the plaintiffs had put forward sufficient evidence to demonstrate that there was a "credible basis" to seek books and records from Gilead under Section 220. In addition, the court granted the plaintiffs leave to move for fee-shifting.

New developments in core M&A and governance doctrines

In re Essendant, Inc,

C.A. No. 2017-0931-JTL (Del. Ch. July 9, 2019)

Why it is important

In *In re Essendant, Inc.*, the Delaware Court of Chancery dismissed a class action suit against the board of directors and CEO of Essendant Inc. (Essendant), as well as Sycamore Partners (Sycamore), a private equity firm and minority shareholder of Essendant, arising out of the Essendant board's decision to terminate a stock-for-stock merger agreement with another buyer in order to accept Sycamore's all-cash offer. The court concluded that the plaintiffs had not stated a claim for breach of the duty of loyalty based on the plaintiffs' failure to show that the board chose Sycamore's offer because it was dominated and controlled by Sycamore or out of self-interest or in bad faith. The plaintiffs also failed to plead facts to support the inference that Sycamore's influence was "so potent that independent directors [could not] freely exercise their judgment, fearing retribution" from Sycamore. This decision underscores the high standards plaintiffs must satisfy when attempting to plead breach of fiduciary duty claims premised on the notion that a minority stockholder is a controlling stockholder and in light of an exculpatory provision in a company's charter.

Summary

In April 2018, Essendant Inc. (Essendant) and Genuine Parts Company (GPC) announced that they had entered into a merger agreement through which GPC would acquire Essendant in a stock-for-stock deal. Three days before that announcement, Essendant began merger discussions with Sycamore Partners (Sycamore). Those discussions culminated in an offer by Sycamore to purchase Essendant for US$11.50 per share in cash. After further negotiations, Essendant terminated the merger agreement with GPC and announced an all-cash merger with Sycamore for US$12.80 per share. In response, the plaintiffs filed suit.

The court first determined that the plaintiffs would need to state a claim for the breach of the duty of loyalty or bad faith in order to succeed based on the Section 102(b)(7) exculpatory clause in Essendant's charter. The plaintiffs alleged that the directors breached their duties of loyalty by "acced[ing] to the will of Sycamore as a controlling stockholder at the expense of other stockholders." The court found, however, that Sycamore was not a controlling shareholder because Sycamore neither owned over 50 percent of "the company's voting power" nor "exercised control over the business affairs of the corporation." The court further found that the plaintiffs did not sufficiently allege that the directors lacked independence.

Similarly, the plaintiffs also failed to plead that the board acted in bad faith. The plaintiffs' bad faith allegations were based on alleged disclosure violations and an alleged defective deal process. The court found those allegations insufficient because they did not support a finding that the alleged omissions were material and because none of the board's other actions – such as considering Sycamore's proposal or terminating the agreement with GPC – met the high standard of bad faith.

The court also considered, and rejected, the plaintiffs' remaining claims. First, the court rejected a claim against the board for aiding and abetting Sycamore's breach of fiduciary duty because Sycamore was not a controlling stockholder. Second, the court dismissed a claim against Sycamore and its subsidiary, Staples, for aiding and abetting Essendant in its breach of fiduciary duties because the plaintiffs did not plead facts showing actions Sycamore or Staples took to help Essendant commit any hypothetical breach. Third, the court rejected a corporate waste claim against the board because the board had a rational reason for terminating the deal with GPC to pursue a merger with Sycamore, which offered a 51 percent premium to the unaffected market price. Finally, the court rejected a breach of fiduciary duty claim against Essendant's CEO because the plaintiffs only alleged one action he took as CEO – receiving a phone call informing him of Sycamore's interest in a merger.

Salladay v. Lev,

C.A. No. 2019-0048-SG (Del. Ch. Feb. 27, 2020)

Why it is important

In *Salladay v. Lev*, the Delaware Court of Chancery provides a valuable primer on the standards of review governing conflicted board transactions that do not involve a controlling stockholder. Absent a controlling stockholder standing on both sides of a transaction, Delaware law recognizes two paths to "cleanse" a transaction otherwise subject to review under the entire fairness standard: (1) approval by the informed, uncoerced vote of the majority of shares held by those free of conflict (pursuant to the *Corwin* decision); or (2) approval by an unconflicted committee of the board with full scope to negotiate or enter any transaction (pursuant to the *In re Trados* decision). In addition to reinforcing these seminal doctrines, the *Salladay* decision breaks new ground by clarifying – for the first time in the context of a conflicted board transaction – that a special committee must be constituted *ab initio*, i.e., before substantive negotiation of economic terms, to have a cleansing effect, just as is the case with controlling stockholder transactions governed by the *MFW* standard.

We have previously covered *Flood v. Synutra International, Inc.* and *Olenik v. Lodzinski*, both of which addressed the use of special committees in controlling shareholder transactions and are cited in *Salladay*.

Summary

Early in 2018, Intersections, Inc. (Intersections) began evaluating its options for potential financing transactions due to financial difficulty. Intersections formed a special committee of independent directors (the Committee), which hired Houlihan Lokey Inc. as a financial advisor. Intersections ultimately chose not to pursue a transaction and instead issued promissory notes, totaling US$3 million, to two of its shareholders.

In September 2018, iSubscribed Investor Group (iSubscribed) approached Intersections about a potential transaction. Between September 14 and October 5, iSubscribed and Intersections discussed the terms of a potential deal, including price. On October 5, Intersections reconstituted the Committee to consider the transaction. Negotiations continued and, on October 29, the Committee met and, after receiving a fairness opinion from an outside firm, voted to approve the transaction in its entirety at a price of US$3.68.

Lance Salladay, an Intersections stockholder, filed a class action to challenge the merger. The defendants moved to dismiss, arguing that review under the business judgment rule was appropriate given the involvement of the Committee and approval by a majority of the company's non-interested shareholders. The court rejected both arguments.

First, the court held that the Committee was ineffective. The court reasoned that a special committee needed to be empowered "*ab initio*," citing recent decisions addressing controlling shareholder transactions. The court found that "commencing negotiations prior to the special committee's constitution may begin to shape the transaction in a way that even a fully-empowered committee will later struggle to overcome." Applying that logic, the court found that the plaintiffs' sufficiently alleged that substantive economic negotiations – in particular, price negotiations – between iSubscribed and Intersections began prior to the October 5 reconstitution of the Committee.

Second, the court also held that the vote of the majority of the non-interested shareholders did not cleanse the transaction under *Corwin*. The court found that the complaint sufficiently alleged material defects in the proxy statement that negated the cleansing effect of approval by non-interested shareholders. Among other things, the court found that the company's 14D-9 failed to adequately disclose the details of a contractual change-of-control provision, emphasizing that "proxies should be lucid, and not a game of Clue," and the resignation of another, unnamed financial advisor prior to the engagement of the financial advisor that ultimately issued a fairness opinion.

The court thus found that the entire fairness standard was applicable and denied the defendants' motion to dismiss.

Hughes v. Hu,

C.A. No. 2019-0112-JTL (Del. Ch. April 27, 2020)

Why it is important

In *Hughes v. Hu,* the Delaware Court of Chancery denied a motion to dismiss a complaint asserting *Caremark* claims grounded in allegations of lack of oversight over critical company operations – in this case, auditing responsibilities. This decision follows recent decisions in *Marchand v. Barnhill* and *In re Clovis Oncology, Inc. Derivative Litigation*, in which the Delaware courts similarly found that the plaintiff had pleaded facts supporting a reasonably conceivable claim that corporate directors had failed to adequately monitor and implement controls to address "mission critical" issues. Although *Caremark* duty of oversight claims continue to be referenced as "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment," this decision further reinforces that the pleading burden to state a *Caremark* claim is not insurmountable.

In particular, this decision highlights the significance of a prior Section 220 books and records inspection demand in stating a *Caremark* claim, and provides guidance to companies responding to Section 220 demands seeking to explore potential oversight failures. Here, as a result of the company's failure to produce documents demonstrating attention to auditing procedures, the court inferred that the documents did not exist, or were not reviewed by the audit committee, thus supporting an inference of wrongdoing at the pleading stage. Companies responding to Section 220 demands should be mindful that the absence of documents, as well as the presence of documents, may be used to support a breach of fiduciary duty claim and to defeat a motion to dismiss.

Summary

Beginning in 2011, audits of Kandi Technologies Group, Inc. (KTG) suggested problems with disclosure of related party transactions, including disguising related parties with other names and parking large amounts of KTG cash in the personal bank accounts of its officers and employees. Similar issues emerged in the next two years' audits, prompting disclosure in KTG's 2013 10-K that "disclosure controls and procedures were not effective as of December 31, 2013, due to a material weakness." The company pledged to reform its reporting structure and improve the audit committee's effectiveness and involvement in reviewing related-party transactions. In March 2017, however, KTG disclosed that its preceding three years of financial statements needed to be restated due to, among other things, KTG's management's lack of sufficient expertise related to US GAAP requirements, SEC disclosure regulations, and disclosure of related-party transactions.

