Insights: The Delaware Edition

Skadden

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If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

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We are pleased to share with you the inaugural issue of *Insights: The Delaware Edition,* a periodic publication addressing significant Delaware deal litigation and corporation law developments.

Q&A With Delaware Litigation Partner Ed Micheletti

What is the most significant recent development in Delaware, from a litigation standpoint?

While there have been a number of important cases and statutory developments, an often-overlooked and extremely important recent development impacting litigation in Delaware has been the changeover in the Delaware Supreme Court and Delaware Court of Chancery over the past two years. Four new Supreme Court justices were appointed during that time, in just a 14-month span — Chief Justice Strine (February 2014), Justice Valihura (July 2014), Justice Vaughn (October 2014) and Justice Seitz (April 2015). In the Court of Chancery, Chancellor Bouchard was appointed in May 2014, and Vice Chancellor Parsons has announced he will be stepping down in October 2015, which will result in a new member on the court. Gov. Jack Markell recently nominated Tamika Montgomery-Reeves, a Delaware practitioner, to succeed Vice Chancellor Parsons, and her nomination will be considered by the Delaware Senate on October 28, 2015.

What will the impact of these judicial changes be?

The impact of this transition remains to be seen. However, we are starting to see some deal litigation and corporate governance decisions from the newly constituted Supreme Court that may provide a window into how it will approach these issues going forward. For example, within the last 10 months, the Delaware Supreme Court has issued at least three opinions that provide important guidance concerning corporate governance and clarify earlier Delaware rulings that created uncertainty. These decisions include *C&J Energy*, *Cornerstone* and *KKR*. We discuss each of these cases in greater detail in this edition of *Insights*.

What is the latest word on multiforum deal litigation?

Multiforum deal litigation is still very much an issue when a deal involving a Delaware company is announced. At a minimum, stockholder cases usually get filed in the state of incorporation and wherever the company's principal place of business is located. This happens because it affords stockholder plaintiffs' counsel more opportunities to jockey for lead counsel position and a greater piece of any perceived fees that will result from the lawsuit.

Is there any way to avoid multiforum deal litigation?

There are a number of ways to address multiforum litigation but no perfect solution. One method that many consider effective is for a company to adopt a forum selection charter or bylaw provision. As explained in one of the articles in this edition of *Insights*, this approach — which had previously been approved by the Delaware courts — was adopted this summer by the Delaware legislature and is now part of the Delaware corporation law.

Are there any new trends or issues in the Delaware Court of Chancery to keep an eye on?

There's always some new theme or development. Since July 2015, everyone has been buzzing about the increased scrutiny the Court of Chancery judges have been placing on disclosure-based deal litigation settlements that involve broad releases

covering board members as well as other defendants such as advisors of the transaction. We discuss this in greater detail in this edition of *Insights*. It is not clear yet where the members of the court will land on this issue, or whether they will even land on a uniform approach to considering such settlements.

Are you awaiting any big decisions that we should keep an eye out for?

Without a doubt, everyone is anxiously awaiting the Delaware Supreme Court's ruling in the *Rural Metro* appeal. Oral argument in that matter was held on September 30, 2015. In particular, many are waiting to see how the Delaware Supreme Court will address the aspect of the opinion that resulted in the target company's investment bank being held liable for money damages on an "aiding and abetting" theory based on a breach of the target board's fiduciary duty of care for which the board members avoided liability (based on an exculpatory charter provision that bars money damages for such claims). A handful of other Court of Chancery cases have adopted the same approach as the one in *Rural Metro*, so the Delaware Supreme Court's decision should provide clarity on whether this will be a viable claim going forward.

Ed Micheletti has extensive experience handling deal litigation and other business law matters in the Delaware courts, and is the co-author of the treatise "Mergers & Acquisitions Deal Litigation Under Delaware Corporation Law."

Delaware Courts Question Long-Standing Practice of Approving Disclosure-Based Deal Litigation Settlements

By Edward B. Micheletti, Jenness E. Parker and Bonnie W. David

In a series of rulings issued over the last few months, the Delaware Court of Chancery has shaken up decades of well-settled authority in the area of deal litigation settlements. The Court of Chancery historically has approved broad releases in deal litigation settlements which cover not only fiduciary duty claims but all claims, known and unknown, based on the same factual predicate. Defendants have taken comfort in the fact that approval of a settlement involving such a release provides certainty and finality. However, with these recent rulings, the court has begun to question whether settlements involving therapeutic benefits (such as supplemental disclosures or deal protection changes) should support broad releases for defendants. The increased scrutiny in this area has resulted in varying decisions by the members of the court.

