Harvard Law School Forum on Corporate Governance

Insights From Delaware Litigators: What We're Watching in 2024

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Key Points

- In a key ruling, the Delaware Chancery Court held that corporate officers, as well as directors, may owe Caremark duties of oversight.
- In two cases, the court held that acquirers were justified in terminating deals because the "bring-down" terms in the respective merger agreements — which required representations and warranties to be reaffirmed at closing — were not qualified by a materiality provision, and the representations and warranties were not strictly satisfied.
- In five rulings involving breach of fiduciary duty claims arising from de-SPAC transactions, the court refused to grant motions to dismiss, finding in each case that the plaintiffs had adequately alleged that fiduciary duties had been breached.
- The court, in the context of a mootness fee decision, commented on a novel issue involving a common merger provision that allows target companies to seek "lost premium" damages from a buyer in the event of a "busted deal" where specific performance is unavailable, strongly indicating that the target company was not able to seek such damages, and that stockholders likely had third-party standing to pursue lost premium damages directly.

In 2023, the Delaware courts continued to be called upon to elaborate important rules of corporate law. The year's docket brought further development in a number of areas, including oversight liability, "busted deal" disputes, SPAC litigation, *Revlon* liability and *Con Ed* provisions. We will be watching as new cases in 2024 explore the implications of those rulings.

The Continued Evolution of Oversight Liability

In 2023, the Court of Chancery issued several notable opinions defining the scope of oversight (also known as "*Caremark*") liability and the ability of a corporation to control any such litigation.

In early 2023, the court expanded oversight liability beyond the boardroom and held that the fiduciary duties of corporate officers also include oversight liability.[1] It stated that the scope of the liability can vary with the officer's responsibilities. For example, CEOs have responsibility for the entire company and would thus have broader oversight duties than an officer who is responsible for only a segment of the company.

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In contrast, the court refused to expand oversight liability to cover the management of ordinary "business risk."[2] In another subsequent case, it also dismissed a derivative action containing oversight claims that had previously survived a motion to dismiss after the corporation established a special litigation committee (SLC) to investigate those claims, conducted an exhaustive seven-month investigation and concluded that the claims should not continue.[3]

What we're monitoring: The refinement of officer-level oversight liability and "business risk," as well as the continued evaluation of SLC investigations of oversight claims.

'Busted Deal' Litigation

In 2023, the Court of Chancery issued several opinions addressing situations where buyers sought to escape from contracts to acquire corporations because of purported breaches of representations and warranties. In two cases, the court determined after trial that the buyers were not required to close because the so-called bring-down conditions — representations and warranties made at signing that were affirmed as true at closing — were "flat," *i.e.*, they did not include any materiality qualifier. The sellers were required to, but did not, maintain their representations and warranties in all respects, the court found.

In one of these cases, the seller's representation regarding its capitalization table was found inaccurate.[4] While the court described the financial value of the discrepancy as "minor" and flagged potential reputational issues for the acquirer, it held that Delaware law will enforce the agreements of sophisticated parties and noted that it was not for the court to question the wisdom of the acquirer's decision to terminate.

In the second case, the court agreed with the acquirer that multiple "flat" bring-down breaches occurred.[5] The court reiterated that Delaware is a "pro-sandbagging jurisdiction" and rejected an

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[1] *In re McDonald's Corp. S'holder Deriv. Litig.*
[2] *In re ProAssurance Corp. S'holder Deriv. Litig.*
[3] *Teamsters Local 443 Health Servs. & Ins. Plan v. Chou.*
[4] *HControl Holdings LLC v. Antin Infrastructure Partners S.A.S.*
[5] *Restanca, LLC v. House of Lithium, Ltd.*

argument that the acquirer should be required to close because it knew at signing that certain representations and warranties had not been satisfied.

What we're monitoring: Changes in deal terms in response to these decisions and the other "busted deal" cases currently before the Court of Chancery.

SPAC Litigation

The Court of Chancery continued to issue rulings on challenges to transactions related to special purpose acquisition companies (SPACs) in 2023. In five rulings, the court denied motions to dismiss, in whole or in part, where there were allegations of breach of fiduciary duty arising from disclosures issued in connection with de-SPAC transactions (where a SPAC merges with an operating company).[6]

In each instance, the court held that the entire fairness standard applied to breach of fiduciary duty claims arising from the de-SPAC transaction, and that there were reasonably conceivable claims for breach of the fiduciary duty of loyalty arising from materially misleading public filings issued in connection with each transaction.

