Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

2018 Delaware Corporate Law and Litigation Year In Review

Introduction

In 2018, the Delaware courts issued a broad range of important decisions addressing various corporate law and governance issues. Those decisions are relevant for public and private companies and will help shape decision-making by boards, executives, and investors in 2019. We provide an overview of these decisions—and related themes and issues that we are observing in practice—in our *2018 Delaware Corporate Law and Litigation Year In Review*.

As a reflection of the busy and central role of the Delaware judiciary, the Delaware legislature and governor expanded the Delaware Court of Chancery—the leading court for business disputes—from five judges to seven judges in 2018. We will continue to monitor developments in the Delaware courts in the year ahead.

Attorneys from WSGR's corporate governance and Delaware law practices contributed to the content of the *2018 Delaware Corporate Law and Litigation Year In Review*. Contributing authors and editors included WSGR partners Amy Simmerman (Wilmington, DE), Brad Sorrels (Wilmington, DE), Katherine Henderson (San Francisco/New York), David Berger (Palo Alto), and partner-elect Ryan Greecher. Also contributing to the report were attorneys Shannon German, Lori Will, Nate Emeritz, Sara Pollock, Amelia Messa, James Griffin-Stanco, and Brian Currie.

If you have any questions or comments, please contact a member of WSGR's Corporate Governance practice.

M&A Litigation

Aside from developments relating to appraisal rights and controlling stockholder conflicts—significant topics that we discuss separately below—several key themes and issues characterized M&A litigation in 2018.

First, one active area of litigation related to whether a corporation had successfully obtained approval of a transaction through a fully informed and uncoerced vote of its disinterested stockholders. This issue has continued to take on importance given the Delaware law rule, which has solidified in recent years and is often referred to as the "*Corwin*" doctrine, that such a vote can extinguish many types of fiduciary duty claims—including where the board has a conflict of interest or where a heightened standard of review would otherwise apply (such as in the sale of a company).

During the past year, several cases explored just what it means for such a vote to be fully informed, which requires that stockholders receive all "material" information. In one case, the Delaware Supreme Court held that although a corporation had disclosed that its chairman, founder, and largest stockholder had abstained from supporting a sale of the company across two board meetings, the corporation should have disclosed his reasons *why*, where the board minutes showed that he thought the transaction was poorly timed and undervalued the company.[1] In another decision, the court held that a company's disclosures were inadequate where, among other things, the company had failed to disclose (1) just how early in the sale process the company's founder had reached a rollover agreement with the acquirer, (2) that the company was under existing activist pressure (rather than "potential" pressure, as had been disclosed), and (3) that the founder had informed the board that if the company was not sold, he may sell his stock.[2]

Second, the Delaware courts, which are generally attentive to the process that a board employs in selling a company, were critical of situations in which the CEO was alleged to have wrongfully steered the sale process. In one case, the CEO allegedly engaged in negotiations with the buyer at a time when the board had instructed him not to do so in an effort to curry favor with the buyer and preserve his job—with the court ultimately allowing a duty of loyalty claim against the CEO to go forward.[3] In another case, the court found, on a motion to dismiss, that the CEO, a son of the company's controlling family, had provided "tips" to the controlling family in a manner that allowed the family to protect its own interests by influencing the sale process. Again, the court permitted duty of loyalty claims to go forward.[4]

Third, for the first time in Delaware history, the Court of Chancery, in a decision affirmed by the Delaware Supreme Court, concluded that a buyer in a multiple-billion dollar public company deal could refuse to close a deal on the basis that the target company had undergone a "material adverse effect" in light of various regulatory problems with the FDA and downturns in the company's business. The decision was grounded in the specific facts of the case but provides critical guidance for similar disputes and issues going forward.[5]

Finally, as in other recent years, buyers pursued lawsuits in the Delaware courts asserting post-closing fraud claims following the acquisition of a private company. Frequently in these cases, the courts are called upon to interpret exactly how the acquisition agreement addresses the parties' liability, underscoring the importance of thoughtful drafting in this area. One common issue relates to the effectiveness of an "anti-reliance" clause, through which a party (most often a seller) attempts to eliminate fraud claims based on statements made *outside* of the contract about a company's business, especially during diligence. In one case, the court examined the effect of a proviso that broadly permitted "fraud" claims and which was affixed to an anti-reliance clause that otherwise disclaimed any reliance on statements made outside of the contract. The court determined that in order to give proper meaning to the initial anti-reliance language, the proviso could only be read to permit fraud claims based on statements (representations) made within the agreement.[6] Separately, in another litigation, the Court of Chancery issued a 153-page post-trial opinion that granted judgment in favor of various defendants and absolved them of liability on fraud claims but held that the selling company's CEO was liable for fraud.[7]

Appraisal Rights and Claims

Another common mode by which a deal outcome can be challenged is through a stockholder's assertion of appraisal rights. These rights are provided to stockholders by the Delaware statute, which allows stockholders to pursue a judicial assessment of the "fair value"

of their shares following various types of mergers—with that "fair value" potentially being more than, less than, or the same as the price paid in a deal. Several decisions in 2018 explored just when stockholders have appraisal rights, whether stockholders can waive such rights, how "fair value" is determined, and what type of information stockholders must be given in connection with appraisal rights.