Vice Chancellor Laster Sparks the Debate

On July 8, 2015, Vice Chancellor J. Travis Laster declined to approve a therapeutic settlement whereby the defendants agreed to the following: a $14 million reduction in the termination fee; reduction in the matching rights period from four days to three days; and supplemental disclosures. *Acevedo v. Aeroflex Holding Corp.*, C.A. No. 9730-VCL (Del. Ch. July 8, 2015) (TRANSCRIPT). Despite "acknowledging … that this is the type of settlement which courts have long approved on a relatively routine basis," the court refused to approve the settlement for a novel reason — namely, that the therapeutic consideration was insufficient to support a broad release.

Instead, the court offered three options for alternative resolution of the action, and indicated that the plaintiffs' counsel would be entitled to a modest mootness fee. The three options were: (i) the plaintiffs could reframe the issues as a dismissal of disclosure claims on mootness grounds, (ii) the parties could renegotiate the scope of the release in the settlement to encompass solely Delaware fiduciary duty claims, or (iii) the defendants could move to dismiss the action. The defendants ultimately moved to dismiss the action, which Vice Chancellor Laster granted without argument.

Vice Chancellor Noble Joins the Discussion

The same day the *Aeroflex* decision was rendered, Vice Chancellor John W. Noble expressed reservations about the scope of a broad release in a therapeutic settlement. *See In re Intermune Inc. Stockholders Litig.*, Consol. C.A. No. 10086-VCN (Del. Ch. July 8, 2015) (TRANSCRIPT). Specifically, he questioned why the scope of the release in the settlement should extend to "process" claims (when such claims appeared to be weak from the outset) and the action was "destined to be" a "disclosure case." Vice Chancellor Noble expressed concerns that permitting the parties to settle process claims with supplemental disclosures is a form of "deal insurance" the court arguably should not be sanctioning. He offered the parties an opportunity to submit additional briefing before he ruled on the merits of the settlement, but all of the parties declined. He then reserved decision on approval of the settlement, which he has not yet issued.

Chancellor Bouchard Voices His Concerns

Before, during and after *Acevedo* and *Intermune*, Chancellor Andre G. Bouchard continued to approve disclosure-based settlements with broad releases, noting a number of times that a broad release may be appropriate so long as the disclosures obtained in the settlement correspond to similarly "weak" price and process claims. *See, e.g., In re Protective Life Corp. S'holders Litig.*, Consol. C.A. No. 9794-CB (Del. Ch. June 16, 2015) (TRANSCRIPT); *In re OpenTable, Inc. S'holders Litig.*, Consol.

C.A. No. 9776-CB (Del. Ch. May 27, 2015) (TRANSCRIPT); *In re Peregrine Semiconductor Corp. S'holder Litig.*, C.A. No. 10119-CB (Apr. 13, 2015) (TRANSCRIPT); *Assad v. World Energy Solutions, Inc.*, C.A. No. 10324-CB (Del. Ch. Aug. 20, 2015) (TRANSCRIPT); *In re TW Telecom, Inc. S'holder Litig.*, C.A. No. 9845-CB (Del. Ch. Aug. 20, 2015) (TRANSCRIPT).

However, on September 16, 2015, Chancellor Bouchard reserved decision on approval of a disclosure-based settlement that he described as the "underbelly of settlements." He requested supplemental briefing on two issues: whether disclosures must be material to support a settlement, and why the scope of the release should include unknown claims. *In re Trulia, Inc. S'holder Litig.*, C.A. No. 10020-CB (Del. Ch. Sept. 16, 2015) (TRANSCRIPT).

Vice Chancellor Glasscock Warns That Broad Releases May No Longer Be Available in Disclosure-Based Settlements

In April 2015, Vice Chancellor Sam Glasscock III approved a therapeutic settlement based on consideration similar to that in the *Aeroflex* settlement, which, as discussed above, Vice Chancellor Laster rejected. Vice Chancellor Glasscock awarded the plaintiffs' counsel $2.1 million in fees and did not express concern about the scope of the release in this settlement. *In re Athlon Energy, Inc. S'holder Litig.*, Consol. C.A. No. 10250-VCG (Del. Ch. Apr. 14, 2015) (TRANSCRIPT).

Months later, on September 15, 2015, Vice Chancellor Glasscock approved a disclosure-based settlement in which he found, after receiving assurance from counsel that the release would not extend to certain federal claims, that the scope of the release was "limited to … the fiduciary duty claims that arose out of the transaction." *In re Susser Holdings Corp. Stockholder Litig.*, C.A. No. 9613-VCG (Del. Ch. Sept. 15, 2015) (TRANSCRIPT). In approving the settlement, Vice Chancellor Glasscock emphasized that the release "was negotiated in good faith under the understanding that typically broad releases have been accepted by the Court."

