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Delaware Corporate and Alternative Entity Law Update

Special points of interest:

- Chancery Court Declines to Enjoin Merger
- Spoliation Sanctions
- Class Action Suit to Enjoin Proposed Merger
- Hedge Fund Manager Violates Partnership Agreement
- Doctrine of Laches
- Mortgage Securities Due Diligence Claims
- LLCs Lack Standing for Derivative Suit

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Revlon Applied in 50/50 Cash/Stock Merger; Injunction Denied

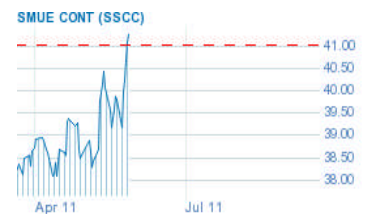


In *In Re Smurfit-Stone Container Corp. Shareholder Litigation* (C.A. No. 6164-VP, Del. Ch. May 24, 2011), the Chancery Court declined to enjoin a merger in which approximately half of the consideration would be cash and the other half would be stock of the acquirer. A large portion of the opinion addresses whether the merger constituted a “change of control” transaction, which under *Revlon* would require the board to act reasonably to maximize short-term value for the shareholders. The *Smurfit-Stone Container* transaction fell between *In re Santa Fe Pacific Corp.*, in which the Delaware Supreme Court held that a merger where only 33% of the merger consideration was cash did not trigger *Revlon* duties, and *In re Lukens Inc. Shareholders Litigation*, in which the Chancery Court assumed that *Revlon* applied to a transaction where each shareholder had the right to elect to receive cash consideration, with a maximum total cash payout of 62% of the total consideration. In this case, the Court followed the reasoning in

Lukens, holding that while the matter is not free from doubt, *Revlon* scrutiny is needed for “a transaction that constitutes an end-game for all or a substantial part of a stockholder’s investment in a Delaware corporation.” The Court found that the substantial cash-out constituted a sufficient end-game for their investment even though Smurfit-Stone shareholders could realize a control premium in future transactions involving the acquirer’s stock.

Applying the *Revlon* standard to the merger, the Court held that the plaintiff shareholder class was unlikely to prevail in its claims that the board had breached its fiduciary duties by engaging in a deficient sale process and obtaining an inadequate price. The Court noted that although management and the company’s inside director were active in merger negotiations, Smurfit-Stone established a special committee consisting of all nine outside directors and appointed a three-person subcommittee to manage the day-to-day tasks associated with the negotiations. The Court deemed it significant that many of the substantive terms of the merger agreement were negotiated not through management but rather

through Smurfit-Stone’s legal and investment advisors. In addition, the Special Committee challenged management projections and obtained concessions from Smurfit-Stone’s investment advisor regarding its fee structure and the acquirer with respect to deal protection devices. The Court held that the merger agreement’s no-shop (with a fiduciary out), matching rights and termination fee provisions were relatively standard and were neither preclusive nor coercive. Finally, the Court found that because the essence of the plaintiffs’ claim was the inadequacy of the price, which could be remedied at law or in an appraisal action, they had not established that failure to enjoin the merger would result in irreparable harm.



Link to Chancery Court Opinion:
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Delaware Supreme Court Upholds Discovery Spoliation Sanctions, Rejects “Implied Ratification” Defense, Discusses Jurisdiction in Section 225 Actions

In *Genger v. TR Investors, LLC* (No. 592, 2010, Del. Supr. July 18, 2011), the Delaware Supreme Court upheld spoliation sanctions imposed by the Chancery Court in connection with a Section 225 action to determine the stockholder group entitled to elect the board of directors of Trans-Resources, Inc. The action stemmed from defendant Arie Genger’s disposition in 2004 of his 52.85% ownership in Trans-Resources, which allegedly violated the plaintiffs’ rights of first refusal and other purchase rights. Believing that they were now entitled to take a majority position in Trans-Resources, the plaintiffs brought suit in the Chancery Court. In finding for the plaintiffs, the Chancery Court also sanctioned Genger for deleting files stored on his work computer at Trans-Resources and directing an employee to use special software to permanently delete the files, in violation of a Status-Quo Order. The Chancery Court awarded the plaintiffs \$750,000 in attorney’s fees incurred to investigate and

litigate the spoliation issue, ordered payment of an additional \$3.2 million fee, which had been previously agreed to by the parties, and required that Genger prove his claims by the heightened standard of clear and convincing evidence. Sitting *en banc*, the Delaware Supreme Court upheld the spoliation finding and award. The Court noted that the Chancery Court had made its finding of spoliation on “narrow factual grounds -- that Genger, despite knowing he had a duty to preserve documents, intentionally took affirmative actions to destroy several relevant documents.” The Court further supported the Chancery Court’s inference that in addition to the documents that the plaintiffs knew were missing, other relevant documents were likely also permanently deleted. In so finding, the Court took care to state that the result might have been different if the software, which wipes out unallocated free space where deleted files are temporarily stored but still recoverable, had been run on a scheduled cycle pursuant to an

existing data retention policy. The Court suggested that future litigants and trial courts address unallocated free space issues before document retention and preservation orders are implemented.

