

Review of Selected Key Decisions from the
Delaware Supreme Court and Delaware Chancery Court in 2008

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This is a brief overview of selected Delaware corporate and commercial decisions from the Delaware Supreme Court and the Delaware Chancery Court during the calendar year 2008. I have previously prepared overviews of such decisions for calendar years 2007, 2006 and 2005.¹

From among the approximately 165 Chancery Court decisions and 25 Delaware Supreme Court decisions that I summarized on my blog during 2008, I am highlighting the issues addressed in only a select number of cases that I think would be of the most far-ranging interest to the broadest range of business lawyers. For those who are interested in reading the entire opinion for any of the noted cases, they can be found by using the search function at www.delawarelitigation.com.

Delaware Supreme Court Cases

In *Crescent/Mach I Partners L.P. v. Dr. Pepper Bottling Co. of Texas*, (Del. Supr., December 1, 2008), the Delaware Supreme Court (in a rare occurrence) reversed the Chancery Court on a procedurally unusual basis, in an appraisal case.

The parties reached a settlement shortly after the trial court entered a final judgment. After the settlement, one of the parties applied to the trial court under Chancery Court Rule 60 to modify what it argued was a clerical error in the numerical computation. The opposing party argued that the error was substantive.

Delaware's High Court reasoned that:

Although judicial decisions are public records, that fact cannot empower a court to modify a judgment rendered moot by settlement, even if the judgment contains errors. To hold otherwise would distort the doctrine of mootness and undercut the finality of settlements.

In *Motorola Inc. v. Amkor Technology, Inc.*, (Del. Supr., Oct. 8, 2008), the Delaware Supreme Court interpreted patent agreements that turned on an interpretation of the meanings in the context of those agreements, of the words "license" and "assignment." Key contract interpretation principles, applicable generally to many types of cases, make this a useful decision

¹ Those summaries are available at the following links on my blog:

<http://www.delawarelitigation.com/int92.PDF>

<http://www.delawarelitigation.com/Bloomberg-Corporate%20Law%20Report.pdf>

<http://www.delawarelitigation.com/2006/01/articles/commentary/review-of-selected-2005-delaware-chancery-and-supreme-court-cases/>

for a business lawyer's toolbox. Delaware's High Court also applied "trade usage" to interpret ambiguous terms in the agreement.

In *Hoag v. Amex Insurance Company*, (Del. Supr., July 21, 2008), the Delaware Supreme Court upheld the trial court's imposition of the penalty of dismissal of a complaint against a plaintiff that failed repeatedly to comply with orders compelling discovery of data that was key to the claims and defenses in the case. The court recited in detail the multiple orders that the appellant simply failed to comply with despite ample opportunity.

Delaware's High Court acknowledged the severity of the penalty but reasoned that it was warranted in light of the circumstances. The opinion includes "good quotable" language about the importance to the legal system of compliance with discovery obligations.

CA, Inc. v. AFSCME Employees Pension Plan, (Del. Supr., July 17, 2008) (Revised opinion dated August 15, 2008). This opinion has been the subject of extensive commentary around the world. It was the first time the SEC certified a question of Delaware law directly to the Delaware Supreme Court, and the Court issued its opinion within a few short weeks of the issue being presented to it.

In sum, a shareholder of CA, Inc., the trillion dollar pension fund of AFSCME, proposed a bylaw amendment that would require the company to reimburse the shareholder for expenses related to nominating a less than full slate to the board of directors.

Here are the two issues presented by the SEC to the Delaware Supreme Court in a procedure authorized last year and used for the first time:

1. Is the AFSCME Proposal a proper subject for action by shareholders as a matter of Delaware law?
2. Would the AFSCME Proposal, if adopted, cause CA to violate any Delaware law to which it is subject?

Answer: Yes and yes.

Wood v. Baum, (Del. Supr., July 1, 2008). This Delaware Supreme Court decision is an important ruling regarding the defense by LLC managers to fiduciary duty and *Caremark* claims against them in light of the exculpatory terms of an LLC agreement.

The court explains the lack of particularity in the conclusory allegations in the complaint - - juxtaposed against the provisions of the operating agreement requiring a showing of fraud or bad faith before the defendants could be found liable.

Delaware law on this point is clear: board approval of a transaction, even one that later proves to be improper, without more, is an insufficient basis to infer culpable knowledge or bad faith on the part of individual directors.

Also, the plaintiff claimed that the Board knowingly ignored “red flags.” Under Delaware law, red flags “are only useful when they are either waved in one’s face or displayed so that they are visible to the careful observer.” The court further reasoned that: “ Here, the Complaint does not allege any contractual claims, let alone a “bad faith” breach of the implied contractual covenant of good faith and fair dealing. Nor, as discussed above, does the Complaint contain any particularized allegations that the defendants acted with the requisite scienter (in “bad faith”).”

This case “enshrines in judicial concrete” (my words) what is already in the LLC statute - - namely, unlike in corporations, fiduciary duties can be waived in an LLC. *In this case, in order to avoid dismissal, the complaint had to satisfactorily allege fraud and other “higher threshold” claims, which it failed to do.*

In *Feldman v. Cutaia*, the Delaware Supreme Court affirmed the Chancery Court’s ruling that, based on the facts before it, a stock option-related claim was derivative cause of action and not a direct claim. The Court of Chancery had concluded that the alleged diminution of Feldman’s share of the Merger proceeds in Court XIII are the same damages that flow from the alleged harm under the predicate derivative claims in those counts of the Third Amended Complaint that challenged the validity of the stock option.

AT & T Corp. v. Lillis, (Del. Supr., May 22, 2008). This 34-page opinion reiterates basic contract interpretation principles under Delaware law in the context of stock option rights, including a discussion of when extrinsic evidence will be considered by the court. Delaware’s High Court also addresses what weight, if any, should be given to prior admissions in pleadings that are later amended, as well as the difference between a stock for stock merger and a cash-out merger.

