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2023 DELAWARE CORPORATE LAW AND LITIGATION YEAR IN REVIEW

Table of Contents

Introduction

In 2023, the Delaware courts issued many decisions addressing an array of important topics, including director and officer oversight obligations, the role of boards in navigating environmental, social, and governance (ESG) issues, dual-class stock structures and controlling stockholder conflicts of interests, structuring and process considerations for mergers and acquisitions, the enforceability of advance notice bylaws in the face of stockholder activism, and governance matters in the venture-backed company context. The Delaware General Corporation Law (the DGCL) was also updated in certain significant ways.

Our *2023 Delaware Corporate Law and Litigation Year in Review* surveys the cases and developments that should be of most interest to boards, management, and investors for both public and private companies, and highlights important takeaways from them.

Trends in Director and Officer Oversight Obligations

Under Delaware law, as an outgrowth of a board's fiduciary duties of care and loyalty, directors owe obligations to exercise proper oversight over the corporation. These obligations require taking steps to implement a system of controls for ensuring legal compliance and to respond to any red flags that come to the board's attention suggestive of wrongdoing or other failures within that system. Directors only breach their oversight obligations if they act in bad faith, either by "utterly failing" to put a system in place or, having established a system of controls, by "consciously disregarding" red flags. Leading up to 2023, the Delaware courts issued a number of decisions that underscored boards' oversight obligations, some permitting oversight claims to go forward beyond a motion to dismiss. In 2023, the trend of stockholder oversight claims continued, with mixed outcomes. Importantly, the Delaware Court of Chancery also ruled for the first time that corporate officers owe a fiduciary obligation of oversight under Delaware law.[1]

As to board obligations, some of the 2023 cases from Delaware reinforced the traditional approach that oversight claims against boards are difficult theories for plaintiffs, that directors will not face exposure merely for making risky business decisions, and that directors, even if confronted with a crisis, will not be liable if they have taken appropriate steps from a fiduciary duty standpoint. In one case, the Delaware Court of Chancery concluded that the plaintiffs were "nowhere close" to pleading oversight claims against the directors of an insurance company.[2] There, the insurance company had shifted its business practice of underwriting professional liability insurance policies for smaller, lower risk physician groups in favor of underwriting policies for larger, riskier physician groups and hospitals, which created difficulty in calculating the company's required loss reserves. After the shift, the company struggled with forecasting the number and severity of claims, which resulted in a significant drag on the company's performance. The court dismissed the oversight claims, noting that the facts suggested the board and audit committee had indeed spent significant time evaluating the business risk associated with the strategy shift and there was no indication that any of the directors had acted in bad faith.

In another much-watched litigation involving McDonald's, the Court of Chancery concluded that even though certain members of management of McDonald's had acted improperly by engaging in sexual misconduct with employees and permitting toxic workplace practices, the board had not failed to respond to red flags that came to its attention. Among other things, the court noted that the directors, through both board-level and committee-level action, were engaged and worked with "management on a response that included (i) hiring outside consultants, (ii) revising the Company's policies, (iii) implementing new training programs, (iv) providing new levels of support to franchisees, and (v) taking other steps to establish a renewed commitment to a safe and respectful workplace."[3]

In late 2023, however, the Delaware Supreme Court reversed the Court of Chancery in a case against the AmerisourceBergen board of directors and permitted oversight claims to proceed.[4] The claims related to the board's alleged failure to respond to red flags indicating a failure in the company's legal compliance system in the midst of the opioid epidemic, particularly after the company faced congressional attention and government subpoenas, investigations, and litigation. The Court of Chancery initially dismissed the claims after taking judicial notice of a West Virginia federal district court's decision concluding that the company had not violated the Controlled Substances Act, but the Delaware Supreme Court held that such an approach was procedurally inappropriate at the pleadings stage under the Delaware rules of evidence. The Delaware Supreme Court also concluded that the plaintiff had alleged sufficient facts, at least for purposes of surviving a motion to dismiss, to plead a claim that the board did not respond adequately to red flags that came to its attention.