The plaintiff filed a derivative action on behalf of KTG, alleging primarily a breach of the duty of oversight. KTG moved to dismiss pursuant to Rule 23.1 for failure to plead demand futility and Rule 12(b)(6) for failure to state a claim. The Court of Chancery denied the motion. The court held that a demand would have been futile because a majority of the board faced a substantial risk of liability arising from the shareholder's claim that they failed to exercise their oversight duties over auditing procedures in good faith, and from related claims of unjust enrichment.

The court further found that plaintiff had adequately alleged a failure of oversight by the audit committee because, among other things, the audit committee met only once a year for no more than 50 minutes. In addition, the audit committee often acted by written consent after meetings to address issues it neglected to address during the meetings. Significantly, the audit committee claimed to have reviewed relevant documents such as "Approval Procedures of Relationship Transactions" or "Management Policy on Related-Party Transactions," but KTG did not produce these documents in response to the plaintiff's Section 220 books and records inspection demand. The court therefore concluded that it was reasonable to infer that the audit committee did not receive or review those relevant documents, especially in light of the short duration of those meetings. Ultimately, the court concluded that the plaintiff's allegations supported an inference that KTG's audit committee devoted inadequate time to its work, had clear notice of irregularities, and consciously turned a blind eye to their continuation, such that KTG's board, through its audit committee, failed to provide meaningful oversight over the company's financial statements and system of controls.

The court also rejected the defendants' arguments that KTG had suffered no harm because the March 2017 restatement had no effect on KTG's net income, finding that the defendants could still be liable for damages incidental to their breach of duty. This included the costs and expenses of the restatement, reputational damages, and the costs of related litigation. The court reached this decision even though several prior shareholder class actions arising from the same 2017 restatement were dismissed for lack of damages.

Finally, the court also refused to dismiss the plaintiff's claim that the officer defendants were unjustly enriched because they received excessive compensation due to the company's overstated financial statements. Because unjust enrichment damages arose from the same breach of fiduciary duty as the *Caremark* claim, the court concluded that the demand futility analysis would be identical and denied the motion to dismiss.

77 Charters, Inc. v. Gould, et al.,

C.A. No. 2019-0127-JRS (Del. Ch. May 18, 2020)

Why it is important

In *77 Charters, Inc. v. Gould*, the Delaware Court of Chancery held that an individual who exerted control over the assets of an LLC through a corporate entity owed limited fiduciary duties to the other LLC members and could be sued personally for breach of fiduciary duty. The court found that so-called "remote controllers" could owe limited fiduciary duties even if they were "second-tier controllers," and could accordingly be sued in their individual capacity for self-dealing or other breaches, unless the relevant LLC agreements clearly disclaimed fiduciary duties. The court further found that an LLC agreement provision limiting liability for damages for "Members" did not clearly eliminate fiduciary duties or shield the LLC's managing member from liability. The ruling is a reminder of the importance of carefully drafting LLC operating agreements, and, in particular, that fiduciary liability may be imposed absent an express and unambiguous disclaimer of fiduciary duties.

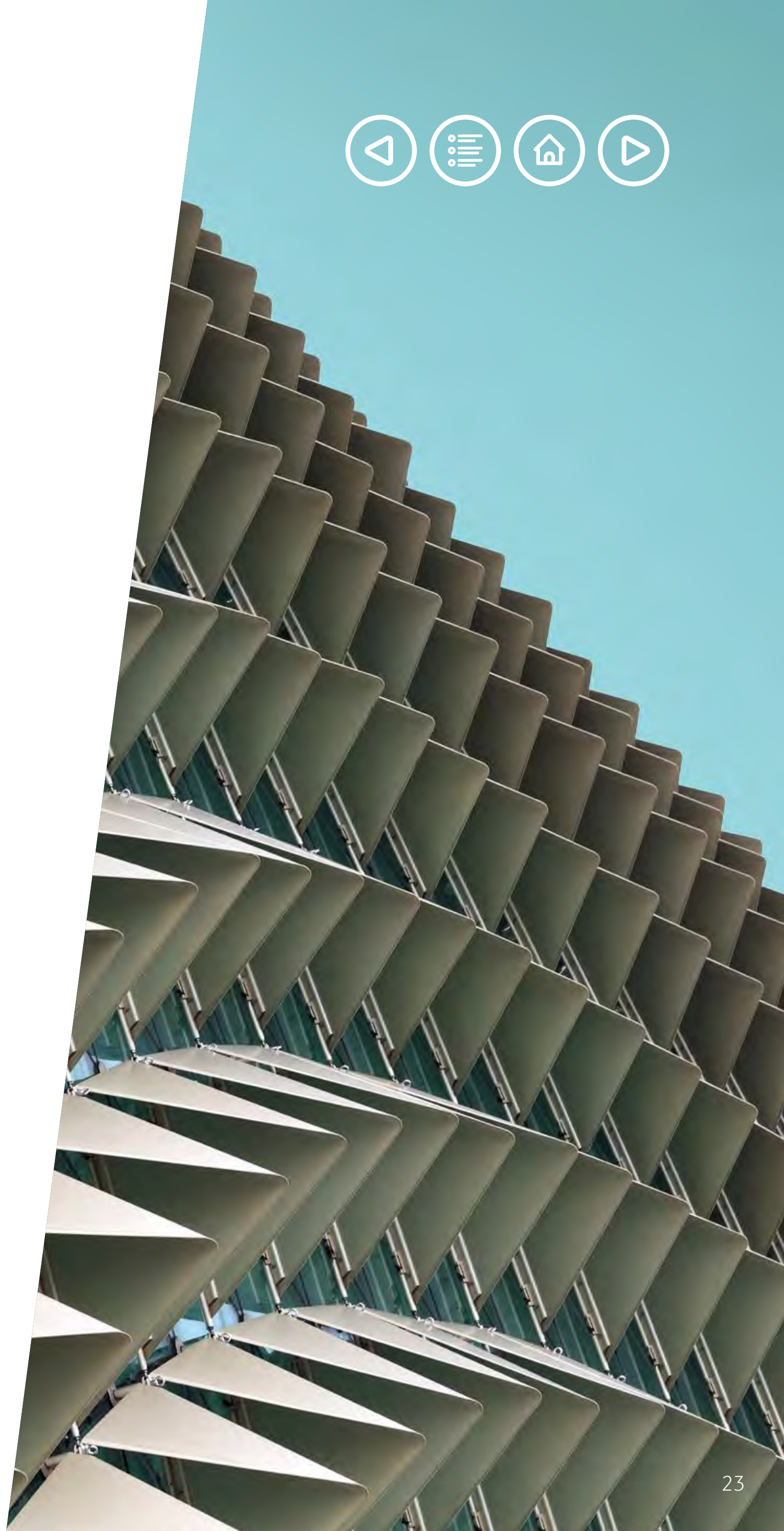
Summary

77 Charters, Inc. (77 Charters) and two other groups of investors acquired a Tennessee shopping mall in 2007 for approximately US$29 million. 77 Charters contributed US$1.2 million in return for a non-preferred ownership interest in an LLC that indirectly owned the mall together with defendant Jonathan D. Gould, entities he controlled, and a non-party, Kimco Preferred Investor LXXIII, Inc. (Kimco), which was a preferred investor. Through entities under his control, Gould served as managing member of the LLC 77 Charters invested in, and also ran the mall's day-to-day operations. In 2013, Gould caused an entity under his control to buy Kimco's interest, giving him control of the operating entity that owned the mall. According to 77 Charters, Gould used this control to modify the operating entity's constitutive documents so as to benefit himself as a preferred shareholder by increasing the distribution preference preferred shareholders enjoyed from 9 percent to 12.5 percent. As a result of this change, when the mall was sold in 2018, all proceeds went to its creditors and preferred investors, leaving nothing for 77 Charters.

77 Charters sued Gould, each of Gould's entities, and an investor that had purchased part of Gould's interest before the mall was sold, alleging breach of fiduciary duty and other claims. The court dismissed some of the claims, criticizing the complaint as a "streaming narrative followed by a laundry list of claims that generally incorporate the narrative but do not state why or how the facts meet the *prima facie* elements of the claim asserted." The court found that 77 Charters had, however, properly alleged a breach of fiduciary duty claim against Gould and the entities under his control for amending the mall's ownership structure to suit his personal interests.

In so holding, the court found that both Gould and the LLCs under his control owed a fiduciary duty to 77 Charters. The court held that Gould was a "second-tier controller" of the subsidiary LLCs and accordingly owed 77 Charters some limited fiduciary duties, even though 77 Charters was not itself a member of the subsidiary LLCs, because Gould effectively controlled the subsidiary LLCs.