In the Matter of the Philadelphia Stock Exchange, Inc., (Del. Supr., March 27, 2008), the Delaware Supreme Court affirmed the Chancery Court’s decision to both approve the class action settlement in the case as well as upholding the trial court’s bifurcation of the settlement proceedings to address an objector’s argument that the settlement proceeds were not fairly distributed among the class members.

In *Reddy v. MKBS Company Limited*, the Delaware Supreme Court affirmed a Chancery Court decision finding that an attempt to “cancel” shares, whether via the certificates representing those shares or the shares themselves, did not comply with statutory and related requirements. Both courts also addressed the difference between “void” and “voidable” stock.

In *Schoon v. Smith*, (Del. Supr., Feb. 12, 2008), the Delaware Supreme Court ruled that a director *qua* director may not sue fellow directors of a corporation derivatively. The Court provided an extensive historical and public policy analysis to support its reasoning.

In *Matulich v. Aegis Communications Group, Inc.*, (Del Supr., Jan. 15, 2008), the Delaware Supreme Court affirmed a Chancery Court decision. Delaware's High Court explained the difference between a contract right of preferred shareholders to consent to a merger and the statutory right to vote on a merger pursuant to the short—form merger procedure in DGCL Section 253. Voting rights were expressly withheld from the preferred shares, as compared with “blocking approval”. In those situations where the issuing document is silent on the topic, the preferred shareholders would have the same voting rights as the holders of common shares. But the court found the contractual terms here to be unambiguous and not susceptible to different reasonable interpretations, thus agreeing with the Chancery Court's dismissal under Rule 12(b)(6).

Delaware Chancery Court Cases

General Video Corp. v. Kertesz, et al., 2008 Del. Ch. LEXIS 181 (Dec. 17, 2008), addresses issues of practical importance to anyone interested in the sundry dilemmas that always arise in connection with the “break-up” of a closely-held business. As commonly happens, one of the “partners” of the failed business in this imbroglio claimed some interest in a new enterprise founded “on the ashes” by the other partner in the original venture. Among the claims addressed by the court in this opinion, include: misappropriation of trade secrets; conversion of corporate property; and tortious interference with business relations.

Notably, the court ruled that resignations by officers and directors, do *not* need to be written in order to be effective.

In re: Cencom Cable Income Partners, L.P. Litigation, (Del. Ch., Nov. 26, 2008) discussed the difference between claims based on a breach of contract and those based on breach of common law fiduciary duties.

Off v. Ross, et al., (Del. Ch., Nov. 26, 2008), rejected a proposed class action settlement (and related request for attorneys' fees), in a derivative and putative class action that challenged the fiduciary duties of the board of trustees of a Delaware statutory trust.

Here are a few highlights of the issues addressed by the Court in its 36-page opinion: (i) satisfying DGCL Section 144 does not automatically entitle one to protection of the Business Judgment Rule; and (ii) prior Delaware cases have raised issues of independence when members of a board are connected to charities to which the company has made generous donations.

The court stayed further proceedings pending resolution of a related pending action in New York.

Alpha Natural Resources, Inc. v. Cliff's Natural Resources, Inc., (Del. Ch., November 6, 2008). When a “mandatory injunction” is requested, seeking affirmative correction or remedial action to be taken it: “requires, in addition [to other prerequisites for injunctive relief], a showing that the petitioner is entitled as a matter of law to the relief it seeks based on undisputed facts.”

Delaware Dept. of Educ. V. Doe, (Del. Ch., Nov. 21, 2008). The issue addressed was whether the settlement discussions between the two attorneys resulted in a binding settlement agreement. Whether a settlement agreement was reached depends on the objective, overt manifestations of the parties, rather than their subjective intent. The agreement contained all terms essential to the parties and that the agreement concluded the negotiations, but the court found that the attorneys involved here never manifested an intent to agree to the settlement. (Another case summarized later addressed a similar issue.)

Greetham v. Sogima L-A Manager, LLC, et al., (Del. Ch., Nov. 3, 2008). The court ruled on an issue of substantial practical importance in many corporate and commercial cases. The court upheld a clause in an agreement that made Delaware law govern any issues that arose, and that also required the parties to litigate in Delaware Chancery Court. *See* Section 2708 of Title 6 of the Delaware Code. The court determined that the irreducible minimum elements of an enforceable contract were not evident in the record after trial, however.

Cargill, Inc. v. JWH Special Circumstance, LLC, (Del. Ch., Nov. 7, 2008). This is a 68-page decision involving a Delaware statutory trust (formerly referred to as a business trust), in which the court found that common law fiduciary duties would apply to a trustee as a “default rule” in light of the agreement among the parties being silent on the issue.

County of York Employees Retirement Plan v. Merrill Lynch & Co., Inc., et al. (Del. Ch., Oct. 28, 2008). This opinion is a treasure trove of Delaware corporate law principles and practical corporate litigation tools that directly address the Delaware legal issues that have arisen in connection with the recent economic crisis of historic proportions.

The Court cursorily reviewed the following claims that were made about the transaction: self-interested directors; duty of care; deal protection claims; irreparable harm; disclosure claims; financial advisor compensation; chairman’s compensation package.

The court denied a motion to stay this Delaware case in favor of a related federal case in New York.

Olson v. Halvorsen, (Del. Ch., Oct. 22, 2008). The Court addressed an issue of first impression in the context of cross motions for summary judgment in this case: Does the statute of frauds apply to an LLC Agreement. The answer is yes.

The court reasoned that in light of the multi-year earnout provision involved in the LLC agreement at issue - - that was never signed, the exception to the statute of frauds for partial performance did not apply.

Kinexus representative LLC v. Advent Software, Inc. (Del. Ch., Sept. 22, 2008). Practical issues involving electronic discovery and what the Court will accept as satisfactory responses to both interrogatories and requests for documents were addressed in this decision.

