DELAWARE STATE BAR ASSOCIATION

CONTINUING LEGAL EDUCATION

DELAWARE CORPORATE COUNCIL 2023

LIVE SEMINAR AT DSBA AND WEBCAST TO SUSSEX COUNTY

SPONSORED BY THE DELAWARE CORPORATIONS LAW COUNCIL

TUESDAY, SEPTEMBER 12, 2023 | 1:00 P.M. – 5:15 P.M.

4.0 Hours CLE credit for Delaware and Pennsylvania Attorneys

Panel 1: Delaware Court of Chancery Process and Corporate Law Update: A Conversation with Practitioners and Vice Chancellor Sam Glasscock, III and Magistrate in Chancery Bonnie W. David

Moderator

Lewis H. Lazarus, Esquire
Morris James LLP

Panelists

The Honorable Sam Glasscock III
Court of Chancery of the State of Delaware

The Honorable Bonnie W. David
Court of Chancery of the State of Delaware

R. Eric Hacker, Esquire
Morris James LLP

Samuel L. Closic, Esquire
Prickett Jones & Elliot, P.A.

Lauren K. Neal, Esquire
Morris, Nichols, Arsht & Tunnell LLP

Panel 2: The 2023 Amendments: Their Purpose and Impact

Moderator

Ellisa Opstbaum Habbart, Esquire
The Delaware Counsel Group, LLC

Panelists

Allison L. Land, Esquire
Skadden, Arps, Slate, Meagher & Flom LLP

Bernard J. Kelley, Esquire
Richards, Layton & Finger, P.A.

James D. Honaker, Esquire
Morris, Nichols, Arsht & Tunnell LLP

Visit https://www.dsba.org/event/delaware-corporate-council-2023/ for all the DSBA CLE seminar policies.

Panel 1

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BIO FOR VICE CHANCELLOR SAM GLASSCOCK III

The Honorable Sam Glasscock III was appointed as Vice Chancellor in 2011 after having served as Master in Chancery from 1999 to 2011. He was born in Erie, Pennsylvania and spent most of his youth in Lewes, Delaware. He received a B.A. in History from the University of Delaware in 1979, a J.D. from Duke University in 1983 and a Master's Degree in Marine Policy from the University of Delaware in 1989. Before coming to the Court of Chancery, he worked as a judicial clerk, as an associate at Prickett, Jones, Elliott, Kristol & Schnee in the litigation section, as a Superior Court special discovery master and as a Deputy Attorney General in the Appeals Unit of the Department of Justice.

The Honorable Bonnie W. David

The Honorable Bonnie W. David became a Magistrate in Chancery in January 2023. Before joining the Court, Magistrate David was a Counsel in the litigation department of Skadden, Arps, Slate, Meagher & Flom LLP, where she litigated before the Court of Chancery with a focus on deal litigation, corporate statutory proceedings, and contract disputes, and advised on corporate governance and transactions.

Magistrate David graduated cum laude from the University of Pennsylvania Law School in 2013, where she served as Senior Editor on the University of Pennsylvania Law Review. She received her B.A. from Boston University, graduating summa cum laude. Immediately after law school, Magistrate David clerked in the Court of Chancery for Vice Chancellor Sam Glasscock III.

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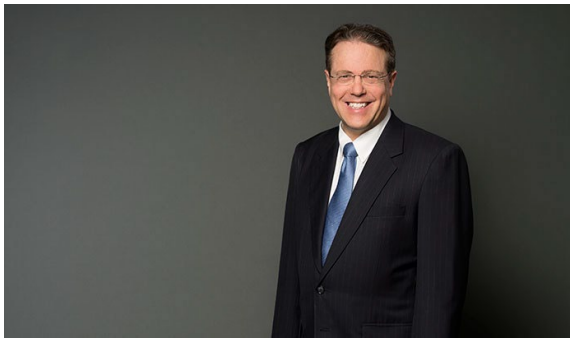

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Lewis Lazarus focuses his practice on corporate governance and commercial matters in the Delaware Court of Chancery. He has been lead counsel in trials arising out of mergers and acquisitions, including cases involving the entire fairness standard of review, appraisal, books and records actions, actions to compel annual meetings, and actions to determine who rightfully are the managers of a Delaware entity. As a result of his knowledge and familiarity with these and related cases, Lewis often advises special committees and boards in conflict-of-interest transactions. He has counseled boards, companies, or special committees in conflict-of-interest transactions totaling over $7 billion in the last several years.

Lewis has been praised for doing “an excellent job advising on Delaware law as it applies to special committees, conflicts of interests, and duties of directors," for the ability to "communicate complex legal language in a businessman's language," and for his “intricate knowledge of the issues and procedures in the Court of Chancery." He has also been commended as a “completely clear thinker" who “knows how to make a real case," and who "understands beyond the case and sees the bigger picture." - *Chambers USA* (2006 - Present)

In addition, Lewis, who speaks fluent Spanish, maintains a particular interest in matters involving Spanish, Mexican, and South American clients, and has traveled to Mexico, Europe, Canada, South America, and the Middle East to discuss the advantages of Delaware law with business representatives.

"My goal is to help clients carry out their duties consistent with Delaware law so they can focus on their business." - Lewis Lazarus

Practice Areas

Corporate and Fiduciary Litigation
Corporate Governance Counseling
Special Committee Representation
Alternative Dispute Resolution
Contract Litigation
Corporate Advice
Business Torts
Non-Compete and Trade Secret Protection
Legal Opinions
Distressed Entity, Insolvency Counseling
LLC, LP, Partnership Litigation

Education

Stanford Law School, J.D., 1982
Swarthmore College, B.A., High Honors, 1978

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SAMUEL L. CLOSIC focuses on business entity transactions and corporate and commercial litigation. Mr. Closic's practice primarily involves mergers and acquisitions, corporate governance, and other complex business matters in the Delaware Court of Chancery.

Mr. Closic received a B.S. from High Point University in 2005 and a J.D., *summa cum laude*, from Widener University School of Law in 2010. While at Widener, Mr. Closic served as the External Managing Editor for *The Delaware Journal of Corporate Law*. Mr. Closic also had the pleasure of serving as a judicial extern to the Honorable Randy J. Holland of the Delaware Supreme Court and the Honorable Mary F. Walrath of the United States Bankruptcy Court for the District of Delaware.

Prior to becoming an attorney, Mr. Closic owned and operated a family retail furniture business.

Mr. Closic is admitted to practice in the courts of the State of Delaware and the United States District Court for the District of Delaware. Mr. Closic has been rated by his peers as AV Preeminent for his ethical standards and legal ability, and was recognized as a Rising Star in Business Litigation by *Super Lawyers, Delaware*.

Professional and Community Activities

Member, Richard S. Rodney American Inn Of Court
Member, Delaware Bankruptcy Inn Of Court
Member, Delaware State Bar Association
Assistant Secretary, Delaware Board Of Bar Examiners
Board Member, Kutz Senior Living Campus

Bar Admissions

Delaware
United States District Court For The District Of Delaware

Publications

The Slow But Sure Evolution Of Brophy: Delaware's Common Law Action For Insider Trading, Business Law Today, April 30, 2014.

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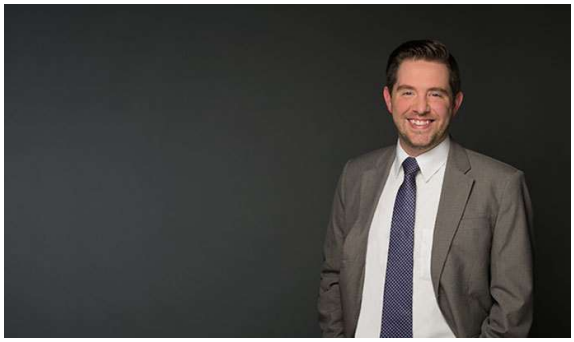

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Eric Hacker is an experienced attorney who practices within Morris James's Business Litigation and Business Law Counseling groups.

Eric's practices include both appeals and trial-level representations. Eric's peers have selected him four times as a top appellate attorney in Delaware Today's annual survey of Delaware attorneys. At the trial level, Eric regularly serves as lead counsel and Delaware counsel in corporate and commercial litigation in the Delaware Court of Chancery and the Complex Commercial Litigation Docket of the Delaware Superior Court.

Eric's practice includes assisting clients with disputes involving corporate governance, fiduciary duties, books and records, elections, and alternative entities. Eric has also represented several clients in post-closing disputes involving stock purchase agreements and asset purchase agreements. He counsels clients regarding business structures and agreements, and he advises clients on best corporate practices. Outside of litigation, Eric's goal is to help clients structure and conduct their business relationships to avoid disputes.

Along with his regular practice, Eric publishes frequently and participates in numerous pro bono and educational activities. Eric routinely publishes pieces regarding developments in Delaware corporate law. He represents pro bono clients through Delaware Volunteer Legal Services and the Office of the Child Advocate. Eric also coached the award-winning Sussex Central High School Mock Trial team at the state and national levels. Each year, Eric serves as an arbitrator and briefing judge for the Willem C. Vis International Commercial Arbitration Moot in Vienna, Austria.

"I help clients identify their immediate and long-term goals so we can work creatively to discover the best solutions for their unique needs." - Eric Hacker

Practice Areas

Corporate and Fiduciary Litigation
Contract Litigation
Business Torts
Strategic Planning and Counseling
Corporate Advice
Corporate Governance Counseling
Land Use
Legal Opinions
LLC, LP, Partnership Litigation
Special Committee Representation

Admissions

Delaware, 2015
Texas, 2009

Education

Emory University School of Law, JD
Bucerlus Law School, Hamburg, Germany
University of North Texas, BA, cum laude

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Lauren is a litigator who has spent her entire career focusing on corporate and commercial litigation in the Delaware Court of Chancery, where she has significant trial experience, and appeals before the Delaware Supreme Court.

She also has experience litigating complex cases in the Delaware Superior Court and the US District Court for the District of Delaware, as well as appeals before the US Court of Appeals for the Third Circuit.

Lauren has been included in *Best Lawyers: Ones to Watch* for her work in corporate law and commercial litigation.

She is a member of the Delaware State Bar Association's Corporation Law and Commercial Law Sections. Earlier this year, she was appointed by the Delaware Supreme Court to serve a three-year term as a Member of the Board of Bar Examiners. She is also a member of the Morris Nichols Recruiting Committee.

PRACTICE AREAS

Corporate & Commercial Litigation

Complex Commercial Litigation

Mergers & Acquisitions Litigation

Shareholder Class & Derivative Litigation

EDUCATION

Washington and Lee University School of Law, JD, cum laude, 2013
Washington and Lee Law Review, lead articles editor, 2012-2013; staff writer, 2011-2012

Franklin and Marshall College, BA, Government and Spanish, magna cum laude, Phi Beta Kappa, 2010

ADMISSIONS

Delaware, 2013

New York, 2016

US District Court for the District of Delaware, 2014

US Court of Appeals for the Third Circuit, 2018

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Delaware Corporate Council 2023 Entire Fairness and *Caremark* Update

SAMUEL CLOSIC

PRICKETT, JONES & ELLIOTT, P.A.

September 12, 2023

Special thanks to Christine Chappelear and Seth Ford

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Caremark Litigation — Recent Developments

Morris James LLP

Delaware Corporate Council 2023

Officer Liability and *Corwin* Developments

R. Eric Hacker
Morris James LLP
September 12, 2023

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Developments in Officer Liability

McDonald's and *Mindbody*

In re McDonald's Corporation Stockholder Derivative Litigation

2023 WL 387292 (Del. Ch. Jan. 26, 2023)

Factual Background

- Defendant David Fairhurst was EVP and Global Chief People Officer at McDonald's Corporation from 2015 until his termination for cause in 2019
- Fairhurst oversaw the company's global human resources function and policies
- Numerous alleged incidents of sexual harassment, other inappropriate conduct, and circumstances giving rise to a hostile work environment

Litigation

- Stockholder plaintiffs brought a derivative action against Fairhurst on behalf of McDonald's, asserting that Fairhurst breached his fiduciary duty of oversight as a corporate officer responsible for labor and HR

- Allegations included that,

    - Fairhurst and the HR department that he oversaw had "turned a blind eye" to sexual harassment at McDonald's, which had become widespread under his watch

Litigation

- Fairhurst did not properly report the purported misconduct to his superiors or address or otherwise remediate the HR issues
- Fairhurst was consciously ignoring clear “red flags” (in addition to creating red flags through his own alleged misconduct)

- Fairhurst filed a motion to dismiss the oversight claim against him, asserting that Delaware law does not impose a duty of oversight on officers

Development of Duty of Oversight

In re Caremark International Derivative Litigation, 698 A.2d 959 (Del. Ch. 1996)

Stone v. Ritter, 911 A.2d 362 (Del. 2006)

Gantler v. Stephens, 965 A.2d 695 (Del. Ch. Jan. 28, 2009)

Development of Duty of Oversight

In re Caremark International Derivative Litigation, 698 A.2d 959 (Del. Ch. 1996)

- Directors have a duty of oversight, which includes obligations to make sure that proper information and reporting systems exist, and that directors properly address "red flags" that point to wrongdoing or other failures

- Plaintiffs must demonstrate "sustained or systematic failure of the board to exercise oversight— such as an utter failure to attempt to assure a reasonable information and reporting system exists."

Development of Duty of Oversight

In re Caremark International Derivative Litigation, 698 A.2d 959 (Del. Ch. 1996)

Stone v. Ritter, 911 A.2d 362 (Del. 2006)

- Delaware Supreme Court recognized two types of Caremark oversight claims against directors

    1. Directors utterly failed to implement any reporting or information system or controls; or,
    2. Having implemented such a system or controls, consciously failed to monitor or oversee the operations

Development of Duty of Oversight

In re Caremark International Derivative Litigation, 698 A.2d 959 (Del. Ch. 1996)

Stone v. Ritter, 911 A.2d 362 (Del. 2006)

Gantler v. Stephens, 965 A.2d 695 (Del. Ch. Jan. 28, 2009)

- Decision did not address duty of oversight *per se*, but it stands for the proposition that "the fiduciary duties of officers are the same as those of directors."

Decision

Corporate officers owe a duty of oversight similar to that owed by directors under *Caremark*

- Officers are fiduciaries—they are agents who report to the board of directors and, therefore, have a principal-agent relationship with the board
- This agency duty "extends beyond what the agent actually knows to encompass what the agent has reason to know or should know."
- Here, plaintiffs stated a claim for breach of the duty of oversight against Fairhurst based on allegations that Fairhurst ignored red flags and that Fairhurst committed misconduct and consciously disregarded pervasive misconduct of others

Lessons and Questions

- After *McDonald's*, there is no question that officers, like directors, now have a duty of oversight

- Officers should be aware that their own misconduct can give rise to a claim for breach of the duty of oversight against them

- Open questions,
  - Will pleading of prosecution of officer cases mimic directors?
    - Demand futility difficult to establish?
    - Bad faith?
  - How will the board's role in setting officers' responsibilities impact whether the officer can be liable for oversight failures?
  - How will *McDonald's* interact with 2022 DGCL amendments permitting exculpatory language limiting officers' personal liability?

In Re Mindbody, Inc. Stockholder Litigation

2023 WL 2518149 (Del. Ch. Mar. 15, 2023)

Background

- Litigation arising out of private equity firm Vista Equity Partners Management LLC's 2019 $1.9 billion take-private acquisition of Mindbody, Inc.

