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### Courts Continue Focus on Board-Level Compliance Oversight

Following decisions earlier this year in *Marchand v. Barnhill* (discussed [here](#)) and *Rojas v. Ellison* (discussed [here](#)), the Delaware Court of Chancery continued its focus on breach of the duty of oversight claims (*i.e.*, “Caremark claims”) in two decisions this quarter, one granting dismissal and the other not. In *In re Clovis Oncology, Inc. Derivative Litigation* (discussed [here](#)), the court, in an opinion by Vice Chancellor Slight, permitted Caremark claims to survive a motion to dismiss. Although the company had in place a board-level compliance system, the plaintiffs’ complaint adequately alleged that the board failed to monitor the compliance systems and ignored a series of red flags related to the clinical trials of the company’s primary product, a cancer drug. Importantly, the decision emphasized that courts are more inclined to find Caremark liability “when a monoline company operates in a highly regulated industry.” In this regard, board oversight of a company’s compliance with positive law is distinguishable from “management of business risk” inherent in the business plan. Here, regulatory compliance risk was itself “mission critical,” and plaintiffs sufficiently pled that the board knew of, yet failed to act on, management’s allegedly improper deviation from protocol when reporting clinical trials to investors.

In *In re LendingClub Corp. Derivative Litigation* (discussed [here](#)), however, the Court of Chancery, in an opinion by Vice Chancellor McCormick, dismissed Caremark claims brought against the board. The court concluded that the board and its committees implemented and adequately monitored internal controls with respect to the various problems uncovered by the company’s internal investigations following reports by a whistleblower. The court noted that the plaintiff did not allege a “single fact” of the board’s acting in bad faith, reaffirming that Caremark claims are predicated not on the mere occurrence of a compliance incident but on a board’s utter failure to implement reasonable compliance systems and procedures.

### Court of Chancery Rules Boston Scientific Must Complete Merger with Channel Medsystems

In *Channel Medsystems, Inc. v. Boston Scientific Corporation*, the Delaware Court of Chancery ordered Boston Scientific to close the \$275 million merger agreement it had sought to terminate in May 2018 after learning that a Channel Medsystems executive had submitted false data to regulators about its flagship product, Cerene. In its case, Boston Scientific claimed that the facts were extremely similar to those in *Akorn, Inc. v. Fresenius Kabi AG* (discussed [here](#)), wherein the court permitted Fresenius to terminate its acquisition of Akorn. In *Channel*, shortly after a deal was announced, the target company disclosed that a quality control executive had made fraudulent submissions to the FDA in

connection with its sole product. The executive was subsequently indicted for embezzlement. Ultimately, however, the court in *Channel*, in an opinion by Chancellor Bouchard, found that no material breaches of the merger agreement had occurred due to the misconduct, and in fact that Boston Scientific had breached its obligation to proceed with the merger in good faith. The court's decision indicates that the *Akorn* case was not a harbinger of change in the Court of Chancery's thinking on material adverse effect ("MAE") clauses and that the right to terminate a merger agreement due to the alleged occurrence of an MAE remains a difficult case to prove. For the opinion, click [here](#).<sup>1</sup>

### **Court of Chancery Holds Plaintiff is Entitled to Privileged Documents Relied On by Special Litigation Committee**

In *In re Oracle Corporation Derivative Litigation*, the Court of Chancery concluded that a stockholder-plaintiff in a derivative suit against the corporation's board was entitled to receive documents that the corporation's special litigation committee (the "SLC") had relied on in determining whether litigation on the corporation's behalf against the directors should proceed, including documents privileged to the corporation. The ruling occurred after an unusual procedural development; the SLC had already decided that claims against the corporation's founder and chairman should proceed and that the stockholder-plaintiff (not the board or committee) should prosecute those claims. More usually, an SLC will determine either to dismiss a pending litigation or, if the SLC decides prosecuting the claim is in the corporation's best interest, to take over control of the litigation on the corporation's behalf. Nonetheless, the case has potential consequences for SLCs, as the court, in an opinion by Vice Chancellor Glasscock, ordered the production to the stockholder-plaintiff of some of the privileged documents that the corporation shared with the SLC. The court held, however, that individual parties named in the suit must be given an opportunity to review the documents before their production, and that the stockholder-plaintiff did not have a right to the SLC's own privileged communications with its attorneys. For the opinion, click [here](#).

### **Court of Chancery Finds Special Committee Members Lacked Independence from Controller Due to Personal and Professional Relationships**

In *In re BGC Partners, Inc. Derivative Litigation*, the Court of Chancery concluded that the personal and professional relationships between the directors and the controlling stockholder rendered demand futile with regard to the plaintiffs' derivative claims challenging the fairness of BGC's acquisition of another controlled company and also stated a claim for breach of loyalty against the members of the special committee that approved the transaction. The court concluded that demand was excused because of a "constellation" of relationships among the controller and a majority of the board. In particular, the plaintiff alleged that the four directors who served on the special committee (only three of whom remained directors when the complaint was filed) had professional and personal relationships of ten to twenty years with the controller, including through board service with lucrative pay at other affiliated companies and charitable giving and other relationships to a particular college (of which one special committee member formerly had been the provost and another had served on its board). For those same reasons, the court reasoned that the special committee members' approval of a transaction involving an interested party (the controller) from whom they may have lacked independence supported a reasonably conceivable claim for breach of their fiduciary duty of loyalty. For the opinion, click [here](#).

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<sup>1</sup> Paul, Weiss represented Channel Medsystems, Inc. in this matter.

## 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.

➤ [October 2019](#)

➤ [November 2019](#)

➤ [December 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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