The key parts of the Court's ruling are at least twofold: (i) The Court required the defendant to produce documents by Bates number that were responsive to each of the interrogatories from plaintiff; and (ii) Defendant was required to provide to plaintiffs "searchable 'extracted text' from the TIFF – formatted documents already produced, but only if plaintiffs pay for the process."

The Court quoted from Rule 33(d) of the Chancery Court Rules as follows:

"Where the answer to an interrogatory may be . . . ascertained from the business records of the party upon whom the interrogatory has been served[,] . . . it is sufficient answer to such interrogatory to *specify the records* from which the answer may be derived or ascertained."

Next, it was emphasized that: "This court requires a specific designation of the documents pertaining to each interrogatory when Rule 33(d) is employed."

Hillsboro Energy, OOC v. Secure Energy, Inc., (Del. Ch., Oct. 3, 2008). Of great importance in this opinion is the Court's rejection of the argument that even though the potential insolvency of the defendant and its alleged inability to pay any potential money judgment has in the past been a potential factor in determining equitable jurisdiction, the Court observed that in this case there is no support for the premise that the financial condition of the defendant would render it unable to meet a potential money judgment in this case (citing *E.I. DuPont de Nemours & Co. v. HEM Research, Inc.*, 576 A.2d 635 (Del. Ch. 1989)).

Weir v. JMACK, Inc., (Del. Ch., Sept. 23, 2008). This Chancery Court decision denied a request for dissolution of a corporation and is another example of the factually intensive aspect of such a request and why it is not necessarily always predictable whether such a request will be granted to appoint a receiver and dissolve a solvent corporation - - even if co-owners of a company, for example, are "stuck in a loveless marriage" in a business context. *See* DGCL Section 226.

In Hexion Specialty Chemicals, Inc. v. Huntsman Corp., (Del. Ch., Sept. 29, 2008). Chancery Court rejected the arguments of Hexion, which is 92% owned by private equity group Apollo, that it should be relieved of its contractual obligations to buy 100% of Huntsman's stock based on a July 2007 agreement that was valued at \$10.6 billion. Hexion/Apollo argued that the "material adverse effect" clause in the parties' agreement was triggered, and in light of a report (that the court found to be unreliable), that the combined companies would together be insolvent, it should not be required to complete the merger. (Wrong.)

In Re Seneca Investments LLC, 2008 WL 4329230 (Del. Ch., Sept. 23, 2008). Chancery denies dissolution request per Section 18-802 of the Delaware LLC Act and per DGCL Section 226(a)(3). This is another reminder that dissolution requests are not always granted.

In Re Loral Space and Communications Inc. Consolidated Litigation, 2008 WL 4293781 (Del. Ch., Sept. 19, 2008), provides a reminder that the Delaware courts do not hesitate to uphold fiduciary duties and impose consequences on directors who do not abide by their obligations. In this *magnum opus*, the Court reformed the terms of a control transaction involving a group that "stood on both sides of the transaction" and breached their fiduciary duties but did not establish the "entire fairness" of the deal that they "pushed through."

- For DGCL Section 102(b)(7) purposes, the Court emphasized that it is not enough that a "non-independent director" voted in favor of a conflicted deal in order for the director to have personal liability imposed on her. Rather, in order to establish liability for such a director, a plaintiff must overcome the hurdle of Section 102(b)(7) by establishing the relevant "state of mind" of the director, such that it would be a "non-exculpated" breach of the duty of loyalty.
- The "special committee" created in this case was one in name only and did not satisfy the prerequisites, such as independence, that would entitle such a committee to any deference.

In Amirsaleh v. Board of Trade of New York City, Inc., 2008 WL 4182998 (Del. Ch., Sept. 11, 2008), the Chancery Court explored the contours and the content of the implied duty of good faith and fair dealing that is imposed on every contract governed by Delaware law.

The court's introductory paragraph includes a classic truism to the effect that even the most carefully drafted agreements cannot anticipate and address every potential issue that might arise in course of performing the terms of a deal. Here is the money quote: "Simply put, the implied covenant requires that the 'discretion-exercising party' make that decision in good faith."

In re Countrywide Corp. S'holders Litig., 2008 WL 4173839 (Del. Ch., Sept. 10, 2008), the objectors to a proposed class action settlement were allowed limited discovery. The Court

tailored limited discovery that was focused on allowing the objectors to evaluate the fairness of the settlement without overly burdening the other parties to the suit.

In *Duthie v. CorSolutions Medical, Inc.*, 2008 WL 4173850 (Sept. 10, 2008), the Delaware Chancery Court addressed three issues in a case in which it had previously ordered advancement.

1. Are the plaintiffs entitled to advancement of fees incurred in affirmatively asserting defamation claims regarding statements made in connection with the litigation about which the initial advancement suit was filed.
2. Were plaintiffs entitled to fees for securing parallel counsel to “get up to speed on the file” in case of a potential conflict (that never materialized)?
3. Are various fees for which advancement has been sought reasonable?

The court’s answer to the first and second question is yes. As to the third question, the court set up a procedure for a Special Master to be appointed if the parties could not resolve the amount of fees to be paid - - after each counsel submitted an affidavit about the reasonableness of their fees.

In *Berger v. Pubco Corp.*, 2008 WL 4173860 (Sept. 8, 2008), the Delaware Chancery Court addressed the amount of attorneys’ fees to be awarded to plaintiff’s attorneys whose litigation efforts resulted in a “corporate benefit”. Like its “cousin: common fund,” corporate benefit is one of the doctrines that allows the court to award attorneys’ fees to plaintiffs’ attorneys who bring derivative actions. The court also discusses the policy underpinning for this policy.