As to the oversight role of officers, the Court of Chancery concluded in 2023—again, in the McDonald's litigation—that corporate officers, like directors, owe fiduciary obligations of oversight.[5] Although the Delaware Supreme Court held in 2009 that officers generally owe the same fiduciary duties as directors,[6] the Delaware courts had not yet specifically addressed officer oversight obligations. In its 2023 decision, the Court of Chancery concluded that the Chief People Officer of McDonald's had breached his fiduciary duty of loyalty by engaging in sexual harassment—which the court explained was intentional misconduct that harms the company—as well as his fiduciary obligation of oversight given the wide-ranging factual allegations in the case, including the promotion of a "party atmosphere" that "emphasized drinking;" ignoring complaints about the conduct of co-workers and executives; reported fear on employees' part to report complaints to the human resources department; two separate months in which over a dozen complaints were filed with the Equal Employment Opportunity Commission; a 2016 employee walkout in over 30 cities to protest sexual harassment and misconduct; attention from Congress and lawsuits by employees relating to sexual harassment at the company; three instances of alleged sexual harassment on the executive's part; and the board's ultimate decision to terminate the executive for cause.[7] The case also provides guidance on a number of related issues, including officers' scope of responsibility in the oversight context and that bad faith must be shown in order for officers to be found to have breached their oversight obligations.

In a subsequent case, the Court of Chancery made clear that officers, like directors, will not easily be found to have breached their oversight obligations.[8] There, the court dismissed an oversight claim against a former officer of Segway after the company alleged that the officer was aware of certain "issues" with Segway's customers, revenue decreases for a product line, and increases in receivables, and that the officer failed to report these facts to the board. The court held that Segway had failed to plead facts sufficient to show that the officer had acted in bad faith, which is a prerequisite to oversight liability, and noted that "[o]fficers' management of day-to-day matters does not make them guarantors of negative outcomes from imperfect business decisions." It remains to be seen if, or when, the Delaware Supreme Court will weigh in on oversight obligations for officers. Until then, we anticipate increased attention on such claims in stockholder litigation.

ESG and Corporate Purpose

In 2023, the debate over ESG and the related role of a board of directors found its way into the Delaware courts. One resulting decision provides important guidance for boards, and the Delaware courts are likely to provide additional guidance in 2024.

In 2023, a stockholder of Walt Disney Co. brought an action in the Court of Chancery seeking books and records to investigate alleged wrongdoing by the Disney board relating to its response to actions by Florida Governor Ron DeSantis and Florida House Bill 1557, also known as the "Don't Say Gay" bill.[9] As a basis for seeking inspection, the stockholder alleged, among other things, that the Disney board members breached their fiduciary duties, and caused harm to the company and its stock price, by placing their own personal beliefs ahead of the interests of the corporation and its stockholders and publicly disagreeing with Governor DeSantis. The court denied inspection, concluding that the stockholder had not stated the requisite proper purpose or demonstrated a credible basis to suspect wrongdoing. The court noted that the materials already provided to the stockholder by Disney, including board minutes, reflected that the board was properly engaged, having met twice to consider the issues and to decide the appropriate course of action. Importantly, the court restated the Delaware law principle that the ultimate purpose of fiduciary duties is to advance stockholder value but also recognized the corollary principle that a board may validly consider non-stockholder interests—including, in this case, the views expressed by Disney employees and creative partners in opposition to the Florida bill—so long as those interests relate to maintaining value for stockholders. The court explained that "[i]t is not for this court to question rational judgments about how promoting non-stockholder interests—be it through making a charitable contribution, paying employees higher salaries and benefits, or more general norms like promoting a particular corporate culture—ultimately promote stockholder value." The case is a powerful illustration that although directors must act for the purpose of advancing stockholder value, directors have wide latitude to consider various factors in furthering that purpose—and should do so thoughtfully and with a good board record.[10]

We are also monitoring pending stockholder litigation in the Court of Chancery against the Meta board of directors alleging that the board breached its fiduciary duties by failing to consider its stockholders' diversified portfolios and focusing single-mindedly on Meta's interests.[11] The plaintiff alleges that Meta has caused social harms, and that if the board took into account the diversified holdings and interests of its investors across the economy, then the Meta board, as a function of its fiduciary duties, would seek to mitigate social harms and externalities related to the Meta business. The court heard arguments on the defendants' motion to dismiss in December 2023, and a decision is expected early in 2024.

