Crisis at the Company

The Role of Independent Directors in Steering the Company to Safe Waters

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Division Between Management and the Board

- **Management** – Officers and Employees, responsible for developing and implementing the Company's business strategy, taking into account appropriate risks and opportunities. Responsible for developing systems, policies, and plans to prevent and respond to crisis.
- **The Board of Directors** – Responsible for overseeing Company, providing guidance, and rendering critical decisions on corporate governance and transactions.
  - Compliance risk oversight falls within the governance responsibilities of the board. *Marchand v. Barnhill*, 212 A.3d 805, 824 (Del. 2019) (describing the board's duty to "put in place a reasonable system of monitoring and reporting about the corporation's central compliance risk").

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Fiduciary Duties – Owed by Officers and Directors

- **Duty of Care.** Care requires informed, deliberative decision-making based on all material information reasonably available.
- **Duty of Loyalty.** Loyalty requires acting (including deciding not to act) on a disinterested and independent basis, in good faith, with an honest belief that the action is in the best interests of the company and its stockholders
  - The fiduciary duty of loyalty imposes on a director "an affirmative obligation to protect and advance the interests of the corporation" and requires a director "absolutely [to] refrain from any conduct that would harm the corporation." *In re Walt Disney Co. Deriv. Litig.*, 2004 Del. Ch. LEXIS 132, at *24 n.49 (Del. Ch. Sept. 10, 2004).
  - Even if the director is a shareholder, he cannot engage in conduct that is "adverse to the interests" of the corporation. *Venoco, Inc. v. Eson*, 2002 Del. Ch. LEXIS 65, at *22 (Del. Ch. June 6, 2002).

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Duty Limitations

DGCL authorizes certificate provisions eliminating director liability for care breach damages; August 1, 2022, amendment permits same protection for officers, except in cases "by or in the right of the corporation." 8 *Del. C.* §102(b)(7).

> "[T]he charter may not eliminate or limit the liability of a director for breaches of the duty of loyalty, acts of bad faith, or any transaction from which the director derived an improper personal benefit." *Manti Holdings, LLC v. Authentix Acquisition Co.,* 261 A.3d 1199, 1218 (Del. 2021) (internal quotation marks omitted).

This eliminates damages, but not necessarily the availability of injunctive relief.

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Duty Limitations

DRULPA and DLLCA allow greater flexibility to limit or eliminate fiduciary duties in the limited partnership or LLC agreement, except claims under the implied covenant of good faith and fair dealing. 6 *Del. C.* §17-1101; 6 *Del. C.* §18-1101.

> "When parties exercise the authority provided by the LP Act to eliminate fiduciary duties, they take away the most powerful of a court's remedial and gap-filling powers. As a result, parties must draft an LP agreement as completely as possible, and they bear the risk of incompleteness. If the parties have agreed how to proceed under a future state of the world, then their bargain naturally controls." *Lonergan v. EPE Holdings LLC*, 5 A.3d 1008, 1018 (Del. Ch. 2010).

Provisions must be clear and explicit. They require tremendous trust in integrity and judgment of managers.