EBG Holdings LLC v. Vredezicht’s Gravenhage 109 B.V., et al. 2008 WL 4057745, (Del. Ch., Sept. 2, 2008). The court addresses a cornucopia of personal jurisdiction issues involving out-of-state defendants. *This opinion is a “mini-treatise” on personal jurisdiction, especially involving “parent and subsidiary” corporations.*

In *PARFI HOLDING AB v. MIRROR IMAGE INTERNET, INC.*, 2008 WL 4110698 (Del. Ch., Sept. 4, 2008), the Delaware Chancery Court provides a *magnum opus* on the “importance of being earnest.” This opinion “draws a line in the sand” and dismisses a case due to the misrepresentations that were made to the court intentionally in an attempt to have the court make a ruling based on those false facts.

Henkel Corp v. Innovative Brands Holdings, LLC, (Del. Ch., Aug. 26, 2008). When a contract does not provide for a specific deadline, depending on the circumstances, the court will impose a “reasonable period of time”, as a deadline. Here, Chancery imposes a “reasonable period of time” to trigger a MAC clause, when no deadline is specified in the agreement.

In Re Lear Corp. Shareholder Litigation, 2008 WL 4053221 (Del. Ch., Sept. 2, 2008). This is the third Chancery Court decision in about as many (business) days that addresses the issue of whether: claims against a board of directors will be dismissed based on the exculpation clause in a corporate charter as authorized by DGCL Section 102(b)(7).

The court summarized its reasoning thusly:

“Directors are entitled to make good faith business decisions even if the stockholders might disagree with them. Where a complaint, as here, does not even create an inference of mere negligence or gross negligence, it certainly does not satisfy the far more difficult task of stating a non-exculpated duty of loyalty claim.”

In *McPadden v. Sidhu*, (Del. Ch., Aug. 29, 2008), the court granted a motion to dismiss under Rule 12(b)(6), against the directors *despite their apparent violation of their duty of due care*, due to the exculpation provision in their charter pursuant to DGCL Section 102(b)(7). Highlights:

1. Section 102(b)(7) protection is not for the benefit of officers - - as compared to directors
2. The Court re-affirmed that the fiduciary duties of directors also apply to officers.

Ryan v. Lyondell. This is the second opinion in this case. This one was issued August 29, 2008. The Court denied the interlocutory appeal by the defendants, but did, however, dismiss Lyondell as a nominal defendant.

I will just highlight a few key “bullet points” from “*Ryan II*”:

- The Chancery Court emphasized that: “*the reports of the death of Section 102(b)(7) (and the consequent possibility for the “resuscitation” of a Van Gorkom-esque liability crisis) in Delaware law are greatly exaggerated both with regard to the application of Lyondell’s exculpatory charter provision in this case, and certainly with regard to the application of a Section 102(b)(7) provision defense in any other case.*”
- The Court went out of its way to repeatedly emphasize the restricted procedural posture of its decision and the circumscribed nature of the meager - - and by definition incomplete - - record in the context of the summary judgment motion that was presented.

In *R & R Capital, LLC v. Buck & Doe Run Valley Farms*, 2008 WL 3846318 (Del. Ch., Aug. 29, 2008). This opinion champions freedom of contract in LLCs and provides a convenient exegesis of all one needs to know about the theoretical underpinnings that define the contours for the

contractual flexibility regarding what terms will be allowed as part of an Operating Agreement for an LLC.

The Court goes to great lengths, however, to emphasize that members will not be helpless if rights are waived to the fullest extent allowable under the Act. For example, the LLC Act does *not* allow the waiver of the “implied duty of good faith dealing.”

In *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*, 2008 WL 3522445 (Del. Ch., Aug. 12, 2008), the Chancery Court denied a motion to compel an inadvertently produced communication that was an attorney/client communication. Importantly, the parties had signed a stipulated Confidentiality Order that had a “standard non-waiver and clawback” provision that allowed one party to demand the return of a mistakenly produced document.

In *Steel Partners II, L.P. v. Point Blank Solutions, Inc.*, 2008 WL 3522431 (Aug. 12, 2008), the initial complaint was filed to force the holding of a shareholders meeting (which had not taken place since 2005), pursuant to DGCL Section 211. After a stipulation was entered into for a date to hold the meeting, the defendant moved for leave of court to postpone the date of the meeting by 90 days. The Chancery Court denied the request.

The request was based on allegations that the plaintiff and its CEO together own about 40% of the stock and would attempt to install their own directors and then seek to buy the company at the lowest possible price for its own investors.

The court reasoned that the best way to deal with the issues presented was to communicate them to the shareholders and let them decide, based on those facts, who they wanted as directors - - instead of further delaying the exercise of the *shareholder franchise, which under Delaware law is sacrosanct.*

In *Re William Lyon Homes Shareholder Litigation*, 2008 WL 3522437 (Del. Ch., Aug. 8, 2008), the Chancery Court ruled that the “*at issue*” exception to the attorney/client privilege did not apply to the facts of the case, and thus the privilege was **not** waived, because the defendants specifically adopted a tactic and strategy to use objective, non-privileged data to address the causation issue in the case - - precisely so that they would not be subject to the “at issue” exception.

In the case of *In Re SS & C Technologies Shareholders Litigation*, 2008 WL 3271242 (Aug. 8, 2008), the Chancery Court reviewed a claim for attorneys’ fees that were awarded as a penalty in a prior opinion.

The amount requested was nearly \$1 million, however, only about 25% of that was granted. The court referred to the common standards to review requests for fees, but noted that it was not

bound strictly by reasonableness guidelines in Rule 1.5(a) because the fees were awarded as a penalty. The various defense counsel asked the court for payment of 700 hours for the 50-page brief and 80 hours related to the two-hour oral argument.

Pharmalytica Services LLC v. Agno Pharmaceuticals LLC, 2008 WL 2721742 (Del. Ch., July 9, 2008) The court treated this dispute over who was entitled to be a manager of the LLC pursuant to Section 18-110 of the Delaware LLC Act (Title 16), as being analogous to Section 225 of the Delaware General Corporation Law which provides for a summary proceeding to determine issues over who rightfully is entitled to maintain a management office.