Dual-Class Structures and Controlling Stockholder Issues

Companies with dual-class structures remain prevalent, and those companies, and many others, have significant stockholders. Consistent with those market realities, the Delaware courts issued a number of decisions in 2023 relevant to such companies, addressing both the technicalities of dual-class structures and fiduciary duty complexities surrounding controlling stockholders. Looking ahead in 2024, the Delaware Supreme Court may redefine the landscape of controlling stockholder transactions.

In 2023, the Court of Chancery rejected a stockholder challenge to Bumble's dual-class capital structure, which provided holders of Bumble's publicly traded Class A common stock with one vote per share unless the share was held by particular stockholders (founders and other significant stockholders) specified in Bumble's certificate of incorporation, in which case the stock possessed 10 votes per share.[12] The stockholder plaintiff argued that such "identity-based voting" was technically impermissible under the DGCL. Consistent with Delaware law's traditional approach of permitting flexibility and private ordering, the court held that under existing case law and the DGCL, a corporation can provide for differential voting power that is dependent upon the owner of the shares, even within a given class or series of stock. The court likewise dismissed a similar challenge to Carvana's capital structure after the *Bumble* decision,[13] all confirming that Delaware corporations have leeway to adopt creative approaches in their capital structures.

The Court of Chancery also decided the highly anticipated question of whether a corporation with a dual-class capital structure is required to obtain separate class votes of its stockholders in order to amend its certificate of incorporation to provide for officer exculpation (i.e., to protect certain officers from liability for certain types of breaches of the duty of care, which recent amendments to the DGCL now permit). In litigations involving Fox Corp. and Snap Inc.,[14] the defendant corporations had adopted charter amendments to provide for officer exculpation. Subject to limited exceptions, a Delaware corporation must obtain board and stockholder approval to amend its certificate of incorporation under Section 242 of the DGCL. Section 242(b)(2) further provides that if a corporation has more than one class of stock outstanding and a charter amendment would adversely "alter or change the powers, preferences, or special rights" of the shares of a class of stock, then that class must separately approve the charter amendment, regardless of whether the class is otherwise non-voting or has differential voting power. Both corporations had at least one class of voting common stock and one class of non-voting common stock outstanding. The plaintiffs in both cases argued that the right to sue officers is a "power" of stock and that the corporations' charter amendments adversely affected that power of the non-voting stock such that a separate class vote of such stock was required. The Court of Chancery entered judgement for the corporations in both cases, relying on longstanding precedent to conclude that the corporations did not need separate class votes and could instead rely on a majority of stockholder voting power to adopt officer exculpation provisions.[15] In January 2024, the Delaware Supreme Court affirmed the Court of Chancery's decision and, importantly, reinforced that "powers, preferences, or special rights" in Section 242(b)(2) are limited to those assigned to classes of stock under Section 151(a) of the DGCL.[16]

The Delaware Supreme Court is expected to issue another closely followed opinion in derivative litigation involving Match Group.[17] There, the court may provide guidance with respect to controlling stockholder conflicts of interest. Under Delaware law, when a controlling stockholder, or controlling stockholder group, engages in a transaction with the corporation or receives certain differential special benefits in a transaction without using specified procedures designed to give disinterested parties a voice on the matter, the business judgment rule does not apply and instead a court will apply a more onerous standard of judicial review—the entire fairness standard of review—to determine if the transaction was entirely fair to the corporation and its stockholders. The underlying question is which standard of review should apply when analyzing whether the defendants—which may include the board, management, and the controlling stockholder—breached their fiduciary duties and whether a remedy should be available. Based on several decisions from the Court of Chancery, the only way a corporation can cleanse a controlling stockholder conflict and restore the protections of the business judgment rule is to follow the so-called "*MFW*" framework, named after the seminal case, which requires that the transaction be conditioned on the proper approval of *both* 1) a fully empowered independent board committee, *and* 2) a fully informed, uncoerced minority stockholder vote. These conditions must be declared up front, on a nonwaivable basis, and before substantive economic negotiations over the transaction begin, and they must be followed throughout the entirety of the transaction process. The *MFW* framework originated in the context of a freeze-out merger, but the Court of Chancery has since applied the framework to a number of different scenarios, such as other M&A deal structures, compensation decisions, recapitalizations, and equity financings. In the Match litigation, the Delaware Supreme Court requested briefing on whether the *MFW* framework should apply only in the context of controlling stockholder freeze out transactions and whether proper use of *either* an independent committee process *or* disinterested stockholder approval could restore the protections of the business judgment rule in all other types of controlling stockholder conflict transactions. This is an important transactional issue for both public and private companies, and the Delaware Supreme Court's decision likely will provide critical guidance on structuring transactions involving controlling stockholders.