Two days later, on September 17, 2015, Vice Chancellor Glasscock approved a settlement with even stronger language concerning the ongoing viability of broad releases in connection with disclosure-based settlements. *In re Riverbed Technology, Inc.*, C.A. No. 10484-VCG (Del. Ch. Sept. 17, 2015). Over multiple objections, Vice Chancellor Glasscock found that the supplemental disclosures obtained in the settlement represented "a positive result of small therapeutic value to the Class which can support, in my view, a settlement, but only where what is given up is of minimal value." In addition, Vice Chancellor Glasscock declined to reject the settlement based on the scope of the broad release but noted that the scope of the release was "troubling," explaining:

> [G]iven the past practice of this Court in examining settlements of this type, the parties in good faith negotiated a remedy — additional disclosures — that has been consummated, with the reasonable expectation that the very broad, but hardly unprecedented, release negotiated in return would be approved by this Court. *I note that this factor, while it bears some equitable weight here, will be diminished or eliminated going forward in light of this Memorandum Opinion and other decisions of this Court.*

In re Riverbed Technology, Inc., C.A. No. 10484-VCG, slip. op. at *14 (*emphasis added*).

Vice Chancellor Noble Approves Disclosure-Based Settlement Using a Balanced Approach

Although he has not yet issued a decision in *Intermune*, on September 17, 2015, only hours after the *Riverbed* decision was issued, Vice Chancellor Noble, ruling from the bench, approved a disclosure-based settlement with broad releases. *In re CareFusion Corp. Stockholders Litig.*, C.A. No. 10214-VCN (Del. Ch. Sept. 17, 2015) (TRANSCRIPT). In approving the settlement, Vice Chancellor Noble acknowledged that no one had appeared to object to the settlement, which offered "a modicum of confidence that nothing else worth pursuing is out there." He found further that "plaintiffs' counsel offered a reasoned analysis as to why … other Delaware or federal claims offered nothing for the class" and indicated that the court could not independently discern any other viable claims either.

Vice Chancellor Noble also mused that "there may be something out there for worry" about a broad release but "[t]hat kind of ever-present speculation does not call for rejecting or limiting the settlement to which the parties have agreed. It is a reason though for caution and care." He acknowledged that "[a]bsolute certainty simply is not a realistic goal," and further explained:

> The shareholder class, and, indeed, the Court, are dependent upon counsel for the class. But, the settle quickly and cheaply to collect a fee [approach] is, I guess, something that we always have to be concerned about. But on the other hand, that may simply be somewhat too cynical. When plaintiffs' counsel represent that they have seriously looked at other possible claims and can explain why they chose not to pursue them because of the merits and not because of sloth or short-term greed, approval of a global release may make much more sense.

Vice Chancellor Noble concluded by finding he was "satisfied the settlement is fair, reasonable, and adequate."

Vice Chancellor Parsons Weighs In

On September 29, 2015, Vice Chancellor Donald F. Parsons, Jr. approved a disclosure-based settlement in *In re Vitesse Semiconductor Corp. Stockholders Litig.*, C.A. No. 10828-VCP (Del. Ch. Sept. 29, 2015). He observed that "[i]n light of this Court's recent decisions — and this would be going back to July, and there have been several of them — involving so-called disclosure-only settlements, including *In re Riverbed Technology Inc. Stockholder Litig.*, it's clear that this Court is paying careful attention to such settlements, and I consider both plaintiff's underlying claims and the scope of the release being granted by the plaintiffs in assessing the give side of the evaluation I have to do here." Vice Chancellor Parsons found the consideration sufficient and added that the scope of the release was broad but "[b]ased on the fairly weak nature of the claims under Delaware law … I will approve the release in its current form."

Vice Chancellor Laster Confirms His Earlier Views Expressed in *Aeroflex*

Nine days after issuing his ruling in *Aeroflex*, in a letter addressing the settlement of another action, Vice Chancellor Laster instructed the plaintiffs' counsel to "address in their brief and be prepared to explain at oral argument why this matter should not be approached in the same manner as the *Aeroflex* case." *In re Aruba Networks, Inc. S'holder Litig.*, Consol. C.A. No. 10765-VCL (Del. Ch. July 17, 2015) (ORDER). On October 9, 2015, Vice Chancellor Laster refused to approve the settlement, finding that the case was not meritorious when filed and that he was unimpressed by the discovery record. Addressing the scope of the release, Vice Chancellor Laster also noted that "we have reached a point where we have to acknowledge that settling for disclosure only and giving the type of expansive release that has been given has created a real systemic problem." Moreover, Vice Chancellor Laster addressed "the idea of expectations and whether there's a reliance interest in the past practice of granting these types of releases," explaining that "[f]or better or for worse, I don't think you had that reliance interest from me." Ultimately, the court determined that it would not certify the class, declined to approve the settlement on "inadequate representation" grounds and went a step further to dismiss on similar grounds the cases filed by the named plaintiffs involved in the litigation.