The court made a note of emphasizing that neither DGCL Section 225 nor Section 18-110 of the Delaware LLC Act require that the normal elements of a preliminary injunction need to be satisfied.

In Re TD Banknorth Shareholders Litigation, 2008 WL 2897102 (Del. Ch., July 29, 2008). This case has a somewhat lengthy history procedurally. In a previous opinion last year, the court rejected a proposed class action settlement and an objector to that settlement then became the class representative. In this Chancery Court opinion the court now certifies a class over the opposition as to the “adequacy” requirement of the class representative, as well as claims that the class representative has not properly monitored plaintiff’s counsel and related allegations.

Sun-Times Media Group Inc. v. Black, 2008 WL 2933093 (Del. Ch., July 30, 2008). The Delaware Chancery Court once again was called upon to address issues involving Lord Conrad Black and his ongoing legal battles related to his publishing empire and affiliated entities. In this latest iteration, the issue was whether Lord Black: Was entitled to advancement of the millions in legal fees he has incurred, in light of the particular factual and procedural posture presented, pending his appeal of a conviction by a federal court in Chicago.

The crux of this dispute is the meaning of the words “the final disposition of such action, suit or proceeding” in the Sun-Times bylaws and Section 145(e) of the Delaware General Corporation Law (the “DGCL”). The court ruled that: “after considering the language of the bylaws and Section 145, the parties’ course of performance under the Sun-Times bylaws, and the practical and policy considerations related to the definition of that language, I conclude that the final disposition of a proceeding in this context is the final, non-appealable conclusion to that proceeding.”

“Course of performance” as a contract interpretation tool was an important part of the court’s analysis. The court also discussed at length the policy implications of its decision.

Sodano v. American Stock Exchange LLC, 2008 WL 2738583 (Del. Ch., July 15, 2008). This Chancery Court decision interprets corporate documents and a settlement agreement to determine rights to advancement of legal fees. The court observes that the word

“indemnification” as used by the parties in the relevant documents in this case was often used as a shorthand to also refer to the separate and distinct provisions for advancement. The court also addressed the obligation of the parties when a separate party is secondarily liable for the advancement obligation.

In *Ryan v. Lyondell Chemical Company*, (Del. Ch., July 29, 2008). The court found that at the procedural stage of a summary judgment motion, it would allow to proceed to trial the issue of whether the independent directors should be exposed to personal liability for their role in the sale of the company - - despite selling the company to the only known buyer for a substantial premium. (See *Ryan II* decision issued on Aug. 29, 2008.)

In *Tanyous v. Happy Child World, Inc.*, 2008 WL 2780357 (Del. Ch., July 17, 2008), the Chancery Court was called upon to make sense out of a record that was comprised of corporate documents that were in disarray as well as conflicting testimony about whether payments made by one of the parties to a start-up business were intended to purchase shares or if they were designed as loans. The court recited in detail the extensive facts and determined that the investment was intended as a stock purchase.

In *Julian v. Eastern States Construction Service, Inc.*, 2008 WL 2673300 (Del. Ch., July 8, 2008), the Chancery Court required directors to disgorge a \$1.3 million bonus they had given themselves in a self-interested manner, without any independent protections, and based on their failure to satisfy their burden to demonstrate the entire fairness of their decision.

The money quote follows (no pun intended) with the court’s reasoning that provides excellent *guidance for anyone attempting to challenge the decision of board members to pay themselves large bonuses*:

Self-interested directorial compensation decision made without independent protections, like other interested transactions, are subject to entire fairness review. Directors of a Delaware corporation who stand on both sides of a transaction have “the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts.”

In *Dweck v. Nassar*, 2008 WL 2602169 (Del. Ch., July 2, 2008), the Chancery Court addressed the authority, pursuant to agency law, of an attorney for a party who agreed to the terms of a settlement of litigation on behalf of a party - - but where that attorney was not “counsel of record” in the case that was settled. The Court held that: “[A]n attorney of record in a pending action who agrees to the settlement of [a] case is presumed to have lawful authority to make such an agreement.”

In *David P. Simonetti Rollover IFA v. Margolis*, (Del. Ch., June 27, 2008), the Delaware Chancery Court issued a preliminary injunction to enjoin a shareholder vote in light of what the court found to be violations of the duty to disclose necessary information.

Wayne County Employees' Retirement System v. Corti, (Del. Ch., July 1, 2008) is a Delaware Chancery Court decision involving a request for a preliminary injunction to stop a shareholders meeting (at which a merger would be voted on), due to alleged disclosure violations. In sum, the Court denied the PI request based on a finding that the plaintiff did not establish the materiality necessary to establish the disclosure violation.

London v. Tyrrell, 2008 WL 2505435 (Del. Ch., June 24, 2008). This Chancery Court decision explained in detail the reasons why it denied a motion to dismiss a derivative claim based on Chancery Court Rules 9(b), 12(b)(6) and 23.1. The derivative complaint alleged that the defendants caused the company to issue stock options in contravention of an equity incentive plan by setting the exercise price of the issued options at an unfairly low value.

The court explained the reasons why it concluded, that both prongs of the *Aronson* case were satisfied. Specifically, the plaintiff demonstrated a reasonable doubt that: (1) the directors were interested and independent; or (2) the challenged transaction was otherwise the product of a valid exercise of business judgment.

The first prong was satisfied because the directors had a financial interest in the challenged stock option. The second prong was satisfied because the allegations rebutted the business judgment rule to the extent that the allegations supported an inference that the directors intended to violate the terms of a stockholder approved plan.