The Delaware Supreme Court also affirmed a high-profile decision issued last year by the Court of Chancery involving Tesla's acquisition of SolarCity.[18] There, in an example of a controlling stockholder transaction that did not comply with the *MFW* framework and thus was subject to the strict entire fairness standard of review, the Court of Chancery concluded in a post-trial opinion that Tesla's acquisition of Solar City was entirely fair given the price paid and certain process considerations. The Delaware Supreme Court affirmed that decision.

M&A Issues and Trends

As can be expected from the nation's leading forum for business disputes, the Delaware courts issued several significant opinions in the context of mergers and acquisitions, including decisions addressing whether stockholders can pursue benefit-of-the-bargain damages in the event of busted deals, as well as the proper roles of directors and officers in negotiating transactions. The Court of Chancery also issued a noteworthy decision addressing when exactly a sale of assets constitutes a sale of "all or substantially all" of a corporation's assets, which requires stockholder approval under the DGCL.

In litigation stemming from Elon Musk's acquisition of Twitter in 2022,[19] a stockholder sought attorneys' fees for its purported role in forcing the Twitter transaction to close. Twitter, for its part, had filed litigation in the Court of Chancery seeking to compel Musk to close the transaction after he announced he would not do so. A stockholder then filed a tag-along suit for Musk's breach of the merger agreement and also sought to compel the transaction to close or to obtain damages if the transaction did not close. After Musk closed the deal, the stockholder sought fees for purportedly contributing to that result by bringing its lawsuit. The court rejected that request, but in doing so, issued an opinion that provides broader guidance for deals.

In providing such guidance, the court walked through a number of legal principles. First, in order to bring a suit for breach of the merger agreement, a stockholder needs to be a third-party beneficiary of the agreement. The Twitter merger agreement, however, expressly provided that stockholders were third-party beneficiaries only in limited circumstances not relevant to the dispute. Accordingly, as the party to the merger agreement, Twitter—and not its stockholders—had the right to bring a claim to compel Musk to close the deal. The court noted that this outcome was consistent with Delaware law providing that a board generally controls litigation on behalf of the corporation. The court further noted, however, that the agreement could be read to grant stockholders third-party beneficiary rights in another circumstance: to seek benefit-of-the-bargain monetary damages had the deal failed to close. On that issue, the court noted that the merger agreement provided that if the deal failed to close in some circumstances, the buyer would be responsible for "lost premium" damages. The court reasoned that in a merger like the one involving Twitter, where stock is converted into the right to be paid in cash, such damages are *not* available to the target corporation, on the theory that stockholders, not the corporation, are paid the deal consideration. Under Delaware contract law, a party cannot recover damages beyond the benefits to which the party is entitled under the contract (or else such damages would impermissibly amount to a "penalty"). The court therefore concluded that the "lost premium" provision in the Twitter merger agreement might have conferred limited third-party beneficiary standing on stockholders had the deal terminated, but not on the plaintiff, given the timing of its filing and the fact that the deal had closed. For all of these reasons, the plaintiff's claims lacked merit when filed and, therefore, the court had no basis to award a mootness fee.

Since its issuance in October 2023, the decision has engendered significant discussion among M&A practitioners and has begun to impact drafting in deals, including related to the damages and remedies available if a party does not close and who is permitted to seek monetary damages. The decision will continue to impact practice in 2024.

