Delaware Law: 2016 Year in Review

Delaware Law Update

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Our Delaware Corporate and Alternative Entity Law attorneys closely followed the opinions coming from Delaware's Supreme Court and Court of Chancery. Our 2016 Year in Review is a collection of brief summaries of selected cases concerning Delaware Corporate and Alternative Entity Law. While this list is a subjective selection of important cases, our intent is to provide our readers with the rationale behind a court's holding to ultimately provide information that may be helpful in strategic and business decisions concerning litigation and commercial arrangements. Our Delaware Corporate and Alternative Entity Law attorneys are experienced in all aspects of Delaware law, including representing our clients in a variety of business transactions and Delaware opinion work. The Delaware Corporate and Alternative Entity attorneys also represents public and private Delaware corporations, LLCs, LPs and GPs in corporate, commercial, shareholder and other litigation in the Delaware Court of Chancery.

PECO Logistics, LLC v. Walnut Investment Partners, L.P. (2/25/16) – Corporate, Commercial

Drafting LLC Agreements for Undesirable Outcomes: Sophisticated investor holds a "put right" but has no basis to challenge valuation on the units that are being "put.

The Court held that the parties to the LLC Agreement unambiguously agreed to be bound by the determination of value that the valuation firm made in response to the Walnut Investors' exercise of the Put Right, and thus that the Court was not free to second-guess the (admittedly reasonable) judgment calls the valuation firm made in applying the valuation methodology in the LLC Agreement to reach its determination.
The rationale for the Court's ruling is captured in a rhetorical question that then-Chancellor Strine posed: "When parties contractually decide to have a qualified expert with relevant credentials make a determination of value without any indication that the expert's judgment is subject to judicial review, on what basis would it make sense to infer that the parties intended to have a law-trained judge do a de novo review of the expert's determination?"
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FdG Logistics LLC v. A&R Logistics Holdings, Inc., C.A. No. 9706-CB (Del. Ch. Feb. 23, 2016) (3/9/16) – Corporate, M&A

Anti-reliance disclaimer by buyer in M&A transaction: Delaware law enforces clauses which identify the specific information on

which a party has relied and foreclose reliance on other information

The sellers argued that those fraud claims must fail because they were being asserted based on information that was made available to the buyer before it entered into the merger agreement. However, the Court held that the merger agreement did not contain an ***affirmative*** disclaimer of reliance by the buyer sufficient to preclude it from asserting a claim for fraud based on representations outside the four corners of the merger agreement. The key takeaway from this case as it relates to limiting claims by aggrieved buyers in M&A transactions is that the disclaimer must be made from the perspective of the party that is making the claim in order to preclude fraud claims for extra-contractual statements.
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Delaware law on advancement of fees incurred by former officers and directors (4/21/16) – Litigation, Advancement

According to the Court, "[a]lthough the Counterclaims appear[ed] on their face to merely implicate Hyatt's role as Members' Representative," their resolution, "in part, necessarily requires Hyatt and Gore to defend their actions as former officers and directors, for which they are contractually entitled to advancement." While Media had been a limited liability company, the Court relied on case law interpreting the Delaware General Corporation Law (the "DGCL") to construe the advancement rights of Media's former directors.
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Demand Refused Rule 23.1 Explained by the Delaware Court of Chancery (5/5/16) – Litigation, Demand Futility

VC Glasscock's ruling confirms that in conjunction with the sale of a company, there are circumstances where it is reasonable for a board to decide not to consider projections, where they "involve[] contingencies over which the Company ha[s] no control, and which might never come to pass…. Such actions do not, on their face, plead a conceivable breach of the Directors[']' loyalty-based duty to act in good faith."
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Delaware Supreme Court Defers to the Court of Chancery's Fact-Finding and Witness Credibility Determinations (6/21/16) – Litigation

The Delaware Supreme Court affirmed a Court of Chancery post-trial decision that found that a company's board of directors failed to fairly value option holders' options per a contractual (rather than a fiduciary) obligation under a stock incentive plan.
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Freedom of Contract in LLC Structure Is Not Absolute Where Parties Seek Bankruptcy Relief (7/21/16) – Corporate, Commercial Agreement