In *Jackson Walker L.L.P. v. Spira Foowear, Inc.*, 2008 WL 2487256 (Del. Ch., June 23, 2008) the court addressed the following issue of first impression in connection with interpreting advancement rights under DGCL Section 145.:

The crux of this case is whether Jackson Walker's actions as Spira's outside litigation counsel constitute actions of an agent of the corporation under the Bylaws and DGCL Section 145. This appears to be an issue of first impression under Delaware law.

The court reasoned that the Jackson firm was entitled to advancement as an agent under Section 145 based on the claims against it relating to the role in which it was sued by the company.

Barrett v. American Country Holdings, Inc., (Del. Ch., June 20, 2008). The Chancery Court in this opinion excoriates a company for refusing to fulfill its obligation to provide advancement rights to former directors. Moreover, it suggests that the unnecessary costs and fees incurred by the company in defending the suit by the directors seeking advancement - - ultimately an

expense borne by the shareholders - - may be a basis for claims against the company's management for breach of their fiduciary duties.

In *Re Transkayrotic Therapies, Inc.*, 2008 WL 2462767 (Del. Ch., June 19, 2008). This Chancery Court opinion is almost 100-pages long in its original format and provides important clarification on "disclosure law" in Delaware.

1. This opinion provides a history lesson on the evolution of Delaware case law concerning breach of the duty of disclosure, sometimes referred to as the duty of candor.
2. The court also discusses fundamentals of corporate governance. Namely, the opinion observes that the BJR is "born" from Section 141(a) of the DGCL.
3. The definitions of directors' "interest" and "independence," so central to rebutting the BJR's presumption, are explained.
4. Section 251(c) of the DGCL requires shareholder approval of mergers such as the one involved in this case. The court found that the plaintiffs "scarcely" rebutted the presumption of a merger's validity connected with the filing of a Certificate of Merger, at least for summary judgment purposes.

In *Schuss v. Penfield Partners, L.P.*, 2008 WL 2433842 (Del. Ch., June 13, 2008). This case involved claims for breach of contract (limited partnership agreement); breach of fiduciary duty and an accounting.

The court explained: (i) Those instances in which both a breach of contract claim and a breach of fiduciary duty claim may proceed "on dual tracks" based on the same operative facts, such as when the remedies that might flow from each claim are not the same, for example when there might be potential personal liability for breach of fiduciary duties but not for breach of contract; and, (ii) When a claim for accounting will be allowed. Although a request for "an accounting" is often referred to as a remedy as opposed to a separate cause of action, the court discussed the claim in this case for "an equitable accounting" in light of disputes regarding improper distributions among partners and described when the claim would be allowed.

In *Maitland v. Int'l Registries LLC*, (Del. Ch., June 6, 2008), the Chancery Court prevented one member of a 50/50 two-member LLC from hiring counsel on behalf of the LLC when the parties were deadlocked. However, the court allowed the 50% member to intervene and present his arguments as an intervenor.

In *Tanyous v. Banoub*, 2008 WL 2233741 (Del. CH., May 22, 2008), the Chancery Court declined to appoint a custodian pursuant to DGCL Section 226(a)(2) despite the fractious

relationship between the shareholders. The court's reasoning was at least in part due to open issues about the exact ownership interests of the shareholders and a pending Section 220 action.

In *Venhill Limited Partnership v. Hillman*, 2008 WL 2270488 (Del. Ch., June 3, 2008), the Chancery Court addressed egregious breaches of the duty of loyalty by the general partner of a limited partnership whose assets were derived from various trusts that were used to keep afloat a failing business the general partner ran. The court fashioned a customized remedy for the breach.

Footnote 102 quotes from a case that reminds me of the "7 deadly sins" that could also motivate one to violate his or her fiduciary duties.

Of educational value additionally is the "mini-business course" that the court provides in the standards typically used by private equity and venture capital investors in deciding whether or not to invest in a business - - none of which were followed in this case by the defendant who used trust assets as his own personal piggy bank.

In *Berger v. Pubco Corp.*, 2008 WL 2224107 (Del. Ch., May 30, 2008) the Chancery Court fashioned a "quasi-appraisal" remedy due to a breach of the statutorily mandated requirements of a short-form merger under DGCL Section 253, as well as for breach of the duty to make necessary disclosures. This is a good primer on the requirements of a short-form merger under Section 253 and what pitfalls to avoid.

In *Sutherland v. Sutherland*, 2008 WL 2221770 (Del. Ch., May 29, 2008), Chancery Court denied a motion to reargue its May 5, decision, pursuant to Chancery Rule 59(f), in which it rejected the report of a one-person Special Litigation Committee (SLC). This is one of several other prior Chancery decisions involving these parties. In the course of repelling the request by the nominal defendant company that the court second-guess its opinion, the Chancery Court recited well-settled law regarding the standard of review used by the court to evaluate the SLC's conclusions and investigations as articulated in the seminal decision of *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981), and the court provided examples of what an SLC should NOT do as well as reiterating precatory practices.

The SLC is not entitled to any presumptions of independence, good faith or reasonableness. Each side has the opportunity to make a record on the motion. If the court is satisfied with the SLC's independence and good faith, and the reasonableness of its inquiry, the court may nonetheless exercise its own business judgment and deny the motion to dismiss.

Citing to prior cases comparing the need for a one-person SLC to be "above reproach, like Caesar's wife", the court noted that the rubric also applied to the evaluation of the SLC's independence as well as its good faith and the reasonableness of its investigation and conclusions.

It did not help the SLC's argument that the one-person SLC apparently "destroyed its original interview notes, after using them to prepare cursory and incomplete summaries of the interviews it conducted, which undermined the court's confidence in the good faith and reasonableness of the SLC's investigation."

In *Zaman v. Amedeo Holdings, Inc.*, 2008 WL 2168397 (Del. Ch., May 23, 2008), Chancery Court reviews corporate issues involving the ultra-rich Sultan of Brunei, and the London barristers of his brother, but more importantly, the court analyzes the barristers' claims for advancement and indemnification as well as "fees on fees." In the course of making its decision, it necessarily recites the background facts of royal family battles that could be part of movie script.

