

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

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VICE CHANCELLOR

New Castle County Courthouse
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July 29, 2010

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RE: Kurz, *et al.* v. Holbrook, *et al.*, C.A. No. 5019-VCL

Dear Counsel:

In a bench ruling on July 19, 2010, I granted the plaintiffs' application for an interim award of fees and expenses to be paid by EMAK Worldwide, Inc. ("EMAK" or the "Company"). EMAK has taken issue with the form of order. According to EMAK, this Court cannot direct payment of an interim fee award unless the order is certified as a partial final judgment pursuant to Rule 54(b). EMAK protests that it would be "contrary to basic notions of justice" to issue such an order "without any right of EMAK to be heard on appeal prior to the payment." Letter from EMAK's Counsel dated July 26, 2006 at 1 [*hereinafter* Letter].

As the United States Supreme Court has observed, the power to award fees, including interim fees, "is part of the original authority of the chancellor to do equity in a particular situation." *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 393 (1970) (quoting *Sprague v. Taconic Nat'l Bank*, 307 U.S. 161, 166 (1939)); *see id.* at 389 (noting a finding of liability under Section 14A of the Securities Exchange Act of 1934 would mean that "petitioners would have been entitled to an interim award of litigation expenses and reasonable attorneys' fees"). A court might grant an interim award of attorneys' fees for many reasons. Fees can be a consequence for bad faith litigation tactics. *See Beck v. Atl. Coast PLC*, 868 A.2d 840, 850-51 (Del. Ch. 2005) (holding that a court may shift attorney's fees "where the court finds litigation to have been brought in bad faith or finds that a party conducted the litigation process itself in bad faith, thereby unjustifiably increasing the costs"). Interim awards are commonly used to address discovery conduct. *See* Ch. Ct. R. 37. An interim award can be granted under Rule 11. *See* Ch. Ct. R. 11(c)(2). It can be imposed as a contempt sanction. *See Great Am. Opportunities, Inc. v. Cherrydale Fundraising, LLC*, 2010 WL 338219, at *29 (Del. Ch. Jan. 29, 2010) ("An

award of counsel fees is also a proper consideration [as a sanction for civil contempt].”). Various statutes contemplate interim fee awards. *See, e.g., Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 603 (2001) (interpreting fee-shifting provision in Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. § 1988, as authorizing an interim fee award); *Hanrahan v. Hampton*, 446 U.S. 754, 757-58 (1980) (per curiam) (same). As here, an interim award could compensate counsel for conferring a corporate benefit. *See, e.g., La. State Emps. Ret. Sys. v. Citrix Sys., Inc.*, 2001 WL 1131364, at *4 (Del. Ch. Sept. 17, 2001).

But whatever the underlying reason, an interim order awarding fees does not hang in suspension until the entry of a final judgment. A trial court has inherent power to enforce its orders and direct timely payment. *See Forsythe v. CIBC Emp. Private Equity Fund (U.S.) I, L.P.*, 2006 WL 846007, at *2 (Del. Ch. Mar. 22, 2006) (“This court . . . retains inherent authority to enforce its decisions, even in the absence of specific authorization by rule.”); *see also Cebenka v. Upjohn Co.*, 559 A.2d 1219, 1225 (Del. 1989) (“[The trial court] has inherent power to enforce its own orders which are issued pursuant to valid authority.”) (internal quotations omitted).

For interim fee awards, the Delaware Supreme Court has recognized this power implicitly. In *Minna v. Energy Coal S.p.A.*, 984 A.2d 1210 (Del. 2009), the Delaware Supreme Court affirmed the Court of Chancery’s entry of a default judgment as a consequence for the plaintiffs’ failure to pay more than \$700,000 in attorneys’ fees awarded to the defendants as a discovery sanction. *Id.* at 1212, 1214. There was no suggestion in *Minna* that the Court of Chancery lacked authority to require payment of the fee award prior to the entry of a final judgment, or that the Court of Chancery only could create a presently enforceable order by entering a partial final judgment pursuant to Rule 54(b).

Nor does the effectiveness of an order requiring the payment of an interim fee award depend on a party having an immediate right to appeal. If it did, then interim fee awards could not be enforced, because there generally is no basis to appeal from an interim fee award.

An interim award of attorney’s fees may not be immediately appealed as a final judgment because the award lacks the requisite finality. Nor is an interim award appealable as a collateral order, unless it can be shown to be unreviewable on appeal from the final judgment. Similarly, such an award may not be certified for immediate appeal under 28 U.S.C. § 1292(b), because the award does not materially advance the litigation.

An interim fee award also generally cannot be certified pursuant to Rule 54(b):

Rule 54(b) does not give district judges carte blanche to make interlocutory orders final and therefore appealable. It merely empowers them to make appealable orders that finally dispose of a separate claim or separate party. . . . Ordinarily an award of attorney's fees in a case that has not been completed is merely an interim award of fees, and an interim award of fees is interlocutory and non-appealable unless the award is made in circumstances in which the party against whom the award is made will not be able to get his money back if he prevails at the end of the case and the award is vacated then. Apart from this exception, an interim award of fees cannot be thought the final disposition of a separate claim, and therefore Rule 54(b) cannot be used to make the award appealable.