* * *

One thing is clear — disclosure-based deal litigation settlements involving a broad release of claims are no longer routinely being approved by the Court of Chancery. The court is openly revisiting and questioning what has been long-settled practice. At present, it does not appear that the members of the court have landed on a uniform view on how to approach the issue going forward.

The court's rulings have left many practitioners asking: What should a company do when presented with an opportunity to settle a deal litigation for therapeutic consideration, such as supplemental disclosures, especially when facing multiforum litigation? Whether to settle or litigate may depend on a number of factors, including:

- whether litigation has been filed in Delaware, or in some other forum or multiple forums;
    - in some respects, this may depend on whether the selling company has adopted a forum selection charter provision or bylaw selecting Delaware as the exclusive forum;
- the judge assigned to the case;
- the strength of the claims asserted, and what standard of judicial review will be used by the court to review the claims; and
- the individual facts and circumstances of each transaction, including, for example, any alleged board conflicts or challenges to independence, or whether a case involves a controlling stockholder or management take-private transaction.

This type of consideration likely will be present in every deal litigation for the foreseeable future, at least until the Court of Chancery lands on a uniform view. In certain circumstances, it may be that litigation, including dispositive motion practice, is a better approach than settlement. In other situations, mooting disclosure claims or agreeing to a more narrow form of release may be warranted.

Until the Court of Chancery issues more concise guidelines, or the Delaware Supreme Court weighs in on the issue, this will be an area for careful attention and discussion between litigants and their counsel. In addition, these recent developments possibly could result in plaintiffs filing (and settling) deal litigation cases in other states, and it is not clear what effect the Court of Chancery's re-examination of settlement practice might have in other forums.

Dole Ruling Serves as Cautionary Tale for Take-Private Deals

By Edward P. Welch and Sarah Runnells Martin

Earlier this year, in a consolidated breach of fiduciary duty and appraisal action, Vice Chancellor J. Travis Laster of the Delaware Court of Chancery issued a post-trial opinion that includes many important takeaways for practitioners, board members, members of management and their advisors. *In re Dole Food Co., Inc. Stockholder Litig. & In re Appraisal of Dole Food Co., Inc.*, C.A. Nos. 8703-VCL, 9079-VCL (Del. Ch. Aug. 27, 2015). The court found that this take-private transaction by its controlling stockholder was the result of unfair dealing, despite the

company having implemented procedural protections recommended by the Delaware Supreme Court in *In re MFW S'holders Litig.* The court found that David Murdock (the 40 percent stockholder and de facto controller of Dole Food Company, Inc. (Dole)) and C. Michael Carter (Dole's president, chief operating officer and general counsel) were jointly and severally liable for more than $148 million in damages for breaches of fiduciary duty.

Background

The transaction was structured pursuant to the formula described in *In re MFW S'holders Litig.*, 88 A.3d 635 (Del. Ch. 2013) — namely, conditioned upon approval of a special committee of Dole directors and a majority of the minority vote of Dole stockholders — which would be expected to result in application of the business judgment rule as the standard of review applied by the court. However, the court instead applied the rigorous entire fairness standard of review to the transaction, finding that "[d]espite mimicking *MFW*'s form, Murdock did not adhere to its substance. He and his right-hand man, Carter, sought to undermine the Committee from the start, and they continued their efforts throughout the process."

The court's decision was driven by specific factual findings of improper conduct by Murdock and Carter. The court found that, prior to the process leading to the sale, Carter made false disclosures that did not identify the full extent of planned cost savings and unilaterally canceled a board-approved share repurchase program, which "primed the market for the freeze-out [transaction] by driving down Dole's stock price and undermining its validity as a measure of value." Moreover, the court found that during the process, Carter "used his control over Dole's management to provide false information to the Committee," including knowingly false "lowball" projections, while providing Murdock's bankers with more positive projections. The court also held that Carter interfered with the committee's efforts to manage the process and negotiate with Murdock by taking steps to undermine the arm's length negotiation process.

As to Murdock, the court highlighted that he had long been seeking to take Dole private and, among other things, used Dole's financial advisor at the time to investigate that plan. In addition, the court found that Murdock had a history of reprisal against board members who did not support his plans, including leaving threatening voice mails and demanding that at least one board member resign.

