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Delaware Supreme Court Finds Directors May Have Breached Caremark Duties by Failing to Oversee Compliance Risks; Rules Personal and Business Relationships Undermined Director's Independence

In *Marchand v. Barnhill*, the Delaware Supreme Court, sitting *en banc*, reversed the Court of Chancery's dismissal of claims alleging that the directors of Blue Bell Creameries USA, Inc. acted in bad faith by failing to implement board-level oversight of compliance and reporting systems (so-called "Caremark claims") with regard to the company's food safety operations. The *Marchand* opinion, written by Chief Justice Strine, reiterates that complete delegation by a board of compliance functions to management may constitute a breach of directors' duty of loyalty.

In the same opinion, the court also ruled a director as being non-independent due to "very warm and thick personal ties of respect, loyalty, and affection" between the director and the Chairman and CEO's family, reflecting other recent cases where long-standing personal friendships also raised independence concerns. For more, click [here](#).

Delaware Supreme Court Clarifies MFW's "Ab Initio" Requirement and Partially Reverses Court of Chancery Dismissal

In *Olenik v. Lodzinski*, the Delaware Supreme Court held that plaintiffs had sufficiently pled facts showing that the dual protections of a special committee and majority-of-the-minority-vote under the MFW roadmap were not in place before the start of substantive economic negotiations in a controller-led merger transaction, and, thus, entire fairness, not business judgment review, should apply. In reversing the Court of Chancery's dismissal of the case on this issue, the Supreme Court—in a decision written by Justice Seitz—cited its intervening *Flood v. Synutra* opinion for the proposition that dismissal is unavailable if MFW's dual protections are not established "early in the process . . . before there has been any economic horse trading." For more, click [here](#).

Delaware Supreme Court Rejects Reliance on Trading Price in Appraisal Action; Orders Award of Deal Price Minus Synergies

In *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, the Delaware Supreme Court reversed the Court of Chancery's exclusive reliance on pre-announcement stock price to determine "fair value" in a statutory appraisal action, reasoning that the valuation methodology was inappropriate based on the record presented. Instead, the Supreme Court directed the Court of Chancery to enter a judgment reflecting the deal price minus synergies, resulting in an increase to the appraisal award originally ordered by the Court

of Chancery by approximately \$2 per share, but nevertheless still approximately 20% less than the negotiated deal price. The Supreme Court's ruling continues the trend of recent Delaware cases utilizing deal-price-minus-synergies as the best measure of fair value for public company mergers subjected to open, arm's length negotiations. For more, click [here](#).

Delaware Court of Chancery Holds Controlling Stockholder Merger May Have Violated Section 203, Stockholders Have Standing to Enforce Standstill and MFW Not Satisfied

In *Arkansas Teacher Retirement System v. Alon USA Energy, Inc.*, the Delaware Court of Chancery held, on a motion to dismiss, that Delek US Holdings, Inc.'s acquisition of Alon may have violated Section 203 of the Delaware General Corporation Law, Delaware's anti-takeover statute. Although the Alon board had exempted Delek from Section 203's restrictions on business combinations, that exemption was conditioned on Delek's entry into a stockholder agreement, which it later allegedly breached. The court ruled that the breach may have "vitiated the Alon board's Section 203 approval and restored the protections of Section 203."

In the same opinion, decided by Vice Chancellor McCormick, the court ruled that Alon stockholders had standing to directly enforce the stockholder agreement's standstill provisions allegedly breached by Delek. The court also ruled that conditions to the application of the *MFW* standard had not been satisfied—and, therefore, the merger was not entitled to business judgment review—because the parties negotiated substantive deal terms before committing to use the procedural protections required by the *MFW* case, among other things. For the opinion, click [here](#).

Delaware Court of Chancery Denies Motions to Dismiss Director Compensation Claims

The Delaware Court of Chancery denied motions to dismiss director compensation claims in two decisions issued this quarter. In *Stein v. Blankfein*, the court permitted a stockholder challenge to discretionary director compensation awards to proceed based on *In re Investors Bancorp, Inc. Stockholder Litigation* (discussed [here](#)), which held that stockholder ratification of an equity incentive plan does not foreclose court review of future discretionary awards. The court rejected defendants' argument that by approving the stock incentive plan, stockholders had effectively waived their right to seek entire fairness review of director compensation decisions. The court concluded that such a waiver could be effective only if the company informed stockholders of the specific self-interested transactions that were contemplated and that they would be waiving their right to redress. For the opinion, click [here](#).