The court also rejected the argument that the LLCs' operating agreements clearly disavowed fiduciary duties. The defendants relied on a provision shielding any "[p]erson acting in its capacity as a Member (including the Managing Member and its Affiliates)" from personal liability. The court held that the language was ambiguous, and could have been intended to mean that individuals were only shielded from liability when acting as LLC members, not when acting as managing members. The ruling stands as a reminder of the importance of clearly and unambiguously addressing fiduciary duties in LLC agreements and of the potential for liability under a "remote controller" theory of fiduciary duty for managing member acts that violate those duties.



Gilbert et al. v. Perlman et al.,

C.A. No. 2018-0453-SG (Del. Ch. Apr. 29, 2020)

Why it is important

In *Gilbert v. Perlman et al.*, the Delaware Court of Chancery held that minority shareholders may become fiduciaries – and thus, owe a fiduciary duty to other minority shareholders – where they form a control group with a controlling shareholder. To plead this "unusual theory," the court held a plaintiff must allege (1) "an arrangement between the controller and the minority stockholders to act in consort to accomplish the corporate action," and (2) facts showing the controller needed to include minority holders to achieve its goals and "ceded some material attribute of its control to achieve their assistance." Although the court recognized this unusual theory, it ultimately dismissed the fiduciary duty claims against the minority shareholders, finding that the mere existence of a voting agreement to roll over shares is insufficient to support an inference that minority shareholders shared in "control power" over a transaction.

Summary

Minority shareholders of Connecture, Inc. (Connecture) filed suit asserting that the company's controlling shareholder, Francisco Partners IV-A, L.P. (Francisco Partners) and several minority shareholders breached fiduciary duties owed to the minority shareholders by agreeing to take the company private through a cash-out merger at an unfair price and using an unfair process. The plaintiffs alleged that the minority shareholders owed them fiduciary duties because they conspired with the company's controlling shareholder, thus becoming part of a control group. The minority-shareholder defendants, Chrysalis Ventures (Chrysalis) and David A. Jones, Jr. (Jones), moved to dismiss the complaint under Rule 12(b)(6), arguing that the complaint failed to adequately allege that Chrysalis and Jones were part of the company's "control group."

The Court of Chancery noted that, while only controlling shareholders typically owe fiduciary duties to minority shareholders, Delaware law also charges minority shareholders with fiduciary duties when they "exercise control over the business affairs of the corporation." The Court of Chancery also noted that minority shareholders could become fiduciaries if they formed part of a company's control group. While under Delaware law a control group typically involves only minority shareholders, the Court of Chancery held that a shareholder owning less than a majority of a company's stock can be considered part of a control group with a majority shareholder, and therefore owe fiduciary duties, if (1) there is a legally significant relationship, such as by contract, common ownership, or other arrangement, toward a shared goal (this being a prerequisite for the formation of any control group under Delaware law) between the minority and controlling shareholders, and (2) the controlling shareholder perceives a need to include the minority shareholders to accomplish the goal and cede "some material attribute of its control to achieve their assistance." As to the latter element, the key is that the "minority stockholders involved wield their own levers of power as part of the group; this control of the corporate machinery makes them fiduciaries."

The plaintiffs argued that several factors indicated that there was a legally significant relationship between Jones, Chrysalis, and Francisco Partners to satisfy the first prong of the court's test, including (1) under SEC rules, the minority and majority shareholders were considered "affiliates;" (2) Chrysalis entered into a voting agreement with Francisco Partners requiring it to vote its shares in favor of the merger; and (3) Chrysalis and Jones coordinated with Francisco Partners before any formal discussion of a take-private transaction, such as by jointly participating in private placements and negotiating a rollover arrangement in the post-transaction entity. The court found that the SEC determination of affiliation was not dispositive, but found the voting agreement and coordinated actions might be sufficient to show more than mere "parallel investing interests" between the two minority defendants and Francisco Partners.

Nevertheless, the Court of Chancery determined that the plaintiffs failed to satisfy the second element of the test. The plaintiffs argued Francisco Partners diluted or limited its control by allowing Chrysalis and Jones to roll over their interest. The court found this was not sufficient under Delaware law, and that if the court accepted the plaintiffs' position, a control group would be created every time a minority shareholder rolled over their investment in a going private transaction with a majority shareholder. The court stated that the complaint "points to neither quid nor quo – it describes nothing [the majority stockholder] needed or ceded to the [minority stockholders], other than the bare right to roll over shares." Simply agreeing to the minority rollover, and therefore agreeing to a smaller stake in the post-merger company, did not satisfy the second prong of the test. Since there were no allegations that the majority "shared" or "limited" its power, the Court of Chancery held that the plaintiffs failed to allege a control group and accordingly could not pursue fiduciary duty claims against Chrysalis and Jones.

Agspring Holdco, LLC v. NGP X US Holdings, LP,

C.A. No. 2019-0567-AGB (Del. Ch. July 30, 2020)

Why it is important

In *Agspring*, the court found that the plaintiffs sufficiently pleaded fraud claims against a private equity firm in connection with the sale of a controlled business. The private equity firm held 98 percent of the membership interests of the equity, three of the five board seats, and had significant knowledge of the company's operations and financials. Coupled with the fact that the alleged misrepresentations concealed a decline in EBITDA of nearly 50 percent, the court held that the plaintiff adequately pleaded the private equity firm's knowledge of fraudulent misstatements in the sale documents, including a material adverse effect clause. Although *Agspring* arguably involved an extreme set of facts, it nonetheless provides a cautionary tale, illustrating Delaware law's low burden to plead fraud against a controlling stockholder with a large financial stake and significant operational knowledge.

Summary

In 2012, Agspring LLC (Agspring) entered into an Advisory Services, Reimbursement, and Indemnification Agreement with NGP X US Holdings, L.P. (NGP), a private equity affiliated partnership, whereby NGP provided approximately 96 percent of Agspring's initial capital (US$150 million). In 2014, Agspring's founders indicated that they needed more capital to finance their acquisitions, and suggested that NGP exit its investment so that Agspring could find different financing partners. Working with NGP, the founders sought US$300 million from a buyer.

In January 2015, American Infrastructure MLP Funds (AIM) expressed interest in acquiring Agspring and signed a term sheet in May 2015 to purchase Agspring for US$325 million in cash. In mid-July, AIM sought a price reduction based on its diligence findings regarding Agspring's earnings, and the price was lowered by US$5 million. Based on further reduced projections of Agspring's EBITDA for 2016, AIM and NGP agreed on a further US$25 million reduction in the purchase price.

In November 2015, Agspring's internal projections continued to decline. However, it failed to disclose these reductions to AIM until after the transaction closed on December 14, 2015. In June 2016, Agspring reported that its total 2016 EBITDA was only US$701,900—not the US$33 million it had projected in its final disclosure to AIM.

The plaintiffs (the buyer and investors) brought suit in July 2019 against NGP, alleging claims for fraud, aiding and abetting fraud, civil conspiracy, breach of fiduciary duties, unjust enrichment, and contractual indemnification. The defendants moved to dismiss in December 2019 on several grounds.

First, the defendants moved on statute of limitations grounds. The court, however, found that the plaintiffs had sufficient alleged fraudulent concealment on the part of the former founders, who made statements to "perpetrate the myth that the artificially inflated forecast they provided to AIM . . . shortly before the closing remained achievable when they knew otherwise."

Second, the defendants argued that the fraud claim was insufficiently pleaded because a statement as to future performance was not actionable as fraud. Rejecting this argument, the court held that it was "reasonably conceivable," given the "sharpness of the financial decline the Company had experienced before the closing and the known fact that the Company would be incurring $80 million of additional debt," that events had *already* occurred that would lead to Agspring's default. The court also held that the plaintiffs had pleaded adequate facts to render it reasonably conceivable that the contractual "material adverse effect" clause was knowingly inaccurate.

The court also held that the plaintiffs' allegations were sufficient to plead knowledge, i.e., that the contractual representations were knowingly false when made. In finding sufficient allegations to establish NGP's knowledge, the court considered, among other things, the fact that NGP: (1) held 98 percent of Agspring; (2) had three of the five board seats; (3) attended board meetings and regularly received financial information; (4) had close involvement in the sale to AIM; (5) understood the importance of the EBITDA projection; (6) "constantly communicated" with the founders; and (7) pushed the founders to close the deal as the forecasts worsened.

The court declined to consider the "novel issue" whether the "personal participation doctrine" – which provides that a corporate officer can only be held liable for a tort they directed, ordered, ratified, approved, or consented – can apply to a controlling member of an LLC because the complaint sufficiently alleged that NGP was contractually liable.