In other cases, the Court of Chancery issued post-trial opinions providing important guidance on what the court expects from board members and management when a company is sold. In each of these cases, the court criticized sale processes that were, according to the court, improperly steered by executives and acquirors, with the court awarding significant damages to stockholders for the executives' breaches of fiduciary duty and the acquirors' aiding and abetting those breaches. In stockholder litigation involving Mindbody, Inc.,[20] the court held that the Mindbody CEO was personally liable to stockholders for millions of dollars in damages after improperly tilting a transaction process toward his preferred buyer. The court likewise found the acquiror liable for aiding and abetting the CEO's breach of fiduciary duty in providing inadequate disclosures to stockholders regarding his conduct. The court found a number of process deficiencies, including the occurrence of various undisclosed meetings between the CEO and his preferred buyer, the fact that the CEO's (and the company's largest stockholder's) desire for near-term liquidity was not disclosed to the full board, and various other communications between the CEO and the preferred buyer that gave the preferred buyer a leg up on the bidding process. The court concluded that the stockholders had pleaded a "paradigmatic" claim in the sale context involving "a conflicted fiduciary who is insufficiently checked by the board and who tilts the sale process toward his own personal interests in ways inconsistent with maximizing stockholder value." The court also held that because these process issues were not disclosed to stockholders, the CEO was likewise liable for breach of his duty of disclosure. The court further held that the acquiror was liable for aiding and abetting the disclosure violations, noting that under the merger agreement, the acquiror had an obligation to review the proxy statement under the merger agreement and notify the company of any material deficiencies and that the acquiror had reviewed and participated in the drafting of the disclosures and knew the disclosures omitted various material facts about the transaction process. As a remedy, the court awarded noncumulative damages equal to $1 per share against the CEO—given evidence that the acquiror would have paid $37.50 per share instead of the deal price of $36.50—and against the CEO and the acquiror for the disclosure violations.[21]

In a similar, fact-intensive case, the Court of Chancery held that TransCanada aided and abetted breaches of fiduciary duties by several officers and directors of Columbia Pipeline in the 2016 sale of Columbia to TransCanada.[22] The court detailed the various process deficiencies in its 192-page opinion, but, fundamentally, found that the top three executives of Columbia—its CEO, CFO, and an executive vice president and CEO of a business unit—were all on the verge of retirement, desired a sale of the company following its spinout that would give them much greater liquidity, and improperly steered the sale of the company as a result. According to the court, the CEO and CFO in particular steered the sale process in favor of a deal with the buyer and away from bidders interested in a stock deal, and they repeatedly engaged in discussions with the buyer without the board's knowledge and in a manner that continually undermined Columbia's negotiations and revealed sensitive information in breach of their fiduciary duties. The court determined that the buyer, acting through savvy executives with much more M&A experience, knowingly exploited the executives' conflicts and misconduct, thereby aiding and abetting the executives' breaches of their fiduciary duties during the sale process. Some of the most critical conduct in the case occurred when the buyer exploited the executives' desire to get a deal done, even if not the optimal deal, by reneging on an agreed-upon deal, dropping the price by $0.50/share, putting a three-day clock on the new offer, and coercively threatening to publicly announce the deal was dead if not accepted, even though the buyer was in fact prepared to pay more. The court also concluded that the target board members breached their fiduciary duties by failing to supervise management properly or exert adequate control over the process. The decision was, fundamentally, focused on the buyer's culpability: the directors were not defendants in the litigation and the target CEO and CFO settled the case against them earlier for $79 million. As in the Mindbody litigation, the court concluded that the buyer also aided and abetted breaches of fiduciary duties in connection with the target's disclosures to stockholders, which did not disclose the extent or nature of management's conversations with the buyer, among various other points. The court concluded that the buyer was potentially liable for up to $1 per share in nominal damages for the conduct-related claims and $0.50 per share in nominal damages for the disclosure-related claims—on a noncumulative basis and capped at $1 per share. The court noted, however, that further proceedings on remedies would occur to determine, for example, if the $79 million paid by the target executives in their settlement should be credited against the damages award in the buyer's favor.