These claims included the omission of the "net cash per share" number — a per-share basis of the amount of total cash that will be invested by the SPAC in the target — which plaintiffs alleged was materially below the $10-per-share redemption price. The court found that, based on allegations raised and arguments presented, it was reasonably conceivable that this information was material to SPAC stockholders evaluating the proposed transaction.

An additional opinion addressed whether a de-SPAC transaction was required to close (and thus also qualifies as a "busted deal" transaction, as discussed above).[7] The request for specific performance was unusually complicated because the target-entity defendant was a Philippine corporation with its assets outside the United States, and there was a *status quo ante* order in place from the Supreme Court of the Philippines arising from a dispute about the proper governing body of the target. Citing these impediments and the fact that the SPAC's own actions were not entirely forthright, the court denied the SPAC's request for specific performance.

What we're monitoring: Continued de-SPAC litigation.

Revlon *Judgments*

This year, plaintiffs prevailed in two cases seeking damages for violation of fiduciary duties that were evaluated under a *Revlon* standard of review.[8] In both cases, the Court of Chancery found

[6] *Delman v. GigAcquisitions3, LLC; Laidlaw v. GigAcquisitions2, LLC; In re XL Fleet (Pivotal) S'holder Litig.; Malork v. Anderson; In re FinServ Acquisition Corp. SPAC Litig.*
[7] *26 Capital Acquisition Corp. v. Tiger Resort Asia Ltd.*
[8] *In re Mindbody, Inc. S'holder Litig.; In re Columbia Pipeline Grp., Inc. Merger Litig.*

that the officers of the target preferred the eventual acquirer and took actions that steered the target to the officers' favored counterparty — and they did so for unique, personal reasons. In both cases, the officers were held to have violated their fiduciary duty of loyalty. In addition, the court also found the acquirers in both cases liable for aiding and abetting the officers' breaches.

Both cases awarded "nominal" per-share damages for the fiduciary breaches between $0.50 per share and $1 per share. However, each target had tens of millions of shares outstanding at the time of the transaction, resulting in sizable damages awards. In each case, some defendants also settled before trial. Both cases also saw additional litigation over the availability of any "settlement credit" for payments made by parties who settled out, with one such request being rejected so far.[9]

What we're monitoring: The continued evaluation and evolution of the Court of Chancery's post-closing *Revlon* jurisprudence, the damages (and set-offs) flowing from those decisions and any appeals from the 2023 cases.

Con Ed *Provision Held Unenforceable*

In 2023, the Court of Chancery explained that a "lost premium provision" in a merger agreement could not be enforced either by the target (a social media company) or its stockholders (given that the transaction had closed).[10] The court's ruling arose in an odd procedural context — a mootness fee application by a stockholder plaintiff seeking $3 million in attorneys' fees arising from the closing of the target's merger — which the court rejected because his complaint was not meritorious when filed.

The outcome turned on whether the plaintiff had third-party beneficiary rights to enforce the lost premium provision. The provision required the contractual acquirer, in the event of a breach of the merger agreement, to be liable for the benefits of the transaction, including "lost stockholder premium."

The court recognized this provision as one of the so-called *Con Ed* provisions that M&A practitioners implemented to address the U.S. Court of *Appeals for the Second Circuit's 2005 decision in Consolidated* Edison, Inc. v. Northeast Utilities. In that case, the Second Circuit held that Northeast's stockholders did not have standing to sue Con Ed when it terminated its merger agreement with Northeast.

The Court of Chancery held that the lost premium provision could not define the target's damages in the event of a breach because the company would never have received the merger consideration; it would have flowed directly from the acquirer to the target's stockholders.

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[9] *In re Mindbody, Inc. S'holder Litig.*
[10] *Crispo v. Musk.*

In addition, the target's stockholders could not enforce the provision unless they were granted third-party beneficiary status under the merger agreement. The court found this doubtful under the plain language of the merger agreement.

The court conceded that an alternative construction of the agreement was possible, which could convey third-party standing to stockholders to enforce the lost premium provision in "exceptionally narrow circumstances" when specific performance was no longer available. However, ultimately, those circumstances could not have arisen — and the stockholder plaintiff's claim under the provision never had merit — because the target company was pursuing specific performance of the merger agreement at all relevant times.

What we're monitoring: The court's continued evaluation of lost premium and other Con Ed provisions.