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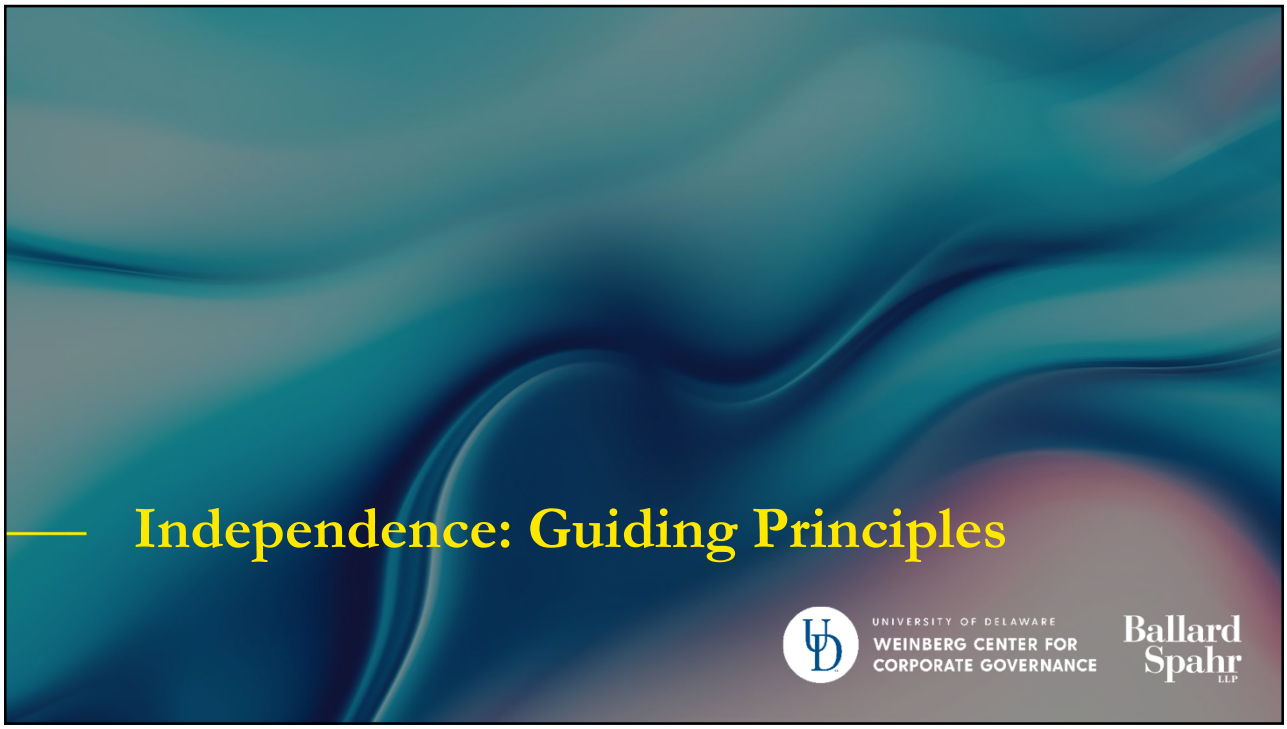

Independent Directors

Under Nasdaq and NYSE rules, the determination of independence is straightforward. To paraphrase:

> The director is (1) not an executive officer or an employee of the Company and (2) the board determines the person has no relationship that would interfere with his/her independent judgment.

NASDAQ Listing Rules 5005(a)(20) and 5605(a)(2); NYSE Listed Company Manual, Section 303A.02(a)(i)

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Independent Directors – Delaware Law

- A director is independent "when he is in a position to base his decision on the merits of the issue rather than being governed by extraneous considerations or influences." *Diep v. Trimaran Pollo Partners, L.L.C.*, 280 A.3d 133, 152 (Del. 2022).
- **Independence is a fact-intensive inquiry**
  - "The question of independence 'turns on whether a director is, *for any substantial reason*, incapable of making a decision with only the best interests of the corporation in mind.' That is, the independence test ultimately 'focus[es] on impartiality and objectivity.'" *In re Oracle Corp. Deriv. Litig.*, 824 A.2d 917, 920 (Del. Ch. 2003) (emphasis and alteration in original).
  - If a single member committee is to be used, "the member should, like Caesar's wife, be above reproach." *Lewis v. Fuqua*, 502 A.2d 962, 967 (Del. 1985).

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Analysis of Independence

- Director's ***authority*** (the person's ability to make independent decisions or say no to management) or ***involvement*** in the transaction or event in question.
- **Economic Factors**
  - Materiality of director compensation to the individual
  - Business interests or ties among the directors or to a controlling shareholder, management, or any other person with a material interest in the transaction different from those of stockholders generally
- **Non-Economic Factors**
  - Qualifications of director
  - Social, political, family or chartiable ties
  - Personal incentives or emotional motiviations