- Derivative plaintiffs claimed that Mindbody founder/CEO Richard Stollmeyer and the other directors breached their fiduciary obligations and that Vista aided and abetted those breaches

- According to plaintiffs, Stollmeyer was motivated by burnout, near-term liquidity needs and the prospect of post-acquisition employment

Background

- In a 2020 decision, the Court denied a motion to dismiss and rejected the defendants' ratification defense based on Corwin

- Trial proceeded on claims against Stollmeyer and Vista

- Two theories of breach,
  - Stollmeyer breached his fiduciary duties by tilting the process in favor of Vista
  - Stollmeyer committed disclosure violations by failing to disclose facts about the sale process and omitting information

Findings After Trial

- Stollmeyer became “smitten” with Vista after meetings in which Vista touted the financial incentives Stollmeyer could achieve if Vista acquired Mindbody and kept Stollmeyer as CEO

- Thereafter, “Stollmeyer did not adequately involve the Board or erect, much less adhere, to speed bumps to ensure a value-maximizing process” but instead “greased the wheels for Vista by stalling the Board process.”
    - Did not timely inform board of Vista offer
    - Did not disclose personal motivation for sale
    - Tipped Vista on the launch of a formal sale process and the expected minimum deal price
    - Omitted data about Mindbody’s revenue results

- The speed at which the transaction moved effectively prevented other potential bidders from making offers

Legal Analysis

- The parties presented a “complicated surfeit of standards,” which “read like a legal version of a choose-your-own adventure story”

- But ultimately, the Court adopted the three-step approach advocated by Stollmeyer:
    - “addressing Plaintiffs’ claims against Stollmeyer under *Revlon*,
        - evaluating the viability of *Corwin*, and
            - assessing disclosure as an independent path to liability”

Legal Analysis - *Revlon*

- Under *Revlon*, if a company's board decides to put the company up for sale, then the board must focus on obtaining the best price reasonably available

- Once *Revlon* duties trigger, directors (as fiduciaries) face enhanced scrutiny of their actions during the sale process

- "[T]he paradigmatic *Revlon* claim involves 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."

Legal Analysis - *Revlon*

- The Court found that the facts established a "paradigmatic *Revlon* claim"
- The Court concluded that the decision-making process related to the sale was not adequate because Stollmeyer "suffered disabling conflicts" and "tilted the sale process" in Vista's favor
- And because Mindbody's board did not know about Stollmeyer's conflicts, the board did not manage them effectively, so the board's approval did not support the reasonableness of the sale

Legal Analysis - *Corwin*

- Although “a defendant can restore the business judgment rule through *Corwin* cleansing by demonstrating that the transaction was ‘approved by a fully informed, uncoerced majority of the disinterested stockholders[]’” . . .

Legal Analysis - *Corwin*

- Although "a defendant can restore the business judgment rule through *Corwin* cleansing by demonstrating that the transaction was 'approved by a fully informed, uncoerced majority of the disinterested stockholders[]'" . . . when a plaintiff proves the paradigmatic *Revlon* claim, [generally] a defendant will not be able to show that the stockholder vote was fully informed" because an uninformed board cannot inform the stockholders.

Legal Analysis - *Corwin*

- Although "a defendant can restore the business judgment rule through *Corwin* cleansing by demonstrating that the transaction was 'approved by a fully informed, uncoerced majority of the disinterested stockholders[]'" . . . when a plaintiff proves the paradigmatic *Revlon* claim, [generally] a defendant will not be able to show that the stockholder vote was fully informed" because an uninformed board cannot inform the stockholders.

- Such was the case here: "The stockholders were not made aware of Stollmeyer's conflicts or the way in which the process favored Vista."

Legal Analysis – *Disclosure Violations*

- "[W]hen fiduciaries choose to provide the history of a transaction, they have an obligation to provide shareholders with 'an accurate, full, and fair characterization of those historic events.'"

- But here, proxy materials and supplemental disclosures created a "sterilized" and "false" narrative that downplayed or omitted Stollmeyer's interactions with Vista before and during the sale process

Legal Analysis – *Other Bits*

- The Court also found Vista liable for aiding and abetting the disclosure violations because it knew the existence and significance of the omitted information
- And Vista was jointly and severally liable for damages, based in part on merger agreement language requiring Vista to notify Mindbody if it learned of any materially misleading or incomplete disclosures
- For the process claims, the Court awarded $1/share in damages to bring the deal price in line with what Vista's internal price deliberations showed Vista likely would have paid if not for the process violations
- Relying heavily upon Chancellor Brown's *Weinberger* decision, the Court also awarded $1 per share in nominal damages to remedy the harm to the stockholders caused by the inadequate disclosures that deprived them of the fair opportunity to vote down the merger.

Lessons and Questions

- Delaware courts expect officers to follow the board's direction and to inform the board of their actions and motivations, including with respect to communications and conflicts with potential acquirors

- Officers and the board must delicately manage situations when the interests of the board, large insider stockholders, and disinterested stockholders diverge

- Similarly, acquirers should be wary of engaging with officers or key persons who strongly support a deal before the start of the board process, and should embrace a sound board-level sale process

Lessons and Questions

- Some questions,
  - Is *Mindbody* simply a situation of a conspicuous target — *i.e.*, a conflicted executive leading a deal process?
  - Is there a duty for the board to investigate the motivations of key persons or large insider stockholders?
  - Would the case have come out differently if the disclosures had said less about the genesis of the deal?

Corwin Developments

2022 – 2023 Summary

- Approximately 30 written Delaware decisions citing *Corwin*
  - 15 contain substantive discussions
  - 135 written Delaware decisions citing *Corwin* total

- Several decisions with reading,
  - *Goldstein v. Denner*, 2022 WL 1671006 (Del. Ch.)
  - *Teamster Members Ret. Plan v. Dearth*, 2022 WL 1744436, (Del. Ch.), *aff'd,* 289 A.3d 1264
  - *New Enter. Associates 14, L.P. v. Rich*, 292 A.3d 112 (Del. Ch.)
  - *In Re Edgio Stockholders Litigation*, 2023 WL 3167648 (Del. Ch.)

In Re Edgio Stockholders Litigation

2023 WL 3167648 (Del. Ch. May 1, 2023)

Background

- Limelight Network, Inc., an underperforming network services company and potential activist target, was approached by an investor about a merger with Edgecast,Inc. (whose parent was 90% owned by the investor)

- After due diligence, the parties entered an agreement in which Limelight (now, Edgio) acquired Edgecast and in exchange, Edgecast's parent received 35% of Limelight's outstanding post-closing common stock

- As part of the deal, the parties entered a stockholders' agreement which later became the subject of litigation

Background

- In advance of a stockholder vote required by Nasdaq listing rules, Limelight issued a proxy statement that summarized the deal and the stockholders' agreement

- Limelight's stockholders overwhelmingly approved the deal

Litigation

- After the closing, two Limelight stockholders brought an action against the company and its board

- The plaintiffs sought to enjoin three provisions of the stockholder's agreement, which the plaintiffs claimed created a significant and enduring stockholder block designed to entrench the board and shield it from stockholder activism

- The defendants moved to dismiss because the board's decision was protected by the business judgment rule and regardless, under *Corwin*, because the company's stockholders approved the deal, including the stockholders' agreement

Corwin Revisited

- *Corwin*'s command was that "when a transaction not subject to the entire fairness standard is approved by a fully informed, uncoerced vote of the disinterested stockholders, the business judgment rule applies." In this way, *Corwin* cleanses a problematic deal.

- Subsequent decisions have refined *Corwin*'s "entire fairness" language to differentiate between transactions with controllers and other transactions, such as those involving a conflicted board

- For instance, *In re Merge Healthcare Inc.*, 2017 WL 395981 (Del. Ch. Jan. 30, 2017) confirmed that, where a majority of informed, disinterested, and uncoerced stockholders approve a transaction other than with a controlling stockholder, the business judgment rule will apply absent waste even if the transaction was approved by a conflicted board majority

Unocal Revisited

- *Unocal* "was conceived of as a method to police the inherent conflict present when a board resolves to oppose a takeover bid."

- "Because of the omnipresent specter that a board may be acting primarily in its own interests . . . there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred."

- Although *Unocal* arose in the era of hostile takeovers, it has found new life in cases involving board responses to activist stockholders.

Unocal Revisited

- As framed in *Ryan v. Armstrong,* "*Unocal* enhanced scrutiny is primarily a tool for [the Court of Chancery] to provide equitable relief where defensive measures by directors threaten the stockholders' right to approve a value-enhancing transaction."

- And as framed in *Edgio*, "*Unocal*'s core function is, and has always been, providing a framework for evaluating whether an injunction should issue against defensive measures."

Decision

- The Court began by tackling what it viewed as an open question: “whether *Corwin* can apply to a claim governed by *Unocal* and seeking injunctive relief.”
- The answer in *Edgio* was *no*.
- “In my view, several aspects of *Corwin* preclude its application to claims for injunctive relief under *Unocal*.”

Decision

- Most notably, these aspects include,
  - *Corwin*'s "plain text limits its holding to post-close damages claims and . . . leave[s] untouched . . . *Unocal* and *Revlon* in claims for injunctive relief.
  - *Corwin* "also left untouched . . . precedent that ...suggest[s] stockholder votes cannot cleanse [Unocal] claims . . . seeking injunctive relief.
  - "[T]he policy rationales underpinning *Corwin* and the cases on which it relies do not justify extending *Corwin* cleansing to such claims."

Decision

- Because the plaintiffs sought under *Unocal* "to enjoin an enduring entrenchment device and . . . [not] monetary damages," the Court concluded *Corwin* cleansing was unavailable

- Next, the Court concluded that the plaintiffs pled that *Unocal* governs, while recognizing that the pleadings-stage "mandate to make plaintiff-friendly inferences does a lot of work" in getting the Court to infer "that the Board negotiated for and obtained the Challenged Provisions to defend against a perceived threat of activism."

- Accordingly, the motion to dismiss was denied, and now, the matter is moving toward trial.

Lessons and Questions

- Under *Edgio*, boards cannot rely on a fully informed, uncoerced stockholder vote to avoid enhanced scrutiny of defensive measures under *Unocal*.

- *Edgio* may be limited to its facts. Absent surrounding facts, such as Limelight being an activist target and the 35% stake, "it is unlikely that the [stockholder's agreement] alone would be sufficient to trigger Unocal."

Lessons and Questions

Follow up questions,

- Would the decision have been different if stockholder's agreement had been subject to a standalone vote? (*Stroud* and *Williams* vs. *Santa Fe*)
- What if Limelight weren't considered vulnerable to activists?
- To what extent is *Edgio* a function of pleadings-stage procedure colliding with broader principles?
- How does *Edgio* fit with the situation in *Unocal*, where the board took unilateral action? What about with *Corwin*'s policy of allowing stockholders to have "the free and informed chance to decide on the economic merits of a transaction"?

Refresher: Caremark's Reasoning is Adopted

- In *Stone v. Ritter*, the Delaware Supreme Court set a standard of liability for director oversight and identified two types of *Caremark* claims:

  (1) The directors utterly failed to implement any reporting, information system, or controls; or

  (2) having implemented such a system or controls, the directors consciously failed to monitor or oversee its operations, thus disabling themselves from being informed of risks or problems requiring their attention.

- This led to oversight claims being called either a prong-one *Caremark* claim or a prong-two *Caremark* claim.

Current State of Caremark Claims – 3 Species

Caremark Prong 1	**Information Systems Claim:** When corporate fiduciaries utterly failed to implement any reporting, information system, or controls to address a central compliance risk.
Caremark Prong 2	**Red Flags Claim:** When corporate fiduciaries were put on notice that the corporation was violating the law or otherwise headed for a corporate trauma, but willfully ignored the evidence and consciously decided to do nothing.
	***Massey* Claim:** When corporate fiduciaries intentionally decided to cause the corporation to violate the law, typically because of the cost of compliance and its effect on profits.

Pleading a *Caremark* Claim

- A *Massey* Claim, a Red Flags Claim, and an Information Systems Claim each rests on the same concept: a breach of the duty of loyalty grounded on bad faith action.
- But is a *Massey* claim subsumed within *Caremark* or is it a more generic loyalty breach claim?
- Each type of claim serves as a guidepost for the Court's analysis of the allegations, rather than as a form of action that the allegations must perfectly fit.
- Directors and officers owe oversight duties.

Business Risk vs. Recidivist Behavior

Business Risk:

- When directors make a business decision that carries legal risk, but which otherwise involves legally compliant conduct, then the business judgment rule protects that decision.
- Alleging that the board made a wrong decision in responding to red flags is insufficient as well.
- It is not the Court's role to act as an arm of a regulator.

Recidivist Behavior:

- The business judgment rule plays no role in a decision to proceed in a way that violates the law.
- In *Caremark* cases alleging violation of a consent order, however, the Court must address whether the Company is continuing a course of conduct that it knows is illegal.

Business Risk

- *City of Detroit Police & Fire Retirement System ex rel Nisource, Inc. v. Hamrock*, 2022 WL 2387653 (Del. Ch. June 30, 2022) (dismissing complaint because allegation of suboptimal compliance is not a violation of positive law).
- *Construction Industry Laborers Pension Fund v. Bingle*, 2022 WL 4102492 (Del. Ch. Sept. 6, 2022), *aff'd* 297 A.3d 1083 (Order) (dismissing claim for oversight liability based on a mere failure to monitor a business risk).
- *Firemen's Retirement System of St. Louis v. Sorenson*, 2021 WL 4593777 (Del. Ch. Oct. 5, 2021) (dismissing claim for cybersecurity oversight failure where board and audit committee were routinely apprised of cyber issues and sought pertinent advice from consultants).

Recidivist Behavior

- *Ontario Provincial Council of Carpenters' Pension Trust Fund v. Walton*, 2023 WL 3093500 (Del. Ch. Apr. 26, 2023) (upholding *Caremark* claim based on allegations that directors knowingly sacrifice compliance for profits).

- *In re Facebook, Inc. Derivative Litigation*, C.A. No. 2018-0307-JTL (May 10, 2023) (Telephonic Rulings on Defendants' Motion to Dismiss) (TRANSCRIPT) (holding pervasive red flags of legal violations supported pleading stage inference "that management is operating an enterprise based on recidivist lawbreaking").

- *See also Teamsters Local 443 Health Services & Insurance Plan v. Chou*, 2020 WL 5028065 (Del. Ch. Aug. 24, 2020) (sustaining *Caremark* prong 2 claim where directors ignored red flags indicating that its healthcare product imposed a "mission critical compliance risk").

Laches Analysis – a Matter of First Impression

- "Red flags" can accrue at multiple points, rather than as either a single isolated event or as a continuous course of conduct.
- The separate accrual method treats a series of related decisions, or non-decisions as a sequence of wrongful acts, each giving rise to a separate limitations period.
- The approach "strikes an appropriate balance by respecting the important interests served by limitations periods while preserving a litigation vehicle that can provide accountability and generate compensation for injuries." *Collis*, 287 A.3d at 1205.

Laches

- *Lebanon County Employees' Retirement Fund v. Collis*, 287 A.3d 1160 (Del. Ch. 2022) (applying separate accrual approach to Red Flags claims and *Massey* claims).
- *Ontario Provincial Council of Carpenters' Pension Trust Fund v. Walton*, 294 A.3d 65 (Del. Ch. 2023) (applying separate accrual approach to Information Systems claims under *Caremark* prong 1).

Parting Thoughts on *Caremark* and *Massey*

- A *Massey* claim requires a knowing positive violation of law and is a rare bird.
- Monday-morning quarterbacking of a Board of Directors' management of business risk does not make for a strong *Caremark* claim.
- What would a *Caremark* or *Massey* trial look like?

