

DELAWARE BUSINESS COURT INSIDER

Chancery Decision Recites Basic Advancement Rules

In *Sider*, Vice Chancellor Kathaleen McCormick rejected the request for interlocutory review, reasoning that the defendant could not establish one of the elements of the interlocutory appeal standard: “that there is no just reason for denying the appeal.”

By Francis G.X. Pileggi and Chauna A. Abner | July 10, 2019



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The Delaware Court of Chancery in *Sider v. Hertz Global Holdings*, C.A. No. 2019-0237-KSJM, Order (Del. Ch. June 17, 2019), recently resolved an issue of first impression for the court: “should a defendant be permitted immediate appellate review of a decision granting entitlement to advancement, although disputes concerning the reasonableness of advancement fees remain unresolved?” In *Sider*, Vice Chancellor Kathaleen McCormick rejected the request for interlocutory review, reasoning that the defendant could not establish one of the elements of the interlocutory appeal standard: “that there is no just reason for denying the appeal.”

To advance the argument that there is no “just reason” for denying an appeal, the defendant in *Sider* contended that advancement rights encompass significant timing issues, such as the right to payments in advance of the final proceedings that gave rise to the claims. The defendant further argued that it would suffer irreparable harm if it paid what it believed to be unwarranted advancement.

In responding to the defendant’s arguments, the court noted that the defendant ignored the unextraordinary nature of the advancement issue before the court, explaining that many litigants share the concern that absent immediate appeal they will pay advancement that they may not be able to recoup later. The court held that granting interlocutory review in such a mundane case would change the nature of interlocutory review from being a procedure that is only employed when there is an “infrequent harsh case,” to being a procedure that is commonly employed.

Ultimately, the court held that there was a sound basis for denying the appeal, namely, that the court will not allow litigants to use Rule 54(b) to flood the Delaware Supreme Court’s docket with advancement disputes that commonly arise.

In addition to resolving an issue not previously addressed by the court, the order in *Sider* is noteworthy because the court recited several key truisms and basic principles of great practical usefulness for practitioners, regarding claims for advancement by former officers and directors who were sued “by reason of the fact” they were acting in their corporate capacity. (See DGCL Section 145.) Bolstered by copious, robust footnotes, the order makes two momentous points.

First, the abundant case law interpreting the operative phrase “by reason of fact” is well-settled under Delaware law for determining whether advancement is available for an executive who was acting in a corporate capacity. This serves as a practical cautionary notice for advocates trying to make new law on this issue. Second, the *Fitracks* procedure is now followed by all members of the Court of Chancery. This provides in detail a monthly procedure for counsel to follow to resolve issues about the reasonableness of the amount of monthly bills submitted pursuant to an order to pay advancement—when an amount has not been determined or the exact amount of fees payable is disputed.

Although this decision comes in the form of an order and not a formal opinion, regular readers are aware that the Court of Chancery permits practitioners to cite to orders and transcript rulings in their briefs.

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