The court concluded that "by taking these actions, Murdock and Carter deprived the Committee of the ability to negotiate on a fully informed basis and potentially say no to the Merger." The court found that Murdock and Carter likewise deprived the stockholders of their ability to consider the merger on a fully informed basis and potentially vote it down as a result of the nondisclosure of critical information bearing on value, and that Murdock and Carter's conduct throughout the committee process, as well as their credibility problems at trial, demonstrated that their actions were not incorrect or inadvertent, but rather intentional and in bad faith. The court went so far as to find that Carter "engaged in fraud," which "rendered useless and ineffective the highly commendable efforts of the Committee and its advisors to negotiate a fair transaction that they subjectively believed was in the best interests of Dole's stockholders." Even though the court found that the special committee and its financial advisor acted "with integrity," and a majority of minority stockholders approved the merger, "what the Committee could not overcome, what the stockholder vote could not cleanse, and what even an arguably fair price does not immunize, is fraud." Thus, the court found that Murdock and Carter were liable for breaches of fiduciary duty — Murdock in his capacity as controlling stockholder and a Dole director, and Carter in his capacity as a Dole director and an officer. The court found that the exculpatory provision in Dole's charter did not apply to Murdock in his capacity as controller, and as a director, did not exculpate him because he acted in bad faith. Likewise, because Carter acted in bad faith in his capacity as a Dole director, the exculpatory provision did not apply to him. Moreover, the exculpatory provision did not apply to Carter when acting in his capacity as an officer.

The court found that stockholders were not limited to a remedy of fair price, but were rather "entitled to a fairer price designed to eliminate the ability of the defendants to profit from their breaches of the duty of loyalty." The court found that damages of $2.74 per share over the deal price were appropriate and awarded a total of $148 million in damages assessed against Murdock, his entity DCF Holdings LLC and Carter, with pre- and post-judgment interest compounded quarterly.

However, the court found that there was no evidence that the remaining directors acted disloyally or in bad faith, and they were therefore entitled to exculpation under Dole's charter.

The court also found that Murdock's financial advisor and lead financing source in connection with the take-private transaction was not liable on an aiding and abetting theory. The court noted that the financial advisor previously had served as advisor to Dole in connection with a strategic business review and "acted improperly by favoring Murdock and treating him as the bank's real client in transactions before the Merger, even when [it] was officially representing Dole." However, the court concluded that Murdock's financial advisor "did not participate knowingly in the breaches that led to liability" against Murdock and Carter in this case.

Conclusions and Takeaways

There are a number of important takeaways for practitioners from this opinion.

- One clear message the court is sending is that the substance, not just the form, of the process matters, and the court will closely scrutinize the underlying facts to determine the application of the business judgment rule to a controller take-private transaction under *MFW*.
- Moreover, committees of independent directors should have capable, experienced legal and financial advisors to guide them through a process involving a management buyout or controlling stockholder, taking appropriate steps to mitigate conflicts and to seek to obtain relevant information to inform careful action.
- *Dole* highlights the pitfalls of an important, but sometimes overlooked, corporate governance principle — namely, that officers and members of management owe fiduciary duties to the company and its stockholders generally and not to a controlling stockholder specifically or to more senior officers. If a committee asks for information, an officer has a duty to provide truthful and complete information, particularly accurate and up-to-date financial information about the company's performance.

Recent Amendments to the Delaware General Corporation Law Address Fee-Shifting and Forum Selection Provisions

By Edward B. Micheletti, Joseph O. Larkin and Matthew P. Majarian

It has become almost axiomatic that when a public company merger is announced, stockholder litigation quickly follows. In recent years, some studies have indicated that more than 90 percent of transactions valued at more than $100 million draw such litigation. In many instances, litigation is filed in multiple forums, despite the fact that the challenged transaction typically involves Delaware corporate entities and claims governed by Delaware law. This dynamic often forces Delaware corporations and their fiduciaries to fight a multifront litigation war, which poses, among other things, increased costs and burdens, as well as the risk of dueling discovery tracks and inconsistent court rulings on virtually identical issues on behalf of the same purported stockholder class.

Courts, practitioners and commentators have expressed concerns about the issues raised by the increase of such multiforum deal litigation. However, the issues were not squarely addressed by the Delaware courts until 2013, when the Delaware courts issued rulings generally confirming the validity of fee-shifting (or "loser pays") provisions and forum selection provisions in the organizational documents of Delaware corporate entities. These decisions, which sparked significant commentator reactions both in favor of and against the holdings, in turn prompted the Delaware legislature to work with the Corporation Law Council of the Delaware State Bar Association to establish balanced corporate policy on these issues. On June 24, 2015, after several months of public debate, Delaware Gov. Jack Markell signed into law important amendments to the Delaware General Corporation Law (DGCL), which are intended to clarify Delaware law in light of the courts' holdings.