Addressing the merits of the Section 225 action, the Court upheld the Chancery Court’s finding that the plaintiffs had not impliedly ratified the 2004 transfers by later negotiating with Genger (who held an irrevocable proxy for the disposed shares) regarding a funding agreement. The Court then addressed the Chancery Court’s Side Letter Opinion which decided the ownership of shares allegedly transferred to entities not party to the original Section 225 action. After initially declining to decide the ownership of those shares, the Chancery Court determined that it was appropriate to reach the issue since arguably election of two of the six Trans-World directors would depend on the outcome. The Supreme Court held that while the Chancery Court had jurisdiction to determine record ownership of the

contested shares, it did not have jurisdiction to determine beneficial ownership of shares putatively owned by a non-party to the action. The Court noted that a Section 225 action is a summary proceeding of an *in rem* nature, with the limited purpose of determining issues that pertain to the election or removal of the holder of the *res*, the disputed corporate office. Since adjudication of record ownership of stock was necessary to determine the rights to elect the directors, the Chancery Court was within its jurisdiction to determine that issue. However, the Court held that since the parties allegedly holding a beneficial interest in the shares had not consented to jurisdiction, the Chancery Court had overstepped by “enlarge[ing] the Section 225 proceeding into a concurrent plenary action that would empower the court to determine the ultimate beneficial ownership” of the shares.

Link to Supreme Court opinion:

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Chancery Court Rules on Request for Expedited Proceedings

In *In re Ness Technologies, Inc. Shareholders Litigation* (C.A. No. 6569-VCN, Del. Ch. August 3, 2011), a class action suit to enjoin a proposed merger, the Delaware Chancery Court reviewed a motion to expedite proceedings. The plaintiffs, shareholders of Ness Technologies, Inc., alleged that the merger with Citi Venture Capital International (“CVCI”) was the product of

a flawed sales process with inadequate disclosures. After noting that courts regularly grant requests to expedite proceedings, the Chancery Court reminded the parties that a plaintiff seeking such relief must articulate a sufficiently colorable claim and show a sufficient possibility of a threatened irreparable injury so as to justify the extra costs of an expedited preliminary

injunction proceeding. The Court based its review of the sufficiency of the plaintiffs’ claims on their Amended Complaint, which incorporated Ness’ proxy soliciting approval for the merger. The Court first held that the allegation that one of the Ness Board members was conflicted because he was a nominee of CVCI was not colorable, since the proxy had indicated, and the plaintiffs

did not contest, that the Board Member had been excluded from the Special Committee designated to respond to the offer and had not been present for any negotiations or decisions regarding the sales process. The Court also held that without further details, allegations of unfair process based on the mere use of deal protection devices such as “no shop” and “no talk” provisions, a termination fee

of 2.72% of the sale price, and a fiduciary out were not colorable. With respect to the plaintiffs' disclosure claims, the Court found that the proxy's summaries of management projections, the financial advisors' work, and the sale process satisfied the Board's obligations to provide fair summaries of these subjects. Noting that

"shareholders are not entitled to a 'play-by-play' description of merger negotiations," the Court held that the disclosure claims based on these summaries were not colorable. The Court did find sufficient specificity in the plaintiffs' claims related to potential conflicts of interest by the financial advisors selected by the Special Committee and the

Board to render a fairness decision. Although the proxy statement disclosed that the advisors had in the past provided services to affiliates of CVCI, the disclosures did not indicate the amount of business that the advisors had done and expected to do for CVCI or its affiliates. The Court therefore held that the plaintiffs' price and process

claim and disclosure claim based on these potential conflicts of interest were colorable and granted expedited discovery on the question of whether the advisors' dealings with CVCI and its affiliates created conflicts of interest.

Link to Chancery Court Opinion:

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Chancery Court Finds That Hedge Fund Manager Breached Fiduciary Duties

After a trial in the case *Paige Capital Management, LLC v. Lerner Master Fund, LLC* (C.A. No. 5502-CS, Del. Ch. Aug. 8, 2011), the Chancery Court found that a hedge fund manager had violated the Partnership Agreement with the fund's seed investor, and more importantly, her fiduciary duties to the fund and the investor. The dispute arose out of Paige Capital Management's Partnership and Seeder Agreements with Lerner Master Fund, under which Lerner invested \$40 million in Paige. Under the agreements, Lerner was generally precluded from withdrawing its capital for the first three years, after which the capital could be withdrawn without penalty. However, the Partnership Agreement also contained a "Gate Provision" that enabled the manager to restrict a withdrawal of capital if it would result in over 20% of the fund's assets being withdrawn in any 6-month period. During the first three years of the fund's existence, the manager deployed very little of the fund's capital and signed up no new investors. Lerner expressed its concerns about Paige's investment strategies and its ability to attract additional capital and ultimately notified Paige of its intention to withdraw at the

end of the three-year period. In response, Paige invoked the Gate Provision and filed suit in the Chancery Court seeking a declaratory judgment that the Gate Provision allowed the fund to prevent the withdrawal of 80% of Lerner's capital. Lerner counterclaimed for breach of contract, breach of fiduciary duties, and dissolution of the fund. Applying New York law to the contract claim, the Court found that the Seeder Agreement and Partnership Agreement, when read together, supplanted the Gates Provisions with the Seeder Agreement's provisions allowing withdrawal without penalty after the 3-year period expired.