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Economic Considerations

- **Limited Financial Ties to an Interested Party May not be Disqualifying**
  - "[T]he existence of some financial ties between the interested party and the director, without more, is not disqualifying. The inquiry must be whether, applying a subjective standard, those ties were *material*, in the sense that the alleged ties could have affected the impartiality of the individual director." *Kahn v. M&F Worldwide Corp.,* 88 A.3d 635, 649 (Del. 2014) (emphasis in original).
- **Totality of Entanglements Considered**
  - In *Sandys v. Pincus*, 152 A.3d 124, 126 (Del. 2016), a network of business relationships between directors and the company's controlling stockholder raised reasonable doubts as to the impartiality of those directors. Two outside directors held equity in a company the controlling stockholder's wife co-founded. *Id.* Another director co-owned an airplane with the controlling stockholder and his wife, suggesting "an extremely intimate personal relationship." *Id.* The Court found based on the "network" of "repeat players" there were relationships that could create "human motivations compromising the participants' ability to act impartially toward each other on a matter of material importance." *Id.*

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Non-Economic Considerations: Relationship to Controller

- Appointment by a controller "without more" is insufficient to undermine independence. *McElrath v. Kalanick*, 224 A.3d 982, 996 (Del. 2020).
- ***Limited Connections May Be Ok -*** In *Diep v. Sather*, 2021 Del. Ch. LEXIS, at *1 (Del. Ch. July 30, 2021), professional and personal relationships of directors to the company's founder, but not enough to have "impaired" the directors "impartiality." One director served with the founder on another 30 member board and the other had a personal relationship "based largely around their children." *Id.* at *27-29.
- ***But Can't Be A Stooge***
  - *Bamford v. Penfold, L.P.*, 2022 Del. Ch. LEXIS 147, at *129 (Del. Ch. June 24, 2022), in a director's trial testimony she "portrayed herself as an individual so devoid of knowledge" about the Company's business that "her compensation would qualify as corporate waste." Though it was "likely that she played dumb and pretended not to know anything ... that behavior itself provides powerful evidence of an illicit and symbiotic relationship" between the director and controlling member. *Id.* at *132. The controller paid the director "to be his stooge." *Id.*

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A Crisis Arises

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A Threat to the Company Arises

- Risk that threatens Company's operation, business, or reputation
- Product malfunction, environmental disaster, public health crisis, data breach/hacking
- Whistleblower complains of unlawful activity
- Accounting errors or fraud
- Accusation of insider trading or self-dealing management
- Controlling stockholder requesting a buyout

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Public Company's Duty to Disclose Investigation

- Prior view: *Richman v. Goldman Sachs,* 868 F. Supp. 2d 261, 272-74 (S.D.N.Y. 2012): No duty to disclose the receipt of a Wells Notice from the SEC (Wells Notice usually is issued at the end of an investigation, and indicates the Staff's intention to recommend litigation if no settlement is achieved).
- More current practice: Disclose the receipt of the Wells Notice. *E.g.*, Under Armour (2020), Bausch Health (2020).
- Second Circuit in *Noto v. 22nd Century Group*: Where company previously disclosed "accounting weaknesses," company was required to disclose the existence of a SEC investigation into the same issues. *Noto v. 22nd Century Grp., Inc.,* 35 F.4th 95, 105 (2d Cir. 2022).

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The Sarbanes-Oxley Act

- Section 301 of SOX: Audit Committees of public companies must establish internal procedures for:

  (A) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and

  (B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters

- In-house counsel must report a material violation of securities law or breach of fiduciary duty to the company's Chief Legal Counsel or Chief Executive Officer.
- In-house counsel must ensure that the company takes an "appropriate response" to the complaint.

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Can or Should Management Handle?

- To ensure a meaningful investigation and maximize Company's protections in future litigation and avoid adverse consequences, individuals with conflicts **should not** handle the crisis.
- This could include, but is not limited to, instances where the members of Management:
    - Created the crisis
    - Benefited from the conduct
    - Are unduly influenced by the interested parties or controlling stockholder

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Is the Board's Duty of Oversight Triggered?