In two separate litigations this year, the Court of Chancery addressed whether a particular transaction structure implicated appraisal rights. One decision involved a business combination in which Keurig merged with a subsidiary of Dr Pepper, Dr Pepper issued a large number of shares to Keurig stockholders, and Dr Pepper's stockholders received a large cash dividend and retained only 13 percent of the resulting company.[8] The court concluded that although the transaction looked like a typical change of control, Dr Pepper simply was not directly involved in the merger as a "constituent" corporation and the transaction structure therefore did not give Dr Pepper's stockholders appraisal rights under the wording of the Delaware appraisal statute. The court cited the importance of applying the statute with predictability, to promote orderly transaction planning. In another decision involving the merger of Rite Aid and Albertsons, the court concluded that stockholders did not have appraisal rights where they could elect to receive either a fractional share of stock or cash and were not forced to take cash (which would have triggered appraisal rights).[9]

Given that the exercise of appraisal rights can have potentially surprising and powerful effects—and can blossom into a fiduciary duty claim as well, as illustrated by a case this year[10]—a common question is whether stockholders can prospectively waive appraisal rights, such as in an investors' rights agreement. The case law on that issue has been surprisingly limited. In 2018, however, the Court of Chancery honored a waiver of appraisal rights that had been provided by a holder of common and preferred stock in a private company stockholders' agreement—indicating that at least in some contexts, such waivers may be enforceable.[11]

Meanwhile, the Court of Chancery continued to refine its approach to determining "fair value" following the guidance from the Delaware Supreme Court in the *Dell* and *DFC Global* decisions issued in late 2017. In those cases, the Delaware Supreme Court, reacting in part to the high number of appraisal litigations in recent years challenging arm's-length transactions, gave substantial weight to the deal price as evidence of fair value when it resulted from a robust, informed, and competitive process reflecting an efficient market for the corporation.[12]

In February 2018, the Court of Chancery declined to defer to the deal price in the appraisal of Aruba Networks following its acquisition by Hewlett-Packard, but not because the deal process did not support using that metric.[13] Rather, the Vice Chancellor expressed concern about the precision with which the court could assign value in that case to the portion of the deal price representing synergies—which Delaware law expressly provides must be deducted as "an element of value arising from the accomplishment or expectation of the merger."[14] Thus, instead of relying on the "deal-value-less-synergies" approach, the court seized on the Supreme Court's efficient market hypothesis and turned to academic research suggesting the unaffected stock price for a widely traded public company was the best approximation of fair value and, therefore, awarded the 30-day average unaffected market price—which was more than 30 percent below the deal price—as fair value. The case is currently pending on appeal to the Delaware Supreme Court, with oral argument likely to take place in the coming months and a decision issued sometime this spring.

In *Norcraft Companies*, the court similarly rejected using deal-price-less-synergies. In this case, however, the court cited flaws in the deal process, and in particular called into question the effectiveness of the post-signing "go shop" used there. Instead, the court relied exclusively on a discounted cash flow analysis, awarding the petitioners a modest premium of 2.5 percent over the deal price.[15]

At the same time, in another notable appraisal decision involving Solera Holdings, the Chancellor determined fair value using deal-price-less-synergies and awarded the petitioners an amount approximately 3.4 percent less than the deal price.[16] Thus, in each of these cases, the court used a different method of determining fair value, suggesting there is no one-size-fits-all approach for appraisal.

It remains to be seen what the landscape of Delaware appraisal litigation will look like as case law continues to develop—particularly after the Delaware Supreme Court weighs in on the *Aruba Networks* case—but it is clear that the Court of

Chancery will continue to take to heart the Delaware statute's direction to "take into account all relevant factors" in determining fair value and be guided by the particular facts of the case.

Finally, in both public and private company mergers that trigger appraisal rights, stockholders generally are entitled under Delaware law to a statutory notice informing them of their rights—usually provided as part of a package of deal disclosures. In one decision in 2018, the Court of Chancery addressed precisely what type of information must be provided to stockholders. The court noted that stockholders must be given all information material to the appraisal rights decision and determined that the notice at issue in the case had been inadequate. In particular, the court observed that the notice failed to include "any financial information" relating to the selling company, any description of the company's "business and its future prospects," and any information about how the merger "price was determined or whether the price was fair to stockholders."[17] The court's commentary provides important guidance about the types of disclosures that courts expect to be given to stockholders.

Controlling Stockholder Conflicts

In the last several years, the amount of Delaware case law addressing controlling stockholder conflicts of interest has exploded, with 2018 being no exception. In one post-trial decision in 2018, the Court of Chancery awarded a plaintiff more than $20 million in damages against a controlling stockholder investor.[18] Under Delaware law, the default rule is that the deferential business judgment rule protects business decisions by boards and that courts will not second guess those decisions, but where a controlling stockholder conflict exists, the courts can apply the much more difficult and exacting entire fairness standard of review.