In re National Collegiate Student Loan Trusts Litigation,

C.A. No. 12111-VCS (Del. Ch. Aug. 27, 2020)

Why it is important

In *In re National Collegiate Student Loan Trusts Litigation*, the Delaware Court of Chancery held in a 191-page ruling that trusts holding title to collateralized student loans had a fiduciary duty to exercise control rights retained under securitization agreements for the benefit of the noteholders and other parties who held beneficial interests in the loans and could not exploit their control rights for personal gain through self-dealing transactions. The court's decision, which addressed the fiduciary duties owed to the beneficial owners of the collateralized loans as a matter of first impression and myriad other legal issues, provides guidance on the legal principles courts will use to interpret indenture agreements in securitization transactions.

Summary

The disputes at issue in this litigation concern a group of Delaware statutory trusts formed between 2003 and 2007 for the purpose of acquiring and servicing a multi-billion dollar portfolio of student loans. The function of the trusts, the court found, was to "serve as special purpose vehicles designed to separate the Student Loans from the balance sheets of the financial institutions that first extended credit to the borrowers." They did so in the following manner: first, the trusts acquired the student loans with proceeds they received by issuing notes; they then entered into an indenture, granting all "right, title and interest" in the student loans to an Indenture Trustee acting for the noteholders, with the trusts retaining an obligation to "provide for" the "administration" and the "servicing of the Student Loans." Myriad disputes arose regarding what powers the trusts, which held title to the student loans, had retained, and what duties they owed to the noteholders, reinsurers, and other parties who acquired beneficial interests in the student loans. The trusts argued that they had not assigned ownership of the student loans under the indenture agreement and accordingly remained free to direct their representatives "to do anything with respect to the Trusts as long as the directions fit within certain contractual boundaries." The beneficial owners of the loans disagreed and argued that "the Owners lack any plenary authority to control the Trusts, and certainly have no right to cause the Trusts to enter into self-dealing transactions."

The Court of Chancery held that as a matter of New York law, the indenture agreement created both a precautionary security interest and an assignment, and that it was an "inescapable conclusion, based on the plain language of the Indenture, that the Trusts currently have no beneficial interest in the Student Loans that serve as collateral for the Notes." The court further found that, as a matter of Delaware law, "the Owners' ultimate control over certain aspects of these owner-directed Trusts justifies the imposition of fiduciary duties upon them, running to the Indenture Parties, to the extent they exercise that control as the Trusts' fulfill their role as administrator (and collector) of the Student Loans."

The court also noted that other disputes among the parties "too numerous to recite" had arisen, and that "the parties are so disconnected in their views of the transactional structure created by the Trust Related Agreements . . . that they have brought 143 competing requests for declaratory relief relating to nearly all aspects of the Trusts' governance and operation." These disputes, the court found, "have left the Trusts in a state of near paralysis," including because "[t]hird parties interacting with the Trusts cannot determine who actually speaks for the Trusts and who has authority to bind the Trusts." The court's ruling provides guidance on the legal principles courts will use to interpret indenture agreements in securitization transactions and may be helpful to parties seeking to reduce the likelihood of similar disputes in future securitization transactions.

Rudd v. Brown,

No. 2019-0775-MTZ (Del. Ch. Sept. 11, 2020

Why it is important

In *Rudd v. Brown,* the Delaware Court of Chancery dismissed a lawsuit against the directors and chief financial officer of Outerwall, Inc. (Outerwall) that alleged that the defendants breached their duties of loyalty by selling the company too cheaply in order to avoid a proxy fight and to secure certain contingent payments. The court enforced the Section 102(b)(7) exculpatory clause in Outerwall's charter and concluded that the plaintiffs' allegations did not state a claim for breach of the duty of loyalty or good faith. In particular, the court rejected the plaintiff's two conflict of interest theories, one based on an activist shareholder's threat of a proxy fight to remove the directors if a strategic alternative was not pursued and the other based on "golden parachute-related payments" owed to the defendants if a transaction was consummated. *Rudd* reaffirms the high bar that a plaintiff must meet if a company's charter contains a Section 102(b)(7) clause and also provides guidance on situations in which directors may be found conflicted for the purposes of determining whether a breach of the duty of loyalty occurred.

Summary

Outerwall operates self-service kiosks, including Redbox, which allows customers to rent or purchase movies and video games; Coinstar, which converts coins to cash; and ecoATM, which allows customers to sell certain electronic devices. Meanwhile, in early 2016, Engaged Capital, LLC (Engaged) had acquired a significant share of Outerwall stock. Shortly thereafter, Engaged sent a letter to the Outerwall board, threatening to launch a proxy contest to replace the board if they did not "explore strategic alternatives for the entire business."

Shortly after receiving Engaged's letter, and as the revenues for Outerwall's business declined, including the revenues associated with its most lucrative Redbox business, management began to consider a possible sale of the company. In May 2016, several companies submitted proposals to purchase the business for a price of between US$27 and US$57 per share in cash. Two of the original bidders pursued a transaction, Apollo and Company A. After several rounds of bidding, Apollo offered US$52 per share and Company A offered US$50.82 per share. Outerwall's board ultimately voted to sell to Apollo on July 24, 2016. The two-step merger transaction closed on September 27, 2016.

In September 2019, Rudd filed a class action suit alleging breach of fiduciary duty against Outerwall's board and chief financial officer. The complaint alleged that the defendants "failed to take reasonable efforts to maximize the value of the Company for the benefit of Outerwall's public stockholders, instead accepting grossly inadequate consideration," and "failed to disclose material information concerning the Acquisition, thus rendering the Company's stockholders unable to make an informed decision whether to tender their shares and whether to seek appraisal."

The court found that, taking all allegations as true as it is required to do on a motion to dismiss, it could not dismiss the claim based on stockholder ratification under *Corwin*. However, even "assuming that Plaintiff's claim is timely and that Outerwall stockholders were not fully informed when they tendered their share," the court concluded that the plaintiff had not stated a claim. The court found that the Section 102(b)(7) exculpatory clause in Outerwall's charter barred all fiduciary duty claims except claims for breach of the duties of loyalty or good faith even though enhanced scrutiny under *Revlon* was appropriate. The court found that the plaintiff failed to adequately plead facts supporting a rational inference that a majority of the board acted based on self-interest, to advance the self-interest of an interested party, or acted in bad faith. In particular, the court found that the plaintiff failed to adequately plead that the defendants were conflicted because (1) the bare-bones conflict theory that the directors acted in their own interest to avoid a proxy fight and preserve their board seats fails under Delaware law and (2) allegations regarding the mere possibility of change-in-control benefits, interests in post-closing employment or assertions regarding conflicts as a stockholder appointees likewise are insufficient. Finding no conflict, the court rejected the plaintiff's loyalty claim and dismissed the complaint in its entirety.

In re Nine West LBO Sec. Litig.,

No. 20 MD. 2941 (S.D.N.Y. Dec. 4, 2020)

Why it is important

In *In re Nine West,* the United States District Court for the Southern District of New York addressed motions to dismiss claims arising out of the 2014 leveraged buyout pursuant to which Sycamore Partners Management LP (Sycamore) acquired The Jones Group (Jones), which it rebranded as Nine West. Nine West subsequently went bankrupt and its litigation trustee asserted claims against former directors and officers for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, unjust enrichment, fraudulent transfer, and state law claims premised on allegations that the Nine West directors and officers failed to adequately investigate and consider Jones's post-sale solvency. Critically, the court denied the directors' motion to dismiss the breach of fiduciary duty claims, finding that the business judgment rule did not apply because they "made no investigation whatsoever" into aspects of the transaction that would impact Jones's post-sale solvency. In so holding, the court rejected the directors' argument that they could not be liable for failing to consider the effect of post-sale transactions, finding that the court may "collapse" the pre- and post-sale aspects of the overall transaction, including the incurrence of new debt or a spin-off of assets post-closing, where the alleged harm of the post-sale transactions was "foreseeable." Although the *Nine West* decision is not a final determination of liability, it provides a stark warning to sell-side corporate decision-makers to consider the buyer's post-transaction financial viability before approving a transaction.

No. 20 MD. 2941 (S.D.N.Y. Dec. 4, 2020)

Summary

In 2014, Sycamore Partners Management LP (Sycamore) acquired The Jones Group (Jones) in a leveraged buyout. The merger provided for five different components: (1) Jones would merge with a Sycamore affiliate and become “Nine West Holdings” (Nine West); (2) Sycamore would contribute at least US$395 million in equity to Nine West; (3) Nine West would increase its debt from US$1 billion to US$1.2 billion; (4) Jones shareholders would receive US$15 per share; and (5) two high-end brands, along with another business unit, would be sold to other Sycamore affiliates for less than fair market value.

