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## Delaware M&A Quarterly

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### Stockholder Nominees Barred for Noncompliance with “Clear Day” Advance Notice Bylaw

In [Rosenbaum v. CytoDyn Inc.](#), the Delaware Court of Chancery, in an opinion by Vice Chancellor Slights, upheld a board’s decision to exclude stockholder nominees from being considered at CytoDyn’s annual meeting because the stockholders’ notice failed to include information required by the company’s advance notice bylaw. The court found that the board had not engaged in any manipulative or inequitable conduct in rejecting the nominees. Even though the board waited almost one month before notifying the stockholders of the deficiencies in their nomination notice, the court emphasized that the notice was deficient, that the stockholders had not submitted their notice until close to the deadline, which left no time to fix the deficiencies, and that the bylaw did not in any event require the board to engage in an iterative process with stockholders to fix deficiencies. For more, click [here](#).

### Delaware Court of Chancery Dismisses *Caremark* Claims

In [Firemen’s Retirement System of St. Louis v. Sorenson](#), the Court of Chancery granted a motion to dismiss breach of the duty of oversight claims (i.e., *Caremark* claims) against the board of directors of Marriott International, Inc. that related to a cybersecurity breach of customer data at Starwood Hotels and Resorts, a company acquired by Marriott in 2016. The cybersecurity breach had begun in 2014 (before the acquisition) and was discovered and announced by Marriott in 2018. The plaintiff’s claims related to the Marriott directors’ conduct both before and after the acquisition of Starwood, including allegations that, pre-acquisition, there was inadequate due diligence of Starwood’s cybersecurity technology and, post-acquisition, the directors continued to operate Starwood’s deficient system and failed to timely disclose the data breach. The court, in an opinion by Vice Chancellor Will, concluded that none of the directors faced a substantial likelihood of liability on a nonexculpated claim. The pre-acquisition claims were time barred. With regard to the post-acquisition claims, while the court acknowledged that cybersecurity poses an increasing risk deserving of board level monitoring, the plaintiff failed to meet the high bar required to state a *Caremark* claim, as the complaint did not show that the directors completely failed to undertake their oversight responsibilities, turned a blind eye to known compliance violations or consciously failed to remediate cybersecurity failures.

### Delaware Supreme Court Affirms Buyer Termination Based on Breach of Ordinary Course Covenant During Pandemic

In [AB Stable VIII LLC v. MAPS Hotels and Resorts One LLC](#), the Delaware Supreme Court, sitting *en banc*, affirmed the Court of Chancery’s earlier decision (discussed [here](#)) which held that the COVID-19 pandemic

did not result in a material adverse effect (“MAE”) on the target because pandemics fall within the plain meaning of the applicable MAE definition’s exception for “natural disasters and calamities.” Nevertheless, the buyer was excused from its obligation to close the transaction, and was ultimately justified in terminating the sale agreement, because the target had made significant changes to its business post-signing as a result of the COVID-19 pandemic without seeking the buyer’s consent, and therefore violated its covenant to operate its business in the ordinary course consistent with past practices. On appeal, the seller argued, among other things, that the Court of Chancery’s interpretation of the ordinary course covenant was inconsistent with the MAE clause’s intent to transfer the risks of the pandemic to the buyer. In rejecting that argument, the Supreme Court, in an opinion by Chief Justice Seitz, noted that the parties could have restricted, but did not, a breach of the ordinary course covenant to events that would qualify as an MAE, as they had done in other provisions in the agreement. Moreover, according to the court, the two provisions serve different purposes. An ordinary course covenant reassures the buyer that the target has not changed its business or business practices in a material way before closing, while the MAE provision is intended to allocate the risk of changes in the target company’s valuation. The Supreme Court also upheld the Court of Chancery’s ruling that the “consistent with past practice” qualification to the ordinary course covenant did not permit the seller unilaterally to take reasonable actions in response to extraordinary circumstances like the COVID-19 pandemic. Instead, the contract required the seller to seek the buyer’s consent (not to be unreasonably withheld), and the seller breached that covenant by taking extraordinary actions without even attempting to seek consent from the buyer.

### **Delaware Court of Chancery Dismisses Claims Against Directors under Delaware Dividend and Share Repurchase Statutes**

In *In re The Chemours Company Derivative Litigation*, the Court of Chancery, in an opinion by Vice Chancellor Glasscock, held that plaintiffs failed to adequately plead that the directors of The Chemours Company faced a substantial likelihood of liability relating to certain stock repurchases and dividends that, the plaintiffs alleged, rendered the company insolvent. In connection with its 2015 spin-off from E.I. DuPont de Nemours and Company, Chemours assumed certain of DuPont’s environmental liabilities. Between 2015 and 2020, the Chemours board authorized several stock repurchases and quarterly dividends in reliance on GAAP-based surplus calculations. The plaintiffs argued that because the environmental liabilities were contingent, a GAAP-based calculation failed to adequately account for them, thereby violating Delaware’s dividend and share repurchase statutes. Stating that it would defer to a board’s surplus calculation if it was calculated “in good faith, on the basis of acceptable data, by methods that they reasonably believe reflect present values,” and the calculation “is not so far off the mark as to constitute actual or constructive fraud,” the court held that plaintiffs did not adequately plead that a majority of the board did not reasonably believe in good faith that their surplus calculation was accurate. The court also determined that under Section 172 of the Delaware General Corporation Law, the directors were “fully protected” from liability based on their good faith reliance on the records of the corporations, as well as presentations from management and financial advisors.

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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.

[October 2021](#)

[November 2021](#)

[December 2021](#)

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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