

## DELAWARE BUSINESS COURT INSIDER

# Four Lessons From Delaware Corporate Litigation You Should Have Learned in 2023

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**W**hile another year in the Delaware courts has gotten sporadic attention from one-off appearances of household names and national political controversies, the litigation events of 2023 that will likely have the most impact moving forward are, as usual, the ones that garner attention from the small bar that litigates the world's biggest business deals.

The Court of Chancery and Delaware Supreme Court hammered home these points multiple times throughout 2023, signaling to litigators that they may want to keep them in mind as they head into the new year.

### Officers May Face Oversight Liability

One of the first 2023 Chancery decisions that sparked a conversation among corporate attorneys was released at the end of January in the case in which McDonald's shareholders brought Caremark claims related to the company's handling of sexual harassment.

Vice Chancellor J. Travis Laster's opinion concluded that corporate officers, like directors, can face oversight liability, officially putting on paper a concept that many said had been implicit for years under Delaware law.

"Procedurally, it was interesting to see the first opinion come out with the reminder that officers also have fiduciary duties, including the duty of oversight. That's not carved out," said Skadden, Arps, Slate, Meagher & Flom partner Jenness Parker. "That's been an interesting discussion as people continue to think about what that means."

But that discussion still involves hypotheticals, because a month later, Laster issued a second opinion in the same case, dismissing oversight claims. Since then, no other shareholder has been able to get a Caremark claim against corporate officers further than the McDonald's case, though Laster's first decision has been cited: Vice Chancellor Lori Will just dismissed claims against Segway's former president in an



Blair Connelly and Colleen Smith

opinion that reiterated there's still a high bar officer oversight claims need to clear to move forward in the court.

"It's unclear to us whether officer liability for Caremark claims is going to get a lot of traction because it's different than Caremark liability at the director level, given the demand futility standard," Latham & Watkins partner Colleen Smith said. "I don't think we've seen a lot of those cases for that reason. It's getting a lot of attention, but may ultimately not be something we see a lot of going forward."

"That's something that's going to take a while to flush out in practice," Sullivan & Cromwell partner Brian Frawley said.

### Not Looking for the Perfect Deal

There's arguably no corporate law topic that's created more of a stir in Delaware this year than entire fairness, with the Court of Chancery and Supreme Court both making decisions that have some practitioners rethinking their trial strategy.

In the past, it was exceedingly rare for the entire fairness standard to be applied and for a defense motion to dismiss not to be granted. It was also rare, if not unprecedented, for shareholders who did make it to trial in those cases not to win.

That's no longer the norm in 2023, which showed three examples of corporate defendants prevailing under the

entire fairness standard of review: cases involving Tesla's acquisition of SolarCity, the merger between BGC Partners Inc. and Berkeley Point Financial and Oracle's acquisition of NetSuite.

"It was, in some ways, the year of entire fairness. We had a lot of cases on just entire fairness, and we will continue to: when does it apply and what exactly does it mean?" said **Blair Connelly** of **Latham & Watkins**, which represented defendants in both the BGC and Oracle cases.

Last year's Chancery opinion stating the SolarCity acquisition was imperfect but fair was affirmed by the Supreme Court in June, and the case is now frequently cited in Chancery filings.

"Of course, no process is the same, and the Delaware Supreme Court was very clear to say, it doesn't have to be pitch perfect," Parker said. "It's been interesting to see some of these fact patterns unfold in that area."

Defense verdicts in the Oracle and BGC cases were issued post-trial, and the Supreme Court has summarily affirmed the BGC decision.

Some on the plaintiff's side have said the trio of cases has given corporate defendants an edge. Among them is Bernstein Litowitz Berger & Grossmann partner Gregory Varallo, who appeared for the plaintiff in the BGC case.

"This wasn't a close call. I don't think that we should have lost. I think that the case potentially makes it much harder for corporate lawyers in the boardroom to convince controllers to do the right thing," Varallo said.

But defense attorneys say they represent the proper application of a standard that's long been in place.

"The law had always been that you had to prove that the deal was fair. That's still the law. It's just that people did it now," Connelly said. "That's the only thing that's changed. People actually did it."

### **The Courts' Standard Isn't 'Anything Goes'**

The Delaware courts weren't just letting any transactional conduct slide in 2023, with two key decisions showing the Court of Chancery's handling of SolarCity, BGC and Oracle weren't a sign that it's scrutinizing deals—or their potential to be tainted by conflict—in any less detail.

In both the Mindbody and Columbia Pipeline cases, the court found conflict existed on the side of the target companies and that the conflicted directors had acted for personal gain rather than in shareholders' best interests when negotiating. But parties on the buyer's side were also found liable for aiding and abetting in both of those cases.

"In the ordinary capitalist economy, it's OK for buyers to be rough and tumble when buying a company. You try and get the lowest buy price you can. And these were circumstances where the court found that they went beyond ordinary economic competition and actually helped violate fiduciary duties," Varallo said.

The decisions in all five of those cases were all highly fact-specific—they didn't set out a checklist for the perfect deal or say any one part of the deal process should be considered in isolation. But they've gotten attention because they still do offer some guidance on the interplay between certain moving parts in a negotiation involving a controller, giving corporate attorneys more examples for bits and pieces they may want to emphasize or downplay in future deal-related litigation and signaling to M&A attorneys what they may want to steer clients away from.

### **It's the Board's (Not Shareholders') Thoughts That Count**

Sprinkled in among the attention-grabbing, entire fairness-contemplating cases of 2023 was Chancery litigation that didn't get as far for a simple reason: just because a shareholder doesn't like an action made by a corporation's board doesn't mean the board took that action in bad faith.

That idea was given by the Court of Chancery in both the litigation challenging Block's acquisition of Tidal and a Section 220 case claiming Disney was wrong to have taken a stance against Florida's Parental Rights in Education bill, colloquially known as the "Don't Say Gay" bill.

Chancellor Kathaleen St. J. McCormick decided in May that Block was "free to make a terrible business decision" if there's no evidence that its board made the decision in bad faith. After argument in November during which the fine points of where good faith ends were discussed, the Supreme Court quickly affirmed McCormick's decision.

In June, Vice Chancellor Will ruled that the Disney shareholder who sued for books and records hadn't demonstrated a proper purpose.

"At bottom, what the court said was, you can disagree with a board's decision, but that's not a credible basis to suspect wrongdoing, and that's not the keys to the books and records," Parker said.

While the cases, having been dismissed fairly early on in the litigation process, didn't set a legal precedent, they're a reminder to shareholders that there's a certain threshold of showing corporate misconduct that needs to be present if they're going to be able to win in Delaware.