As announced in *In re Caremark Int'l*, 698 A.2d 959 (Del. Ch. 1996), even directors who are exculpated under §102(b)(7), may be held liable for failing to properly oversee the management of the company on a theory of breach of the duty of loyalty, *if* the directors have:

- (1) utterly failed to implement any reporting or information system or controls; **OR**
- (2) despite having such systems in place, ignored "red flags" or consciously failing to monitor its operations.

- A director's lack of good faith is a "necessary condition to liability" under either prong. *Stone v. Ritter,* 911 A.2d 362, 369 (Del. 2006).

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Landscape of *Caremark* Liability

- "Key enterprise risks affecting a corporation's 'mission critical' components has been a focus of Delaware courts in assessing potential oversight liability, particularly where a board has allegedly failed to implement reporting systems or controls to monitor those risks." *Firemen's Ret. Sys. v. Sorenson*, 2021 Del. Ch. LEXIS 234, at *27 (Del. Ch. Oct. 5, 2021)
  - Typically found in highly-regulated industries, where a company violates the law or runs afoul of regulatory mandates.
  - Have not expanded to a monitoring risk of business decisions, focused on oversight of fraudulent or criminal conduct.

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Caremark Liability Developments

"*Caremark* claims, once relative rarities have in recent years bloomed like dandelions after a warm spring rain" but they remain "one of the most difficult claims to cause to clear a motion to dismiss." *Constr. Indus. Laborers Pension Fund v. Bingle*, 2022 Del. Ch. LEXIS 223, at *3 (Del. Ch. Sept. 6, 2022).

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Caremark Liability Developments

***Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019)**

- Listeria outbreak at an ice cream manufacturer which killed three people and caused the company to recall all of its products, shut down production, lay off a significant portion of its workforce, and seek equity financing.
- The Court found potential *Caremark* liability under prong 1 because food safety posed a "mission-critical risk" to the company, which was a monoline business, yet there was:
    - No committee to oversee food safety, nor did it have any protocol for advising the board of food safety reports.
    - No discussion of food safety reflected in the Board's minutes.

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Caremark Liability Developments

***In re Clovis Oncology, Inc. Deriv. Litig.*, 2019 Del. Ch. LEXIS 1293 (Del. Ch. Oct. 1, 2019)**

- Chancery Court allowed complaint to proceed under *Caremark*'s second prong where red flags about a company's single promising drug were ignored.
- Company overstated the effectiveness of the treatment of the lung cancer drug it was developing and did not comply with the rules for reporting test results set by the FDA.
- Unlike in *Marchand*, the Clovis board's "Nominating and Corporate Governance Committee was 'specifically charged' with 'provid[ing] general compliance oversight ... with respect to ... Federal health care program requirements and FDA requirements.'" *Id.* at *29.
- Instead, plaintiffs successfully alleged "that the Board consciously ignored red flags that revealed a mission critical failure to comply with [federal health care protocols] and associated FDA regulations." *Id.* at *23.

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Caremark Liability Developments

***In re Boeing Co. Deriv. Litig.*, 2021 Del. Ch. LEXIS 197 (Del. Ch. Sept. 7, 2021).**

Shareholder derivative suit following tragic Boeing 737 Max crashes in 2018 and 2019. Unique in that Delaware Chancery Court allowed derivative claims to proceed on ***both* prongs**. Boeing operates a monoline business in a highly regulated industry where product safety constitutes mission-critical risk. Plaintiffs successfully alleged:

- **Prong 1**: Board failed its duty because it lacked a safety committee and other mechanisms for ensuring that safety reports reached the board; the board's general audit committee appeared focused on financial risk, not plane safety.
- **Prong 2:** Board failed its duty because its response to red flags (i.e., the 737 Max crashes) was slow, optional, and focused around public relations and optics rather than actual safety.

Following denial of a motion to dismiss, the parties settled **$237.5 million**, the largest-ever settlement of *Caremark* claims in Delaware. The settlement also provides for significant corporate governance reforms.

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Caremark Liability following Litigation Demand?