Entire Fairness Litigation—Recent Developments

Entire Fairness Standard – *Overview*

- Delaware corporate law's most rigorous standard of review.
- Applies by default where a controlling stockholder stands on both sides of a transaction.
- Shifts the burden to the defendant to show the transaction was entirely fair to the corporation and its stockholders.
- Liability for the controller after trial is not a given.
- Encompasses an analysis of the two prongs of fair process and fair price.
- Not all roads lead to fair price, but it can take a commanding presence in the analysis.

BGC and *Tesla*

***In re BGC Partners, Inc. Derivative Litigation*, 2022 WL 3581641 (Del. Ch. Aug. 19, 2022), *aff'd* 2023 WL 5127340 (Del. Aug. 10, 2023)**

- Demonstrates that defendants can prevail under entire fairness despite "defects in the process" if the record reflects strong evidence of fair price and an independent special committee negotiating process.
- Emphasizes that the special committee must be independent and have the authority to engage independent advisors.

***In re Tesla Motors, Inc. Stockholder Litigation*, 2023 WL 3854008 (Del. June 6, 2023) (affirming Court of Chancery post-trial decision, 2022 WL 1237185 (Del. Ch. Apr. 27, 2022))**

- Discusses the role of special committees and majority-of-the-minority voting provisions in protecting stockholders, an interesting history starting with ***Kahn v. M&F Worldwide Corp.***, 88 A.3d 635 (Del. 2014).
- Shows that the entire fairness standard is not insurmountable for a controlling stockholder.

Special Committees After *BGC* and *Tesla*

- Forming a Special Committee remains the optimal path.
  - Where independent, informed and well-functioning, a special committee can replicate arms' length bargaining with a controller.
- The use of a Special Committee provides an opportunity to minimize litigation costs at the front end, potentially avoiding the need for a trial.
- Controllers that involve themselves in the Special Committee's process or selection of advisors will be scrutinized and viewed in a dim light.

Questions?

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DELAWARE COURT OF CHANCERY PROCESS AND CORPORATE LAW UPDATE: A CONVERSATION WITH PRACTITIONERS AND VICE CHANCELLOR SAM GLASSCOCK, III AND MAGISTRATE IN CHANCERY BONNIE W. DAVID

Lauren K. Neal

September 12, 2023

Section 220: Procedural and Substantive Developments

Morris Nichols
ARSHT & TUNNELL

Section 220: Procedural Developments

- Under 10 *Del. C.* § 372, unless prohibited by statute, "the Court of Chancery may, in any cause pending in the Court of Chancery of this State, appoint a Magistrate in Chancery."
  - *See also DiGiacobbe v. Sestak*, 743 A.2d 180, 182 (Del. 1999) ("[A] judge of the Court of Chancery may appoint a master to hear and evaluate all of the claims presented in an entire case unless otherwise provided by statute or rule of court.").
- On April 4, 2023, Chancellor McCormick started assigning Magistrates to hear several books and records actions by filing a letter on the docket.

Section 220: Procedural Developments

Dear Counsel:

This action has been assigned to Master David.

Actions filed pursuant to 8 *Del. C.* § 220 are summary in nature. Accordingly, this court attempts to resolve them within ninety days, unless the plaintiff states that expedition is not required or the parties stipulate to a stay or extension of deadlines to permit an amicable resolution of the dispute. Absent a communication to this effect, the instructions set forth below apply.

The parties shall confer on a schedule designed to resolve this action before the Master within sixty days and submit a proposed schedule within one week of this Order. The faster schedule is warranted to permit a resolution of this action on a summary basis in view of the exceptions process permitted by Court of Chancery Rule 144. If the parties seek a more leisurely schedule, then they should strongly consider agreeing to submit this matter to the Master for a final decision that shall not be subject to further

Section 220: Procedural Developments

judicial review in accordance with Rule 144(h). The parties may so stipulate using the following language, filed in a Stipulation And Proposed Order For Final Resolution By The Master In Chancery:

> The parties hereby agree that, subject to approval by the Court, the above-captioned action shall be submitted to a Master in Chancery for a final decision under Court of Chancery Rule 144(h). The parties hereby waive the right to seek further judicial review of the Master in Chancery's decision at the trial level and confirm their understanding that the Master in Chancery's final decision will be subject to direct appeal to the Delaware Supreme Court, under all applicable rules. In making this stipulation, each party has either consulted with counsel or been notified of the right to consult with counsel and declined to do so.

In all events, unless otherwise permitted by the Master, all exceptions to interlocutory reports prepared by the Master are stayed under Rule 144(d).

When negotiating a schedule, the parties should be mindful that pleading-stage motions are generally disfavored by this court in summary proceedings. The assigned Master is likely to deny a proposed schedule that contemplates case-dispositive motions unless the parties demonstrate that there is a compelling need or extraordinary circumstances. The parties should further be aware that Section 220 actions are often resolved on a paper record without the need for extensive discovery or a trial with live testimony. Where discovery is permitted, the discovery requests strike at limited issues. Likewise, the scope of evidence permitted at a live trial will be limited.

To further streamline this summary proceeding, the parties shall meet and confer within a week of the issuance of this letter to attempt to minimize the scope of disputes presented to the Master. During the meet and confer, the defendant shall identify any defenses it intends to assert to each category of documents and the location of such

document. If documents responsive to any category do not exist, the defendant shall so state. If the defendant objects to inspection on grounds of volume or burden, the defendant shall provide evidence of the volume and burden of documents sought. The above list of issues to be raised during the meet and confer is not exhaustive. The parties may and should raise other issues if doing so will minimize the number and scope of disputes.

IT IS SO ORDERED.

Sincerely,

/s/ Kathaleen St. J. McCormick

Chancellor

Section 220: Substantive Developments

- ***Wilkinson v. Schulman* is still alive.**
  - In *Simeone v. Walt Disney Company*, a stockholder sought books and records, "assert[ing] that Disney's directors and officers may have breached their fiduciary duties to the company and its stockholders by opposing HB 1557." 2023 WL 4208481, at *1 (Del. Ch. June 27, 2023). Although "Disney produced certain board minutes and corporate policies[,]" the stockholder filed suit. *Id.*
  - The Court held in favor of the company after a trial on a paper record: "The plaintiff and his counsel may disagree with Disney's position on HB 1557. But their disagreement is not evidence of wrongdoing. Regardless, the plaintiff has all necessary and essential documents relevant to his purpose." *Id.*
  - In so holding, the Court not only found that the plaintiff had not met his burden to show a credible basis from which to infer possible wrongdoing, but the Court also found that "the purposes described in the demand [we]re not the plaintiff's own purposes." *Id.* at *7.
    - "In rare circumstances, a defendant can prove that a stockholder lacks a proper purpose where 'the purposes for the inspection belong to [the stockholder's counsel]' rather than the stockholder himself. Disney has prevailed in making that showing here." *Id.* (quoting *Wilkinson v. A. Shulman, Inc.*, 2017 WL 5289553, at *2 (Del. Ch. Nov. 13, 2017).

Section 220: Substantive Developments

- **Be mindful when applying redactions.**
  - "This court has acknowledged that when producing books and records, a company may redact 'material unrelated to the subject matter of the demand.'" *In re McDonald's Corp. Stockholder Deriv. Litig.*, 291 A.3d 652 (Del. Ch. 2023) (citation omitted); *see also Ontario Provincial Council of Carpenters' Pension Trust Fund v. Walton*, 2023 WL 3093500, at *3 (Del. Ch. Apr. 26, 2023) (same).
  - But in *McDonald's*, the Court stated:
    - "When the documents from a Section 220 production contain gaps, a plaintiff can seek inferences about what the redacted material might say. A court can credit those inferences, and that outcome could be worse for the defendants than if the Company had produced the documents without redactions." *McDonald's* at 697.
    - "Alternatively, a court can convert the motion to dismiss into a motion for summary judgment and allow some level of discovery before adjudicating the motion. Full-blown merits discovery need not follow. A court can tailor the extent of discovery to the needs of the case. Requiring some measure of discovery beyond the Section 220 documents, perhaps including electronic documents and depositions from a limited number of custodians, both provides a more thorough record and creates an additional incentive for companies not to misuse the redaction tool." *Id.*
  - And in *Walton*, the Court stated:
    - "For a typical document [with extensive redactions], one possible inference is that the substance of the discussion and any decision would favor the plaintiffs' theory of the case. Another possible inference is that the substance of the discussion and any decision would favor the defendants' position. At this stage [motion to dismiss], the court must draw the inference that favors the plaintiffs." *Walton* at *3.

Section 220: Substantive Developments

- **Fee-shifting continues post-*Gilead*.**
  - *Seidman v. Blue Foundry Bancorp*, 2023 WL 4503948 (Del. Ch. July 7, 2023) (ordering fee-shifting).
  - *Bruckel v. TAUC Holdings, LLC*, 2023 WL 116483 (Del. Ch. July 17, 2023) (ordering fee-shifting).
  - *See also Myers v. Academy Securities, Inc.*, 2023 WL 4782948 (Del. Ch.) (July 27, 2023) (granting leave to brief fee-shifting motion).
  - *But see Dearing v. Mixmax, Inc.*, 2023 WL 2632476 (Del. Ch. Mar. 23, 2023) (Order) (denying fee-shifting).

Section 220: Substantive Developments

- **The Supreme Court speaks on confidentiality restrictions.**
  - The Supreme Court recently considered an appeal "concern[ing] the extent to which a Delaware corporation's production of books and records under Section 220 of the Delaware General Corporation Law should be subject to confidentiality restrictions." *Hauppauge Digital, Inc. v. Rivest*, 2023 WL 4440279, at *1 (Del. July 10, 2023) (Table).
  - The Court of Chancery ordered the company to produce documents free of any confidentiality restrictions, holding that under *Tiger v. Boast Apparel, Inc.*, 214 A.3d 933 (Del. 2019), "the Section 220 production was not subject to a presumption of confidentiality and that 'the Company failed to provide a credible basis for a threat of harm sufficient to warrant a confidentiality restriction.'" *Id.* at *2.

Section 220: Substantive Developments

- The Supreme Court affirmed the Court of Chancery.
- "Section 220 vests the Court of Chancery with discretion to 'prescribe any limitations or conditions with reference to' a books-and-records inspection[,]" which is "a context-driven balancing exercise, the result of which will not be disturbed on appeal unless clearly unreasonable or capricious." *Id.* (quoting 8 *Del. C.* 220(c)(3)).
  - *See also id.* at *4 ("[T]he Court of Chancery exercises its discretion under Section 220 when applying the *Tiger* balancing test; neither the corporation nor the stockholder has an evidentiary burden under *Tiger*.").
- After summarizing its holding in *Tiger*, as well as the Court of Chancery's reasoning, the Supreme Court held that the Court of Chancery had faithfully applied *Tiger's* balancing test. *Id.*

Section 266: Companies that move to Nevada, stay in Nevada? (*Tripadvisor*)

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Section 266: Corporations that move to Nevada, stay in Nevada?

- Section 266 of the DGCL provides:
  - "A corporation of this State may, upon the authorization of such in accordance with this section, convert to…a foreign corporation."
  - "The board…shall adopt a resolution approving such conversion…."
  - "Such resolution shall be submitted to the stockholders of the corporation at an annual or special meeting."
  - "If a majority of the outstanding shares of stock of the corporation, entitled to vote thereon shall be voted for the adoption of the resolution, the conversion shall be authorized…."
    - Pre-2022 amendment, Section 266 required unanimity.

Section 266: Corporations that move to Nevada, stay in Nevada?

- Two Delaware corporations, Tripadvisor, Inc. ("Tripadvisor") and Liberty TripAdvisor Holdings, Inc. ("Liberty TripAdvisor"), sought to become Nevada corporations.
- There is no dispute they complied with Section 266.
  - Each conversion was approved by the company's board.
  - Each conversion was approved by the majority of the voting power of the company's stock.
    - The companies' proxy statements disclosed reasons for the conversions.
    - A relatively small percentage of the companies' minority stockholders voted in favor of the conversions.

Section 266: Corporations that move to Nevada, stay in Nevada?

- Reasons for the conversions (from proxy statements):
  - Savings of about $250,000 per year in franchise taxes.
  - Attraction and retention of "qualified management by reducing the risk of lawsuits being filed against us and our directors and officers."
  - "[P]otentially greater protection from unmeritorious litigation for our directors and officers."

Section 266: Corporations that move to Nevada, stay in Nevada?

- Purported stockholders of Tripadvisor and Liberty TripAdvisor filed a class action complaint in the Court of Chancery, which they then amended after receiving books and records. *See Palkon, et ano. v. Maffei, et al.*, C.A. No. 2023-0449-JTL (Del. Ch.).
- Plaintiffs assert claims for breach of fiduciary duty against Gregory Maffei, as purported controlling stockholder of both companies (Counts I, III), and claims for breach of fiduciary duty against both companies' boards (Counts II, IV).
- Plaintiffs seek to enjoin the conversions.
  - A status quo order is currently in place.

Section 266: Corporations that move to Nevada, stay in Nevada?

- Defendants have moved to dismiss the amended complaint.
  - For purposes of the motion, Defendants do not contest that Maffei is a controlling stockholder.
- The key issue is what standard of review will apply: business judgment rule or entire fairness.

Section 266: Corporations that move to Nevada, stay in Nevada?

- Plaintiffs argue:
  - Even though the conversions technically complied with Section 266, the Court still must evaluate whether they were equitable.
  - Because Plaintiffs have pled that the conversions would provide a non-ratable benefit to Maffei and the other directors, entire fairness applies.
    - "The key dispute that the Court must resolve is whether, as Defendants claim, a controller obtains a non-ratable benefit only when 'a transaction…extinguishes *existing* potential liability' or whether, as Plaintiffs contend, a controller may also obtain a non-ratable benefit from a transaction that effectively extinguishes, forever, any risk of *future* liability for fiduciary misconduct. At the pleadings stage, the Court should find it reasonably conceivable that…a permanent get-out-of-jail-free card is a non-ratable benefit." AB at 27 (citations omitted).
  - It is inappropriate to grant a motion to dismiss when entire fairness applies "because the burden is on the defendants to develop facts demonstrating entire fairness." *Id.* at 42 (citation omitted).

Section 266: Corporations that move to Nevada, stay in Nevada?

- Defendants argue:
  - Because Plaintiffs have not pled that the conversions would provide a non-ratable benefit to Maffei and the other directors, the facts pled are insufficient to rebut the business judgment rule.
  - "There is no pending or proposed controlling stockholder transaction that would be affected by the Conversions, and there is no existing potential liability that would be extinguished by the Conversions." RB at 5.
  - Plaintiffs' argument "that the mere fact that Nevada law might make it more difficult for a stockholder to challenge potential future transactions or conduct is [not] enough to plead a nonratable benefit today." *Id.*

Section 266: Corporations that move to Nevada, stay in Nevada?

- What's next?
  - Motion to dismiss was fully briefed as of August 18.
  - There's no indication on the docket when oral argument will occur.

Section 242: Class Voting (*Fox* & *Snap*)

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Section 242: Class Voting

- Section 242(b)(2) of the DGCL provides:
  - "The holders of the outstanding shares of a class shall be entitled to vote as a class upon a proposed amendment, whether or not entitled to vote thereon by the certificate of incorporation, if the amendment would increase or decrease the aggregate number of authorized shares of such class, increase or decrease the par value of the shares of such class, or alter or change the powers, preferences, or special rights of the shares of such class so as to affect them adversely."