The Jones board approved the merger unanimously. Before the deal closed, however, Sycamore changed the terms, contributing less equity and causing Nine West to incur more debt. Following the closing of the deal, several stockholders filed suit. Nine West created a special litigation committee (SLC) to investigate the claims; the SLC recommended the company not pursue the stockholder claims, which were subsequently settled.

Four years after the merger closed, Nine West filed for bankruptcy. Nine West’s litigation trustee and indenture trustee filed suit against the former officers and directors of Jones, alleging breach of fiduciary duties, aiding and abetting breach of fiduciary duty, fraudulent conveyance, unjust enrichment, and violations of state law, all in connection with the 2014 merger. Both the officers and directors moved to dismiss. The court granted in part and denied in part the motions.

The court began its analysis by addressing several procedural arguments the defendants made.

- First, the court found that the litigation trustee was not a “Releasing Person” under the settlement, and thus the 2014 settlement of the stockholder derivative claims did not release any claims he had against the officers and directors.
- Second, the defendants argued that the litigation trustee’s claims were barred by *res judicata* based on the 2014 litigation. The court disagreed, finding that the stockholder claims and the litigation trustee’s claims pursued different interests. The 2014 stockholder claims alleged that the defendants sold the company for too little, while the litigation trustee alleged that the defendants distributed too much money to shareholders, thereby bankrupting the company. Therefore, the shareholders that brought the derivative claims did not represent the interests of the litigation trustee.
- Third, the court found that as a matter of applicable state law, the conclusion of the company’s special litigation committee bore only on the stockholder claims, not claims asserted by the company or the litigation trustee.

Moving on to the defendants’ substantive arguments, the court denied the director defendants’ motion to dismiss the claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty against the directors. The court considered whether the litigation trustee had rebutted the application of the business judgment rule by alleging either (1) that the majority of the board was interested in the transaction, or (2) the directors did not approve the transaction in good faith after a reasonable investigation. The court found that the litigation trustee failed to plead that the directors were interested in the transaction.

However, the court concluded that the litigation trustee successfully pleaded that the directors failed to conduct a reasonable investigation into whether the 2014 transaction “as a whole” would render Nine West insolvent. Rejecting the argument that the director defendants had no obligation to investigate the impact of post-closing transactions that they would not be asked to authorize on Nine West’s solvency, the court found that the litigation trustee adequately pleaded that the multiple steps of the LBO transaction “collapse into a single integrated plan” and that the harm – potential insolvency – was “foreseeable.” The court also found evidence of recklessness, thereby precluding the application of the company’s exculpatory clause. However, the court granted the non-director officers’ motion to dismiss the fiduciary duty claims, finding that the litigation trustee failed to allege that the officers had the ability to halt the transaction.

As for the remaining claims, the court also found that the fraudulent conveyance claims against the officers could go forward against certain officers, while the claims against others were time-barred. The officers’ motion to dismiss the unjust enrichment claims was uncontested, and therefore the court dismissed those as well.

In re Mindbody, Inc. Stockholders Litigation,

No. 2019-0442-KSJM (Del. Ch. Oct. 2, 2020)

Why it is important

In *In re Mindbody, Inc. Stockholders Litigation*, the plaintiffs alleged that the defendants, the officers and directors of Mindbody, Inc., breached their fiduciary duties in connection with a going-private sale transaction due to conflicts of interest. The plaintiffs alleged that, among other things, the defendants "tilted the sale process" in favor of the buyer based on personal financial stakes in the going-private transaction, including promises of future employment. The Delaware Court of Chancery permitted claims to go forward against two executives, but dismissed claims against the outside director. In doing so, the Court of Chancery declined to apply the business judgment rule and instead applied enhanced scrutiny under Delaware's *Revlon* standard, which presumptively applies to change-of-control transactions, and rejected defendants' position that the transaction was ratified by the stockholders under *Corwin* on the grounds that the alleged conflicts were not disclosed. This case serves as a reminder to corporate officers that all potential conflicts of interest – including an interest in continued employment, as is often the case – will be closely scrutinized and may create a risk of liability if they assume a role in negotiating or approving a transaction, especially in situations involving going-private transactions that traditionally draw additional scrutiny.

Summary

Richard Stollmeyer founded Mindbody, Inc. (Mindbody or the Company) in 2001 and became the chairman of the board of directors and CEO of the company in 2004. In 2012, venture capital firm Institutional Venture Partners (IVP) purchased stock in Mindbody and, in 2014, IVP's general partner, Eric Liaw, was appointed to the Mindbody board of directors. Following two key acquisitions in 2018, Mindbody's stock price increased significantly.

Before Mindbody went public in 2015, and again in 2017, Stollmeyer communicated with Vista Equity Partners (Vista) regarding the prospect of a take-private sale of Mindbody. Vista, however, "chose not to engage in buyout talks at that time because Mindbody stock was trading 'at an all-time high.'" In 2018, however, Vista changed its mind and expressed interest in acquiring Mindbody. Following the expression of interest, Mindbody management lowered the Company's guidance and, on the earnings call for Q4 2018, noted several challenges facing the Company. In response, Mindbody's stock price fell.

Later in November 2018, Mindbody pursued a take-private transaction, forming a Transaction Committee that hired a financial advisor to select potential bidders, including Vista. After some price negotiation, on December 23, 2018, the board approved the sale to Vista, which was announced on December 24, 2018.

Following the announcement of the transaction with Vista, the plaintiffs brought suit against Stollmeyer, Brett White, Mindbody's CFO and COO, and Liaw, alleging that they breached their fiduciary duties by "initiating, timing, and tilting the sales process in favor of Vista in their own self-interest" and by "failing to disclose all material information to Mindbody stockholders' in advance of the stockholder vote on the Merger." The shareholders asserted that each was conflicted because: (1) Stollmeyer was motivated by his desire to obtain liquidity and the prospect of future employment, (2) Liaw was motivated by IVP's desire to exit the investment, and (3) White was motivated by the prospect of future employment.

The court declined to dismiss the claims against Stollmeyer and White. Applying enhanced scrutiny under *Revlon*, the court found that the plaintiffs sufficiently alleged that Stollmeyer was motivated by his own desire for liquidity and his own employment prospects, and that Stollmeyer purposely drove down the stock price and provided Vista with "information and timing advantages" throughout the sales process. In so holding, the court held that the formation of an independent committee to oversee the transaction, standing alone, was insufficient to overcome a pleading-stage inference of conflict. Similarly, the court concluded that the plaintiffs adequately alleged that White either acted with gross negligence or reckless indifference throughout the sales process, including in altering Mindbody's forecasts and providing timing and informational advantages to Vista.

With regard to Liaw, however, the plaintiffs' allegations that Liaw was motivated to liquidate IVP's investment were insufficient to allege a claim for breach of fiduciary duty. The court found the complaint lacked any allegations that Liaw was involved in lowering the Company's guidance or in providing Vista any advantages during the sales process.

Finally, the court declined to find that a fully informed stockholder vote supported dismissal under *Corwin*. Based on the allegations against Stollmeyer, the court stated that "[g]enerally, where facts alleged make the paradigmatic *Revlon* claim reasonably conceivable, it will be difficult to show on a motion to dismiss that the stockholder vote was fully informed." Here, the court found that the allegations regarding Stollmeyer's alleged undisclosed conflicts were sufficient to defeat a *Corwin* defense at the pleading stage.

Jaroslawicz v. M&T Bank Corp.,

No. 17-3695 (3d Cir. June 18, 2020)

Why it is important

In *Jaroslawicz v. M&T Bank Corp.*, the United States Court of Appeals for the Third Circuit held that a company seeking shareholder approval for a merger must include company-specific, rather than generic, descriptions of industry, company, and investment risks and concise, plain English explanations of the most significant risk factors associated with the proposed transaction in order to comply with SEC rules (specifically, Item 105 of Regulation S-K). The court held that the putative class plaintiffs stated viable claims that the banks did not adequately disclose risks associated with regulatory scrutiny of one of the merging banks' checking account and anti-money laundering practices, despite knowing that this "regulatory scrutiny could sink the merger." Although the court reinstated the action, it did so expressing "worry over the many well-argued doubts about these kinds of aggregate claims[,]" pointing to the continued rise in securities class actions each year and urging "a more searching inquiry" into whether "that tide represents an efficient current or 'muddled logic and armchair economics[.]'"