- In *Garfield v. Allen,* 277 A.2d. 296 (Del. Ch. 2022), the Delaware Court of Chancery denied dismissal and accepted a "novel theory" advanced by the plaintiff – namely, that a board's failure to act to address a problem it learns of through a litigation demand letter may constitute a breach of the directors' fiduciary duties.
  - Demand letter challenged stock awards as violating a Long-Term Incentive Plan for granting equity awards. Company refused the demand.
  - Plaintiffs brought claims including breach of fiduciary duty against directors, even those who did not approve the challenged awards. Although the theory "lacked precedent," the Court found that "the logic of the . . . theory is sound." *Id.* 306. The court noted that, under *Caremark*, directors are liable for not fixing a problem after they consciously ignore "red flags" that the problem exists. The result should not be different, the Court concluded, where the source of the notice of the problem is, instead, a litigation demand.
  - However, the Court accepted the theory "with admitted trepidation" and cautioned that, in future cases, the court should not permit a plaintiff to pursue a "strategy" of creating a new claim by sending a demand letter as part of "an artifice" to, for example, make an untimely claim or improperly bring additional defendants into the case. *Id.*

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Is the Board able to Handle free of Undue Influence?

- If litigation ensues, the Court will evaluate whether facts raises "a reasonable doubt as to the disinterestedness or independence of at least half" of the Board and will do so "on a director-by-director basis." *Gottlieb v. Duskin*, 2020 Del. Ch. LEXIS 348, at *11 (Del. Ch. Nov. 20, 2020).
- The Board or GC should undertake a similar analysis to determine whether there is sufficient independence to handle as a whole or appoint a special litigation committee ("SLC") or independent committee to handle the crisis or transaction.

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Special Litigation Committee or Independent Committee

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Special Litigation Committee or Independent Committee?

- A SLC is a committee of disinterested and independent directors appointed and empowered by the board to investigate whether the prosecution of a derivative claim is in the company's best interests. SLCs represent a last chance for a corporation to control a derivative suit after demand has been excused as futile.
- Use of an Independent Committee can decrease exposure to enhanced scrutiny if a transaction is challenged later.
  - *E.g.*, derivative claim challenging a transaction involving a controlling stockholder is ordinarily subject to "entire fairness review." *Kahn* v. *M&F Worldwide Corp.*, 88 A.3d 635, 646 (Del. 2014) (full protection of business judgment rule requires both an effective special committee *and* that the transaction receive an uncoerced, fully informed vote of the majority of the minority stockholders).
  - However, use an independent committee may be an admission that the majority of the Board is not independent.

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What Constitutes an "Effective Special Committee"?

To constitute an "effective special committee," the committee must:

1. be properly constituted (i.e., consist of independent and disinterested directors);
2. have an appropriate mandate from the full board (e.g., not be limited to simply reviewing an about-to-be-agreed-to transaction); and
3. have its own independent legal and financial advisors.

Kahn v. Tremont Corp., 694 A.2d 422, 429-30 (Del. 1997).

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Process for Forming the Special Committee

- Board resolution appointing the committee members – consisting of independent and disinterested directors – and providing a "mandate" of authority.
- Committee hires independent counsel and advisors.
- Committee undertakes it work, with some assistance from management, and renders its recommendations in good faith based on well-informed analysis.

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Conflicted Persons Interacting with SLC or Independent Committee

- The Committee can, and should, work with management to obtain the factual information it needs to perform its duty.
- However, the Committee cannot allow conflicted persons – whether its management or a controlling stockholder – to direct the process.
  - In *In re Pattern Energy Grp., S'holder's Litig.*, 2021 Del. Ch. LEXIS 90, at *132-39 (Del. Ch. May 6, 2021), the Court declined to dismiss complaint challenging a company's go-private sale, *despite* creation of an independent committee, because the committee allowed conflicted management and a conflicted financial advisor to tip the sales process in favor of the preferred buyer of the company's parent.