The 2018 case law addressed several important issues that arise when navigating and litigating potential controlling stockholder conflicts. One such issue is precisely when a stockholder possesses control. In one case arising from Tesla's acquisition of SolarCity, the Court of Chancery concluded, at least on a motion to dismiss, that Elon Musk potentially possessed control over Tesla despite only a 22 percent ownership stake given his alleged influence over the company.[19] In another case challenging a preferred stock financing round and the subsequent winding up of a private company, the court determined that an investor that owned less than a majority stake nonetheless possessed control, given the investor's ongoing dominance over the company and its use of veto rights to exert influence over the board's decision-making.[20]

In order to avoid costly litigation over controlling stockholder conflicts and return a transaction to the business judgment rule, boards and controlling stockholders can use the so-called "*MFW*" framework, named after a 2014 Delaware Supreme Court case.[21] That framework requires a commitment at the *outset* of negotiations that a transaction will not go forward unless (1). a fully empowered, independent committee of the board that exercises its duty of care approves the transaction, and (2). minority stockholders approve the transaction in a fully informed, uncoerced vote. Two cases this past year explored a common issue that arises in practice: when is it too late, beyond the outset, to agree to these conditions? In one case, the Delaware Supreme Court explained that the conditions must be declared before "substantive economic negotiations" begin.[22] In a separate decision, currently on appeal, the Court of Chancery drew a distinction between preliminary discussions versus negotiations, concluding that it was not fatal that some exploratory meetings and conversations occurred before the parties agreed to use *MFW*, especially given that the independent board committee ultimately was active and engaged in price negotiations.[23]

Board Independence and Conflicts

The deferential business judgment rule assumes and requires that a decision is made by disinterested and independent fiduciaries. Where, by contrast, at least half of the board has a potential conflict of interest, courts can much more closely examine a decision under the entire fairness standard of review, unless the board properly uses an independent board committee or obtains a disinterested stockholder vote to dissipate the conflict. In these claims, directors face a risk of personal liability for monetary damages.

Given the stakes, the assessment of whether board members are disinterested and independent is often a critical

issue. Several cases in 2018 explored when directors might have a conflict. In essentially all of those cases, the courts explained that the assessment of director independence and disinterestedness is fact-intensive, based on the specific board decision at hand, which parties benefit from the decision, and relationships among the relevant parties.[24] Several of the 2018 decisions reinforced that in the public company context, director independence under stock exchange rules can be relevant to a Delaware court but it is not conclusive.[25]

In many cases, the court looked for signs of close personal friendship between directors and the party benefiting from a transaction, such as the receipt of large gifts, vacationing together, and public statements about their friendship.[26] As in prior years, "dual fiduciaries" were found to have a potential or actual conflict of interest, where, for example, a director was a principal of a venture fund that participated in a financing round or otherwise received special benefits in a given transaction, or where a director served as an officer or director of an affiliate entity that was engaging in a transaction with the company.[27] The courts also looked for signs of other types of economic conflicts of interest: for example, where board members were alleged to hold board and executive positions at other companies where a party benefiting from a board decision had a meaningful interest; where a director had an unusual opportunity to co-invest in an NBA team made available by a conflicted party; where an influential stockholder had supported a board member's outside economic endeavors such as through a book blurb or public endorsements; and where a director received significant consulting fees from the company.[28] Importantly, recent litigation has illustrated that the courts often permit broad discovery into texts, emails, and social media to explore whether such relationships or potential conflicts exist.[29]

The 2018 case law also provides some insight into the types of issues the courts examine in determining whether a board employed an adequate process and reached a fair decision in the midst of a conflict. For example, in cases involving financing rounds with insider conflicts, the courts were critical of boards for failing to use a financial advisor, preferred stock terms that appeared overly "rich," and the company's failure to use an independent board committee or obtain a disinterested stockholder vote.[30]

It is also important for investors and financial advisors to bear in mind that where stockholders assert that board members have a conflict, such stockholders often claim that a third party, such as a venture fund that appointed the director to the board, "aided and abetted," or "knowingly participated" in, such a conflict. Thus, in 2018, the case law continued to feature aiding and abetting claims against financial advisors and investors, many of which survived a motion to dismiss.[31]

Board Compensation

Last December 2017, the Delaware Supreme Court issued a decision on board compensation that had ripple effects on governance advice and litigation in 2018.[32] In the 2017 decision, the court held, consistent with prior case law, that when directors make decisions about their own compensation, such decisions are inherently conflicted and usually subject to the difficult entire fairness standard of review *unless* the corporation's stockholders approve the board's compensation. In a departure from previous Court of Chancery cases, however, the court went on to indicate that in order for that stockholder approval to be effective, stockholders will generally need to approve specific amounts of director compensation or self-effectuating formulas for director compensation, *not* ranges or ceilings within which directors make decisions, as had been allowed in prior case law.