Jaroslawicz v. M&T Bank Corp., (Continued)

No. 17-3695 (3d Cir. June 18, 2020)

Summary

Following the 2008 recession, Hudson City Bank (Hudson) and M&T Bank Corporation (M&T) agreed to merge, subject to shareholder approval. Hudson and M&T issued a Joint Prospectus (Joint Proxy) and filed a Form S-4 to comply with the SEC's notice requirement. The Form S-4 requires that merging parties identify – pursuant to what has been recodified as Item 105 of Regulation S-K – the "most significant factors that make an investment in the registrant or offering speculative or risky." 17 C.F.R. § 229.105. In the Joint Proxy and Form S-4, M&T disclosed several risks, including that increased regulation may lead to loss of revenues and a delay in closing the merger, and that regulatory approval may not be obtained in the desired time frame. M&T did not, however, disclose the specific risk that regulatory scrutiny of M&T's anti-money laundering and Bank Secrecy Act compliance practices could delay or derail the merger. M&T also did not disclose that the bank had a practice of offering free checking accounts and then switching customers to accounts with fees, or the risk that scrutiny of this practice could imperil the merger. The shareholders approved the merger, but regulatory review by the Federal Reserve Board and an enforcement action commenced by the Consumer Financial Protection Bureau, delayed the closing by two and a half years.

A few weeks before the merger closed, Hudson Bank shareholders filed a putative class action against M&T, Hudson, and their officers and directors (collectively referred to as M&T) alleging (1) breaches of fiduciary duty and (2) that the information contained in the Joint Proxy was misleading. They alleged that M&T had failed to disclose deficiencies in M&T's Bank Secrecy Act and anti-money laundering compliance program, the fact that M&T had imposed fees on "no fee" checking accounts, and the risk that regulatory scrutiny into these deficiencies could derail the planned merger. The plaintiffs further alleged that the defendants had misstated their compliance with regulatory requirements, rendering the Joint Proxy misleading.

The District Court for the District of Delaware dismissed the plaintiffs' original and amended complaints, finding that the regulatory risks associated with the merger were sufficiently disclosed. On appeal, the Third Circuit reversed, holding that the plaintiffs had plausibly alleged a violation of Rule 14a-9, which prohibits proxy statements containing "any statement which, at the time and in light of the circumstances in which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading . . . ." 17 C.F.R. § 240.14a-9(a). The court held that to comply with Item 105, the Joint Proxy needed to contain concise, "plain English" explanations of material company, industry, and investment risks that link each risk to the industry, the company, or the merger "using details that connected the pending merger review to its existing and anticipated business lines." Statements of "generic and generally applicable risks," the court held, are not sufficient and should not be included.

The court found that M&T's Joint Proxy contained potentially material omissions under these standards. It held that the plaintiffs adequately alleged that M&T did not properly disclose problems with its Bank Secrecy Act and anti-money laundering compliance programs, and the risk that regulatory scrutiny into those problems could delay or derail the planned merger. The court also held that the plaintiffs could proceed with their claim that M&T omitted information about its checking account practices, finding that it was "reasonable" to infer "the consumer checking practices cast doubt on M&T's controls and compliance systems, and posed an independent regulatory risk to the merger material, enough that a reasonable shareholder would consider it important in deciding how to vote." The court agreed with the District Court, however, in holding that the allegations that M&T had provided misleading opinions in the Joint Proxy were not sufficient to state a claim.

Despite this holding, the court expressed "caveats, cautions and qualms." In particular, the court noted the continued rise in securities class action filings, and emphasized that whether "that tide represents an efficient current or 'muddled logic and armchair economics' . . . is the sort of question that deserves a more searching inquiry."

In re. Solera Ins. Coverage Appeals,

No. 413, 2019 (Del. Oct. 23, 2020)

Why it is important

On appeal, the Delaware Supreme Court rejected a company's attempt to obtain reimbursement from its D&O insurers for the costs of an appraisal action. The court found the appraisal action to be a neutral inquiry into fair value, which was not covered by the language in the D&O policy. This decision provides guidance for insurers and insureds going forward on how the plain language of D&O policies may be interpreted.

Summary

Solera Holdings, Inc. (Solera), a software company, carried excess D&O insurance policies, with coverage up to US$55 million, from three different insurers. The Delaware Superior Court previously found that the D&O insurance policies covered costs stemming from an appraisal action against Solera following Solera's acquisition by an affiliate of Vista Equity in 2016 for US$55.85 a share. After a full hearing, the trial court determined that fair value was US$53.95, less than what Solera's shareholders received in the acquisition. But Solera was ordered to pay US$38 million in pre-judgment interest, and incurred US$13 million in fees in connection with those proceedings. Solera sought to recover those amounts under its D&O policies. The D&O policy language at issue related to losses resulting from "any Securities Claim," a term specifically defined in the policy as "any actual or alleged violation" of a securities law.

The court's analysis centered on whether an appraisal action could reasonably be described as stemming from a "violation" of a law or rule regulating securities and whether allegations of wrongdoing were required for a matter to be a "Securities Claim" under the D&O Policy. The trial court held that a "violation" did not require an allegation of wrongdoing, and thus a demand for appraisal – which "is an allegation that the company contravened" the right of shareholders to receive fair value – was a "Securities Claim" under the policy.

Reversing that decision, the Delaware Supreme Court held that the plain meaning of "violation" indicates an element of wrongdoing and that the wrongdoing is largely irrelevant to an appraisal action. The statutory appraisal action, the court held, was designed to remedy a specific problem of individual shareholders withholding consent and blocking mergers by providing a method for such shareholders to obtain a neutral, "independent" assessment of fair value. The court acknowledged that there are cases in which courts look at indicators of unfairness in the sales process in ascertaining fair value, which could suggest that wrongdoing was an important consideration, but held that this inquiry only went to the weight of the corporation's evidence of fair value, but was not otherwise relevant to an appraisal action.

Federal forum selection provision

Salzberg v. Sciabacucchi,

No. 346, 2019, 2020 WL 1280785 (Del. Mar. 18, 2020)

Why it is important

In *Salzberg v. Sciabacucchi,* the Delaware Supreme Court held that provisions mandating that cases under the Securities Act of 1933 be brought in a federal forum – so called "federal-forum provisions" or FFPs – are not facially invalid when included in Delaware corporate charters. The Delaware Supreme Court found FFPs were permitted under the "broad enabling text" of Section 102(b)(1) of the Delaware General Corporation Law, reversing the Court of Chancery's decision limiting the scope of Section 102(b)(1) to prohibit such provisions. Because it was ruling on a facial challenge to FFPs, the Delaware Supreme Court cautioned that there may be instances in which "as applied" challenges would render an FFP unenforceable.

Following this decision, many Delaware corporations are likely to consider adoption of a FFP, while others that already have adopted a FFP but declined to enforce it pending the Delaware Supreme Court's decision can be expected to exercise their rights.

Please see our prior coverage of the Court of Chancery's decision in Sciabacucchi here.

Salzberg v. Sciabacucchi, (Continued)

No. 346, 2019, 2020 WL 1280785 (Del. Mar. 18, 2020)

Summary

This appeal arose from a putative class action brought by Matthew Sciabacucchi seeking a declaratory judgment that federal-forum provisions (FFPs) included in corporate charters were invalid under Delaware law. The Court of Chancery granted summary judgment in favor of Sciabacucchi, holding that the FFPs were facially invalid. The Court of Chancery found that FFPs were "ineffective and invalid" because the "constitutive documents of a Delaware corporation cannot bind a plaintiff to a particular forum when the claim does not involve rights or relationships that were established by or under Delaware's corporate law."

The Delaware Supreme Court reversed the Court of Chancery's decision, beginning its analysis with the text of Section 102(b)(1) of the DGCL, which governs the contents of certificates of incorporation. Section 102(b)(1) authorizes two broad types of provisions: "any provision for the management of the business and for the conduct of the affairs of the corporation," and "any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders . . . if such provisions are not contrary to the laws of this State."

According to the Delaware Supreme Court, FFPs address securities claims arising from a company's disclosures to stockholders in connection with an initial or secondary offering, and the creation of those disclosure documents "is an important aspect of a corporation's management of its business and affairs and of its relationship with its stockholders." Thus, the Delaware Supreme Court concluded that FFPs could fall in either category under Section 102(b)(1).

The Delaware Supreme Court made several other points supporting its approval of FFPs. First, the Court noted the practical benefits of FFPs. The Court found state court cases alleging claims under the Securities Act of 1933, following the U.S. Supreme Court's reaffirmation of the concurrent state and federal jurisdiction over '33 Act claims had increased parallel litigation for many corporations. The Court found the use of FFPs to avoid parallel litigation would increase litigation efficiency and benefit corporations.

Second, the Delaware Supreme Court held that FFPs did not violate state or federal law. The Delaware Supreme Court reasoned that "stockholder-approved charter amendments" are consistent with state policies recognizing freedom of contract in the corporate context, and cited to Supreme Court precedent to show that "federal law has no objection to provisions that preclude state litigation of Securities Act claims."