Section 242: Class Voting

- The boards of two Delaware corporations, Fox Corporation ("Fox") and Snap Inc. ("Snap"), approved amendments to their charters to provide exculpation for officers under the newly amended Section 102(b)(7).
  - Fox has two classes of common stock. Fox's Class B stockholders approved the adoption of the amendment.
  - Snap has three classes of common stock. Snap's Class C stockholders acted by written consent to approve the amendment.

Section 242: Class Voting

- Purported stockholders of Fox and Snap filed class action complaints in the Court of Chancery. *See Elec. Workers Pension Fund Local 103, I.B.E.W. v. Fox Corp.*, C.A. No. 2022-1007-JTL (Del. Ch.); *Sbroglio v. Snap, Inc.*, C.A. No. 2022-1032-JTL (Del. Ch.).
- Plaintiffs assert claims for violation of Section 242(b)(2) because there was not a separate class vote on the charter amendments.
- Plaintiffs seek declarations that the charter amendments violated Section 242(b)(2) and are void.

Section 242: Class Voting

- Plaintiffs and Defendants cross-moved for summary judgment.
- On March 29, the Court issued a 70-page bench ruling in favor of Defendants.
  - The Court granted the defendants' motion and denied the plaintiffs', "view[ing] this case as controlled by two precedents": (i) the Supreme Court's 1942 decision in *Dickie Clay*, and (ii) the Court of Chancery's 1997 decision in *Orban*. Tr. at 4. "Fealty to those precedents dictates the outcome." *Id.*
  - But, the Court noted: "I am sympathetic to the plaintiff's arguments. Were I writing on a blank slate and being asked to determine the plain meaning of Section 242(b)(2) without the interpretive glosses of *Dickie Clay* and *Orban*, I think the plaintiff's position would be a quite strong one." *Id.*
- On April 12, Plaintiffs appealed. The parties agree that review is *de novo*.

Section 242: Class Voting

- On appeal, Plaintiffs argue:
  - The charter amendments required separate class votes under Section 242(b)(2).
    - "The statute's plain language compels that a charter amendment depriving stockholders of the ability to hold officers liable for certain breaches of the duty of care adversely affects the stocks 'powers.'" Appeal OB at 8.
    - Versus Defendants' argument: "[T]he triad of 'powers, preferences, or special rights' in Section 242(b)(2) refers to the 'peculiar' class-based interests of shares of a class designated under Section 151 that 'serve[] to distinguish them from shares of another class.'" Appeal AB at 16 (citing *Dickey Clay* and *Orban*).
  - *Dickey Clay* and *Orban* do not dictate the outcome of the case.
  - Market expectations did not mandate the trial court's holding.

Section 242: Class Voting

- What's next?
  - The appeal was fully briefed as of July 17.
  - Oral argument before the Court *en Banc* is set for October 18.
- What happens if the Supreme Court reverses?
  - Plaintiffs have suggested that companies could use Section 205.

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A REVIEW OF RECENT & RELEVANT CASES ADDRESSING *CAREMARK* CLAIMS

1. *In re Facebook, Inc. Derivative Litigation*, No. 2018 -0307-JTL (Del. Ch. May 10, 2023) (TRANSCRIPT) (Vice Chancellor Laster)

Background: Facebook had developed a system that allowed third-party applications to view personal data of Facebook users and their friends without their knowledge or consent. Facebook also implemented a program called "Instant Personalization" that allowed third-party applications to pay Facebook to receive instant access to users' private information whenever the users connected to third-party websites. Facebook also maintained data-sharing partnerships allowing manufacturers to access devices and obtain users' information and the friends of users' personal information, including sensitive subjects such as religious and political views, work and educational history, and relationship status, all without knowledge or consent. The practices led to the FTC filing a complaint against Facebook. Ultimately, Facebook and the FTC resolved the matter in 2012 through Facebook agreeing to a consent order requiring Facebook end its illegal privacy practices. In addition, and among other requirements, Facebook and its representatives were required to establish, implement, and thereafter maintain a comprehensive privacy program designed to address privacy risks.

However, less than three months after entering into the 2012 consent order, the two top officers at Facebook, and other Facebook leadership violated the consent order and continued to do so regularly for the following years. A variety of red flags were brought to the attention of the board of directors that indicated that Facebook was not complying with the consent order, including

the Cambridge Analytica Scandal that broke in 2018 which led to the board of directors agreeing to $5.5 billion fine.

Facebook's stockholders filed a derivative action based in *Caremark* and *Massey* contending that Facebook's senior officers and directors breached their fiduciary duties by either causing Facebook to engage illegal conduct or consciously allowing Facebook to engage in illegal conduct. Defendants moved to dismissed under Rule 23.1 and 12(b)(6).

Decision: The Court determined that the complaint was similar to *Massey* and *AIG* because "it support[ed] a pleading-stage inference that management [was] operating an enterprise based on recidivous law breaking." The Court explained that the directors "were on notice of the law breaking" and "either affirmatively went along with it or consciously disregarded it." Specifically, the Court explained that "the 2012 consent order required that the illegal practices be stopped. The company didn't do that; the company did the opposite. The company engaged in whitelisting. The company failed to enforce restrictions. The company inferably lied to government regulators and legislative assemblies." The Court ultimately held that demand was futile as to the *Massey* and Red-Flags claim after evaluating each board member one by one.

2. *Ontario Provincial Council of Carpenters' Pension Trust Fund v. Walton*, 2023 WL 3093500 (Del. Ch. Apr. 26, 2023) (Demand Decision) (Vice Chancellor Laster)
&
***Ontario Provincial Council of Carpenters' Pension Trust Fund v. Walton*, 294 A.3d 65 (Del. Ch. 2023) (Laches Decision) (Vice Chancellor Laster)**

Background: Walmart's pharmacy chain dispensed prescription opioids and acted as a wholesale distributor for its pharmacies. The company's involvement with prescription opioids led to various lawsuits claiming Walmart had not met its obligations under the federal Controlled Substances Act. In 2011, the company had also entered into an undisclosed Settlement Agreement with its primary regulator, the U.S. Drug Enforcement Administration (DEA).

After an 8 *Del. C.* § 220 investigation, the plaintiffs, stockholders of Walmart, brought suit claiming that Walmart's directors and officers had breached their fiduciary duties of oversight under *Caremark* by having knowingly caused the company to fail to comply with (i) its legal obligations with respect to its dispensing of opioids (the "Pharmacy Issues"); (ii) its legal obligations with respect to its distribution of opioids (the "Distributor Issues"); and (iii) the terms of the DEA Settlement (the "DEA Settlement Issues"). The defendants moved for dismissal arguing that the plaintiffs' claims were time barred, that the plaintiffs had not established demand futility under Court of Chancery Rule 23.1, and that the claims against two of the officer defendants should be dismissed under Court of Chancery Rule 12(b)(6).

Laches Decision: The Court held that the separate accrual approach is the appropriate method for determining when Information Systems claims accrue,

given "the developing and ongoing nature of the claim." This was consistent with the Court of Chancery's prior holding that the separate accrual approach applies to Red Flags and *Massey* claims. Applying the separate accrual approach to each of the Pharmacy Issues, the Distributor Issues and the DEA Settlement Issues, the Court found that all of the plaintiffs' claims were timely brought. Vice Chancellor Laster explained that "[t]he court can only apply the defense of laches at the pleading stage if it is clear from the face of the complaint that the claims are time-barred." As a result, the motion to dismiss as to timeliness was denied.

Demand Decision: According to the Court, the pleading-stage record supported the existence of a business plan to drive prescription traffic to Walmart's pharmacies as a means of increasing pharmacy revenue and getting customers into its stores. The record also supported an inference that Walmart incentivized pharmacists to fill prescriptions quickly, set unrealistic goals for the time to fill each prescription, and deprived pharmacists of information that they could use to fulfill their Refusal-To-Fill Obligation. During the same period, Walmart underfunded its efforts to comply with the DEA Settlement, all of which supported an inference that the board of directors was sacrificing compliance for profits. Thus, the motion was denied as to the DEA Settlement Issues and the Pharmacy Issues. The motion was granted as to the Distributor Issues because plaintiffs failed to tie those claims to the board of directors considering demand.

3. *In re McDonald's Corp. Stockholder Derivative Litigation*, 291 A.3d 652 (Del. Ch. 2023) (Director Decision) (Vice Chancellor Laster)
&
***In re McDonald's Corp. Stockholder Derivative Litigation*, 289 A.3d 343 (Del. Ch. 2023) (Officer Decision) (Vice Chancellor Laster)**

Background: McDonald's stockholders alleged that the company's directors and officers had breached their fiduciary duties arising out of an officer's inappropriate conduct with employees and for failing to exercise adequate oversight in response to repeated sexual harassment and misconduct at McDonald's.

Director Decision: The Court granted the motion to dismiss derivative claims against McDonald's directors relating to their alleged failure to address sexual harassment issues at the company. The Court emphasized how hard it is to plead *Caremark* claims, while also observing that directors have an obligation to monitor not just "mission critical" issues but all "central compliance risks." However, the complaint failed to effectively allege that the board acted improperly when it addressed the sexual harassment issues at the company. The board's decisions on how to address the alleged red flags were protected by the business judgment standard of review.

Officer Decision: The officer defendants' motion to dismiss was denied because the plaintiff sufficiently alleged that the officer knew of the sexual harassment and misconduct in the corporation and failed to address red flags. This case was the first Delaware decision expressly holding that corporate oversight duties apply to not just directors but also to officers. The Court observed that the major reasons identified by Chancellor Allen in *Caremark*

for imposing oversight obligations on directors apply equally – if not more so – to corporate officers. The Court explained that "[o]fficers are an essential link in the corporate oversight structure," and providing upward information and identifying red flags to the board are "indispensable part[s] of an officer's job."

4. *Lebanon County Employees' Retirement Fund v. Collis*, 2022 WL 17841215 (Del. Ch. Dec. 22, 2022) (Demand) (Vice Chancellor Laster)
&
***Lebanon County Employees' Retirement Fund v. Collis*, 287 A.3d 1160 (Del. Ch. 2022) (Laches) (Vice Chancellor Laster)**

Background: One of the largest wholesale distributors of opioids, AmerisourceBergen, faced a variety of investigations, enforcement actions, and litigation arising from its opioid distribution business practices. In 2021, the company agreed to pay over $6 billion as part of a nationwide resolution of multidistrict litigation. Plaintiffs, stockholders of AmerisourceBergen, brought a Red Flags claim and a *Massey* claim after conducting an 8 *Del. C.* § 220 investigation. Plaintiffs alleged that the company's board knowingly implemented a revised monitoring program but the new program actually served to further reduce suspicious opioid order reporting.

Laches Decision: Defendants argued that laches barred fiduciary duty claims against AmerisourceBergen's directors and officers relating to the company's distribution of opioids, and that the claims should be dismissed. Addressing an issue of first impression, the Court decided to apply a "separate accrual" analysis to the *Caremark* claims. The separate accrual analysis views "a series of related decisions and conscious nondecisions as a sequence of wrongful

acts, each of which gives rise to a separate limitations period." The Court described the approach as "a Goldilocks regime that falls in between a too-defendant-friendly discrete act approach and a too-plaintiff-friendly continuing wrong approach." Under this approach, "the plaintiff can prove liability and recover for acts that occurred during the limitations period, even if other aspects of the ongoing conduct occurred outside of the limitations period." Accordingly, the Court held the plaintiffs' claims were timely filed.

Demand Decision: The Court dismissed the plaintiffs' claims for breach of fiduciary duty. Although the Court found that the complaint sufficiently pled *Massey* and Red Flag claims, a post-trial decision from a West Virginia federal court previously found that the AmerisourceBergen defendants did not violate their anti-diversion obligations. Based on the federal court finding, the Court of Chancery deemed that it was not reasonably conceivable that the AmerisourceBergen board could be liable in the Delaware litigation.

5. *Construction Industry Laborers Pension Fund v. Bingle*, 2022 WL 4102492 (Del. Ch. Sept. 6, 2022), *aff'd* 2023 WL 3513271 (Del. May 17, 2023) (Vice Chancellor Glasscock)

Background: Plaintiffs brought suit after SolarWinds (a software company) suffered a cyberattack. The plaintiffs claimed that the board failed to "monitor corporate effort in [a] way that prevented cybercrime."

Decision: Although the Court found cybersecurity to be "mission critical" for SolarWinds, it dismissed the claim because, based on the allegations, the director defendants (1) did not allow the company itself to violate positive law; (2) ensured the company had at least a minimal reporting system regarding

corporate risk, including cybersecurity; and (3) did not ignore sufficient red flags of cyber threats to imply a conscious disregard of their known duties. The decision acknowledged that no case in Delaware had previously imposed oversight liability based "solely on failure to monitor business risk"; it noted the "increasing importance of cybersecurity" and that it is "possible" to conceive of an "extreme hypothetical" that could lead to liability, such as where directors act in bad faith regarding such a risk.

6. *City of Detroit Police & Fire Retirement System ex rel Nisource, Inc. v. Hamrock*, 2022 WL 2387653 (Del. Ch. June 30, 2022) (Chancellor McCormick)

Background: Plaintiffs, stockholders of Nisource, Inc., brought claims under both *Caremark* prongs after a series of explosions occurred in a pipeline run by the company.

Decision: The Court rejected the Information Systems Claim (e.g., *Caremark* prong one) because books and records obtained by the plaintiffs demonstrated that the board established a system for monitoring and reporting on the "mission critical" risk of pipeline safety, which "demonstrate[d] the existence of a system rather than its absence." Plaintiffs brought both *Massey* and Red Flags claims under prong two of *Caremark*. The *Massey* claim was rejected because plaintiffs failed to allege a violation of positive law. The allegations only supported the inclination that the directors' timeline to bring the company into compliance was longer than what may be considered optimal, and although the plan was "regrettable" it was a "legitimate business decision" and not bad faith. The Red Flags claim was rejected because the alleged red flags

were unrelated to the explosions and never made it to the board level. The defendants' motion to dismiss was granted.

7. *Firemen's Retirement System of St. Louis v. Sorenson*, 2021 WL 4593777 (Del. Ch. Oct. 5, 2021) (Vice Chancellor Will)

Background: Marriott discovered a data breach in a reservation database it had acquired two years prior. The cyber issue had gone undetected for an extended period of time and caused the exposure of personal information of its guests. The plaintiff, a Marriott stockholder, brought a derivative claim for breach of the fiduciary duty of loyalty against several Marriott executives and members of the Marriott board of directors. Plaintiff alleged that members of the board failed to conduct adequate cybersecurity due diligence before the acquisition, failed to implement adequate internal controls after the acquisition, and were late in disclosing the cyber incident. Defendants moved to dismiss, arguing demand was not futile.

Decision: The Court rejected each of the three arguments. The due diligence theory was rejected as time barred. The second argument, which was rooted in *Caremark*, was rejected because the Court determined that the flawed effort by the board did not amount to a deliberate failure to act in the face of red flags or knowledge of positive law violations. The board of directors and audit committee were routinely apprised of cyber issues, sought advice from outside consultants, were notified of potential red flags. The Court also determined that the board of directors did not delay disclosure in a material way. Accordingly, demand was not futile and the claims were dismissed.