The key takeaway from this case is that while Delaware law permits parties in an LLC structure to freely contract among themselves, if such contract runs afoul of federal public policy, any such agreement among the members may not be enforceable.
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What Is the Fair Value of a Stock? Delaware Court of Chancery Rejects the Transaction Price as the Most Reliable Measure (7/28/16) – Litigation, Appraisal

Dell and *DFC Global* reflect the need for companies to consider various methodologies, including a DCF analysis, when considering a fair transaction price. Moreover, these opinions are a reminder of the risks associated with appraisal proceedings. Even though Vice Chancellor Laster found that there was no breach of fiduciary duties in Dell and that the *Dell* Committee did "many praiseworthy things" during the Dell sale process, and Chancellor Bouchard determined that DFC Global's sale process "extended over a significant period of time and appeared to be robust," the Court in each nevertheless concluded that the

transaction price was not the most reliable indicator of fair value.
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Chancery Addresses Limitations of the Power to Delegate Authority to Third Parties in a Delaware LLC (7/28/16) – Litigation, Special Litigation Committees

Obeid is significant for a variety of reasons. It is a reminder of the flexibility provided by Delaware's LLC statute, which, by and large, permits parties to tailor and order their business relationships in any manner they please. To the extent the resulting LLC resembles another type of business entity, however, parties and drafters must be aware that non-LLC law may be applied by analogy. Corporate directors and managers of corporate-like LLCs must also be aware that special litigation committees cannot be staffed by non-directors or non-managers, and to the extent they are, their decisions are not likely to be upheld.
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2016 Amendments to the Delaware General Corporation Law and the Delaware Limited Liability Company Act Effective August 1, 2016 (8/1/16) – Corporate, DGCL

In the event that you missed it, on June 16, 2016, Delaware Governor Jack Markell signed House Bill 371 into law, thereby amending the Delaware General Corporation Law (the "DGCL") in numerous significant respects. Also, on June 22, 2016, Governor Markell signed House Bill 372 into law, which amended the Delaware Limited Liability Company Act (the "LLC Act").
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Board's Adoption of a Plan of Dissolution Held Not to Be a Breach of the Directors' Fiduciary Duties (11/10/16) – Corporate, Board Governance, Fiduciary Duties

This case has a few noteworthy takeaways for practitioners and boards alike: When the Board takes action that may implicate the director's fiduciary duty obligations, it may make sense to seek stockholder approval as a mechanism of cleansing a transaction which otherwise would be subject to an exacting standard of director scrutiny. A director-officer who may receive change-in-control benefits pursuant to a preexisting employment agreement does not by itself rebut the presumption that the director acted with loyalty and care. Lastly, unless a shareholder specifically negotiates for specific provisions requiring certain board actions to be subject to unanimous approval, a court may limit its interpretation of an agreement to not unreasonably subject all extra-contractual rights to the unanimity requirement.
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The Court of Chancery Determines $2 Billion Dispute Is One for an Independent Auditor to Decide (12/29/16) – Corporate, M&A

This decision is important to buyers and sellers alike in that most purchase agreements contain a provision addressing the dispute resolution mechanism related to post-closing sale price adjustments. This decision reflects the importance of drafting such provisions with a clear objective in mind. Moreover, the Court of Chancery established that the potential size of the adjustment is not a determining factor in assessing whether the dispute is one for an independent auditor to resolve.
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The Court of Chancery Deviates from Some Recent Appraisal Decisions and Gives "100 Percent Weight" to the Deal Price (12/31/16) – Litigation, Appraisal

Merion Capital L.P. v. Lender Processing Services, Inc. (*"LPS"*) should help assuage concerns that arose from recent appraisal decisions rejecting the transaction price. LPS establishes that those decisions are limited to their particular facts and circumstances (such as in *Dell*, where the Court weighed heavily the MBO-nature of the transaction), and do not

preclude the Court from relying on the deal price as a valid measure of fair value. *LPS* confirms what has long been recognized in appraisal litigation: a robust sale process is key.
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