Estate of Drayton v. Nelson, 53 F.3d 165, 167 (7th Cir. 1994) (Posner, J.) (citations omitted).¹

Although our courts have not considered the precise question raised by this case, the Delaware Supreme Court has held that an interim fee award under 19 *Del. C.* § 2350(f) is interlocutory. *Playtex Prods., Inc. v. Roland*, 841 A.2d 308, 2004 WL 220332, at *1 (Del. Feb. 2, 2004) (ORDER). “Section 2350(f) provides, in part, that the Superior Court may allow a reasonable fee to claimant's attorney for services on appeal from an Industrial Accident Board decision.” *Id.* n.2. In *Playtex*, the Superior Court remanded the underlying cases to the Industrial Accident Board for further proceedings, and thus the fee award for the appeal was an interim award. *See id.* The appellant argued that the fee award was not interlocutory because the award was severable and could be enforced against the appellant as a separate judgment. *Id.* The Supreme Court rejected this view, stating that although the award “becomes a fixed entitlement as of the date of the order, the order itself is interlocutory. . . .” *Id.*

The Delaware Supreme Court similarly rejected an appeal from an interim fee award in *Pollard v. The Placers, Inc.*, 692 A.2d 879 (Del. 1997). There, the appellant

¹ *Accord Cleveland Hair Clinic, Inc. v. Puig*, 104 F.3d 123, 126 (7th Cir. 1997) (Easterbrook, J.) (rejecting principle that “any order requiring immediate payment also is immediately appealable” in favor of rule that “immediate appeal is proper only if there is reason to be concerned that payment would be irreversible because the prevailing party will be unable or unwilling to repay if the award is ultimately altered”); *see, e.g., In re: Diet Drugs Prods. Liab. Litig.*, 401 F.3d 143, 156-59 (3d Cir. 2005) (holding that interim fee award was not appealable final order nor appealable collateral order); *Petties v. District of Columbia*, 227 F.3d 469, 472-73 (D.C. Cir. 2000) (same); *Shipes v. Trinity Indus., Inc.*, 883 F.2d 339, 341-44 (5th Cir. 1989) (same).

sought to certify the award for interlocutory appeal. The Supreme Court held that the interim award did not meet the requirements of Rule 42. *Id.* at 881. The Supreme Court further noted that “apart from the application of Rule 42, an aggrieved party has the assurance that an unappealable interlocutory order is preserved for review upon the entry of a final judgment.” *Id.* By statute, the “failure to appeal from an interlocutory order, judgment or decree of the Court of Chancery or Superior Court shall not bar a party from making any objection to such interlocutory order, judgment or decree on appeal from the final order, judgment or decree.” 10 *Del. C.* § 144. The *Pollard* Court relied on this statute as further support for its decision not to entertain a separate appeal from the interim fee award. 692 A.2d at 881.

The Delaware Supreme Court’s holdings in *Playtex* and *Pollard* comport with its strong policy against piecemeal appeals. As then Vice Chancellor, now Chief Justice Steele observed, “[t]here can be no mystery about the relative weight the Supreme Court places on its policy against piecemeal appeals and of avoiding judicial inefficiency in the Court below.” *Emerald P’rs v. Berlin*, 1996 WL 361510, at *3 (Del. Ch. June 25, 1996); *accord In re Tri-Star Pictures, Inc. Litig.*, 1989 WL 112740, at *1 (Del. Ch. Sept. 26, 1989) (noting Delaware’s “long established policy against piecemeal appeals”); *see, e.g., In re CNX Gas Corp. S’holders Litig.*, 2010 WL 2690402 (Del. July 8, 2010) (ORDER) (declining to accept interlocutory appeal to address standard of review for controlling stockholder’s unilateral two-step freeze-out because “[t]he issues raised in this application should be addressed after the entry of a final judgment”).

Additionally, EMAK’s notion of a “right . . . to be heard on appeal prior to the payment,” Letter at 1, conflicts with the general rule that filing an appeal does not automatically stay the judgment of the trial court. *E.g., Sannini v. Casscells*, 401 A.2d 927, 929 (Del. 1979) (citing Del. Const. Art. IV, § 24). Assuming hypothetically that the interim fee award could be entered as a partial final judgment, EMAK would not be entitled automatically to an appeal prior to payment. Absent a stay pending appeal, EMAK would be required to comply with the order.

Applied to the current case, these authorities establish that EMAK can be directed to pay the interim fee award now, that an immediate right of appeal is neither required nor warranted, and that the fee award can be reviewed on appeal from the final order in the case and recovered at that time if altered or set aside. There has been no suggestion that plaintiffs’ counsel cannot repay the award if it is later modified. For its part, EMAK has not hesitated to pay its own counsel and Crown’s counsel over \$5 million to litigate against the plaintiffs. EMAK also has paid significant bonuses to senior management during this corporate control dispute, including to individuals whose loyalty to the corporation has been called into question by the considerable evidentiary record developed by the plaintiffs.

Consequently, I have entered an order requiring EMAK to pay the interim fee award within five days. I decline to certify the order as a partial final judgment pursuant to Rule 54(b).

Very truly yours,

/s/ J. Travis Laster

J. Travis Laster
Vice Chancellor

JTL/krw