Third, the Delaware Supreme Court rejected Sciabacucchi's argument that the addition of Section 115 to the DGCL in 2015 "implicitly amended" Section 102(b)(1). Section 115 provides that a corporation can require "internal corporate claims" to be brought exclusively in Delaware, but cannot "prohibit bringing such claims in" Delaware. The Delaware Supreme Court rejected the argument on several grounds, finding, among other things, that "Section 115 simply clarifies that for *certain claims*, Delaware courts may be the only forum, but they cannot be excluded as a forum."

Fourth, the Delaware Supreme Court disagreed with the Court of Chancery's holding that Section 102(b)(1) only applies to "internal affairs" of a corporation, finding that "the universe of matters encompassed by Section 102(b)(1) is greater than the universe of internal affairs matters."

Fifth, the Delaware Supreme Court acknowledged that "the most difficult aspect of this dispute" was whether FFPs would "be respected and enforced by our sister states." Because FFPs do not specify the forum for a strictly intra-corporate claim, to which Delaware law would apply pursuant to the internal affairs doctrine, the Delaware Supreme Court recognized the possibility that other states, applying their own choice-of-law principles, may apply a different law and fail to enforce the FFP. The Delaware Supreme Court believed the FFPs would and should be enforced because, among other things, the corporate charter is a contract between the corporation and its shareholders and all states regularly enforce forum selection provisions in contracts. But it remains to be seen whether the Delaware Supreme Court's prediction is correct.

Wong v. Restoration Robotics, Inc.,

No. 18CIV02609 (Cal. Super. Ct. Sept. 1, 2020)

Why it is important

In *Wong v. Restoration Robotics, Inc.*, the California Superior Court in San Mateo County addressed an issue of first impression: whether the exclusive federal forum provision (FFP) in Restoration Robotics, Inc.'s (Restoration) corporate charter is applicable to claims under the Securities Act of 1933. The court answered in the affirmative, finding that an FFP can require plaintiffs to file '33 Act claims in federal court. In upholding the validity of the FFP as applied to '33 Act claims, the court found that Restoration's FFP is not illegal under California law, did not violate due process because plaintiffs still can sue in federal court in the state in which they would have filed, and because all rights and remedies remain available to plaintiffs in federal court. By upholding the FFP, the court provided corporations with a means to avoid having to defend parallel actions in state and federal court, promoting consistent outcomes and minimizing unnecessary costs.

Summary

Shareholders of Restoration, a Delaware corporation, filed a lawsuit in California state court against Restoration as well as certain directors, officers, underwriters, and venture capital investors alleging violations of the '33 Act. Restoration moved to dismiss, arguing that the shareholders' choice of filing the suit in state court violated its FFP. The California Superior Court originally denied Restoration's bid to dismiss the action citing the Delaware Chancery decision in *Salzberg v. Sciabacucchi,* in which the Delaware Chancery Court held that FFPs were not "internal affairs" and therefore, not enforceable under Delaware law. Following the Delaware Supreme Court's reversal of the Chancery Court's decision, the California Superior Court granted Restoration's motion for reconsideration of its motion to dismiss.

Like many corporations, Restoration adopted an FFP following the United States Supreme Court's decision in *Cyan*, which held that claims under the Securities Act of 1933 could not be removed from state to federal court. This was the first case in California addressing the validity of an FFP in this context since the Delaware Supreme Court ruled in *Salzberg* that FFPs were allowable under Delaware law because "Delaware Section 102 allowed corporate charters to go beyond matters of 'internal affairs.'"

The court was initially dismissive of the Delaware Supreme Court's holding in *Salzberg* and critical of the *Salzberg* court's lack of analysis as to whether FFPs were contrary to federal law. Nevertheless, the *Wong* court agreed with the Delaware Supreme Court that FFPs are enforceable, but did so based on an application of the standards California courts use to determine the validity of forum selection clauses and forum non conveniens arguments. The court found that plaintiffs did not meet their burden to show that the FFP was "unenforceable, unconscionable, unjust, or unreasonable" because the FFP (1) was subject to shareholder approval, and (2) came into effect before the present lawsuit was filed. The court further concluded that FFPs do not violate due process because all rights and remedies remain available, and plaintiffs are not meaningfully inconvenienced as they can file their suit in the federal court located in the state in which they would have otherwise sued. Therefore, the court dismissed the complaint against Restoration, as well as its officers and directors.

The court did not dismiss plaintiffs' claims against Restoration's underwriters and investors, finding that neither group had standing to invoke rights under the corporation's charter. It also declined to rule on the plaintiffs' arguments that the FFP violated the U.S. Constitution's Commerce and Supremacy Clauses, as that analysis would have been outside the scope of the court's focus on the defendants' motion to dismiss for forum non conveniens.

In re Uber Technologies, Inc. Securities Litigation,

No. GCG-19-579544 (Cal. Super. Ct. Nov. 16, 2020)

Why it is important

In *In re Uber Technologies, Inc. Securities Litigation*, the California Superior Court in San Francisco County became the second California state court in three months to dismiss federal securities claims brought in state court based on an exclusive federal forum provision (FFPs) in the defendant corporation's charter. The court also held that claims against the underwriters of Uber's IPO also had to be dismissed, even though the underwriters were not parties to Uber's charter, because the charter's forum clause included broad language covering "any complaint" arising under the Securities Act of 1933. If affirmed and followed in other jurisdictions, the ruling could pave the way for corporations across the country to avoid the cost and burden of litigating duplicative securities claims in state and federal court by including federal forum selection clauses in their charters.

Summary

In 2018, the U.S. Supreme Court ruled in *Cyan Inc. v. Beaver County Employees Retirement Fund* that state and federal courts have concurrent jurisdiction over claims brought under the Securities Act of 1933. That decision led to a significant increase in securities class action lawsuits filed in state courts. In response to the *Cyan* ruling, numerous corporations added a provision to their certificate of incorporation or charter requiring that any claims brought under the Securities Act be brought exclusively in federal court. If enforced, these provisions could limit or prevent plaintiffs from bringing securities class actions in state court under *Cyan*. *In re Uber* joins a growing list of cases in which these clauses have been tested and found to be enforceable.

The plaintiffs in *Uber* brought Securities Act claims in California state court against Uber and certain officers, directors, and underwriters involved in Uber's IPO, alleging that Uber's offering documents omitted material facts necessary to make other statements not misleading. The plaintiffs filed similar claims in federal court, but violated the forum selection clause in Uber's charter by also bringing suit in state court. The charter provided that federal court "shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act."

The court found that Uber's forum selection clause was enforceable and dismissed the complaint in its entirety, including with respect to the underwriter defendants, who were not parties to the charter.

The court found that the forum selection clause did not violate the Securities Act's bar on removal to federal court, and did not violate *Cyan* because *Cyan* dealt with jurisdiction rather than the enforceability of a contractual forum selection clause. The court also found that the forum selection clause was not substantively unconscionable or otherwise unenforceable because Uber's stockholders were on notice of the terms of Uber's charter when they purchased Uber's stock, and that enforcing the forum selection clause was therefore within a reasonable buyer's expectations. The court agreed with the plaintiffs that the forum selection clause, which was located deep within Uber's governing documents, was procedurally unconscionable, but this finding was insufficient to invalidate the clause because the court found it was not substantively unconscionable, including because the clause did not eliminate or otherwise limit the plaintiffs' substantive rights under the Securities Act and only affected the forum in which those claims could be brought. Finally, the court dismissed the plaintiffs' claims against the underwriter defendants involved in Uber's IPO on the grounds that Uber's forum selection clause was broadly drafted to cover "any complaint" arising under the Securities Act.

Securities, Shareholder, and M&A Litigation practice overview

Securities, Shareholder, and M&A Litigation practice overview

At Hogan Lovells, we guide companies – and their officers and directors – through all types of disputes that arise with their investors, shareholders, and transactional partners. You must engage seasoned litigators who will work with you through the full lifecycle of the dispute to protect your interests. We are the team to have on your side, to obtain favorable outcomes at the earliest possible stage, or to defend your interests all the way to verdict through appeal, when necessary.

We have a unique approach to defending our clients in securities, shareholder, and M&A litigation. First and foremost, we work with you to identify and prioritize your business objectives. We also help you develop the factual and legal framework to drive the proper narrative. We put together the right team to handle your matter, including lawyers across different practices, geographies, and industry experience. We are able to do this in a cost effective way through use of our advanced technology platforms, such as machine learning and other types of AI, to review documents, prepare litigation outcome assessments, help surface new insights, and realize other efficiencies and enhance service quality.

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1. Corporate governance litigation
2. Private company M&A disputes
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4. Federal securities litigation
5. Investment fund disputes and litigation

Corporate governance litigation

Shareholders frequently challenge decisions made by the board of directors at both public and private companies; our role is to advise, and when necessary defend, companies and their directors against these challenges. We have successfully done so in a wide array of contexts, including M&A transactions, dissolutions, recapitalization plans, compensation awards, by-law amendments, and voting rights agreements.