These cases reflect the court's expectation that when management and directors embark on a sale process, directors will be given full information and will be allowed to lead the process in a way that ensures independence, addresses conflicts of interest, and advances the best interests of stockholders. A proper board process ultimately protects management—and large stockholders and buyers—as well. The court's awards of monetary damages against the officers and acquirors in these cases underscore the potential stakes.

In 2023, the Court of Chancery also provided guidance with respect to Section 271 of the DGCL, which provides that a corporation must obtain stockholder approval for the sale, lease, or exchange of "all or substantially all" of the corporation's assets and can raise interpretive questions as to what constitutes "all or substantially all" of a corporation's assets. In litigation involving Mandiant's $1.2 billion sale of its legacy FireEye business,[23] the court was tasked with determining whether a stockholder vote under Section 271 was triggered. The plaintiffs pointed to the fact that the FireEye business accounted for over 60 percent of the combined company's revenue in 2019 and more than 55 percent in 2020. However, the company's projections indicated that the FireEye business was expected to represent only 48 percent of the company's revenue in 2022 and 42 percent of the company's revenue in 2023, and the sale would not fundamentally change the nature of Mandiant's business. The court applied the longstanding test under Section 271 that a sale should be examined on a quantitative and qualitative basis and concluded that no stockholder vote was needed under Section 271. In so doing, the court emphasized the relatively low percentage of total asset value that FireEye represented, the revenue figures discussed above, and the fact that the transaction, while important and out of the ordinary, would not "strike a blow" to Mandiant's "heart," as it would continue to be a cybersecurity company after the sale. Mandiant also sold the remainder of its business for over $5 billion during the course of the litigation. The decision is helpful for companies navigating sales of business lines, especially business lines that are projected to decline as compared to other, more promising lines. It also provides welcome additional commentary on Section 271, which has been the subject of limited judicial review in recent years.

Private Company Governance and Venture Capital Issues

The Court of Chancery issued two significant opinions in 2023 addressing governance and transactional issues in the private company space.

In one decision,[24] the Court of Chancery permitted fiduciary duty claims brought against the directors of the company by a venture capital investor to proceed beyond a motion to dismiss where the directors conducted an insider-led financing round and a recapitalization with "onerous" terms that resulted in all existing preferred stock being converted to common stock. Shortly after the financing round, the company received an indication of interest from a buyer, and that buyer eventually acquired the company. However, in the intervening time between the indication of interest and the closing of the merger, certain insiders extended the financing round and conducted a second offering of preferred stock at the same "generous" terms as in the prior offering. They also granted options to themselves and the company's employees after the indication of interest had been received. The participants in the financing rounds ultimately received a 750 percent return on their investment, and the option grant recipients received a 3,200 percent return. The court permitted the stockholder's challenges to the financing and the option grants to proceed on a number of bases, including the fact that the board was, according to the court, entirely conflicted in approving the financing and the option grants and that the board failed to disclose the existence of the indication of interest when seeking stockholder approval for the second offering. This decision underscores the importance of identifying and managing conflicts at the board level, including in the private company space—and in turn, designing a process that can protect fiduciaries, promote stockholder interests, and protect the board's ultimate decision.

In a separate opinion dealing with the same transaction,[25] the court reviewed the enforceability of covenants not to sue. Such covenants are commonly found in venture capital voting agreements,[26] and the covenant in this case was based on language found in the National Venture Capital Association model voting agreement. The particular language at issue was the drag-along provision in the voting agreement among the company and stockholders, which provided that if specified board and stockholder approvals were obtained in connection with a sale of control of the corporation, the signatory stockholders agreed to take various actions in support of the transaction, including voting in favor of the transaction. The covenant not to sue itself provided, in pertinent part, that each signatory stockholder would refrain from exercising appraisal rights or "asserting any claim or commencing any suit" challenging a sale of the company or the voting agreement or "alleging a breach of any fiduciary duty . . . in connection with the evaluation, negotiation or entry into" a sale of the company or the consummation of transactions contemplated thereby, but only if the transaction met certain requirements specified in the voting agreement. Ultimately, the court concluded that such covenants not to sue may be enforceable, but that the circumstances in an individual case will matter and such covenants cannot protect boards of directors and other defendants from liability for intentionally harmful conduct. In this case, the court determined that because the underlying allegations could support claims for intentional misconduct by the board and the controlling stockholder, the covenant not to sue could not serve as a basis to dismiss the claims. Following this case, the market continues to explore the use of covenants not to sue.