During the past year, plaintiffs' attorneys dedicated ongoing attention to these issues. As part of that, the Delaware courts provided guidance in 2018 on when courts may or may not approve negotiated settlements between companies and stockholders in litigation over director compensation. In one case, the Court of Chancery approved a settlement that involved a $395,000 fee award to plaintiff's counsel, where the settlement provided for reduced compensation for directors, the implementation of director-specific compensation limitations, stockholder approval of director compensation with agreed-upon disclosures, and other related governance changes.[33] In another case, by contrast, the court refused to approve a settlement that provided only for enhanced disclosures to stockholders, concluding that the settlement provided inadequate benefits to stockholders—

which resulted in a continuation of the litigation and a likely award of attorney's fees to the stockholder who successfully objected to the settlement.[34]

Separately, but on a similar note, the Court of Chancery issued a decision in 2018 determining that a decision by a three-member board of a small, publicly traded company to grant options to themselves was inherently conflicted and subject to the entire fairness standard.[35] The court was critical of the board's process and decision-making, where it appeared that the awards were larger than awards at peer companies, that the board's process was "thin" with very little attention paid to the topic in board minutes, and that the board did not use advisors or consultants. Given the particular issues in that case, however, the court declined to award damages against the directors.

Stockholder Activism, Director Designees, Boardroom Disputes, and Director Information

A number of litigations during the past year addressed delicate issues relating to stockholder activism, directors designated by particular stockholders, and the implications of factions in the boardroom. In one case, the Court of Chancery determined after years of litigation that an activist stockholder—which had launched a proxy contest, obtained seats on the board, and successfully agitated for a sale of the company—aided and abetted fiduciary duty breaches by the company's directors in connection with a sale of the company, particularly in light of various actions taken by a principal of the activist fund who served on the company's board.[36]

In the much-publicized dispute between CBS and its controlling stockholder, stemming from a disagreement over the controlling family's desire to merge the company with Viacom, the Court of Chancery discussed an issue that frequently arises when factions materialize in the boardroom: the information rights of directors vis-à-vis one another.[37] The court observed that, as a general matter, directors are broadly entitled to the same information as other directors. But consistent with prior cases, the court noted that there are some circumstances in which directors may not be entitled to information—in particular, where a director agrees in advance not to receive certain information, where a board properly forms a committee excluding a director, or where adversity exists between a director and the company. In *CBS*, the court determined that at least in some circumstances, sufficient adversity existed between the company and its controlling stockholder such that some—although not all—information could be withheld from directors affiliated with the controlling stockholder.

In two other litigations, the Court of Chancery addressed other related facets of the relationship between significant stockholders and directors they appoint. In one decision, the Court of Chancery held that although directors can, as a baseline matter, share information with stockholders who appoint them, a stockholder may be liable for using confidential information in a manner that harms the corporation or other stockholders.[38] In another decision, the court held that a "corporate opportunity" provision in a company's charter—renouncing the company's interest in corporate opportunities flowing to an investor—could help protect the investor and its director designee from fiduciary duty and trade secrets claims relating to competitive investments and the use of corporate information in making such investments.[39]

Potential Conflicts and Insider Trading in IPOs and Secondary Offerings

In December 2018, the Court of Chancery issued a decision that could have implications for some companies when conducting an IPO or secondary offering. Although the court emphasized that its decision arose at the early pleadings stage and later developments would need to support the plaintiff's case, the court permitted insider trading claims and a traditional duty of loyalty claim to go forward against several members of a public company board and its CFO in connection with the company's IPO and secondary offering.[40] The plaintiff's central theory was that several members of the board had approved an IPO and waived lockups in the secondary offering in order to allow themselves to sell stock before negative news about a product impacted the company's stock price. The plaintiff contended that the company's public disclosures about the product were inadequate and that the secondary offering occurred relatively unusually close in time to the IPO.

Technical Defects and Ratification

For several years in a row, a considerable amount of litigation has occurred in the Delaware courts over technical validity issues—for example, relating to whether board and stockholder approvals conformed to Delaware law requirements, or whether a merger or charter amendment was properly effectuated under Delaware law. This activity has, in part, been related to the introduction of Sections 204 and 205 of the Delaware corporate statute in 2014, under which companies can pursue self-help and court-based ratification procedures to address technical defects. These types of decisions also frequently stem from stockholder disputes over control of the company—particularly concerning who owns valid stock and who can elect directors. These decisions highlight the importance of strictly complying with technical statutory rules when issuing equity, adopting charter amendments, and engaging in transformative events.

In two separate cases in 2018, the Court of Chancery validated large private company mergers following a lawsuit brought by unhappy stockholders who seized on technical issues to challenge the deals. In one case, the court concluded that the company had defectively effectuated a reverse stock split four years before the company was sold for $170 million, such that the ownership of the company's stock was quite different from what the ultimate sale of the company had contemplated.[41] After years of litigation, the court used its powers under Section 205 to validate the merger on the terms on which the deal had been effectuated. In another case, the court concluded that stockholder written consents approving a merger in which a company was sold for $600 million were defective, although the court went on to validate that merger under Section 205 as well.[42]

In another litigation arising from a dispute among founders over control of a private company, the Court of Chancery rejected a founder's claim that he had been granted stock options over time, concluding that the options had been defectively approved under the Delaware statute.[43] The court declined to use its powers under Section 205 to honor the purported grants, on the rationale that the various flawed board records that existed did not demonstrate an adequate "meeting of the minds" as to precisely what the board intended. Separately, the court also concluded that the same founder had breached his fiduciary duties by refusing, out of disgruntlement with his co-founders and in an alleged attempt to gain leverage over them, to help the company validate various defective stock issuances it had made over time to other stockholders.