Among the details that compel a reading of the whole decision, is the following nugget: ". . . the Sultan preceded his 2004 legal campaign by amending Brunei's constitution to declare himself infallible and immune from any obligation to appear in court (or for his designees to appear), and to subject anyone who criticized him to criminal punishment."

The Chancery Court allowed advancement for certain counterclaims brought by the plaintiffs in the New York state court proceedings against them because the Chancery Court considered them compulsory counterclaims under the traditional test used in Delaware and federal civil procedure, and thus they are deemed to be part of a defense for purposes of DGCL Section 145.

The court also concluded that the plaintiffs were entitled to 80% of the costs of prosecuting their case for advancement and indemnification as they "substantially prevailed on their claims."

In *Monier, Inc. v. Boral Lifetile, Inc.*, (Del. Ch., May 13, 2008), the Chancery Court relied on prior precedent to hold that on a Motion to Dismiss under Rule 12(b)(6), it could not choose between two (or more) reasonable interpretations of an Operating Agreement.

Fisk Ventures, LLC v. Segal, 2008 WL 1961156 (Del. Ch., May 7, 2008). Though clearly separated in the structure of the opinion, the court's discussion of the breach of contract claim and the breach of fiduciary duty and implied duty claims, was somewhat, of necessity, interwoven. The court began its analysis with basic contract principles and the truism that LLCs are creatures of contract, and that a prerequisite to any breach of contract analysis, is to determine if there is a *duty* in the document that has been breached.

In this regard, the court cites in footnote 34 to Delaware Supreme Court Chief Justice Myron Steele's article entitled: *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 32 Del. J. Corp. L. 1, 4 (2007) ("Courts should recognize the parties' freedom of choice exercised by contract and should not superimpose an overlay of common law fiduciary duties . . .")

Importantly, the court found no provision in the LLC Agreement at issue that “create[d] a code of conduct for all members; on the contrary, most of those sections expressly claim to limit or waive liability.”

Here is the money quote: “There is no basis in the language of the LLC Agreement for Segal’s contention that all members were bound by a code of conduct, but, even if there were, this Court could not enforce such a code because there is no limit whatsoever to its applicability.”

The court read the parties’ LLC Agreement in this case to eliminate fiduciary duties because it flatly stated that: “. . . members have no duties other than those expressly articulated in the Agreement. Because the Agreement does not expressly articulate fiduciary obligations, they are eliminated.”

Nelson v. Emerson, 2008 WL 1961150 (Del. Ch., May 6, 2008). This Chancery Court decision provides a cornucopia of useful and important statements of Delaware law for those lawyers whose practice overlaps corporate governance and creditors’ rights, including bankruptcy proceedings. Although one could appropriately write a lengthy article about this case, the constraints of time and space compel me to highlight just a few key points from the opinion.

The essential claims made were that the directors and majority stockholders of a company breached their fiduciary duties to the only secured creditor by causing the company to file for bankruptcy and by paying themselves “excessive compensation” during the time that the creditor was insolvent, both before and after the bankruptcy.

In sum, the court determined that Nelson, the creditor/plaintiff, had made the same arguments before, and they were rejected in the bankruptcy court. The court nonetheless explained its reasoning in great detail.

Here is a money quote: The directors of an insolvent company who, in good faith, undertake a strategy to benefit the company’s equity holders cannot be held liable just because the strategy failed. Regarding the claim that the defendant directors paid themselves “excessive compensation,” the court’s opinion provides a tutorial about the necessary elements of that claim.

Madison Real Estate Immobilien-Anlagegesellschaft Beschränkt Haftende Kg v. Kanam USA XIX LTD. Partnership, 2008 WL 1913237 (Del. Ch., May 01, 2008). (Yes, that is the correct spelling of the unusual case name.) The court concluded that the evidence demonstrated that the primary purpose for seeking books and records was for the purpose of making a tender offer, which was not a proper purpose.

The court also relied on the defenses available at Section 17-305(b) which allows documents to be withheld if they are trade secrets and/or if they are the subject of confidentiality agreements with third-parties (even if, as here, they are oral agreements).

The language in the document providing for “books and accounts” did not include the documents sought by the plaintiff - - even if a “proper purpose” requirement was not superimposed on the contract claim.

In *Young v. Kaassan*, (Del. Ch., April 25, 2008), the Chancery Court granted a motion to compel discovery of the documents that a special litigation committee relied on, and because the defendant referred to the committee’s finding in its motion to dismiss.

Levitt Corp. v. Office Depot, Inc., 2008 WL 1724244 (Del. Ch., April 14, 2008). In this case Chancery decided an issue of first impression: nomination of directors is part of the right to elect directors. The court was presented in this case with differing interpretations of an “advance notice bylaw” and the argument by Office Depot that Levitt did not comply with the requirements of the bylaw related to Levitt’s attempt to nominate new directors to the board in connection with a self-funded proxy contest.

One of the issues addressed in the court’s opinion was the interface between the concepts of “electing” directors as compared with “nominating” directors.

Helaba Invest Kapitalanlagegesellschaft mbH v. Fialkow, 2008 WL 1128721 (Del. Ch., April 11, 2008). [Yes, that is a long case name.] The Delaware Chancery Court decided an issue in this case that is usually of great interest to both lawyers and clients alike: attorneys’ fees awarded by the Court.

The court observed that as an alternative to the “common fund doctrine”, attorneys’ fees can be awarded pursuant to the “corporate benefit doctrine” when a “tangible monetary benefit has **not** been conferred, but some other valuable benefit is realized by the corporate enterprise or the stockholders as a group.