Activism and Advance Notice Bylaws

Public companies continue to navigate stockholder activism, and an important tool available to them is advance notice bylaws—i.e., bylaws that require stockholders seeking to nominate director candidates or bring proposals of business at stockholder meetings to provide advance notice to the company of such nominations or business, in compliance with certain deadlines and by providing specified disclosures. In 2022 and 2023, many public companies amended their bylaws to account for the universal proxy rules adopted by the U.S. Securities and Exchange Commission and to align with new market trends and Delaware statutory amendments. Reflecting these trends, Delaware courts have heard a number of cases in recent years pertaining to advance notice bylaws. 2023 was no exception, giving Delaware courts the occasion to review and assess advance notice bylaws, including whether various bylaws were enforceable or went too far and whether stockholders had complied with them.[27] In many instances, although not all, the Delaware courts have enforced advance notice bylaws—and one factor that appears to continue to influence the court's approach is whether bylaws were adopted on a clear day or in the midst of a looming proxy contest. One clear upshot of these litigations for companies is that they should review their bylaws on a routine basis, including for compliance with evolving Delaware case law, and that it is beneficial to do so on a clear day, outside of any threats.

DGCL Updates

In August 2023, the Delaware General Corporation Law was amended to provide greater ease for Delaware corporations in certain circumstances. Of particular note, the amendments simplify the process by which some corporations can effect forward and reverse stock splits. Historically, all stock splits—which require an amendment to the corporation's charter—have required board approval followed by stockholder approval. However, forward stock splits can now be effected without stockholder approval if the corporation has only one class of stock and that stock is not divided into series. For reverse stock splits, if the corporation is publicly traded, stockholder approval is still necessary, but the voting threshold has been reduced from a majority of the outstanding stockholder voting power, which had proved challenging to attain in some circumstances, especially where corporations had a larger retail stockholder base. Now, the reverse split can be approved at a stockholder meeting at which a quorum is present if the number of votes cast for the charter amendment exceeds the votes cast against the amendment. In order for this lower voting threshold to be available, however, the shares of the relevant class must be listed on a national securities exchange immediately before such amendment becomes effective and meet the listing requirements of such national securities exchange relating to the minimum number of holders immediately after such amendment becomes effective. A corporation seeking to use the amendments should also ensure that the statutory approach comports with its specific governing documents. Where the statutory path is available, it should allow corporations to take these actions more easily.

