



Client Alert

July 2008

Delaware Decision Reconfirms Directors' Duty of Disclosure

In a decision rendered on June 19, 2008, the Delaware Chancery Court reconfirmed the nature of the so-called duty of disclosure of corporate directors.

The fiduciary duties of directors include a duty of fair disclosure when seeking stockholder approval of corporate actions such as a merger. It is unclear under the corporate laws of some states, including California, whether the duty of disclosure is separate and distinct from the better known fiduciary duties of care and loyalty.

In Delaware, however, recent decisions have made it clear that the duty of disclosure is not separate from the duties of care and loyalty, but is a part of both. This line of reasoning was reinforced recently in the matter of Transkaryotic Therapies, Inc. ("TTI"). The matter involved several breach-of-fiduciary-duty claims arising out of a merger acquisition of TTI, including claims that the directors of TTI failed to disclose material information to the TTI stockholders in seeking stockholder approval of the merger.

In dismissing the claims, the Delaware Chancery Court reconfirmed that the duty of disclosure is not a separate, independent duty, but a feature of the fiduciary duties of care and loyalty. Whether damages are available to remedy an alleged failure to disclose depends on whether the failure is based on the duty of care or the duty of loyalty. In this case, the Court concluded that there was no evidence of bad faith or self-dealing on the part of the directors, so that the alleged failure to disclose arose as part of the duty of care and that Delaware's statutory exculpatory provision, Section 102(b)(7) of the Delaware General Corporation Law, prohibited a recovery of monetary damages from the directors in connection with a breach of the duty of care.

Although injunctive relief will be available in appropriate circumstances, the Court found that such relief was not available in this case, where the merger in question occurred three years ago.

On the other hand, monetary damages are available to remedy a director's failure to disclose material information involving a director's duty of loyalty.