Early on in 2018, the Court of Chancery issued a pair of decisions interpreting technical provisions in stockholders' agreements. In one decision, the court gave effect to a stockholders' agreement, which provided specific requirements for issuing stock and provided that a violation of those requirements would result in stock being "null and void *ab initio*."[44] In a dispute over control of the board, the court concluded that stock had been issued in violation of the agreement and was void. In another case, which also related to a dispute over control over the board and the rightful CEO of a company, the court held that a stockholders' agreement could not be interpreted in a manner that would allow stockholders to remove and replace a CEO—a function that is within the province of the board of directors.[45]

Finally, at the end of 2018, again in the context of a stockholder dispute over the composition of a board, the Court of Chancery addressed important issues relating to the validity of stockholder written consents in lieu of a meeting.[46] In that case, the company's majority stockholders had attempted to remove and replace a member of the board by way of a stockholder action by written consent. In the resulting litigation, the court held that the company's failure to deliver a notice required by the Delaware statute informing non-consenting stockholders of the action did not necessarily invalidate a stockholder written consent—reasoning that a company could not thwart the action by refusing to send such a notice. Second, the court rejected the argument that the stockholder consents were not immediately effective given their non-compliance with notice periods under Rule 14c-2 of the Securities Exchange Act of 1934. The court concluded that non-compliance with securities laws did not necessarily affect the validity of consents under Delaware law.

Charter and Bylaw Provisions

In December 2018, the Court of Chancery issued a much-anticipated decision addressing the validity of charter and bylaw provisions specifying that

securities law claims must be brought in *federal* courts, not state courts. Various companies have adopted such provisions in an effort to curb opportunistic claims brought in state courts. The court concluded that such forum provisions are invalid under Delaware law in that Delaware-governed charters and bylaws cannot regulate securities claims that are "external" to the operation of Delaware corporate law.[47] Companies whose governing documents contain such a provision should consult with their legal advisors.

In another case, the Court of Chancery addressed an important issue that arises in practice but that has received very little attention in the Delaware case law: the status of preferred stock after a stockholder seeks redemption of the preferred stock in accordance with rights set forth in the company's governing documents, but where the company lacks the surplus and solvency required under Delaware law to pay for the redemption of such stock.[48] In this case, at least based on the facts and provisions before it, the court concluded that the holders of such stock have an ongoing, future right to payment and possess the status of a contractual claimant. The court also provided valuable guidance on the status of such shares in a subsequent sale of the company.

In a final case, the Court of Chancery was confronted with a claim brought by an agent of a company, who sought indemnification from the company of legal expenses incurred in connection with litigation against the Federal Aviation Administration.[49] In particular, the agent—a pilot who worked on a contract basis for the company, which chartered flights—claimed that he was entitled to such indemnification because of a mandatory provision in the company's bylaws providing for indemnification and advancement rights for the company's "agents," in addition to its directors and officers. The court enforced the bylaw, finding that the pilot was an agent of the company and had incurred legal expenses in his capacity as such. The case is a valuable reminder that companies may want to review the breadth of their advancement and indemnification provisions with legal counsel.

Books and Records Demands

Throughout 2018, we continued to see evidence of the trend in recent years of plaintiffs making use of stockholders' statutory right to make demands for corporate "books and records" as a precursor to M&A or other fiduciary duty litigation. Although the lion's share of those demands are resolved without court intervention, there were still several notable decisions in 2018 that provide guidance on when books and records demands are appropriate and to what documents a stockholder may be entitled.

In early 2018, the Court of Chancery rejected a company's reliance on the existence of a ratifying disinterested stockholder vote as a basis for refusing a books and records demand seeking to investigate mismanagement in connection with an M&A deal.[50] The court reiterated that the proper lens for evaluating whether a stockholder has stated a proper purpose is the more lenient credible basis test, which only requires a stockholder to put forward "some evidence" of mismanagement, and that the ratifying vote in itself was not sufficient to defeat this showing.

As for the types of books and records to which a stockholder may be entitled, Delaware courts in 2018 generally continued to grant stockholders inspection rights for documents "necessary and essential" to the purpose for their demand as contemplated by the statute. A key issue in this area is whether a stockholder can obtain emails from the corporation's officers and directors—that is, beyond the more typical production of "core" documents, such as board minutes and materials—through a books and records demand. In one case, the Court of Chancery described the production of email communications as "more the exception than the rule."[51] In another case, however—perhaps serving as one of those exceptions—the court granted a request for the emails of the lead negotiator in the context of a demand challenging an M&A transaction.[52] Because email production can significantly increase the cost of responding to a demand, and at least anecdotally contributes to the likelihood of a follow-on, full-blown lawsuit, this is an issue to be watched in 2019.

Alternative Entity Developments

We continue to see an increased use of alternative entities—limited liability companies, statutory trusts, and partnerships. As a reflection of that trend, more of the Delaware courts' caseload has related to disputes in the

alternative entity context. In 2018, the most notable case law in this arena dealt with eliminating fiduciary duties—which is permitted in the alternative entity context—as well as the implied covenant of good faith and fair dealing, the authority of officers, and when alternative entity case law will analogize to other contexts for interpretive guidance.