In *Corporate Property Associates 14 Inc. v. CHR Holding Corp.* 2008 WL 963048 (Del. Ch., April 10, 2008), the court denied a Motion to Dismiss fraud and negligent misrepresentation claims against a company for disclosing misleadingly incomplete information to warrant holders that discouraged them from exercising their warrants just prior to a transaction that devalued them - - even though the court held that they were not owed fiduciary duties.

In *TravelCenters of America, LLC v. Brog*, the Delaware Chancery Court, on April 4, 2008, issued a ruling from the bench, that a notice of intent to nominate new members of the board of managers of the LLC did not comply with a provision of the LLC agreement, and was in violation of several U.S. securities laws applicable to proxy contests.

Here is a money quote from the related letter decision of April 3: Delaware does not impose a legal requirement on LLCs to draft their bylaws to be consistent with some abstract notion of

“good corporate governance.” On the contrary, limited liability companies are creatures of contract, “designed to afford the maximum amount of freedom of contract, private ordering and flexibility to the parties involved.”

In *Reinhard & Kreinberg v. The Dow Chemical Co.*, 2008 WL 868108 (Del. Ch., Mar. 28, 2008), the court determined that only compulsory counterclaims and not permissive counterclaims would be subject to advancement.

In *Jana Master Fund, Ltd. V. CNET Networks, Inc.*, 2008 WL 660556 (Del. Ch., Mar. 13, 2008), the Delaware Chancery Court addressed issues relating to the application of SEC Rule 14a-8 and its relevance, or not, to notice and proxy provisions in CNET’s bylaws. The court held that: “Under this Court’s rules of construction favoring the free exercise of shareholders’ electoral rights, I must read that final sentence to set the scope of the bylaws narrowly and, therefore, conclude that the bylaw does not apply outside the context of Rule 14a-8.”

Midland Grange No. 27 Patrons of Husbandry v. Walls, 2008 WL 616239 (Del. Ch., Feb. 28, 2008). The nugget of this case is the recitation by the court that regardless of whether the defendants were considered officers or directors, their fiduciary duties would be the same.

In *Pfeffer v. Redstone*, 2008 WL 308450 (Del. Ch., Feb. 1, 2008), the Chancery Court provides a treasure trove of the applicable standards used to review the conduct of directors in connection with claims for breach of fiduciary duty related to failure to make full disclosure in documents sent to shareholders.

The court rejected an effort to have the “entire fairness” standard apply. Despite the fact that Viacom owned a majority of the shares of Blockbuster, the court did not find any special scrutiny “triggers” for a few reasons. First, the transaction at issue was a voluntary, non-coercive tender offer. Thus, the duty was to disclose all material facts. That is, the directors must not do any of the following: (i) make materially false statements; (ii) omit a material fact; or (iii) make a partial disclosure that is materially misleading.

After a discussions about what members of a board are reasonably presumed to have knowledge of (without evidence that they were actually presented with certain data), the court described the allegations that the directors knew about certain projections and failed to disclose them, as: “. . . a daisy chain of surmise and illogic . . .”

A majority shareholder does not have duties in this context unless they are controlling the whole transaction (e.g., compare a freeze-out merger). Here, the majority owner of Viacom did not even participate in the transaction.

In *Citrin Holdings LLC v. Cullen 130, LLC*, 2008 WL 241615 (Del. Ch., Jan. 17, 2008), the Chancery Court followed the familiar *McWane* line of cases and granted a Motion to Stay this Delaware case in favor of a first-filed Texas case. This decision recognizes the plaintiff's right, in general to litigate in the proper forum of its choice.

Pharmathene, Inc. v. SIGA Technologies, Inc., 2008 WL 151855 (Del. Ch., Jan. 16, 2008). Here, Chancery refused to dismiss a claim for breach of an "agreement to agree" and allowed claims for failure to negotiate in good faith and failure to use best efforts to conclude an agreement.

In *Fogel v. U.S. Energy Systems, Inc.*, 2008 WL 151857 (Del. Ch., Jan. 15, 2008), the Delaware Chancery Court refused to defer its decision to order a shareholders' meeting pursuant to DGCL 211, despite the "automatic stay" provision of Section 362 of Chapter 11 of the Federal Bankruptcy Code. Between the date that the court ordered the meeting to be held but prior to setting an exact date, the company filed for bankruptcy in New York's Southern District.

The Chancery Court cited to a decision of the U.S. Court of Appeals for the Second Circuit - - which in turn relied on a Delaware Supreme Court decision, that asserted the "well-settled rule that the right to compel a shareholders' meeting for the purpose of electing a new board subsists during reorganization proceedings." Moreover, the Chancery Court relied on a U.S. Supreme Court decision for the principle that: "a corporation in Chapter 11 reorganization continues to owe duties to its shareholders and that 'the passage into bankruptcy does not sound the death knell for the shareholders' role in corporate governance.'"

Portnoy v. Cryo-Cell International, Inc., (Del. Ch., Jan. 15, 2008). This Chancery Court decision addresses issues raised in a challenge to the election of directors under DGCL Section 225 based on claims that the management engaged in inequitable behavior to entrench themselves, both in proxy battles leading up to the annual meeting, as well as shenanigans during the annual meeting itself.

However, the court found it was a breach of the CEO's fiduciary duty to use corporate machinery to coerce and to threaten economic penalties with commercial partners who did not vote in favor of management.

The CEO announced during the Annual Meeting at 2 pm that she was taking a 3-hour lunch break. The court determined that (what it called) the "lupper" break affected the election of the directors and the defendants could not carry their burden to show that the CEO's actions were "motivated by a good faith concern for the stockholders, and not by a desire to entrench [herself]."

The customized remedy that the court fashioned in this case was to order a prompt special meeting for the new election of directors - - and to make the management slate pay for the costs of such a meeting. The court also ordered the removal of the new director who was elected at the

tainted meeting. Moreover, the court declined to award attorneys' fees in part due to the apparent violation of a confidentiality agreement by the plaintiff.

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