8. *Teamsters Local 443 Health Services & Insurance Plan v. Chou*, 2020 WL 5028065 (Del. Ch. Aug. 24, 2020) (Vice Chancellor Laster)

Background: Stockholder plaintiffs alleged that a wholly owned subsidiary of AmerisourceBergen ("Pharmacy") "was run like a criminal organization." Plaintiffs alleged that Pharmacy operated in a way that appeared as if it were a state-licensed pharmacy, although it was not, to purposely avoid the Food and Drug Administration (FDA)'s oversight. Pharmacy's business was to buy single-dose sterile vials of oncology drugs, put those drugs into syringes, and sell them to cancer patients. Plaintiffs claimed Pharmacy bought the single-dose vials knowing that they were intentionally overfilled by the manufacturer, and rather than discarding this overfill, Pharmacy illegally "pooled" the overfill and used it to fill additional syringes. While the process led to a host of issues including contamination of the pooled drugs, the company was able to use the "extra" product to gain additional revenue. Plaintiff brought claims under both prongs of *Caremark*.

Decision: The Court viewed the company's failure to ensure safety of the healthcare product as a "mission critical compliance risk." The court explained that even if the pharmacy business was only responsible for a small portion of the company's overall revenue, compliance with FDA regulations is a primary focus for the company and its pharmacy business. Additionally, the Court concluded there were numerous red flags raised and ignored by the board of directors, including reports from outside counsel indicating a need for centralized compliance and reporting, inadequate tracking of compliance and ethics processes, inadequate accountability for compliance violations, other

law suits, subpoenas, and an FDA search warrant. As a result, the Court denied the motion to dismiss on all counts.

9. *Hughes v. Hu*, 2020 WL 1987029 (Del. Ch. Apr. 27, 2020) (Vice Chancellor Laster)

Background: In 2014, the company publicly announced that there were issues with its financial reporting and oversight system that it planned to fix. Three years later, however, the company disclosed that three years' worth of financial statements would need to be restated because there were various issues regarding their accuracy, completeness, and a failure to properly account for taxes. Plaintiffs, stockholders of Kandi Technologies Group, Inc., brought *Caremark* claims asserting that the board of directors failed to conduct proper oversight of the company's reporting processes.

Decision: The Court determined the allegations supported a pleading-stage inference that "the Company's Audit Committee met sporadically, devoted inadequate time to its work, had clear notice of irregularities, and consciously turned a blind eye to their continuation." The Court also concluded that "[T]he Company suffered from pervasive problems with its internal controls, which the Company acknowledged in March 2014 and pledged to correct. Yet after making that commitment, the Audit Committee continued to meet only when prompted by the requirements of the federal securities laws. When it did meet, its meetings were short and regularly overlooked important issues."

The Court sustained the claims, finding that "chronic deficiencies" in internal controls over financial reporting "support[ed] a reasonable inference that the

Company's board of directors, acting through its Audit Committee, failed to provide meaningful oversight over the Company's financial statements and system of financial controls."

10. *In re Clovis Oncology, Inc. Derivative Litig*ation, 2019 WL 4850188 (Del. Ch. Oct. 1, 2019) (Vice Chancellor Slights)

Background: Plaintiffs, stockholders of Clovis Oncology, Inc. alleged that the publicly traded biopharmaceutical firm, focused on acquiring, developing and commercializing cancer treatments, "ignored multiple warning signs" that management was inaccurately reporting the efficacy of a trial drug in violation of internal trial protocols and related FDA regulations with respect to a product that was "intrinsically critical to the [C]ompany's business operation."

Decision: The Court concluded that "when a company operates in an environment where externally imposed regulations govern its 'mission critical' operations, the board's oversight function must be more rigorously exercised." Because "protocols and related FDA regulations" governing the company's clinical trial were "mission critical regulatory issues" for the company's "mission critical product," the Court was satisfied that, at the pleading stage, the plaintiffs had pled the board consciously ignored red flags by failing to correct the Company's reporting. Accordingly, the Court denied defendants' motion to dismiss.

A REVIEW OF RECENT & RELEVANT CASES ADDRESSING ENTIRE FAIRNESS

1. *In re Tesla Motors, Inc. Stockholder Litigation*, ,-- A.3d --, 2023 WL 3854008 (Del. June 6, 2023) (Delaware Supreme Court)

Background: In this appeal of a post-trial Court of Chancery opinion, Tesla, Inc. stockholders claimed that Tesla CEO Elon Musk caused Tesla to overpay for SolarCity Corp. through his alleged control and domination of the Tesla board. Their main theory at trial was that SolarCity was insolvent at the time of the acquisition.

Procedural History: Then-defendants, Musk (now-appellee) and the Tesla board members, moved to dismiss in the trial court under Corwin v. KKR Financial Holdings LLC, 125 A.3d 304 (Del. 2015), and then-plaintiffs (now appellants) opposed, arguing Musk was Tesla's controlling stockholder, and Corwin therefore didn't apply. The trial court denied the motion to dismiss, noting that it was a "close call," but it was "reasonably conceivable" that Musk was the controlling stockholder (though a minority blockholder) and exerted control over the board in connection with the acquisition. The trial court established entire fairness as the standard of review.

Both sides moved for summary judgment, which the court denied, holding that genuine issues of material fact existed as to whether Musk was Tesla's controlling stockholder. The parties reached a settlement as to all of the then-defendants other than Musk. After trial, the Court of Chancery found that Musk had satisfied the entire fairness requirements, so the deal was acceptable.

In terms of fair dealing, the court found that any control Musk may have attempted to exert regarding the acquisition was "effectively neutralized by a board focused on the bona fides of the Acquisition, with an indisputably independent director leading the way." The court noted the process strengths, such as the inclusion of a majority-of-the-minority stockholder vote provision, which pointed in favor of fair dealing despite the road to the acquisition not being entirely smooth. In terms of fair price, the trial court found that Musk prevailed in establishing the price was fair, and that SolarCity was not insolvent as appellants argued and derived its value from long-term cash flows. Plaintiffs-below appealed, raising only a legal challenge focused on the application of the entire fairness standard and its focus on fair price and contending that as a result of the trial court's decision, boards will be disincentivized from using any Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014) protections in the future.

The Supreme Court affirmed the Court of Chancery's findings that the transaction passed muster under the entire fairness test.

Findings on Appeal: The Supreme Court first focused on the entire fairness standard of review, the applicability of which the parties did not challenge. The Court acknowledged that entire fairness is a "unitary" test that requires trial court to scrutinize both fair dealing and fair price. The court had correctly assumed that Musk had the burden of proof.

The Court then moved on to the trial court's fair dealing analysis, holding the trial court did not err in its fair dealing analysis. The Court noted that the element of fair dealing focuses on the conduct of corporate fiduciaries in

effectuating a transaction. Strong indicators of fair dealing are arms' length negotiations, the use of a special committee, majority-of-the-minority voting provision, and fair process, which "usually results in a fair price." The Court held that the trial court had made a finding of fair dealing supported by the record. The factors laid out in Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983) form the court's fair dealing analysis. The Court applied the Weinberger factors as follows even though the trial court hadn't done so:

(i) **Initiation of the acquisition**: Any control Musk may have attempted to wield was neutralized by a board operating in good faith led by an undeniably independent director; there was no inherent coercion, and in several instances the Tesla board refused to follow Musk's wishes.

(ii) **Timing of the acquisition**: The timing of the deal was a strength indicating fairness since the timing was right for Tesla, and the board waited until the time was right for the company instead of acquiescing to Musk's proposed timing.

(iii) **Structure of the acquisition**: Under *MFW*'s unified standard, in controller buyouts, business judgment applies if a process is employed that garners approval by both disinterested directors through a special committee and disinterested stockholders through a majority-of-the-minority provision, but the absence of *MFW* protections does not automatically result in a finding of liability. Tesla should have formed a special committee, but they paid the price for not doing so by being subjected to entire fairness, and it was laudable that they included a majority-of-the-minority provision.

(iv) **Negotiation of the acquisition**: While there were some process flaws, there were redeeming features emulating arms' length bargaining, like an independent director, independent advisors, Tesla making two

offers, the second being lower as a result of due diligence, the advisors insulating Musk from the process, and an awareness by the board of SolarCity's growing liquidity challenges thanks to Tesla's advisor, Evercore.

(v) **Approval of the acquisition**: The directors followed a rigorous negotiation process not dominated or controlled by Musk.

The Court also found that the trial court's finding that the stockholder vote was informed was supported by the record. It noted that most of Musk's involvement in the process was disclosed, and where it was not, when evaluated in the context of the evidence as a whole, the total mix of information provided to stockholders wasn't affected.

The Court then moved on to fair price, finding that the trial court did not err in its fair price analysis. A fair price analysis typically applies "recognized valuation standards." Despite appellants' contentions, the trial court did not apply a bifurcated entire fairness analysis; the opinion made extensive findings regarding process and recognized that entire fairness is a composite, not bifurcated, test, with fair price sometimes serving as "the most important showing" of fair process.

The Court found that the credible evidence supported the fairness of the price. Appellants argued the trial court placed too much weight on market evidence, but market evidence was only one part of the court's analysis. Appellants only pressed a single fair price valuation theory, insolvency, at trial, which the trial court rejected, leaving it to find no credible basis to conclude a fairer price was available. Meanwhile, the trial court found Musk's evidence adequately

supported a finding of fair price. The fairness opinion prepared by Tesla's investment banker was based upon multiple valuation analyses, including discounted cash flow methodologies, and it credibly demonstrated to the court that the price paid was fair. The trial court rightly considered SolarCity's liabilities, long-term cash flows, and synergistic values, as well as the overwhelming majority of Tesla stockholders voting in favor of the transaction.

The Supreme Court did find that the trial court erred in not explaining its reliance on a single-day Tesla market price or why the weight it placed on the price was warranted. The Supreme Court noted that though reliance should not be placed on a stock price that fails to account for material, nonpublic information, doing so here did not undermine the trial court's overall fair price finding, as other evidence amply supported the fair price finding.

Conclusion: Under the unitary application of the entire fairness test, the trial court rightly found that Musk proved entire fairness. The trial court considered both price and process and the effect of the flaws in the process. The Supreme Court affirmed the trial court's judgment.

2. ***In re BGC Partners, Inc. Derivative Litigation*, 2022 WL 3581641 (Del. Ch. Aug. 19, 2022) (Vice Chancellor Will), *aff'd*, 2023 WL 5127340 (Del. Aug. 10, 2023) (Order) (Delaware Supreme Court)**

Background: In this derivative action, plaintiff stockholders of BGC Partners, Inc. challenged the fairness of BGC's acquisition of Berkeley Point Financial, LLC from an affiliate of Cantor Fitzgerald, L.P. BGC purchased the entity and

simultaneously invested $100 million in the mortgage-backed securities business of a Cantor affiliate, CCRE. The plaintiffs allege that Howard Lutnick, the controlling stockholder of both BGC and Cantor, caused BGC to enter into an unfair transaction that benefitted him to the detriment of BGC's stockholders. Defendants were originally Lutnick, two Cantor entities, and the four special committee members who approved the transaction.

Procedural History: The Court of Chancery denied motions to dismiss for failure to establish demand futility and failure to state a claim at the pleadings stage. At summary judgment the Court reaffirmed that demand was excused but dismissed all special committee members except William Moran. The questions remaining at trial were breach of fiduciary duty claims against Lutnick, the Cantor entities Lutnick controlled, and Moran, as well as the question of demand futility.

The Court found that BGC's acquisition of Berkeley Point and investment in CCRE's CMBS business were entirely fair, and the Cantor defendants were thus not liable for breaches of fiduciary duty. Furthermore, Moran was not liable for breach of the duty of loyalty.

Findings: The Court first addressed the question of demand futility, a "fundamental issue in derivative litigation" and the question of whether the board should bring a lawsuit on behalf of the corporation. A director is disqualified from exercising judgment about a litigation demand if they "lack[] independence from someone who received a material personal benefit from the alleged misconduct that would be the subject of the litigation demand or who would face a substantial likelihood of liability on any of the claims that are the

subject of the litigation demand." A director can also be disqualified if faced with a "substantial likelihood of liability" on any of the claims that would be the subject of the litigation demand. The Court found that one of the directors, Curwood, was not independent for purposes of demand futility because his board service provided more than half of his household income, a material financial tie that enabled him to support his family and pursue his passions, as he acknowledged at deposition. The Court said that it was "difficult to imagine more personally motivating factors" than these. The other director, Moran, did not suffer from a lack of independence despite his respect for Lutnick; the Court found that nothing suggested his respect was "so personal" or "bias producing" that it would have clouded his judgment were he asked to sue Lutnick. However, the Court found Moran could not have impartially considered a demand because he faced a substantial likelihood of liability on certain claims that would have been the subject of the demand. Therefore, demand was excused.

The Court next moved on to its entire fairness analysis, starting with fair process. The Court acknowledged some defects in the process but noted that "[p]erfection is an unattainable standard that Delaware law does not require, even in a transaction with a controller." Analyzing the factors laid out in *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983), the Court concluded that the process, though imperfect, was ultimately fair:

(i) **Transaction initiation and timing**: Even though Lutnick initiated the deal and sought to drive its timeline, he was unsuccessful. The deal was not completed on any of his proposed timeframes, and the timing that the special committee agreed to did not disadvantage BGC's minority stockholders.

(ii) **Transaction structure**: Procedural protections such as an independent board negotiating committee is an "important indicum of fairness." Here, a "fully empowered" special committee of independent directors, advised by independent advisors, negotiated the transaction and approved it. Although Lutnick had a role in selecting the special committee's chairs, he did not dictate its membership more broadly. There was no evidence the remaining two directors lacked independence or were beholden to Lutnick during the negotiations, and they instead advocated for the stockholders. When considering the selection process of the committee's advisors, another "critical" factor, the Court noted that though Lutnick should not have been involved in selecting the committee's advisors, the firm chosen was selected by the committee and was not conflicted; in fact, the firm had actually negotiated against Lutnick in its prior work for him.

(iii) **Transaction negotiation and approval**: The special committee was well informed of the material facts when it voted, having met at least nine times, being "deeply engaged" and "very hardworking," and utilizing their bargaining power against Lutnick to obtain concessions. Though some information requested by the committee was initially held back, it was eventually shared, and the Court found "no basis to attribute illicit motives" to the decisions to withhold the information. Further, the projections utilized by the committee were not "the stuff of doctored projections or fraud"; they were Berkeley Point's best estimate, and increased projections were not "based on Lutnick's say so." The "most compelling evidence that the transaction resulted from a fair process" was the committee's achievement of a deal with the structure it preferred and that the Cantor defendants disfavored.

> Lutnick appropriately separated himself from the committee after some early meddling, and the committee bargained hard on the deal structure to achieve its goals.

Moving on to fair price, the Court found that the transaction price was fair. The Court first noted that under this analysis it looked at "the economic and financial considerations of the [transaction], including all relevant factors." A fair price analysis can draw upon generally recognized valuation techniques, though it is not a remedial calculation as under the appraisal statute. Rather, the Court of Chancery must determine whether the transaction price falls within a range of fairness. Price is the "paramount consideration" because procedural aspects indicate whether the price is far.

First, focusing on the Berkeley Point transaction, the Court found that the deal price was fair, confirmed by expert opinions and testimony. Defendants' expert provided three analyses: an event study, a comparable companies analysis, and a dividend discount model. The Court found that the event study was an "imperfect method" for assessing the value of Berkeley Point, and afforded it little weight as a result. The Court then noted that a comparable company analysis is a "standard valuation technique." However, it only found one of the defendants' expert's three approaches to provide a reliable assessment of Berkeley Point's value because the other two approaches utilized companies that were not sufficiently comparable. The Court found the figures generated by the third approach to be reliable since it used "the closest public company comparable to Berkeley Point." Finally, the dividend discount model was unreliable because it is not a dependable valuation methodology for real estate finance companies, which do not have reliable projections by nature.