Fee-Shifting Provisions

Amendments to Sections 102 and 109 of the DGCL were designed to prohibit fee-shifting provisions in a stock corporation's charter or bylaws. The genesis of these amendments is the direct result of the Delaware Supreme Court's decision in *ATP Tour Inc. v. Deutscher Tennis Bund, et al.*, which held that fee-shifting bylaws are facially valid in the context of non-stock corporations. The bylaw at issue in *ATP* provided that if a claiming party did not "obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought," such claiming party must reimburse the counterparties for "all fees, costs and expenses of every kind" incurred in connection with such claim. Reimbursable claims were expressly defined in the bylaw as claims that are based upon a violation of an officer's, director's or stockholder's duty or as to which the DGCL confers jurisdiction on the Court of Chancery.

The reaction to the *ATP* decision was swift, resulting in strong views from both the plaintiff and defense bars, as well as academics and business media commentators. Some believed that the case should be applied only to non-stock corporations. Others, however, believed that the case might not be read so narrowly, and that it had the potential to tip the playing field against stockholder plaintiffs in litigation — including in deal litigation. The flip side of the coin was that many companies and defense lawyers saw fee-shifting provisions as the answer to the multiforum litigation problem because they would deter meritless litigation from ever being filed.

Ultimately, the DGCL amendments were designed to maintain what the legislature felt was a level playing field, by barring fee-shifting provisions and — according to the legislative synopsis — to preserve the efficacy of the enforcement of fiduciary duties in stock corporations. The statutory amendments, however, have limits — they do not disturb the *ATP* decision insofar as it relates to non-stock corporations, nor do they invalidate any fee-shifting provision in a stockholders' agreement or other writing signed by the stockholder against whom the provision is sought to be enforced.

Forum Selection Provisions

Despite the ban on fee-shifting provisions, the Delaware legislature took measures in the amendments to help curtail multiforum litigation by statutorily endorsing the Court of Chancery's decision in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, in which the court upheld the facial validity of forum selection provisions in a certificate of incorporation or bylaws. New Section 115 of the DGCL provides that the certificate of incorporation or bylaws of a corporation, consistent with applicable jurisdictional requirements, (i) may contain a provision requiring that any or all intracorporate claims be brought exclusively in any or all courts of the state of Delaware and (ii) may not contain a provision prohibiting such claims from being brought in Delaware courts. In other words, Section 115 permits a corporation to select Delaware or both Delaware and a non-Delaware forum for resolving intracorporate disputes, but a corporation cannot exclude Delaware as an available forum. The amendments do not disturb the application of a non-Delaware forum selection provision if it is contained in a stockholders' agreement or other writing signed by the stockholder against whom the provision is sought to be enforced.

Although the amendments do not permit fee-shifting bylaw provisions (which, arguably, would have curtailed stockholder litigation generally, not just the multiforum variety), they are intended to address the multiforum stockholder litigation concern by expressly authorizing exclusive forum selection charter and bylaw provisions requiring litigation to be filed exclusively in Delaware courts. The effectiveness of such provisions may depend largely on whether non-Delaware courts will enforce such provisions, if and when stockholder litigation is filed in a non-Delaware forum against a Delaware corporation that has enacted an exclusive forum selection bylaw picking Delaware. The fact that most courts faced with the issue prior to the adoption of Section 115 enforced exclusive forum selection bylaws should provide some degree of comfort that such bylaws will continue to be respected and enforced. The adoption of Section 115 should help in this regard, but the context in which a forum selection bylaw was adopted may affect the willingness of a court to uphold it.

Accordingly, Delaware corporations should strongly consider whether this type of provision would be helpful to them in ensuring that intracorporate disputes are resolved by Delaware's pre-eminent business courts, as well as managing the costs and burdens associated with multiforum stockholder litigation. Among other things, exclusive forum selection provisions may provide defendants greater confidence that they can strongly defend deal litigation on the merits (as well as any related requests for expedited discovery and injunctive relief) without concern that plaintiffs in a non-Delaware forum will attempt to undermine or circumvent such efforts.

As with any corporate decision, a board of directors should carefully consider whether adopting an exclusive forum provision is in the best interests of the company and its stockholders. In doing so, a board may wish to consider information including:

- the multiforum litigation problem discussed above and, in particular, any experience the corporation may have had in defending such litigation;
- the empirical evidence surrounding stockholder suits in publicly traded companies;
- the offering of various solutions to the multiforum litigation problem, including the adoption of exclusive forum selection bylaws;
- the possibility of litigation resulting from the enactment of a forum selection bylaw; and
- possible stockholder relations and proxy advisory service ramifications.