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Advisors Must Be Independent, Competent, and Act in Good Faith

- To be independent the counsel and advisors need to have no material prior relationship with the Company or the controlling stockholder.
- Sham legal opinions can be rejected.
  - *Bandera Master Fund LP v. Boardwalk Pipeline Partners, LP*, 2021 Del. Ch. LEXIS 266, at *1 (Del. Ch. Nov. 12, 2021), Loews Corporation ("Loews") controlled Boardwalk's GP and maintained a right to acquire any outstanding public Boardwalk units if certain conditions were met. To take it private, GP needed to the receive an "opinion of counsel" demonstrating the Federal Energy Regulatory Commission ("FERC") implemented regulatory changes that would have a "materially adverse effect" on Boardwalk's status as a pass-through tax entity in the near future. After reviewing the record, the Court concluded that the legal opinion was not rendered in good faith. Rather, it "was a contrived effort to reach the result that the General Partner wanted" and was based on "counterfactual assumptions" that "addressed an imaginary scenario that was never reasonably likely to come to pass." *Id.* at *156. The Court stressed that, "[i]f the factual representations are 'tantamount to the legal conclusions being expressed,' then the opinion giver is regurgitating facts, not giving an opinion in good faith." *Id.* at *162.

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Prelude to Litigation

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Inspection Demands

- DGCL Section 220 provides stockholders right to demand and inspect corporation's books and records.
  - Inspection rights may be narrower under alternate entity statutes.
- Often a precursor to derivative litigation, in part because Courts encourage stockholders to use as the "tools at hand" for pre-suit investigation.
- Requires stockholder have a "proper purpose" for the demand which means "a purpose reasonably related to such person's interest as a stockholder."
  - Purpose must be stated specifically enough to permit corporation and Court to evaluate propriety.
  - Can include investigation into mismanagement, among other purposes such as ascertaining value of equity; evaluating proposed transaction; and communicating with other holders on matters of stockholder interest.
  - Must have a credible basis for asserting investigative purpose.

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Books and Records Litigation

Recent uptick in Section 220 litigation filings

- Past several years the Court has seen a steady increase in Section 220 filings.
- The Court has quoted observations that "defendants are increasingly treating Section 220 actions as 'surrogate proceeding[s] to litigate the possible merits of the suit' and 'place obstacles in the plaintiffs' way to obstruct them from employing it as a quick and easy pre-filing discovery tool.'" *Pettry v. Gilead Scis., Inc.*, 2020 Del. Ch. LEXIS 347, at *5 (Del. Ch. Nov. 24, 2020).

In *Pettry v. Gilead Scis., Inc.*, 2021 Del. Ch. LEXIS 156, at *1 (Del. Ch. July 22, 2021), the Court awarded $1.8 million in attorneys' fees and expenses based on the company's overly aggressive defense at the Section 220 phase. Pointing to Gilead's pre-litigation and litigation-related conduct, the Court held that, "when viewed collectively," Gilead's positions "were glaringly egregious." *Id.* at *3.

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Derivative v. Direct Claims

Derivative Claim: a claim brought by a stockholder, on behalf of the corporation, to recover for harms done to the corporation.

Direct Claim: stockholders may sue on their own behalf (and, in appropriate circumstances, as representatives of a class of stockholders) to seek relief for direct injuries that are independent of any injury to the corporation.

Classic test focuses on (1) who suffered the alleged harm (the corporation or the stockholders individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders individually).

Recent Clarification:

- *Brookfield Asset Mgmt. v. Rosson*, 261 A.3d 1251 (Del. 2021) – The Delaware Supreme Court eliminated an exception under *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006), that had allowed minority stockholders to bring **both** direct and derivative claims in situations where a controlling stockholder allegedly diluted the minority's financial and voting interests, even though dilution claims were normally considered purely derivative. Now such claims are recognized as purely derivative. This limits the ability of minority stockholders to bring such a dilution claim in the wake of a consummated merger since, following an acquisition of all shares, the minority stockholders typically lose their standing to pursue derivative claims.

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Derivative Litigation Procedures

- Shareholder derivative suits encroach upon the authority of the board of directors to manage a corporation's business and affairs and exercise all of its powers. Recognizing this, Delaware corporate law affords boards facing derivative litigation some important procedural protections.
  - ***First***, plaintiff-shareholders must either make a demand on the board, giving it a chance control any litigation on the company's behalf, ***or*** establish that such a demand would be futile.
  - ***Second***, even if demand futility is established, the board may appoint a special litigation committee ("SLC") to investigate and recommend whether the derivative suit should proceed. The sections below briefly summarize the current standards.

