

Q&A With Delaware Litigation Partner Ed Micheletti

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10/22/15

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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.

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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."