In *Howland v. Kumar*, the Delaware Court of Chancery, in an opinion by Vice Chancellor McCormick, also declined to dismiss fiduciary duty and unjust enrichment claims against directors and officers of Anixa Biosciences, Inc. challenging alleged repricing of stock options shortly before the company announced the issuance of a key patent to its subsidiary. The plaintiff alleged that the directors and officers knew the patent had been issued but delayed the public announcement until after the compensation committee repriced their options. The court held that entire fairness applied and it was reasonably conceivable, based upon the facts alleged by the plaintiff, that the process and price were unfair. For the opinion, click [here](#).

Delaware Court of Chancery Asserts Personal Jurisdiction over Non-Delaware PE Investor

In *In re Pilgrim's Pride Corporation Derivative Litigation*, the Delaware Court of Chancery, in an opinion by Vice Chancellor Laster, held that a foreign private equity investor and controlling stockholder of the subject corporation impliedly consented to personal jurisdiction in Delaware because the controller's director designees approved a Delaware forum selection bylaw concurrently with an asset purchase from the controller, which was being challenged in the underlying litigation. Although the court limited its holding to the facts of the case, the opinion provides helpful instruction to private equity firms in managing their controlled Delaware portfolio companies. For the opinion, click [here](#).

Delaware Court of Chancery Upholds Provision Precluding Use of Privileged Communications in Post-Closing Disputes

In *Shareholder Representative Services LLC v. RSI Holdco, LLC*, the Delaware Court of Chancery, in an opinion by Vice Chancellor McCormick, upheld a merger agreement provision that precluded the buyer from using the seller's pre-merger privileged emails against the seller in post-closing litigation. While the default rule is that all pre-merger privileges of a target (including privileged communications between the entity's attorneys and its directors and officers) vest in the surviving entity (owned post-merger by the buyer), under the Court of Chancery's decision in *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, parties may contractually agree to exclude from transferred assets privileged communications that the seller desires to retain. The merger agreement at issue in *RSI* contained such a carve-out to the transferred assets. Even though the emails remained on the target company's servers, which were transferred to the buyer, the court concluded that the carve-out provision preserved the privilege and prevented the buyer from using or relying on the privileged communications in any post-closing dispute. For the opinion, click [here](#).

Delaware Court of Chancery Addresses Indemnification Issues

The Delaware Court of Chancery, in two separate actions, addressed issues related to indemnification of directors and officers of Delaware corporations. In *Brown v. Rite Aid Corp.*, the court granted summary judgment to a former director and officer of Rite Aid seeking indemnification from the company after the dismissal of a state court lawsuit against him based on a technical defense. Vice Chancellor Zurn held that the plaintiff had the right to indemnification under Section 145(c) of the Delaware General Corporation Law and Rite Aid's charter and bylaws as a "covered person" in a "covered proceeding" who succeeded "on the merits or otherwise" in his state court lawsuit. The court rejected Rite Aid's argument that the plaintiff was not entitled to indemnification because he first litigated and failed on several unsuccessful defenses. Rite Aid argued that he should have raised the successful defense years earlier instead of wasting resources on the unsuccessful defenses. The court disagreed, ruling that the fact that the plaintiff obtained the successful result based on only one technical argument presented after years of litigation does not diminish his right to mandatory indemnification. For the opinion, click [here](#).

In *Pulier v. Computer Sciences Corporation*, the court denied Computer Sciences' request for partial summary judgment on its claim to recoup advancement paid to the former CEO of a company that it acquired based on an indemnification clause set forth in an equity purchase agreement. The court, in a letter opinion by Chancellor Bouchard, concluded that the indemnification provision only covered post-closing losses for "board-approved" liabilities related to the sale of the acquired company, which was not the basis for the prior advancement paid to the former CEO. For the opinion, click [here](#).

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M&A Markets

The following issues of *M&A at a Glance*, our monthly newsletter on trends in the M&A marketplace and the structural and legal issues that arise in M&A transactions, were published this quarter. Each issue can be accessed by clicking on the date of each publication below.

➤ [April 2019](#)

➤ [May 2019](#)

➤ [June 2019](#)

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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