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Demand Futility Test

- Delaware Supreme Court recently clarified the standard a shareholder must meet to file a derivative suit without first taking their complaint to the board in *UFCW & Participating Food Indus. Empls Tri-State Pension Fund v. Zuckerberg*, 250 A.3d 862, 890 (Del. 2021). The three prongs are:

  1. Whether the director received a material personal benefit from the alleged misconduct that is the subject of the demand;
  2. Whether the director would face a substantial likelihood of liability on any of the claims that are the subject of the demand; and
  3. Whether the director lacks independence from someone who received a material personal benefit from the alleged misconduct that is the subject of the demand or who would face a substantial likelihood of liability on any of the claims that are the subject of the demand.

- This test is applied to each member of the board in place at the time of the litigation demand (i.e., the "demand board"). If any of the three prongs are satisfied by at least half the members of the demand board, demand will be excused as futile, allowing the suit to move forward.

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Recent Demand Futility Example

***Firemen's Ret Sys. v. Sorenson*, 2021 Del. Ch. LEXIS 234 (Del. Ch. Oct. 5, 2021)**

- A derivative action was brought asserting a breach of fiduciary duty against directors and officers of Marriot related to the alleged failure to undertake appropriate cybersecurity due diligence during an acquisition, failure to implement adequate controls following the acquisition, and failure to disclose a data breach in a timely manner. Defendants moved to dismiss for failure to make a demand on the Board. Court agreed demand was not futile because:
  - Majority of demand board was independent and disinterested;
  - Directors did not face substantial likelihood of personal liability for non-exculpated claims because those claims were all time-barred or failed to state a claim for breach of duty of loyalty under *Caremark*.

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Decision of Special Litigation Committee in Response to Demand

- When an SLC recommends against pursuing a derivative claim, Delaware law instructs courts to assess the motion in two steps:
  1. The SLC bears the burden of persuading the Court that its members are independent, acted in good faith, and had a reasonable basis for their conclusions;
  2. The Court applies its own independent business judgment to determine whether dismissal is in the best interest of the corporation.

  Zapata Corp. v. Maldonado, 430 A.2d 779, 788-89 (Del. 1981).

- As discussed, SLC director independence is a fact-specific inquiry that turns on whether the director is, for any substantial reason, incapable of making a decision with only the corporation's best interests in mind. *In re Oracle Corp. Deriv. Litig.*, 824 A.2d 917, 920 (Del. Ch. 2003).

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Example of Evaluating SLC Vote to Decline Demand

In *Diep v. Trimaran Pollo Partners, L.L.C.*, 280 A.3d 133 (Del. 2022), the Delaware Court of Chancery granted dismissal of claim because SLC voted against bringing a derivative suit. On appeal, Plaintiff argued the SLC members were not independent because, prior to the creation of the SLC, they voted as part of the board to authorize filing of an unsuccessful motion to dismiss. Through this, the SLC members allegedly demonstrated bias against the claims. Affirmed in a 4-1 vote.

- **Majority View:** No material question of whether the SLC members prejudged the merits of the suits because the exposure to the motion to dismiss was "at best" part of a litigation review at a board meeting that included a "less than in-depth discussion" of the motion to dismiss. *Id.* at 154. With this context, the majority held that "mere familiarity with an issue does not compromise independence" and were satisfied that the SLC members had not prejudged the merits of the derivative complaint. *Id.*

- **Dissenting View (Justice Valihura):** The bias claim was sufficient to impugn the SLC because the motion to dismiss included merits-based arguments. Her opinion found "the [motion to dismiss] did not merely raise technical or procedural arguments as to why the derivative claims should be dismissed. Instead, the [motion to dismiss] affirmatively argued the very substantive issues that the SLC would later be tasked with independently investigating." *Id.* at 163.