The use of net income rather than cash flows to calculate return on equity is "problematic" and in turn overestimated cash and value.

Plaintiffs presented a single valuation approach, a guideline transactions method, using one comparable transaction. The Court found that plaintiffs' expert did not account for differences in Berkeley Point's growth in different years in the primary assumption underlying its methodology. Of the four multiples employed, the Court found that only one, price/book value, provided an appropriate measure of Berkeley Point's value, as it is "by far one of the most popular [multiples] for the valuation of financial institutions."

The Court found that the acquisition price fell within the fairness range created by the experts' analyses, so the price was therefore fair.

Looking at whether the investment into CCRE was financially fair, the Court found that the fact that the special committee negotiated the cost down and obtained additional downside protections indicated fairness. The Court also found the price to be fair per the experts' analyses.

Separately, the Court analyzed the sole claim remaining against Moran for breach of the duty of loyalty, holding he did not. The Court found that Moran was independent of and not "beholden" to Lutnick, and he did not act to substantially further Lutnick's interests in the transaction. Though his behavior was imperfect, perhaps even grossly negligent, he worked "tirelessly" for the special committee and was prepared to stand up to Lutnick.

The Delaware Supreme Court affirmed the Court of Chancery by order.

Conclusion: Under the unitary fairness application of entire fairness, under which the Court must make a "single judgment that considers each of these aspects," the Court found that the transaction was fair in all respects. Despite some flaws, there was no evidence that those flaws rendered the process unfair. Instead, the special committee undertook good faith, arm's length negotiations, guided by independent advisors resulting in a deal with a favorable structure and price.

Panel 2

Moderator

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Panelists

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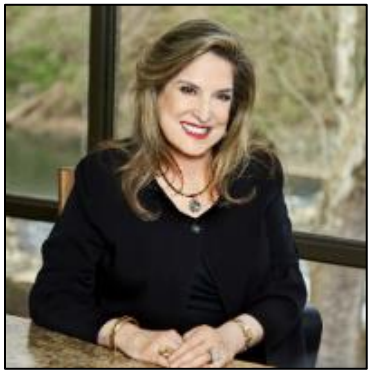

Ellisa Habbart leads The Delaware Counsel Group LLC and advises lawyers globally on the Delaware law aspects of complex transactions. Her experience spans over 25 years and has focused on cross border transactions since 1996. Ms. Habbart advises on issues ranging from the creation, acquisition and financing of business entities to the operation, governance and dissolution of business entities.

Ms. Habbart is top ranked in *Chambers & Partners USA Corporate/M&A: Alternative Entities-Delaware for* her "wealth of experience advising on transactional and governance issues regarding Delaware alternative entities" and "is often sought out to handle cross-border matters". She receives praise for her "detailed and comprehensive knowledge of Delaware law", her "good approach to problem solving and good analytical mind". *Who's Who Legal,* published by Law Business Research Ltd, selected Ms. Habbart for her work in *M&A and Corporate Governance* and *Expert Guides: The World's Leading Lawyers Chosen By Their Peers,* published by Legal Media Group, selected Ms. Habbart for each of their *Corporate Governance* and *World's Leading Women in Business Law* guides. The American Bar Foundation has distinguished Ms. Habbart as a Fellow, a distinction limited to just 1% of practicing lawyers in each jurisdiction.

Education

- Temple University, Bachelor of Business Administration
- Drexel University, Master of Science in Taxation
- Villanova University, Juris Doctor

Publications

- Co-author *Delaware Limited Liability Company Forms and Practice Manual,* published by Data Trace.
- *United States: Delaware* chapter of *The Corporate Governance Review,* published by The Law Reviews.
- *United States* chapter of *Treasury Shares Guide,* published by the International Bar Association Corporate & M&A Law Committee.

- *Delaware Limited Partnership Law* chapter of *Partnerships, Joint Ventures and Strategic Alliances,* published by ALM.
- Co-author *Is a Delaware LLC the Answer to Address Risks of Personal Liability in Private Equity Investments in Brazil?,* published by The Journal of Private Equity
- Co-editor *Director's Duties Checklist*, published by the International Bar Association Corporate and M&A Law Committee and Corporate Counsel Forum.
- Co-author *The Uniform Statutory Trust Act: A Review,* published by The Business Lawyer.
- *Disputes Involving the United States (Delaware)* chapter of *Private Fund Dispute Resolution,* published by Private Equity International.
- Co-author *Legal Due Diligence Guidelines,* published by the International Bar Association Corporate and M&A Law Committee.

Leadership Positions

Delaware State Bar Association

- Member Council of the Corporation Law Section – a body of twenty-six (26) appointees responsible for recommending amendments to Delaware's corporate and business entity statutes.
- Former member drafting committee responsible for the Delaware Statutory Trust Act.

International Bar Association

- Current IBA Corporate & M&A Law Committee appointee to the Legal Policy & Research Unit.
- Former Vice Chair Private Equity Committee.
- Former Vice Chair Corporate Governance Subcommittee.

American Bar Association

- Section of Business Law LLC, Partnerships and Unincorporated Entities Committee ("LLC Committee") representative to International Coordinating Committee.
- Chair US Entities Internationally Subcommittee of the LLC Committee.
- Member LLC Committee Executive Committee since 2010.
- Former Vice-Chair LLC Committee.
- Former Chair Business Trusts, REITS and Financing Vehicles Subcommittee of LLC Committee.
- Advisor to Uniform Law Commission Drafting Committee for the Uniform Statutory Trust Entity Act.

National Association of Minority and Women Owned Law Firms

- Co-Chair Committee on Mergers and Acquisitions.

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Education

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B.S., Lehigh University, 1988

Bar Admissions

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Allison Land is head of the M&A/Corporate Group in Skadden's Wilmington, Delaware office. She has a diverse corporate practice with a focus on joint ventures, mergers and acquisitions, renewable energy transactions, REIT transactions, and Delaware corporate and alternative entity advice.

Ms. Land has substantial experience advising clients in the renewable energy industry, including in connection with joint ventures, acquisitions and complex financing and restructuring transactions. In recognition of her work in the renewable energy field, she was named to the 2022 Top 100 Legal Power List published by A Word About Wind. She also was named *Best Lawyers*' 2022 Delaware Lawyer of the Year for Corporate Law and has been recognized repeatedly by *IFLR1000* and *The Best Lawyers in America*. In addition, Ms. Land regularly advises equity sponsors, asset management firms and other financial services clients on a wide variety of matters, including equity investments, corporate governance matters, acquisitions, and debt and equity offerings.

Ms. Land counsels clients in all areas of Delaware law governing corporations, limited liability companies and limited partnerships. As the immediate past chair of Delaware's Corporation Law Council and a long-standing member of both the Council and its Alternative Entity Subcommittee, she provides clients with in-depth insight into Delaware's business entity laws and the manner in which they have been interpreted by courts. She regularly advises clients on the use of Delaware alternative entities in connection with a broad array of complex transactions, including joint ventures, equity investments, securities offerings, spin-offs, acquisitions and restructurings in a wide variety of industries, including for REITs. Ms. Land has been selected for inclusion repeatedly in *Chambers USA: America's Leading Lawyers for Business*, in which clients have praised her for "a mastery of Delaware corporate law that many strive to have."

In renewable energy M&A and joint ventures, Ms. Land recently has represented:

- NextEra Energy Partners in connection with:
  - its acquisition of a 49% stake in a 1.5 GW renewables portfolio and 100% of the indirect membership interests in a 345 MW portfolio of operating wind assets, and a related $805 million convertible equity portfolio financing with the Ontario Teachers Pension Plan Board (Canada)
  - its $849 million acquisition of a 50% stake in a 2,520 MW renewables portfolio and a related $824 million equity financing by Apollo Global Management, Inc.
  - equity investments by funds managed by KKR, including in a transaction named Renewable Energy Deal of the Year at the 2020 *Power Finance & Risk* Awards
  - equity investments by funds affiliated with BlackRock G to finance a $1.28 billion acquisition of renewable energy projects
- NextEra Energy Resources, LLC in connection with:
  - its $849 million sale of a 50% interest in a 2,520 MW renewables portfolio to an affiliate of the Ontario Teachers' Pension Plan Board (Canada) and a related joint venture arrangement
  - the formation of a partnership with KKR's third Global Infrastructure Investors Fund to own an interest in a portfolio of renewable energy projects
  - corporate governance changes and restructuring transactions

Ms. Land's M&A representations have included:

- Builders FirstSource, Inc. in its all-stock merger transaction with BMC Stock Holdings, Inc. to create a combined company with an equity value of $5.5 billion
- CrossAmerica Partners LP in connection with its $263 million acquisition of 106 convenience stores from 7-Eleven, Inc. and in its asset exchange with Circle K Stores
- Sealed Air Corporation in its $3.2 billion carve-out sale of its Diversey Care division and the food hygiene and cleaning business within its Food Care division to Bain Capital
- CF Industries Holdings, Inc. in connection with its strategic venture with CHS Inc., including on a $2.8 billion investment and other matters

In REIT transactions, Ms. Land has represented:

- Suntex Marinas Investors, LLC in connection with its recapitalization and equity issuance to Centerbridge Partners, L.P. and Resilient Capital Partners, LLC., and its REIT serialization
- Alexander & Baldwin, Inc. in its conversion to a REIT serialization and other matters
- Darden Restaurants, Inc. in its spin-off of Four Corners Property Trust, Inc., a separately traded, public company that is treated as a REIT
- Ladder Capital Corp in connection with its REIT conversion and serialization

Publications

"Proposed Changes to Delaware Law Would Facilitate Ratification of Defective Corporate Acts, Disposition of Pledged Assets, Stock Splits and Changes to the Number of Authorized Shares," *Thomson Reuters' Wall Street Lawyer*, June 2023, and *Skadden, Arps, Slate, Meagher & Flom LLP*, May 25, 2023

"Officer Exculpation Under Delaware Law—Encouraging Results in Year One," *Harvard Law School Forum On Corporate Governance*, June 1, 2023

"Skadden Discusses Proposed Changes to Delaware Corporation Law," *The CLS Blue Sky Blog*, May 30, 2023

"100 Years of Commitment to the Development of Delaware Corporate Law," *The Journal of the Delaware State Bar Association*, April 2023

"Exculpation of Personal Liability Expanded to Include Certain Corporate Officers," *Harvard Law School Forum On Corporate Governance*, December 20, 2022

"How Directors Can Manage the UK Supreme Court's 'Balancing Exercise' in Difficult Times," *Skadden's 2023 Insights*, December 13, 2022

"Discusses Proposed 2022 Amendments to Delaware Corporation Law," *The CLS Blue Sky Blog*, April 20, 2022

"Proposed 2022 DGCL Amendments Include Significant Changes Addressing Exculpation of Officers, Appraisal Rights and Domestication-Related Transactions," *Skadden, Arps, Slate, Meagher & Flom LLP*, April 18, 2022

Co-Author, *Folk on the Delaware General Corporation Law*; *Folk on the Delaware General Corporation Law, Fundamentals* (published annually)

"Skadden Discusses Delaware Law Authorizing Captive Insurance for D&O Coverage," *The CLS Blue Sky Blog*, February 18, 2022

"Indemnification Considerations for Directors and Officers of Delaware Entities," *Skadden, Arps, Slate, Meagher & Flom LLP*, February 9, 2021

"Delaware Corporate Law Amendments Address Emergency Powers, Public Benefit Corporations and Other Matters," *Westlaw Practitioner Insights*, July 14, 2020

"Delaware Corporate Law Amendments Address Emergency Powers, Public Benefit Corporations and Other Matters," *Skadden, Arps, Slate, Meagher & Flom LLP*, June 25, 2020

"Delaware Governor Issues Order Regarding Notice of Change to Virtual Stockholders' Meeting for Public Companies Due to COVID-19," *Skadden, Arps, Slate, Meagher & Flom LLP*, April 7, 2020

"How Delaware Refreshed Its LLC Act and General Corp. Law," *Law360*, August 6, 2018

Professional Memberships

Immediate Past Chair, Council of the Corporation Law Section of the Delaware State Bar Association

Former Chair and Emeritus Member, Alternative Entity Subcommittee of the Corporation Law Council of the Delaware State Bar Association

RICHARDS LAYTON & FINGER

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Bernard Kelley is a director of Richards, Layton & Finger. Head of the firm's Limited Liability Company and Partnership Advisory Group, Bernie has more than 30 years of experience in the organization and operation of Delaware alternative entities. He is actively involved in a wide variety of transactional matters involving Delaware limited liability companies, general partnerships, limited partnerships, limited liability partnerships, and statutory trusts.

Bernie is a founding fellow of the American College of LLC and Partnership Attorneys. He serves as the chair of the Delaware state bar subcommittee responsible for proposing amendments to Delaware's LP, LLC, and GP statutes. Bernie has been recognized in *Chambers USA*, *The Legal 500*, and *The Best Lawyers in America*.

Bernie is a graduate of Swarthmore College (B.A., 1986) and University of Pennsylvania Law School (J.D., 1989).

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Jim advises public companies, boards of directors and committees on Delaware corporation law issues, including corporate governance and fiduciary duties.

In his practice, he advises on corporate governance issues under Delaware law, including in the areas of proxy contests, oversight and compliance, director and officer indemnification and director compensation.

Drawing on his experience with private company financings and acquisitions, he also counsels boards and committees of independent directors on merger and acquisition transactions. His clients hail from a range of industries, including the energy, manufacturing, financial services, media, healthcare, and technology sectors.

Since 2015, Jim has served as a member of the Corporation Law Council of the Delaware State Bar Association, and in that role assists with drafting amendments to the Delaware General Corporation Law (DGCL). Since 2006, he has co-authored a series of articles to annually chronicle the amendments to the DGCL. Jim also served on a committee that drafted the Annotated Model Certificate of Designations for Preferred Stock of a Public Corporation, which is a publication of the Business Law Section of the American Bar Association.

Since 2020, Jim has been selected for inclusion in *The Best Lawyers in America*, and designated "Lawyer of the Year" for mergers and acquisitions law in the 2021 edition. He has also been mentioned in *The Legal 500 US* for M&A work as Delaware counsel.

PRACTICE AREAS

Corporate Counseling

Corporate Governance

Financings & Structured Transactions

Mergers, Acquisitions & Divestitures

Special Committees

CLERKSHIPS

Law Clerk to the Honorable E. Norman Veasey, Delaware Supreme Court, 2002-2003

EDUCATION

University of Virginia School of Law, JD, 2002

University of Delaware, BA, 1999

ADMISSIONS

Delaware, 2002

James D. Honaker

HONORS & RECOGNITIONS

The Legal 500 US, mentioned in M&A Delaware counsel, 2019-2021

The Best Lawyers in America, listed in Delaware mergers and acquisitions, corporate law, and corporate governance law, since 2020

PROFESSIONAL & CIVIC

American Bar Association (Business Law Section)

Delaware State Bar Association (Council of the Corporation Law Section, prior secretary)

Society for Corporate Governance

RICHARDS LAYTON & FINGER

2023 AMENDMENTS TO DELAWARE LLC AND PARTNERSHIP ACTS

DELAWARE CORPORATION LAW COUNCIL CLE
September 12, 2023

Bernard J. Kelley
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IN TODAY'S DISCUSSION

- SBs 112, 113 and 115 amended the Delaware Revised Uniform Limited Partnership Act (the "LP Act"), the Delaware Limited Liability Company Act (the "LLC Act") and the Delaware Revised Uniform Partnership Act (the "GP Act").

- Amendments to the LP, LLC and GP Acts became effective August 1, 2023.