We also are frequently involved early in corporate transactions to help clients navigate the conflicts of interest – and other potential pitfalls – that often later give rise to shareholder litigation. We represent special committees of the board in investigating shareholders' allegations of misconduct. And when shareholders make books and records demands on a company under § 220 of the Delaware General Corporations Law, or similar state laws, prior to making a litigation demand, we have significant experience in successfully limiting or opposing inappropriate demands.

Private company M&A disputes

Disputes between the buyer and the seller in private company M&A transactions arise in several predictable areas:

1. Purchase price disputes in which one party (usually the buyer) seeks to re-negotiate the deal price through the use of a post-closing price adjustment provision;
2. Earn-out disputes in which the parties disagree about whether deferred portions of the purchase price are payable based on the target's post-closing performance; and
3. Indemnification disputes where one party (usually the buyer) seeks indemnification for breach of representations and warranties in the purchase agreement.

Working with our Corporate M&A colleagues, we review transaction documents to craft the most favorable terms for your company, and if a dispute later arises – whether in arbitration or in court, we have substantial experience litigating the complex accounting and contract issues involved.

Public company M&A litigation

Recent data reflects that, in more than 90 percent of public company M&A transactions, lawsuits are filed by shareholders that purport to challenge the transactions; in transactions in excess of US$100 million that number is over 95 percent. Working together with our M&A group, we advise directors on relevant litigation issues prior to the M&A announcement and aggressively defend the predictable suit when filed, aiming to prevent plaintiffs and their lawyers from disrupting transactions that the board has found to be in the best interest of the company and its stockholders. We also have experience representing companies when faced with tender offers or proxy battles that can arise in conjunction with announced M&A transactions.

Federal securities litigation

We have deep experience representing public companies and their officers and directors in all types of securities litigation in courts across the United States. We have successfully defended clients in cases involving initial and secondary offerings alleging violations of Sections 11 and 12 of the '33 Act and fraud claims under Section 10(b) of the '34 Act. We defend companies in proxy litigation and short-swing trading cases. Underwriters and auditors also rely on us to defend them, and our attorneys have won victories for all of the major accounting firms and the leading investment banks.

Investment fund disputes and litigation

We have represented funds of all types – private equity, venture capital, distressed debt, REITs, and investment management companies – in disputes at the portfolio company and fund level. These disputes have run the gamut, involving any of the following:

- investor complaints by limited partners and shareholders,
- board disputes and/or contests for board control;
- corporate governance rights or creditor rights, both in and out of bankruptcy;
- allegations of alter ego and veil piercing;
- minority shareholder rights when the funds are not in a control position; and
- damages claims when an investment suffers loss or when a portfolio company or fund is threatened with such claims.

Private equity funds are repeat players in private M&A and corporate governance disputes, and so are we, having developed significant experience representing fund sponsors in these disputes. The sponsors also can have unique disputes with their own minority partners or investors, whether over capital calls, investor rights, or management decisions under the terms of the fund documents, and we advise and represent funds in these disputes.

Notable cases and victories

Notable cases and victories

We are a **team of experienced trial attorneys** that are focused on achieving our clients' key business objectives. We are proud of our successes on behalf of our clients, and this year is no different. Notably, in 2020, our team:

- **Won a major motion to dismiss** in the SDNY on behalf of a private equity fund in a federal RICO action brought by investor plaintiffs seeking more than US$1 billion in damages;
- **Won a second complete victory** for Papa John's International Inc. in a securities class action filed in the SDNY;
- Successfully advised a **public hospitality REIT** in its successful termination of a merger agreement after the buyer was unable to close. With our advice, our client was able to manage its business through the effects of COVID-19 without violating any interim operating covenants and without acknowledging an MAE had occurred; and
- **Won an AAA/ICDR arbitration victory** for a China-based conglomerate in an action by the minority investor in a travel-industry technology start-up alleging breach of fiduciary duty and seeking more than US$90 million in damages.

In **federal securities class actions**, we have extensive experience defending claims brought under the **Private Securities Litigation Reform Act**. Over the last 12 months, our team has won **pleading-stage dismissals** of securities class actions filed against public companies in the life sciences, sporting goods, and consumer retail industry sectors.

- We won a second complete victory for **Papa John's International Inc.** in a securities class action filed in the SDNY following a corporate crisis and massive stock price decline caused by press reports of racist language used by the company's founder and #MeToo allegations.
- We also secured a significant victory for a South American country after a minority group of bondholders requested a TRO from the SDNY to prevent the restructuring of their country's external debt. After expedited briefing, the win prevented a potentially catastrophic outcome with potential damages exceeding US$17 billion.

Our team litigated a number of cases in **Delaware**, securing important victories for our clients:

- Won a **unanimous ruling** by the Delaware Supreme Court affirming that, as a matter of equity, the "affirmative deception" by the founder/director of a tech company voided his attempted "coup d'etat" to take control of the company from our client the board of directors; and
- **Defeated a motion to dismiss** in Delaware Chancery Court, securing a major M&A litigation win for our client in an action for fraud and breach of contract stemming from its US$106 million purchase of a cloud computing and data services company in 2018.

In **public M&A litigation matters**, we handled numerous cases in connection with hundred-million dollar deals.

- Represented **a software company** and its board of directors in federal and state court litigation arising from its US$792 million sale to an education tech company.
- Represented **a semiconductor manufacturer** in a series of individual and investor class actions arising from its US$500 million acquisition of a technology company.
- Represented the **special committee** of the board of directors in numerous federal and state suits challenging a "go private" merger transaction.
- Represented **multiple public company acquirors** in MAE disputes arising from the COVID-19 pandemic.

Our team is **efficient and effective** even under the most strenuous circumstances. In 2020, we secured several victories in connection with **requests for injunctive relief,** often briefing the issues in a matter of days or weeks.

- **Defeated a preliminary injunction motion** that sought to shut down our start-up technology clients focused on producing and commercializing sugar alternatives. The case, which involves claims by the joint venture partner alleging fraudulent inducement, unauthorized affiliate transactions, mismanagement of the company's finances, and exceeding the company's purpose, is proceeding in Delaware Chancery Court.
- **Won a preliminary injunction** battle on behalf of the special committee of the board of directors in litigation arising from a "go private" transaction between the controlling stockholder and a NASDAQ-listed plastics manufacturer for the automobile industry.
- **Defeated a temporary restraining order** in the SDNY, in a lawsuit involving our telecommunications investment fund client, where the plaintiff sought to shut down a months' long sales process for assets valued in excess of US$1 billion.

We have vast experience on the defense side, but we can also act as plaintiffs' counsel to protect the rights of our clients.

- We successfully defeated a motion to dismiss in federal court challenging the standing of our client, a minority investor pursuing claims against a controller for self-dealing breach of fiduciary duty and misappropriation of trade secrets.
- We defeated a motion to dismiss our natural gas clients' claim for tortious interference with the acquisition of a regulated natural gas storage facility, including an award of our attorneys' fees.
- We also defeated a motion to dismiss in Delaware Chancery Court, with the court permitting our client to proceed with its claims for fraud and breach of contract stemming from its US$106 million purchase of a cloud computing and data services company in 2018.

In addition, we are actively litigating a number of large cases across a broad array of industries, such as:

- In what the media has described as the largest action even on the island of Puerto Rico, currently representing our client in a RICO action pending in the District of Puerto Rico brought by residents of Puerto Rico against 15 defendants: the world's largest fuel suppliers, PREPA (Puerto Rico's public utility), and fuel testing laboratories for allegations that PREPA improperly overcharged consumers for fuel;
- Currently representing a U.S. aerospace and defense company in connection with individual and class actions arising from its US$5 billion acquisition of a technology-based manufacturer;
- Currently representing in the SDNY one of the defendants in civil actions against various individuals alleged to be connected to one of the most highly publicized hedge fund frauds since the Madoff scandal against claims of breaches of fiduciary duty, fraud, conspiracy, and mail and wire fraud under the RICO statute, among other claims;
- Currently advising a global medical device company in connection with federal securities class actions, derivative litigation, 220 demands, and an SEC investigation arising from multiple alleged earnings misses;
- Currently, for a specialty finance company in a lawsuit recently filed in Delaware Chancery Court against a former director and officer alleging breaches of an employment agreement and duties to the company in which they are an investor;
- Currently representing an American semiconductor company in connection with individual and class actions arising from its US$10 billion cash and stock acquisition of another semiconductor company; and
- Currently representing a thermal imaging company and its board of directors in connection with individual and class actions arising from its US$8 billion sale to an aerospace and defense company.

These examples represent just a sample of our team's experience and successes in 2020 and we are poised to help our clients tackle the new challenges already presented in 2021 – and beyond.

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