The above factors are by no means exclusive and the board of directors of each corporation must consider all relevant facts and circumstances before making any determination on the adoption of an exclusive forum provision.

Delaware Supreme Court Reaffirms Important Protections for Corporate Directors

By Robert S. Saunders, Ronald N. Brown, III and Arthur R. Bookout

A trio of opinions from the Delaware Supreme Court, each authored by Chief Justice Leo E. Strine, Jr., has reaffirmed Delaware's deference to the business judgment of disinterested corporate decision-makers and restored important protections for directors that had been weakened by prior court decisions.

C&J Energy Services, Inc. v. City of Miami General Employees' & Sanitation Employees' Retirement Trust

First, in late 2014, in *C&J Energy Services, Inc. v. City of Miami General Employees' & Sanitation Employees' Retirement Trust*, 107 A.3d 1049 (Del. 2014), the Delaware Supreme Court vacated an injunction issued by the Court of Chancery and held on an expedited appeal that a board of directors was not *per se* required "to conduct a pre-signing active solicitation process" in order to satisfy its fiduciary duties under *Revlon v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

In a bench ruling, the Court of Chancery had issued an injunction ordering the board of directors of defendant C&J Energy Services, Inc. to shop the company to third parties for a period of 30 days before proceeding with a negotiated merger. The Court of Chancery found that C&J's directors were disinterested, but nevertheless found it reasonably likely that they had breached their fiduciary duty of care by, among other things, not conducting a pre-signing market check prior to agreeing to the merger.

Writing for the Supreme Court *en banc*, Chief Justice Strine vacated the Court of Chancery's injunction. The Supreme Court held that the Court of Chancery's decision "rested on an erroneous understanding of what *Revlon* requires." Specifically, it held that "*Revlon* does not require a board to set aside its own view of what is best for the corporation's stockholders and run an auction whenever the board approves a change of control transaction." Nor does *Revlon* require directors to have "impeccable knowledge" to justify the absence of a market check. Instead, *Revlon* permits a board "to pursue the transaction it reasonably views as most valuable to stockholders, so long as the transaction is subject to an effective market check under circumstances in which any bidder interested in paying more has a reasonable opportunity to do so."

C&J Energy confirms that the Delaware courts will not lightly interfere with a disinterested board's decisions about how to pursue a change of control transaction.

In re Cornerstone Therapeutics Inc., Stockholder Litigation

A few months later, again writing for the court *en banc*, Chief Justice Strine authored *In re Cornerstone Therapeutics Inc., Stockholder Litig.*, 115 A.3d 1173 (Del. 2015), which removed a cloud on the effectiveness of exculpatory charter provisions under 8 Del. C. 102(b)(7).

The Delaware legislature added Section 102(b)(7) to the Delaware General Corporation Law in 1986 in response to concerns about a perceived expansion in director liability. Section 102(b)(7) authorizes Delaware corporations to include in their certificates of incorporation provisions eliminating director liability for breach of fiduciary duty except for any breach of the duty of loyalty, acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, and claims of an unlawful dividend, stock repurchase or redemption. In *Emerald Partners v. Berlin*, the Delaware Supreme Court stated that "when entire fairness is the applicable standard of judicial review, a determination that the director defendants are exculpated from paying monetary damages can be made only *after the basis* for their liability has been decided" on a full record. 787 A.2d 85, 94 (Del. 2001). Thereafter, opinions of the Court of Chancery were split as to whether a director could be dismissed when the standard of review was entire fairness.

In *Cornerstone*, plaintiffs argued that this language from *Emerald Partners* required any motion to dismiss by disinterested directors to fail so long as the complaint pleads facts demonstrating that a transaction was subject to entire fairness. Defendants disagreed, arguing that Delaware law has always required plaintiffs to plead non-exculpated claims against each individual defendant in order to survive a motion to dismiss. While the Court of Chancery considered defendants' view of the law preferable, it held that the language of *Emerald Partners* required it to deny the motion to dismiss.

On interlocutory appeal, the Supreme Court acknowledged the difficulty of dealing with the "complex circumstances of the *Emerald Partners* litigation," but clarified that the language of *Emerald Partners* should be read in its case-specific context: In *Emerald Partners*, plaintiffs had already pled facts supporting the inference that each director defendant breached his duty of loyalty. Thus, the language of *Emerald Partners* merely stands "for the mundane proposition that a defendant cannot obtain dismissal on the basis of an exculpatory provision when there is evidence that he committed a non-exculpated breach of fiduciary duty," because *Emerald Partners* must be read in its "case-specific context" where the defendant directors could not rely on the "102(b)(7) charter provision by virtue of their conduct." Accordingly, the Delaware Supreme Court reversed the denial of the *Cornerstone* motion to dismiss.

