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Court of Chancery Reaches Different Results in Two *Caremark* Decisions

In *In re Metlife Inc. Derivative Litigation*, Vice Chancellor Glasscock dismissed *Caremark* claims alleging that the Metlife directors breached their duty of oversight relating to the company's operations of undertaking other businesses' fixed-benefit pension obligations and related policies, which led to millions of dollars in fines and restitution payments. In dismissing the claims, the court concluded that the company had an extensive network of internal controls and monitoring systems. Moreover, the court found that plaintiffs did not adequately allege that a majority of the directors had actual knowledge of and, in bad faith, ignored red flags of potential non-compliance with the monitoring system. For the opinion, click [here](#).

In a second *Caremark* decision this quarter by the Court of Chancery, in *Teamsters Local 443 Health Services & Insurance Plan v. Chou*, the Delaware Court of Chancery, in an opinion by Vice Chancellor Glasscock, denied a motion to dismiss *Caremark* claims, holding that the plaintiffs adequately pled that the officers and directors of AmerisourceBergen Corporation failed to exercise their duty of oversight in bad faith. In particular, the court found, based on plaintiffs' pleadings, that the board ignored red flags and allowed a "woefully inadequate reporting system" with respect to the subsidiary, which engaged in criminal operations to repackage cancer drugs in violation of law. For the opinion, click [here](#).

Court of Chancery Confirms That Inspection Rights of Foreign-Headquartered, Delaware Corporation Governed by Delaware Law

In *JUUL Labs, Inc. v. Grove*, the Delaware Court of Chancery, in an opinion by Vice Chancellor Laster, held that stockholders' rights to inspect books and records of a Delaware corporation are governed by Section 220 of the Delaware General Corporation Law (the "DGCL"), regardless of where the corporation is headquartered. In *JUUL Labs*, a stockholder sought to inspect the books and records of the California-headquartered corporation under a California statute granting inspection rights to stockholders "regardless of [the] corporation's state of incorporation." In denying the inspection rights under the California statute, the Court of Chancery held that "[s]tockholder inspection rights are a core matter of internal corporate affairs" and are governed by Delaware law under the internal affairs doctrine. The case could reflect on the enforceability of other foreign states' statutes that seek to regulate other aspects of corporate affairs of non-domestic corporations, such as statutes relating to required board composition. For the opinion, click [here](#).

Court of Chancery Declines to Dismiss Fraud Claims against Private Equity Seller Due to the Portfolio Company Officers' Concealment of Earnings Decline

In *Agspring Holdco, LLC v. NGP X US Holdings, L.P.*, the Delaware Court of Chancery, in an opinion by Chancellor Bouchard, allowed fraud claims to proceed against a private equity firm and officers of its portfolio company, Agspring LLC, in connection with the private equity firm's sale of Agspring. According to the court, the plaintiffs adequately alleged that it was reasonably conceivable that the Agspring officers concealed from the buyer a significant decline in Agspring's earnings before and after the signing and closing of the sale of Agspring. Moreover, certain of Agspring's representations and warranties in the purchase agreement and related financing agreement were false when made, and not only the officers, but also the private equity firm, knew or were "in a position" to know that the representations were false when made. For the opinion, click [here](#).

Supreme Court Affirms Court of Chancery's Fair Value Determination in Appraisal Action

In *Fir Tree Value Master Fund, LP v. Jarden Corp.*, the Delaware Supreme Court, in an opinion by Chief Justice Seitz, affirmed the Court of Chancery's determination that the unaffected market price of Jarden Corporation was the only reliable indicator of fair value of the company as of the date of the company's merger with Newell Brands. Although it is not often that a corporation's unaffected market price alone supports fair value, the Supreme Court held that the Court of Chancery (in an opinion discussed [here](#)) found that the company's stock traded in an efficient market and adequately explained its reasons for rejecting alternative indicators of fair value. For the Supreme Court's opinion, click [here](#).

2020 Amendments to the Delaware General Corporation Law

The 2020 amendments to the DGCL were enacted on July 16, 2020, and were generally effective upon enactment, subject to certain exceptions noted below. Key amendments to the DGCL this year include the following:

- **Emergency bylaws and other provisions in emergency** – The 2020 amendments amend Section 110 of the DGCL to address the annual meeting and other issues that arose in response to the COVID-19 pandemic. As such, they apply retroactively with respect to any emergency occurring on or after January 1, 2020. Pursuant to these amendments, emergency is now defined as "including, but not limited to, an epidemic or pandemic, and a declaration of a national emergency by the United States government." These amendments also dispense with the requirement that the specific emergency be one that prevents a quorum of the board from convening a meeting. In addition, the amendments add a new subsection to Section 110 that provides that during an emergency, a board may take any action that it determines to be practical and necessary to address the circumstances of such emergency with respect to a meeting of stockholders despite being contrary to the DGCL or the company's governing documents. In such circumstances, the amendments expressly allow for the postponing of a stockholder meeting without losing the original record date and companies required to report under the Securities Exchange Act of 1934 to notice postponements through a filing with the U.S. Securities and Exchange Commission without remailing. In addition, the amendments permit a board, in the event of an emergency, to change the record and/or payment dates of any previously declared dividend, so long as the record date has not yet occurred. The company must give notice "as promptly as practical," which can be given by SEC filing for Exchange Act registrants.
- **Exculpation and indemnification** – The 2020 amendments codify a drafting convention commonly found in exculpatory provisions adopted under Section 102(b)(7) of the DGCL. Specifically, the amendments add a sentence providing that "[a]n amendment repeal or elimination of such a provision shall not affect its application with respect

to an act or omission by a director occurring before such amendment, repeal or elimination unless the provision provides otherwise at the time of such act or omission.”

In addition, the 2020 amendments modify the definition of “officers” entitled to mandatory indemnification under Section 145(c) of the DGCL. Under that provision, corporations must indemnify directors and officers against expenses, without inquiry into whether they satisfied the standard of conduct required by Section 145(a) or (b), if “successful on the merits or otherwise” in defense of any action. Pursuant to the 2020 amendments, for actions after December 31, 2020, “officer” as used in Section 145(c) is now defined by cross reference to Delaware’s long arm jurisdiction statute as anyone: (i) with the title of president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer or chief accounting officer; (ii) identified in SEC filings as one of the corporation’s most highly compensated executive officers; or (iii) who has consented to being an “officer” under 10 *Del. C.* §3114.

- **Holding company mergers** – Before the 2020 amendments to the DGCL, Section 251(g) provided that no stockholder vote was required for holding company mergers, subject to satisfying various conditions (*e.g.*, that the new holding company’s organizational documents and board composition were identical to those of the pre-merger parent). Section 251(g)(7) required the surviving company’s organizational documents also to be identical to those of the parent, subject to certain specified exceptions. Pursuant to the 2020 amendments, the surviving company’s organizational documents are no longer required to be identical, but must still provide that (i) any action requiring stockholder approval (other than director elections) must be approved also by the holding company’s stockholders and (ii) the surviving company will be managed by a board, who owe fiduciary duties. These amendments to Section 251(g) apply only to mergers effected under a merger agreement entered into on or after July 16, 2020.
- **Other amendments** – The 2020 amendments also make various other changes to the DGCL, including to provisions relating to electronic signatures under Section 116, public benefit corporations under Sections 361 through 368, various Secretary of State provisions and global conforming changes.

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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.

➤ [July 2020](#)

➤ [August 2020](#)

➤ [September 2020](#)

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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