One noteworthy LLC case from 2018 involved a fact pattern that arises frequently in the traditional corporate context: a sale of the company where insiders with preferred stock receive greater consideration in a sale than common stockholders and are alleged to have breached their fiduciary duties in pursuing the sale. This case highlighted that the ability to waive fiduciary duties in an LLC agreement can result in a completely different analysis and potential outcome from cases with similar facts in the corporate context.[53] In particular, because the LLC agreement eliminated fiduciary duties, the court upheld a sale transaction that provided a significant preferential payout to a majority member and also refused to invoke the implied contractual covenant of good faith and fair dealing to add terms to the LLC agreement when a party disliked the outcome of the deal.

The Court of Chancery also considered authorization issues in a decision last year where, even though the appropriate person signed a contract on behalf of an LLC, the court concluded that the signatory did not have the authority to execute the contract in the capacity in which she signed, and as a result, the LLC was not authorized to enter into the contract.[54]

In another notable trend in alternative entity case law, the Court of Chancery provided further insight last year into how the court will analyze LLCs when an LLC agreement and the LLC Act are silent on a particular issue. Specifically, the court explained that it will look to the management structure of an LLC when deciding what other entity law is applicable.[55] For example, if an LLC is set up to be board-managed with corporate features, the court will look to corporate precedent. When an LLC is set up to be manager-managed and looks more like a limited partnership structure, limited partnership law will be analogous.

Aside from case law developments, in 2018 the Delaware alternative entity statutes were amended in a number of significant ways to maintain the state-of-the-art status of those statutes. For example, the 2018 amendments confirm that networks of electronic databases, including blockchain and distributed ledgers, may be used with respect to LLCs and limited partnerships for communicating with registered agents, maintaining entity records, and facilitating voting.[56] The amendments to the LLC Act also added new provisions providing Delaware LLCs with a contractual scheme by which they may elect to be formed as Statutory Public Benefit LLCs.[57]

Beyond that, the LLC Act was amended to authorize a single LLC to divide into two or more newly formed LLCs, with the dividing LLC either continuing or terminating its existence in connection with the division.[58] Division can serve as a more direct tool for LLCs effecting certain types of reorganizations, such as spin-offs.

Another significant set of amendments to the LLC Act created a new type of Delaware series LLC known as "registered series," which will be created through, among other things, a filing with the Delaware Secretary of State.[59] Registered series will facilitate the use of series in certain commercial financing transactions because they will qualify as "registered organizations" under the Uniform Commercial Code. The 2018 amendments permit the conversion of existing series LLCs, now called "protected series," to registered series and vice versa, as well as the merger or consolidation of one or more registered series with or into one or more other registered series.[60] Due to the time needed by the Delaware Secretary of State to prepare for the new filings and certificates related to registered series, the amendments relating to registered series and protected series will not be effective until August 1, 2019.

About WSGR's Corporate Governance Practice

Wilson Sonsini Goodrich & Rosati's corporate governance practice advises companies and their boards of directors on a full range of matters involving the implementation of best practices in corporate governance, navigation of director fiduciary duties, and compliance with state and federal law. We also conduct investigations on behalf of management, boards of directors, and special board or management committees, and represent companies faced with stockholder litigation demands and stockholder actions.

Our corporate governance practice applies a multi-disciplinary team approach to provide all areas of expertise that a board and/or senior management need to respond to today's changing governance landscape. Members of the firm's corporate governance team are also regularly called upon to help shape new laws and regulations, with our attorneys serving as advisors to major regulatory bodies in the areas of governance and disclosure.

Our attorneys include expert professionals in offices throughout the world, including in Delaware, California, New York, Washington, Brussels, and China. The firm's office in Wilmington, Delaware includes more than 25 attorneys who focus their practice on corporate governance and Delaware law and litigation matters. The office is led by partners William B. Chandler III, Amy Simmerman, and Brad Sorrels, as well as partner-elect Ryan Greecher. Bill Chandler, who founded the Delaware office, is widely regarded as one of the world's most influential and well-respected jurists on corporate law and governance matters. Also resident in the Wilmington office is former Delaware Supreme Court Justice Randy J. Holland, who joined the firm as Senior Of Counsel after retiring from the Delaware Supreme Court after serving more than 30 years.

For more information on the preceding findings or corporate governance-related matters, please contact your regular Wilson Sonsini Goodrich & Rosati attorney, or any member of the firm's corporate governance practice.

Disclaimer

Endnotes

[1] *Appel v. Berkman*, 180 A.3d 1055 (Del. 2018).

[2] *Morrison v. Berry*, 191 A.3d 268 (Del. 2018).

[3] *In re Xura, Inc., S'holder Litig.*, 2018 WL 6498677 (Del. Ch. Dec. 10, 2018).

[4] *In re Straight Path Commc'ns Inc. Consol. S'holder Litig.*, 2018 WL 3120804 (Del. Ch. June 25, 2018).

[5] *Akorn, Inc. v Fresenius Kabi AG*, 2018 WL 4719347 (Del. Ch. Oct. 1, 2018), *aff'd*, 2018 WL 6427137 (Del. Dec. 7, 2018).