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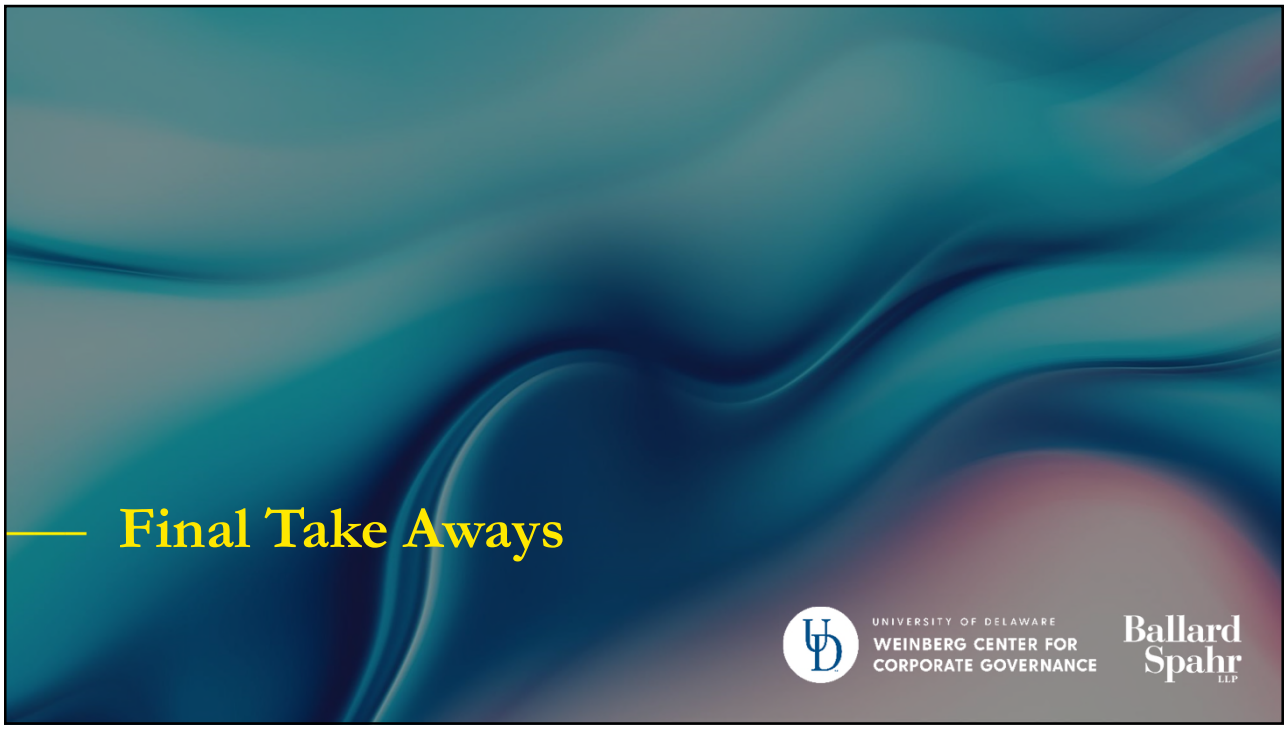

Final Take Aways

- There are several inflection points in dealing with a crisis at a company where a thoughtful evaluation of the following issues can mitigate future litigation or enforcement risk:
  - Evaluate disclosure obligations.
  - Evaluate the judgment and personal interest of key decision makers.
  - Consider the benefits of relying on independent directors to resolve crisis.
    - Form a properly constituted, properly authorized committee.
    - Hire independent and competent advisors.
  - Prompt and serious responses to pre-litigation demands from stockholders.

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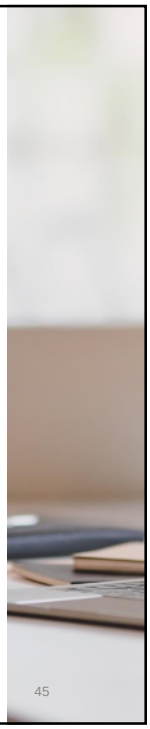
Materials

Email us (questions@ballardspahr.com) for an appendix that contains cases related to the items discussed today



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