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ADOPTION OF AMENDMENTS PER MERGER/CONSOLIDATION VOTE (LP, LLC AND GP ACTS)

The merger and consolidation provisions of the LP, LLC and GP Acts permit, under certain circumstances, the adoption of amendments to a partnership or LLC agreement without compliance with the amendment provisions of the partnership or LLC agreement.

Prior to the amendments, there was some minor confusion on whether a vote authorizing a merger or consolidation could be used to adopt an amendment to a partnership or LLC agreement for an entity that was not to survive the merger or result from the consolidation. Most practitioners were of the view that such an amendment or adoption should not be permissible.

The purpose of these amendments to the LP, LLC and GP Acts is to make clear that the adoption of an amendment to a partnership or LLC agreement pursuant to the merger or consolidation vote only applies to the agreement of the surviving or resulting partnership or LLC, as applicable. It does not apply to the agreement of the non-surviving or non-resulting partnership or LLC.

The Amendments

ADOPTION OF AMENDMENTS PER MERGER/CONSOLIDATION VOTE (LP, LLC AND GP ACTS)

LP ACT

Section 17-209(g) of the LP Act:

(g) An agreement of merger or consolidation or a plan of merger approved in accordance with subsection (b) of this section may (1) effect any amendment to the partnership agreement or (2) effect the adoption of a new partnership agreement**, in either case,** for a limited partnership if it is the surviving or resulting limited partnership in the merger or consolidation.

LLC ACT

Section 18-209(f) of the LLC Act:

(f) An agreement of merger or consolidation or a plan of merger approved in accordance with subsection (b) of this section may: (1) effect any amendment to the limited liability company agreement; or (2) effect the adoption of a new limited liability company agreement**, in either case,** for a limited liability company if it is the surviving or resulting limited liability company in the merger or consolidation.

GP ACT

Section 15-902(g) of the GP Act:

(g) An agreement of merger or consolidation or a plan of merger approved in accordance with subsection (b) of this section may (1) effect any amendment to the partnership agreement or (2) effect the adoption of a new partnership agreement**, in either case,** for a domestic partnership if it is the surviving or resulting partnership in the merger or consolidation.

DEFAULT GENERAL PARTNER FOR LP SERIES

The LP Act permits Delaware limited partnerships to have separate series with separate assets and liabilities. These series are known as "protected series" (established without a filing with the Delaware Secretary of State) and "registered series" (formed by the filing of a certificate of registered series).

Under the LP Act, a Delaware limited partnership generally and each series thereof must have a general partner associated with it. If a partnership agreement does not so provide, then the LP Act will provide a default general partner for the partnership generally or for any series thereof. The purpose of these amendments is to confirm that the LP Act does not provide a default general partner other than for the initial general partner. Thus, if a general partner of a partnership generally or a series suffers an event of withdrawal, the partnership generally or the series may dissolve or terminate unless certain proactive steps are taken to replace the general partner.

The Amendments

DEFAULT GENERAL PARTNER FOR LP SERIES

Section 17-218(b)(1) of the LP Act:

(1) A limited partnership governed by a partnership agreement that establishes or provides for the establishment of 1 or more series shall have at least 1 general partner of the partnership generally and at least 1 general partner associated with each of its protected series. If a partnership agreement does not designate [a] **an initial** general partner of a particular protected series, then each general partner of the limited partnership generally shall be deemed to be a general partner associated with such series. If a partnership agreement does not designate [a] **an initial** general partner of the limited partnership generally, then each general partner of the limited partnership not associated with a protected series or a registered series shall be deemed to be a general partner of the limited partnership generally, but if there is no such general partner, then each general partner of the limited partnership shall be deemed to be a general partner of the limited partnership generally.

Section 17-221(c)(1) of the LP Act:

(1) A limited partnership governed by a partnership agreement that establishes or provides for the establishment of 1 or more series shall have at least 1 general partner of the partnership generally and at least 1 general partner associated with each of its registered series. If a partnership agreement does not designate [a] **an initial** general partner of a particular registered series, then each general partner of the limited partnership generally shall be deemed to be a general partner associated with such series. If a partnership agreement does not designate [a] **an initial** general partner of the limited partnership generally, then each general partner of the limited partnership not associated with a registered series or a protected series shall be deemed to be a general partner of the limited partnership generally, but if there is no such general partner, then each general partner of the limited partnership shall be deemed to be a general partner of the limited partnership generally.

REVOCATION OF TERMINATION/DISSOLUTION OF LP AND LLC SERIES

Like Delaware limited partnerships and LLCs, series thereof are limited-life vehicles, meaning they may dissolve or terminate either by agreement or by operation of law. At times, dissolutions or terminations are inadvertent.

Sections 17-806 and 18-806 of the LP and LLC Acts permit the revocation of the dissolution of a limited partnership or LLC, as applicable. Prior to the amendments, there was no comparable revocation provisions for series.

The amendments to the LP and LLC Acts expressly provide for the revocation of termination of protected series and for the revocation of dissolution of registered series for Delaware limited partnerships and LLCs. The amendments largely follow the statutory precedent that exists in Sections 17-806 and 18-806 of the LP and LLC Acts.

The revocation provisions for series in the LP Act are more complicated than the comparable provisions in the LLC Act because an event of withdrawal of a general partner is a dissolution or termination event for series. That issue does not exist for LLCs as LLCs are not required to have a general partner. For an event of withdrawal of a general partner, there is a need first to revoke the dissolution or termination and then second to appoint a replacement general partner. The amendments to the LP Act provide the mechanisms to revoke and appoint.

REVOCATION OF TERMINATION/DISSOLUTION OF LP AND LLC SERIES

LP ACT

LP Act: New Section 17-218(d) of the LP Act (protected series):

(d) If a partnership agreement provides the manner in which a termination of a protected series may be revoked, it may be revoked in that manner and, unless the limited partnership has dissolved and such dissolution has not been revoked or the partnership agreement prohibits revocation of termination of a protected series, then notwithstanding the occurrence of an event set forth in paragraph (b)(10)a., b., c., or d. of this section, the protected series shall not be terminated and its affairs shall not be wound up if, prior to the completion of the winding up of the protected series, the business of the protected series is continued, effective as of the occurrence of such event:

(1) In the case of termination effected by the vote or consent of the partners associated with the protected series or other persons, pursuant to such vote or consent (and the approval of any partners associated with the protected series or other persons whose approval is required under the partnership agreement to revoke a termination contemplated by this paragraph);

(2) In the case of termination under paragraph (b)(10)a. or b. of this section (other than a termination effected by the vote or consent of the partners associated with the protected series or other persons or an event of withdrawal of a general partner associated with the protected series), pursuant to such vote or consent that, pursuant to the terms of the partnership agreement, is required to amend the provision of the partnership agreement effecting such termination (and the approval of any partners associated with the protected series or other persons whose approval is required under the partnership agreement to revoke a termination contemplated by this paragraph); and

(3) In the case of termination effected by an event of withdrawal of a general partner associated with the protected series, pursuant to the vote or consent of:

a. All remaining general partners associated with the protected series; and

b. Limited partners associated with the protected series who own more than 2/3 of the then-current percentage or other interest in the profits of such series owned by all of the limited partners associated with such series, or if there is no limited partner associated with such series, the assignee of all of the limited partners' partnership interests in such series (and the approval of any partners associated with the protected series or other persons whose approval is required under the partnership agreement to revoke a termination contemplated by this paragraph); provided, however, if there is no remaining general partner associated with the protected series and no limited partner associated with such series or assignee of all of the limited

REVOCATION OF TERMINATION/DISSOLUTION OF LP AND LLC SERIES

partners' partnership interests in such series, the business of such series is continued, effective as of the occurrence of such event, pursuant to the vote or consent of the personal representative of the last remaining general partner associated with such series or the assignee of all of the general partners' partnership interests in such series (and the approval of any partners associated with the protected series or other persons whose approval is required under the partnership agreement to revoke a termination contemplated by this paragraph).

If termination is revoked pursuant to paragraph (d)(3) of this section and there is no remaining general partner associated with the protected series, 1 or more general partners associated with such series shall be appointed, effective as of the date of withdrawal of the last remaining general partner associated with such series, by the vote or consent of the limited partners associated with such series who own more than 2/3 of the then-current percentage or other interest in the profits of such series owned by all of the limited partners associated with such series, or if there is no limited partner associated with such series, the assignee of all of the limited partners' partnership interests in such series. If termination is revoked pursuant to paragraph (d)(3) of this section and there is no remaining general partner associated with such series and no limited partner associated with such series or assignee of all of the limited partners' partnership interests in such series, 1 or more general partners associated with such series shall be appointed, effective as of the date of withdrawal of the last remaining general partner associated with such series, by the vote or consent of the personal representative of the last remaining general partner associated with such series or the assignee of all of the general partners' partnership interests associated with such series.

If the dissolution of the limited partnership under § 17-801 of this title results in the termination of a protected series under this section, unless the partnership agreement prohibits revocation of termination of such series, the termination of such series shall be automatically revoked upon any revocation of dissolution of the limited partnership in accordance with § 17-806 of this title provided there is at least 1 general partner associated with such series. If an event of withdrawal of a general partner who was both the last remaining general partner of the limited partnership and the last remaining general partner associated with a protected series results in both the dissolution of the limited partnership under § 17-801 of this title and the termination of such series under this section, unless the partnership agreement prohibits revocation of termination of such series, the termination of such series shall be automatically revoked upon any revocation of dissolution of the limited partnership in accordance with § 17-806 of this title, and the general partner of the limited partnership appointed pursuant to § 17-806 of this title shall also be the general partner associated with such series effective as of the date of withdrawal of the last remaining general partner associated with such series.

The provisions of this subsection shall not be construed to limit the accomplishment of a revocation of termination of a protected series by other means permitted by law.

REVOCATION OF TERMINATION/DISSOLUTION OF LP AND LLC SERIES

LP Act: New Section 17-221(f) of the LP Act (registered series):

(f) If a partnership agreement provides the manner in which a dissolution of a registered series may be revoked, it may be revoked in that manner and, unless the limited partnership has dissolved and such dissolution has not been revoked or the partnership agreement prohibits revocation of dissolution of a registered series, then notwithstanding the occurrence of an event set forth in paragraph (c)(10)a., b., c., or d. of this section, the registered series shall not be dissolved and its affairs shall not be wound up if, prior to the filing of a certificate of cancellation of the certificate of registered series in the office of the Secretary of State, the business of the registered series is continued, effective as of the occurrence of such event:

(1) In the case of dissolution effected by the vote or consent of the partners associated with the registered series or other persons, pursuant to such vote or consent (and the approval of any partners associated with the registered series or other persons whose approval is required under the partnership agreement to revoke a dissolution contemplated by this paragraph);

(2) In the case of dissolution under paragraph (c)(10)a. or b. of this section (other than a dissolution effected by the vote or consent of the partners associated with the registered series or other persons or an event of withdrawal of a general partner associated with the registered series), pursuant to such vote or consent that, pursuant to the terms of the partnership agreement, is required to amend the provision of the partnership agreement effecting such dissolution (and the approval of any partners associated with the registered series or other persons whose approval is required under the partnership agreement to revoke a dissolution contemplated by this paragraph); and

(3) In the case of dissolution effected by an event of withdrawal of a general partner associated with the registered series, pursuant to the vote or consent of:

a. All remaining general partners associated with the registered series; and

b. Limited partners associated with the registered series who own more than 2/3 of the then-current percentage or other interest in the profits of such series owned by all of the limited partners associated with such series, or if there is no limited partner associated with such series, the assignee of all of the limited partners' partnership interests in such series (and the approval of any partners associated with the registered series or other persons whose approval is required under the partnership agreement to revoke a dissolution contemplated by this paragraph); provided, however, if there is no remaining general partner associated with the registered series and no limited partner associated with such series or assignee of all of the limited partners' partnership interests in such series, the business of such series is continued, effective as of the occurrence of such event, pursuant to the vote or consent of the personal representative of the last remaining general partner

REVOCATION OF TERMINATION/DISSOLUTION OF LP AND LLC SERIES

associated with such series or the assignee of all of the general partners' partnership interests in such series (and the approval of any partners associated with the registered series or other persons whose approval is required under the partnership agreement to revoke a dissolution contemplated by this paragraph).

If dissolution is revoked pursuant to paragraph (f)(3) of this section and there is no remaining general partner associated with the registered series, 1 or more general partners associated with such series shall be appointed, effective as of the date of withdrawal of the last remaining general partner associated with such series, by the vote or consent of the limited partners associated with such series who own more than 2/3 of the then-current percentage or other interest in the profits of such series owned by all of the limited partners associated with such series, or if there is no limited partner associated with such series, the assignee of all of the limited partners' partnership interests in such series. If dissolution is revoked pursuant to paragraph (f)(3) of this section and there is no remaining general partner associated with such series and no limited partner associated with such series or assignee of all of the limited partners' partnership interests in such series, 1 or more general partners associated with such series shall be appointed, effective as of the date of withdrawal of the last remaining general partner associated with such series, by the vote or consent of the personal representative of the last remaining general partner associated with such series or the assignee of all of the general partners' partnership interests associated with such series.

If the dissolution of the limited partnership under § 17-801 of this title results in the dissolution of a registered series under this section, unless a certificate of cancellation of the certificate of registered series with respect to such series has been filed in the office of the Secretary of State or the partnership agreement prohibits revocation of dissolution of such series, the dissolution of such series shall be automatically revoked upon any revocation of dissolution of the limited partnership in accordance with § 17-806 of this title provided there is at least 1 general partner associated with such series. If an event of withdrawal of a general partner who was both the last remaining general partner of the limited partnership and the last remaining general partner associated with a registered series results in both the dissolution of the limited partnership under § 17-801 of this title and the dissolution of such series under this section, unless a certificate of cancellation of the certificate of registered series with respect to such series has been filed in the office of the Secretary of State or the partnership agreement prohibits revocation of dissolution of such series, the dissolution of such series shall be automatically revoked upon any revocation of dissolution of the limited partnership in accordance with § 17-806 of this title, and the general partner of the limited partnership appointed pursuant to § 17-806 of this title shall also be the general partner associated with such series effective as of the date of withdrawal of the last remaining general partner associated with such series.

The provisions of this subsection shall not be construed to limit the accomplishment of a revocation of dissolution of a registered series by other means permitted by law.

REVOCATION OF TERMINATION/DISSOLUTION OF LP AND LLC SERIES

LLC ACT

LLC Act: New Section 18-215(d) of the LLC Act (protected series):

(d) If a limited liability company agreement provides the manner in which a termination of a protected series may be revoked, it may be revoked in that manner and, unless the limited liability company has dissolved and such dissolution has not been revoked or the limited liability company agreement prohibits revocation of termination of a protected series, then notwithstanding the occurrence of an event set forth in paragraph (b)(9) a., b., or c. of this section, the protected series shall not be terminated and its affairs shall not be wound up if, prior to the completion of the winding up of the protected series, the protected series is continued, effective as of the occurrence of such event:

(1) In the case of termination effected by the vote or consent of the members associated with the protected series or other persons, pursuant to such vote or consent (and the approval of any members associated with the protected series or other persons whose approval is required under the limited liability company agreement to revoke a termination contemplated by this paragraph); and

(2) In the case of termination under paragraph (b)(9) a. or b. of this section (other than a termination effected by the vote or consent of the members associated with the protected series or other persons), pursuant to such vote or consent that, pursuant to the terms of the limited liability company agreement, is required to amend the provision of the limited liability company agreement effecting such termination (and the approval of any members associated with the protected series or other persons whose approval is required under the limited liability company agreement to revoke a termination contemplated by this paragraph).