[6] *ChyronHego Corp. v. Wight*, 2018 WL 3642132 (Del. Ch. July 31, 2018).

[7] *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 2018 WL 6311829 (Del. Ch. Dec. 3, 2018).

[8] *City of N. Miami Beach Gen. Emps.' Ret. Plan v. Dr Pepper Snapple Grp., Inc.*, 189 A.3d 188 (Del. Ch. 2018).

[9] *Aklile v. Rite Aid Corp.*, C.A. No. 2018-0305-AGB (Del. Ch. May 9, 2018) (TRANSCRIPT).

[10] *Xura*, 2018 WL 6498677.

[11] *Manti Holdings, LLC v. Authentix Acquisition Co.*, 2018 WL 4698255 (Del. Ch. Oct. 1, 2018).

[12] *Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd.*, 177 A.3d 1 (Del. 2017); *DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346 (Del. 2017).

[13] *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, 2018 WL 922139 (Del. Ch. Feb. 15, 2018), *reargument denied*, 2018 WL 2315943 (Del. Ch. May 21, 2018), *and appeal docketed*, No. 368, 2018 (Del. July 23, 2018).

[14] 8 *Del. C.* § 262(h).

[15] *Blueblade Capital Opportunities LLC v. Norcraft Cos.* 2018 WL 3602940 (Del. Ch. July 27, 2018).

[16] *In re Appraisal of Solera Holdings, Inc.*, 2018 WL 3625644 (Del. Ch. July 30, 2018).

[17] *Cirillo Family Tr. v. Moezinia*, 2018 WL 3388398 (Del. Ch. July 11, 2018).

[18] *Basho Techs. Holdco B, LLC v. Georgetown Basho Inv'rs, LLC*, 2018 WL 3326693 (Del. Ch. July 6, 2018), *judgment entered by* 2018 WL 6515499 (Del. Ch. Dec. 10, 2018) (ORDER), *and appeal docketed sub nom. Davenport v. Basho Techs. Holdco B, LLC*, No. 14, 2019 (Del. Jan. 9, 2019).

[19] *In re Tesla Motors, Inc. S'holder Litig.*, 2018 WL 1560293 (Del. Ch. Mar. 28, 2018), *appeal denied sub nom. Musk v. Ark. Teacher Ret. Sys.*, 184 A.3d 1292 (Del. 2018) (TABLE).

[20] *Basho*, 2018 WL 3326693.

[21] *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014).

[22] *Flood v. Synutra Int'l, Inc.*, 195 A.3d 754 (Del. 2018).

[23] *Olenik v. Lodzinski*, 2018 WL 3493092 (Del. Ch. July 20, 2018), *appeal docketed*, No. 392, 2018 (Del. July 27, 2018).

[24] *Klein v. H.I.G. Capital, L.L.C.*, 2018 WL 6719717 (Del. Ch. Dec. 19, 2018); *Tesla*, 2018 WL 1560293; *Carr v. New Enter. Assocs., Inc.*, 2018 WL 1472336 (Del. Ch. Mar. 26, 2018); *In re Oracle Corp. Derivative Litig.*, 2018 WL 1381331 (Del. Ch. Mar. 19, 2018); *Cumming v. Edens*, 2018 WL 992877 (Del. Ch. Feb. 20, 2018).

[25] *H.I.G. Capital*, 2018 WL 6719717; *Tesla*, 2018 WL 1560293; *Oracle*, 2018 WL 1381331.

[26] *Tesla*, 2018 WL 1560293; *Oracle*, 2018 WL 1381331.

[27] *Carr*, 2018 WL 1472336; *Cumming*, 2018 WL 992877.

[28] *H.I.G. Capital*, 2018 WL 6719717; *Oracle*, 2018 WL 1381331; *Cumming*, 2018 WL 992877.

[29] *See, e.g.*, *In re IAC/InterActiveCorp Class C Reclassification Litig.*, Consol. C.A. No. 12975-JTL (Del. Ch. June 2, 2017) (TRANSCRIPT); Verified S'holder Derivative Compl., *United Food & Commercial Workers Union Participating Emp'rs Tri-State Pension Fund v. Zuckerberg*, C.A. No. 2018-0671-JTL (Del. Ch. Sept. 12, 2018).

[30] *H.I.G. Capital*, 2018 WL 6719717; *Carr*, 2018 WL 1472336.

[31] *See H.I.G. Capital*, 2018 WL 6719717; *In re PLX Tech. Inc. S'holders Litig.*, 2018 WL 5018535 (Del. Ch. Oct. 16, 2018), *appeal docketed*, No. 571, 2018 (Del. Nov. 13, 2018); *Mesirov v. Enbridge Energy Co.*, 2018 WL 4182204 (Del. Ch. Aug. 29, 2018); *Carr*, 2018 WL 1472336.

[32] *In re Inv'rs Bancorp, Inc. S'holder Litig.*, 177 A.3d 1208 (Del. 2017).

[33] *Solak v. Barrett*, C.A. No. 2017-0362-JRS (Del. Ch. May 30, 2018) (TRANSCRIPT).

