



## 15th Annual Securities Litigation and Regulatory Enforcement Update

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### Developments and Trends in Delaware Law: A Review of 2022 and What To Expect in 2023

On January 24, 2023, Skadden presented the fourth and final part of our 15th Annual Securities Litigation and Regulatory Enforcement Update series, “Developments and Trends in Delaware Law: A Review of 2022 and What to Expect in 2023.” Skadden partners **Ken King** (Mergers and Acquisitions; Corporate Governance/Palo Alto), **Ed Micheletti** (Litigation/Wilmington) and **Jenness Parker** (Litigation/Wilmington) discussed books and records litigation; derivative litigation, including *Caremark* claims; claims involving controllers and control groups; deal litigation; and SPAC-related litigation in the Court of Chancery.

Below is a summary of the high-level takeaways.

#### Books and Records

Books and records demands and litigation remain robust. Recent Section 220 opinions continue to highlight that when companies keep formal corporate records of board decision-making, those records should generally be sufficient to resolve books and records demands. However, in some instances, the court has opened the door to including documents beyond formal board materials when deliberations are occurring outside of the board room (including through electronic communications). Further, the court reiterated that nonresponsive documents in books and records may be redacted. Recent cases reflect that where a company does not require a stockholder to litigate in order to access board materials to which it is entitled, the court may shift the burden to the stockholder to demonstrate that it needs more information.

Recent decisions also emphasize that the minutes documenting key decisions and processes (such as a merger process) should match the descriptions of those decisions and processes in proxy statements or other public disclosures. Inconsistencies between a proxy statement and the formal board minutes (which will likely be produced to a plaintiff in a books and records action) may result in production of informal communications.

**Trends to watch for in 2023:** The increased use of books and records demands (and related litigation) is expected to continue this year due to recent opinions permitting access to internal corporate records before filing a complaint. As a result, we anticipate continued development of the parameters around stockholders’ access to corporate books and records.

# Key Takeaways

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### Derivative Litigation/*Caremark* Claims

Despite the increase in *Caremark* claims relating to directors' purported failure to exercise oversight, recent Delaware decisions emphasize that these claims remain difficult to plead and prove because they require allegations of bad faith. As always, the board should continually evaluate a company's reporting mechanisms and test whether they are working and result in significant risk issues being reported to the board or need to be updated. Boards should remain vigilant over every aspect of the business, especially monoline or "mission critical" issues, and be highly attuned to "red flags." Delaware courts continue to shape the bounds of what is "mission critical" and remains particularly sensitive to failure to monitor compliance with statutory and regulatory regimes. Finally, the board should ensure that its oversight activities are well-documented in board minutes in order to preempt a complaint or increase the probability of early dismissal if litigation is filed.

**Trends to watch for in 2023:** Despite the recent uptick in *Caremark* claims following *Marchand v. Barnhill*, Delaware courts continue to emphasize that such claims rarely survive a motion to dismiss. We expect the court to continue to apply *Caremark*'s strict pleading standard, allowing a claim to advance only in limited circumstances. Also, a recent Delaware Court of Chancery opinion has opened to the door to applying *Caremark* duties to officers (as opposed to directors), and the Delaware courts will likely have forthcoming opportunities to further expand on how such duties operate at the officer level.

### Equity

The Court of Chancery is a court of equity. Both the Court of Chancery and the Delaware Supreme Court continue to send strong reminders that board actions will be tested twice — both as a matter of law and equity. When making any decision, particularly decisions impacting the voting rights of stockholders, boards should remain mindful that just because an action may be legally permissible does not mean it will survive equitable scrutiny by the Court of Chancery. Issues concerning equity arise frequently in matters involving advance notice bylaws, particularly in the context of a proxy contest. If a company's actions are challenged, the court will not only consider whether those actions complied with the terms of the relevant bylaw, it will also consider whether they are equitable. Delaware courts will typically consider whether actions are reasonable and proportionate in their application to determine if they are equitable.

**Trends to watch for in 2023:** We expect Delaware courts to continue to assess actions in certain contexts on two levels: Even though something may be considered "legal" or technically correct, the court may consider an action void or voidable if it is deemed inequitable.

### *Corwin* and *MFW*

The *Corwin* doctrine remains a powerful tool to ensure a board's actions are evaluated under the deferential business judgment rule, but only where the stockholder vote is fully informed. It remains a helpful tool for dismissing post-closing breach-of-fiduciary-duty challenges arising from merger transactions where the *Revlon* standard of review applies. However, adequate disclosure is crucial, as recent decisions reflect that where stockholders can identify even one material disclosure deficiency, *Corwin* cleansing is unavailable. Companies should ensure that their public disclosures closely track their board materials, which stockholders will no doubt have accessed prior to filing a complaint.

The *MFW* framework continues to be a predictable and powerful way to render conflicted transactions subject to the business judgment rule at the pleadings stage and potentially secure dismissal of claims (instead of automatically proceeding to an entire fairness trial). Like the *Corwin* doctrine, the *MFW* framework is strict: Each of the six *MFW* requirements must be fulfilled. Without satisfaction of all six requirements, *MFW*'s procedural protection is not available and entire fairness will apply. If *MFW* protections do not apply, particularly in transactions involving a conflicted controller, entire fairness will be the standard of review, requiring actual and expert analysis and a trial to resolve.

However, recent Delaware decisions demonstrate that even at the trial stage, entire fairness can be demonstrated. Even where a transaction process had flaws, if a price is considered fair, the court will likely consider that the transaction meets the entire fairness standard. That said, the court has stressed that even a finding of a fair price "should not minimize" the requirement of having in place adequate safeguards to ensure a fair process.

**Trends to watch for in 2023:** Transactions involving controllers and control groups are always attractive to stockholder plaintiffs, and we anticipate litigation over control issues. In 2023, Delaware courts will likely continue to balance the ability of controllers to vote shares as the majority wishes with a controller's or control group's fiduciary duty obligations to the minority, including through the application of the *MFW* framework and/or entire fairness review.

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### SPACs

The case law around SPACs, which is still new and developing. The limited number of decisions relating to SPACs have favored stockholder plaintiffs. The recent Chancery Court decisions suggest that, at least in the typical SPAC structure, the SPAC's sponsor will be considered a controller, *Corwin* is not applicable and challenges to de-SPAC mergers will likely be subject to entire fairness review.

**Trends to watch for in 2023:** Despite evolving case law regarding SPACs, at this point we know that courts will apply traditional Delaware fiduciary law and focus carefully on conflicts of interest and disclosures. We anticipate that Delaware courts will have more opportunities this year to weigh in on SPAC transactions and other SPAC-related issues.