If a protected series is terminated by the dissolution of the limited liability company, unless the winding up of the protected series has been completed or the limited liability company agreement prohibits revocation of termination of the protected series, the termination of the protected series shall be automatically revoked upon any revocation of dissolution of the limited liability company in accordance with § 18-806 of this title.

The provisions of this subsection shall not be construed to limit the accomplishment of a revocation of termination of a protected series by other means permitted by law.

LLC Act: New Section 18-218(f) of the LLC Act (registered series):

(f) If a limited liability company agreement provides the manner in which a dissolution of a registered series may be revoked, it may be revoked in that manner and, unless the limited liability

REVOCATION OF TERMINATION/DISSOLUTION OF LP AND LLC SERIES

company has dissolved and such dissolution has not been revoked or the limited liability company agreement prohibits revocation of dissolution of a registered series, then notwithstanding the occurrence of an event set forth in paragraph (c)(9) a., b., or c. of this section, the registered series shall not be dissolved and its affairs shall not be wound up if, prior to the filing of a certificate of cancellation of the certificate of registered series in the office of the Secretary of State, the registered series is continued, effective as of the occurrence of such event:

(1) In the case of dissolution effected by the vote or consent of the members associated with the registered series or other persons, pursuant to such vote or consent (and the approval of any members associated with the registered series or other persons whose approval is required under the limited liability company agreement to revoke a dissolution contemplated by this paragraph); and

(2) In the case of dissolution under paragraph (c)(9) a. or b. of this section (other than a dissolution effected by the vote or consent of the members associated with the registered series or other persons), pursuant to such vote or consent that, pursuant to the terms of the limited liability company agreement, is required to amend the provision of the limited liability company agreement effecting such dissolution (and the approval of any members associated with the registered series or other persons whose approval is required under the limited liability company agreement to revoke a dissolution contemplated by this paragraph).

If a registered series is dissolved by the dissolution of the limited liability company, unless a certificate of cancellation of the certificate of registered series with respect to such registered series has been filed in the office of the Secretary of State or the limited liability company agreement prohibits revocation of dissolution of the registered series, the dissolution of the registered series shall be automatically revoked upon any revocation of dissolution of the limited liability company in accordance with § 18-806 of this title.

The provisions of this subsection shall not be construed to limit the accomplishment of a revocation of dissolution of a registered series by other means permitted by law.

RICHARDS LAYTON & FINGER

DIVISION OF LPs AND LLCs

Under Delaware law, a limited partnership may divide into two or more limited partnerships and an LLC may divide into two or more LLCs. According to a duly adopted Plan of Division, the assets and liabilities are allocated among the division partnerships/LLCs. A division is effectuated by the filing with the Delaware Secretary of State of a certificate of division.

A certificate of division contains certain information, including the name and business address of the division contact and the place of business where the Plan of Division is on file. A division contact is a person or entity who must maintain custody of the Plan of Division for six years and who, without cost, will provide to any creditor of the dividing partnership/LLC the name and business address of the division partnership/LLC to which the claim of the creditor was allocated.

With time, the name and address of the division contact and the place of business where the Plan of Division is on file may change. Yet, there was no mechanism for amending the certificate of division. The amendments to the LP and LLC Acts provide a mechanism for amending a certificate of division to change the division contact or the place of business where the Plan of Division is on file.

A separate certificate of amendment is filed by each division partnership/LLC. To make such filings, at least one division partnership/LLC must be in good standing. Further, a certificate of amendment may be filed only to address the division contact or place of business changes. The other aspects of the certificate of division are immutable unless duly addressed by a certificate of correction or corrected certificate.

DIVISION OF LPs AND LLCs: CERTIFICATE OF AMENDMENT OF CERTIFICATE OF DIVISION

LP ACT

New Section 17-220(h)(2)-(5) of the LP Act:

(2) A certificate of division may be amended to change the name or business address of the division contact in a certificate of division or to change information in the certificate of division required by paragraph (h)(1)g. of this section. A certificate of division is amended by filing a certificate of amendment thereto for each division partnership that exists as a limited partnership in the office of the Secretary of State. Each certificate of amendment of certificate of division must include all of the following:

a. The name of the dividing partnership and, if the name has been changed, the name under which the dividing partnership's certificate of limited partnership was originally filed.

b. The name of the division partnership to which the amendment to the certificate of division relates.

c. The amendment to the certificate of division.

(3) If the dividing partnership is a surviving partnership, a general partner of the dividing partnership who becomes aware that the name or business address of the division contact, or information in the certificate of division required by paragraph (h)(1)g. of this section, in a certificate of division was false when made, or that the name or business address of the division contact, or information in the certificate of division required by paragraph (h)(1)g. of this section, in a certificate of division has changed, must promptly amend the certificate of division. If the dividing partnership is not a surviving partnership or no longer exists as a limited partnership, a general partner of any resulting partnership who becomes aware that the name or business address of the division contact, or information in the certificate of division required by paragraph (h)(1)g. of this section, in a certificate of division was false when made, or that the name or business address of the division contact, or information in the certificate of division required by paragraph (h)(1) g. of this section, in a certificate of division has changed, must promptly amend the certificate of division. This subsection does not apply after the expiration of a period of 6 years following the effective date of the division.

(4) Unless otherwise provided in this chapter or unless a later effective date or time (which shall be a date or time certain) is provided for in the certificate of amendment of certificate of division, a certificate of amendment of certificate of division is effective at the time of its filing with the Secretary of State.

(5) Subject to this chapter, the Secretary of State shall accept the filing of certificates of amendment of certificate of division for all division partnerships resulting from the same certificate of division if at least 1 division partnership is in good standing at the time of such filings.

DIVISION OF LPs AND LLCs: CERTIFICATE OF AMENDMENT OF CERTIFICATE OF DIVISION

Section 17-204(a) of the LP Act:

(a) Each certificate required by this [subchapter]**chapter** to be filed in the Office of the Secretary of State shall be executed in the following manner:

(14)a. Unless otherwise provided in the plan of division or the certificate of division, each certificate of amendment of certificate of division must be executed as follows:

1. If the dividing partnership is a surviving partnership, by at least 1 general partner on behalf of the dividing partnership acting on behalf of the division partnership to which the certificate of amendment of certificate of division relates.

2. If the dividing partnership is not a surviving partnership or no longer exists as a limited partnership, by at least 1 general partner on behalf of a resulting partnership acting on behalf of the division partnership to which the certificate of amendment of certificate of division relates.

b. Each division partnership is deemed to have consented to the execution of a certificate of amendment of certificate of division under paragraph (a)(14)a. of this section.

Section 17-1101(j) of the LP Act:

The Secretary of State shall not accept for filing any certificate (except a certificate of resignation of a registered agent when a successor registered agent is not being appointed **and certificates of amendment of certificate of division as required by § 17-220(h)(5) of this title**) required or permitted by this chapter to be filed in respect of any domestic limited partnership, registered series or foreign limited partnership if such domestic limited partnership, registered series or foreign limited partnership has neglected, refused or failed to pay an annual tax, and shall not issue any certificate of good standing with respect to such domestic limited partnership, registered series or foreign limited partnership, unless and until such domestic limited partnership, registered series or foreign limited partnership shall have been restored to and have the status of a domestic limited partnership or registered series in good standing or a foreign limited partnership duly registered in the State of Delaware.

LLC ACT

New Section 18-217(h)(2)-(6) of the LLC Act:

(2) A certificate of division may be amended to change the name or business address of the division contact in a certificate of division or to change information in the certificate of division required by paragraph (h)(1)g. of this section. A certificate of division is amended by filing a certificate of amendment thereto for each division company that exists as a limited liability

DIVISION OF LPs AND LLCs: CERTIFICATE OF AMENDMENT OF CERTIFICATE OF DIVISION

company in the office of the Secretary of State. Each certificate of amendment of certificate of division must include all of the following:

a. The name of the dividing company and, if the name has been changed, the name under which the dividing company's certificate of formation was originally filed.

b. The name of the division company to which the amendment to the certificate of division relates.

c. The amendment to the certificate of division.

(3) If the dividing company is a surviving company, a manager of the dividing company or, if there is no manager of the dividing company, any member of the dividing company, who becomes aware that the name or business address of the division contact, or information in the certificate of division required by paragraph (h)(1)g. of this section, in a certificate of division was false when made, or that the name or business address of the division contact, or information in the certificate of division required by paragraph (h)(1)g. of this section, in a certificate of division has changed, must promptly amend the certificate of division. If the dividing company is not a surviving company or no longer exists as a limited liability company, a manager of any resulting company or, if there is no manager of any resulting company, then any member of any resulting company who becomes aware that the name or business address of the division contact, or information in the certificate of division required by paragraph (h)(1)g. of this section, in a certificate of division was false when made, or that the name or business address of the division contact, or information in the certificate of division required by paragraph (h)(1)g. of this section, in a certificate of division has changed, must promptly amend the certificate of division. This subsection does not apply after the expiration of a period of 6 years following the effective date of the division.

(4) (a) Unless otherwise provided in the plan of division or the certificate of division, each certificate of amendment of certificate of division must be executed as follows:

1. If the dividing company is a surviving company, by 1 or more authorized persons on behalf of the dividing company acting on behalf of the division company to which the certificate of amendment of certificate of division relates.

2. If the dividing company is not a surviving company or no longer exists as a limited liability company, by 1 or more authorized persons on behalf of a resulting company acting on behalf of the division company to which the certificate of amendment of certificate of division relates.

DIVISION OF LPs AND LLCs: CERTIFICATE OF AMENDMENT OF CERTIFICATE OF DIVISION

(b) Each division company is deemed to have consented to the execution of a certificate of amendment of certificate of division under paragraph (h)(4) of this section.

(5) Unless otherwise provided in this chapter or unless a later effective date or time (which shall be a date or time certain) is provided for in the certificate of amendment of certificate of division, a certificate of amendment of certificate of division is effective at the time of its filing with the Secretary of State.

(6) Subject to this chapter, the Secretary of State shall accept the filing of certificates of amendment of certificate of division for all division companies resulting from the same certificate of division if at least 1 division company is in good standing at the time of such filings.

Section 18-1107(k) of the LLC Act:

The Secretary of State shall not accept for filing any certificate (except a certificate of resignation of a registered agent when a successor registered agent is not being appointed **and certificates of amendment of certificate of division as required by § 18-217(h)(6) of this title)** required or permitted by this chapter to be filed in respect of any domestic limited liability company, registered series or foreign limited liability company if such domestic limited liability company, registered series or foreign limited liability company has neglected, refused or failed to pay an annual tax, and shall not issue any certificate of good standing with respect to such domestic limited liability company, registered series or foreign limited liability company, unless or until such domestic limited liability company, registered series or foreign limited liability company shall have been restored to and have the status of a domestic limited liability company or registered series in good standing or a foreign limited liability company duly registered in the State of Delaware.

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DIVISION OF LPs AND LLCs—SCRIVENER'S ERROR

Separate from the amendments creating a certificate of amendment of certificate of division, the amendments to the LP and LLC Acts fix a scrivener's error. The amendments make clear that a dividing partnership/LLC is divided into distinct and independent division partnerships/LLCs.

DIVISION OF LPs AND LLCs—SCRIVENER'S ERROR

LP ACT

Section 17-220(l)(1) of the LP Act:

(1) Upon the division of a domestic limited partnership becoming effective:

(1) The dividing partnership shall be divided into the distinct and independent [resulting] **division** partnerships named in the plan of division, and, if the dividing partnership is not a surviving partnership, the existence of the dividing partnership shall cease.

LLC ACT

Section 18-217(l)(1) of the LLC Act:

(1) Upon the division of a domestic limited liability company becoming effective:

(1) The dividing company shall be divided into the distinct and independent [resulting] **division** companies named in the plan of division, and, if the dividing company is not a surviving company, the existence of the dividing company shall cease.

DIVISION OF LPs AND LLCs—NO REQUIREMENT FOR A SURVIVING PARTNERSHIP OR LLC

Many provisions of the LP and LLC Acts support the view that a dividing partnership/LLC does not need to survive a division. There was some concern that Section 17-220(l)(9) of the LP Act and Section 18-217(l)(9) of the LLC Act created an opposite inference. The purpose of these amendments to the LP and LLC Acts is to confirm that a dividing partnership/LLC need not survive the division. This is consistent with what has been the view of most practitioners.

DIVISION OF LPs AND LLCs—NO REQUIREMENT FOR A SURVIVING PARTNERSHIP OR LLC

LP ACT

Section 17-220(l)(9) of the LP Act:

(9) Any action or proceeding pending against a dividing partnership may be continued against the surviving partnership**, if any,** as if the division did not occur, but subject to paragraph (l)(4) of this section, and against any resulting partnership to which the asset, property, right, series, debt, liability or duty associated with such action or proceeding was allocated pursuant to the plan of division by adding or substituting such resulting partnership as a party in the action or proceeding.

LLC ACT

Section 18-217(l)(9) of the LLC Act:

(9) Any action or proceeding pending against a dividing company may be continued against the surviving company**, if any,** as if the division did not occur, but subject to paragraph (l)(4) of this section, and against any resulting company to which the asset, property, right, series, debt, liability or duty associated with such action or proceeding was allocated pursuant to the plan of division by adding or substituting such resulting company as a party in the action or proceeding.

IRREVOCABILITY OF SUBSCRIPTION

Many private equity funds are formed as Delaware limited partnerships or LLCs. The fundraising period for these types of funds can be lengthy and it is not uncommon for subscription agreements to provide that a subscription is irrevocable for the period stated therein. The purpose of these amendments to the LP, LLC and GP Acts is to be clear that a subscription for interests in a limited partnership, LLC or general partnership may be irrevocable if the subscription states that it is irrevocable to the extent provided by the terms of the subscription.

IRREVOCABILITY OF SUBSCRIPTION

LP ACT

New Section 17-506 of the LP Act:

For all purposes of the laws of the State of Delaware, a subscription for a partnership interest, whether submitted in writing, by means of electronic transmission, or as otherwise permitted by applicable law, is irrevocable if the subscription states that it is irrevocable to the extent provided by the terms of the subscription.

LLC ACT

New Section 18-506 of the LLC Act:

For all purposes of the laws of the State of Delaware, a subscription for a limited liability company interest, whether submitted in writing, by means of electronic transmission, or as otherwise permitted by applicable law, is irrevocable if the subscription states that it is irrevocable to the extent provided by the terms of the subscription.

GP ACT

New Section 15-208 of the GP Act:

For all purposes of the laws of the State of Delaware, a subscription for a partnership interest, whether submitted in writing, by means of electronic transmission, or as otherwise permitted by applicable law, is irrevocable if the subscription states that it is irrevocable to the extent provided by the terms of the subscription.

MERGER/CONSOLIDATION/CONVERSION OF GENERAL PARTNERSHIPS

Like limited partnerships and LLCs, a general partnership may merge, consolidate or convert with or into many types of entities, including "foreign partnerships." While the LP and LLC Acts define "foreign partnerships," the GP Act did not.

The purpose of this amendment to the GP Act is to make clear that, in the context of mergers, consolidations and conversions of general partnerships, a foreign partnership includes non-Delaware state partnerships and partnerships formed under non-United States jurisdictions. This is consistent with the LP and LLC Acts.

The Amendments

MERGER/CONSOLIDATION/CONVERSION OF GENERAL PARTNERSHIPS

New Section 15-101(10) of the GP Act:

(10) "Foreign partnership" means a partnership that is formed under laws other than laws of the State of Delaware.

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