[34] *Stein v. Blankfein*, 2018 WL 5279358 (Del. Ch. Oct. 23, 2018).

[35] *Ravenswood Inv. Co. v. Estate of Winmill*, 2018 WL 1410860 (Del. Ch. Mar. 21, *revised* Mar. 22, 2018), *reargument denied*, 2018 WL 1989469 (Del. Ch. Apr. 27, 2018), *and appeal docketed,* No. 496, 2018 (Del. Sept. 25, 2018).

[36] *PLX Tech.*, 2018 WL 5018535.

[37] *In re CBS Corp. Litig.*, 2018 WL 3414163 (Del. Ch. July 13, 2018).

[38] *Schultz v. QuantPower, Inc.*, C.A. No. 12919-CB (Del. Ch. Aug. 15, 2018) (TRANSCRIPT).

[39] *Alarm.com Holdings, Inc. v. ABS Capital Partners Inc.*, 2018 WL 3006118 (Del. Ch. June 15, 2018), *appeal docketed,* No. 360, 2018 (Del. July 13, 2018).

[40] *In re Fitbit, Inc. S'holder Derivative Litig.*, 2018 WL 6587159 (Del. Ch. Dec. 14, 2018).

[41] *Almond v. Glenhill Advisors LLC*, 2018 WL 3954733 (Del. Ch. Aug. 17, 2018).

[42] *Cirillo*, 2018 WL 3388398.

[43] *CertiSign Holding, Inc. v. Kulikovsky*, 2018 WL 2938311 (Del. Ch. June 7, 2018).

[44] *Southpaw Credit Opportunity Master Fund, L.P. v. Roma Rest. Holdings, Inc.*, 2018 WL 658734 (Del. Ch. Feb. 1, 2018).

[45] *Schroeder v. Buhannic*, 2018 WL 376385 (Del. Ch. Jan. 10, 2018) (ORDER).

[46] *Brown v. Kellar*, 2018 WL 6721263 (Del. Ch. Dec. 21, 2018).

[47] *Sciabacucchi v. Salzberg*, 2018 WL 6719718 (Del. Ch. Dec. 19, 2018).

[48] *QC Holdings, Inc. v. Allconnect, Inc.*, 2018 WL 4091721 (Del. Ch. Aug. 28, 2018).

[49] *Pasternack v. Ne. Aviation Corp.*, 2018 WL 5895827 (Del. Ch. Nov. 9, 2018).

[50] *Lavin v. W. Corp.*, 2017 WL 6728702 (Del. Ch. Dec. 29, 2017), *judgment entered by* 2018 WL 565492 (Del. Ch. Jan. 25, 2018) (ORDER).

[51] *In re UnitedHealth Grp., Inc. Section 220 Litig.*, 2018 WL 1110849 (Del. Ch. Feb. 28, 2018), *aff'd*, 196 A.3d 885 (Del. 2018) (TABLE).

[52] *Lavin*, 2017 WL 6728702.

[53] *See Miller v. HCP & Co.*, 2018 WL 656378 (Del. Ch. Feb. 1, 2018), *aff'd sub nom. Miller v. HCP Trumpet Invs., LLC*, 194 A.3d 908 (Del. 2018) (TABLE).

[54] *See CompoSecure, L.L.C. v. CardUX, LLC*, 2018 WL 660178 (Del. Ch. Feb. 12, 2018), *aff'd in part, rev'd in part*, 2018 WL 5816740 (Del. Nov. 7, 2018).

[55] *See Domain Assocs., L.L.C. v. Shah*, 2018 WL 3853531 (Del. Ch. Aug. 13, 2018), *appeal docketed,* No. 534, 2018 (Del. Oct. 18, 2018).

[56] 6 *Del. C.* §§ 18-104(g), 18-302(d), 18-305(d), 18-404(d); 6 *Del. C.* §§ 17-104(g),17-302(e), 17-305(c), 17-405(d). Similar amendments were made to the Delaware General Corporation Law. 8 *Del. C.* § 224 (2019).

[57] 6 *Del. C.* § 18-1202 (2019).

[58] 6 *Del. C.* § 18-217 (2019).

[59] 81 Del. Laws ch. 357, §§ 1, 2, 4, 5, 7, 10, 12, 14, 15, 17, 19, 21-24 and 29-33 (2018).

[60] 6 *Del. C.* §§ 18-219, 18-220, 18-221.

Upcoming Events

Investors, Companies, and ESG Conference
Wilson Sonsini Goodrich & Rosati
January 25, 2019
8 a.m. to 2 p.m. PT
Menlo Park, California and by videoconference
https://www.wsgr.com/email/IC-ESG/IC-ESG.html

Boardroom Summit
Corporate Board Member
April 2-3, 2019
April 2, 8 a.m. to 6:30 p.m.; April 3, 7 a.m. to 12 p.m. ET
New York, New York
https://www.corporateboardmembersummit.com/

Disruptive Tech Summit
Corporate Board Member
June 10-11, 2019
June 10, 8 a.m. to 7 p.m.; June 11, 7:30 a.m. to 12 p.m. ET
Cambridge, Massachusetts
https://boardroomresources.com/event/disruptive-tech-summit-for-board-members-ceos/

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