Endnotes

1 *In re McDonald's Corp. S'holder Derivative Litig.*, C.A. No. 2021-0324-JTL (Del. Ch. Jan. 26, 2023).
2 *In re ProAssurance Corp. S'Holder Derivative Litig.*, C.A. No. 2022-0034-LWW (Del. Ch. Oct. 2, 2023).
3 *In re McDonald's Corp. S'holder Derivative Litig.*, C.A. No. 2021-0324-JTL (Del. Ch. Mar. 1, 2023).
4 *Lebanon Cnty. Emps.' Ret. Fund v. Collis*, No. 22, 2023 (Del. 2023).
5 *In re McDonald's Corp. S'holder Derivative Litig.*, C.A. No. 2021-0324-JTL (Del. Ch. Jan. 26, 2023).
6 *Gantler v. Stephens*, 965 A.2d 695, 709 (Del. 2009).
7 Additional information on this decision can be found in a client alert by our firm available at: https://www.wsgr.com/en/insights/delaware-court-of-chancery-concludes-that-duty-of-oversight-applies-to-officers.html.
8 *Segway Inc. v. Cai*, C.A. No. 2022-1110-LWW (Del. Ch. Dec. 14, 2023).
9 *Simeone v. Walt Disney Co.*, C.A. No. 2022-1120-LWW (Del. Ch. June 27, 2023).
10 Additional information on this decision can be found in a client alert by our firm available at: https://www.wsgr.com/en/insights/delaware-court-of-chancery-issues-decision-on-disney-boards-obligations-in-the-desantis-dispute.html.
11 *Verified Am. Compl.*, *McRitchie v. Zuckerberg*, C.A. No. 2022-0890-JTL (Del. Ch. Feb. 7, 2023).
12 *Colon v. Bumble, Inc.*, C.A. No. 2022-0824-JTL (Del. Ch. Sep. 12, 2023).
13 *Vestal v. Carvana Co.*, C.A. No. 2022-0609-KSJM (Del. Ch. Sep. 27, 2023).
14 *Elec. Workers Pension Fund, Local 103, I.B.E.W. v. Fox Corp.*, C.A. No. 2022-1007-JTL (Del. Ch. Mar. 29, 2023) (TRANSCRIPT).
15 Our firm represented Fox Corporation in this matter. Additional information on this decision can be found in a client alert by our firm available at: https://www.wsgr.com/en/insights/delaware-court-of-chancery-issues-important-ruling-for-multi-class-companies-addressing-class-votes.html.
16 Additional information on this decision can be found in a client alert by our firm available at: https://www.wsgr.com/en/insights/delaware-supreme-court-affirms-important-ruling-for-multi-class-companies-concerning-class-votes.html.
17 *In re Match Grp., Inc. Derivative Litig.*, No. 338, 2022 (Del.).
18 *In re Tesla Motors, Inc. S'holder Litig.*, No. 181, 2022 (Del. 2023).
19 *Crispo v. Musk*, C.A. 2022-0666-KSJM (Del. Ch. Oct. 31, 2023). Additional information on this decision can be found in a client alert by our firm available at: https://www.wsgr.com/en/insights/delaware-court-of-chancery-addresses-benefit-of-the-bargain-damages-in-busted-deals-and-who-can-seek-them.html.
20 *In re Mindbody, Inc. S'holder Litig.*, C.A. No. 2019-0442-KSJM (Del. Ch. Mar. 15, 2023).
21 Months after the decision, the Court of Chancery held that the CEO and the acquiror were not entitled to a $27 million offset based on amounts paid in settlement by other defendants. *See* Leslie Pappas, *Mindbody Ex-CEO, Vista Fail To Get $27M Damage Offset*, LAW360 (Nov. 15, 2023, 8:39 p.m.), https://www.law360.com/articles/1767311/mindbody-ex-ceo-vista-fail-to-get-27m-damage-offset. Additional information on this decision can be found in a client alert by our firm available at: https://www.wsgr.com/en/insights/in-rare-decision-delaware-court-of-chancery-imposes-liability-on-ceo-and-acquiror-post-trial.html.
22 *In re Columbia Pipeline Grp. Merger Litig.*, C.A. No. 2018-0484-JTL (Del. Ch. June 30, 2023).
23 *Altieri v. Alexi*, C.A. 2021-0946-KSJM (Del. Ch. May 22, 2023).
24 *New Enter. Assocs. 14, L.P., v. Rich*, Case No. 2022-0406-JTL (Mar. 9, 2023).
25 *New Enter. Assocs. 14, L.P., v. Rich*, Case No. 2022-0406-JTL (May 2, 2023). Additional information on this decision can be found in a client alert by our firm available at: https://www.wsgr.com/en/insights/delaware-court-of-chancery-addresses-drag-along-provisions-and-covenants-not-to-sue-in-the-private-company-manda-context.html.
26 *See* Model Voting Agreement, § 3.2(e), Nat'l Venture Cap. Assoc., https://nvca.org/model-legal-documents/.
27 *See Kellner v. AIM Immunotech Inc.*, C.A. No. 2023-0879-LWW (Del. Ch. Dec. 28, 2023); *Paragon Techs., Inc. v. Cryan*, C.A. No. 2023-1013-LWW (Del. Ch. Nov. 30, 2023); *Verified Compl.*, *Politan Cap. Mgmt. LP v. Kiani*, C.A. No. 2022-0948-NAC (Del. Ch. Oct. 21, 2022).

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