The *Cornerstone* opinion helpfully resolved the uncertainty created by *Emerald Partners* and clarified that Delaware courts will dismiss claims for money damages against a corporate director who is protected by an exculpatory charter provision, unless the plaintiff pleads facts supporting a rational inference that the director breached the duty of loyalty (or engaged in other non-exculpated conduct), even when the underlying standard of review is entire fairness.

Corwin v. KKR Financial Holdings, LLC

Most recently, the Delaware Supreme Court's opinion in *Corwin v. KKR Financial Holdings LLC*, No. 629, 2014 (Del. Oct. 2, 2015), again authored by Chief Justice Strine for the court *en banc*, held that an uncoerced, fully informed vote of disinterested stockholders in favor of a challenged transaction provides an independent basis to invoke the business judgment rule, thereby eliminating uncertainty on this question that had existed following the Delaware Supreme Court's opinion in *Gantler v. Stephens*, 965 A.2d 695 (Del. 2009).

In the opinion below, the Court of Chancery held that a stock-for-stock merger between KKR & Co. L.P. (KKR) and KKR Financial Holdings LLC (Financial Holdings) was subject to business judgment review. Plaintiffs' had argued that KKR was a controlling stockholder of Financial Holdings because, even though KKR owned less than 1 percent of Financial Holdings, KKR managed Financial Holdings through an affiliate under a contractual management agreement that could only be terminated by Financial Holdings if it paid a termination fee.

The Court of Chancery noted the "unusual existential circumstances," but observed that "Financial Holdings had real assets its independent board controlled and had the option of pursuing any path its directors chose." As a result, the Court of Chancery found KKR was not a controlling stockholder and entire fairness did not apply. The Court of Chancery also found that enhanced scrutiny under *Revlon* did not apply because "the transaction was approved by an independent board majority and by a fully informed, uncoerced stockholder vote" and dismissed the case under the business judgment rule. The Court of Chancery held that the Delaware Supreme Court's opinion in *Gantler* did not bar this result. On appeal, the Delaware Supreme Court affirmed all the holdings.

On the question of whether *Revlon* enhanced scrutiny applied to the transaction, the court held that "the Chancellor was correct in finding that the voluntary judgment of the disinterested stockholders to approve the merger invoked the business judgment rule standard of review and that the plaintiffs' complaint should be dismissed. For sound policy reasons, Delaware corporate law has long been reluctant to second-guess the judgment of a disinterested stockholder majority that determines that a transaction with a party other than a controlling stockholder is in their best interests."

Addressing the policy considerations at issue and plaintiffs' argument that affirming the Court of Chancery's holding would "impair the operation of *Unocal* and *Revlon* or expose stockholders to unfair action by directors without protection," the Delaware Supreme Court articulated several factors that supported the result:

- First, *Unocal* and *Revlon* are primarily designed to give stockholders and the Court of Chancery the tool of injunctive relief to address important M&A decisions in real time, before closing. They were not tools designed with post-closing money damages claims in mind, the standards they articulate do not match the gross negligence standard for director due care liability under *Van Gorkom*, and with the prevalence of exculpatory charter provisions, due care liability is rarely even available. …
- Second and most important, the doctrine applies only to fully informed, uncoerced stockholder votes, and if troubling facts regarding director behavior were not disclosed that would have been material to a voting stockholder, then the business judgment rule is not invoked. …

Finally, when a transaction is not subject to the entire fairness standard, the long-standing policy of our law has been to avoid the uncertainties and costs of judicial second-guessing when the disinterested stockholders have had the free and informed chance to decide on the economic merits of a transaction for themselves. There are sound reasons for this policy. When the real parties in interest — the disinterested equity owners — can easily protect themselves at the ballot box by simply voting no, the utility of a litigation-intrusive standard of review promises more costs to stockholders in the form of litigation rents and inhibitions on risk-taking than it promises in terms of benefits to them.

The Delaware Supreme Court also clarified that *Gantler* was "a narrow decision focused on defining a specific legal term, 'ratification,' and not on the question of what standard of review applies if a transaction not subject to the entire fairness standard is approved by an informed, voluntary vote of disinterested stockholders."

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These three opinions provide helpful guidance to Delaware practitioners and corporate planners and reinforce the power and ability of a disinterested board of directors to exercise its business judgment without fear of liability, regardless of the standard of review.

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