The Court then turned to Lerner's claim that refusing to waive the Gates Provision was a breach of the manager's fiduciary duty to the fund. As a threshold matter, the Board noted that the manager was subject to fiduciary duties in her capacity as managing member of the fund's General Partner, since a director, member or officer of a corporate entity serving as the general partner of a limited partnership who exercises control over the partnership's property owes fiduciary duties directly to the partnership and the limited partners. The

Court rejected the manager's "novel" argument that because the manager also owed fiduciary duties to the General Partner, it would be impossible both to waive the Gates Provision and satisfy those duties. Instead of "absolv[ing] a governing fiduciary of responsibility for acting in its own self-interest," the Court explained, the presence of a conflict of interest occasions "more searching judicial review." The Court also rejected the argument that the provision in the Partnership Agreement granting the General Partner "sole discretion" in its decision-making precluded application of fiduciary duties, holding that sole and absolute discretion is circumscribed by the duty of loyalty and exercise of good faith and that any contractual displacement of fiduciary duties of loyalty and care must be made with clarity. Because the decision to use the Gates Provision was made for the purpose of enabling the manager to continue to collect fees rather than to protect the General Partner's 0.01% investment in the fund, the refusal to waive the Gates Provision was self-interested and was therefore a violation of the duty of loyalty. Noting that the manager had consistently represented the Gates

Provision as a means of protecting the management fee stream and at trial had been unable to articulate a non-self-interested reason for its use, the Court concluded that the manager's reading of the Partnership Agreement was not in good faith. Refusing to "exculpate fiduciaries for self-serving interpretations of governing instruments," the Court found that the manager could not take refuge in the "good faith" exculpation provisions of 6 Del. Code §17-1101(e), and that the manager and her husband, who served as General Counsel to the fund, were not entitled to indemnification for their legal expenses. The Court also held that the manager was not entitled to indemnification of expenses related to the expanded litigation resulting from Lerner's counterclaims, since the counterclaims were compulsory; in addition, reimbursement of legal expenses related to defamation claims filed against Lerner was not available since these claims were not in connection with the performance of the manager's duties to the fund.

Link to Chancery Court Opinion:

Click [Here](#)

Delaware Supreme Court Affirms Indemnification Decision Applying Traditional Laches Analysis

In *IAC/Interactivecorp. v. O'Brien* (No. 629, 2010, Del. Supr. August 11, 2011), the Delaware Supreme Court applied the doctrine of laches to a corporate indemnification claim, finding that the claim was not barred even though the analogous statute of limitations would have run. The case arose out of breach of fiduciary claims against Wesley O'Brien, CEO of Precision Response Corporation (PRC). In 2000, PRC was acquired by Defendant IAC/Interactivecorp., who assumed PRC's obligations under its indemnification agreement with O'Brien. Two years later, IAC sued O'Brien for breach of fiduciary duties and fraudulent inducement in connection with a recently consummated merger, and PRC refused to advance O'Brien's legal fees. In 2005, an arbitration panel found that PRC was not entitled to recovery on its claims against O'Brien; in the meantime, O'Brien sued PRC in Florida for breach of contract based on the failure to indemnify and

to advance fees. The litigation dragged on until 2008, when PRC filed for bankruptcy. O'Brien then sued IAC in Delaware Chancery Court for indemnification and advancement of his attorneys' fees and expenses in the arbitration, the Florida action and the Delaware action. The Court of Chancery granted O'Brien summary judgment, applying a traditional laches analysis rather than applying the analogous statute of limitations.

Sitting *en banc*, the Delaware Supreme Court affirmed. The Supreme Court cited the following factors that could bear on a laches analysis: (1) whether the plaintiff had been pursuing his claim, through litigation or otherwise, before the statute of limitations expired; (2) whether the delay in filing suit was attributable to a material and unforeseeable change in the parties' personal or financial circumstances; (3) whether the delay in filing suit was attributable to a legal determination in another

jurisdiction; (4) the extent to which the defendant was aware of, or participated in, any prior proceedings; and (5) whether, at the time this litigation was filed, there was a bona fide dispute as to the validity of the claim. Reviewing the facts in light of these factors, the Supreme Court first noted that O'Brien had promptly sought advancement against PRC and had filed suit in Florida before the arbitration was even concluded. In addition, IAC, the party ultimately responsible for PRC's indemnification and advancement obligations, had controlled the Florida litigation. The Court also noted that O'Brien had initially lost the Florida litigation at the trial court level, and that he could not in good faith proceed against IAC during the period, when the decision was on appeal, which lasted over a year. PRC's unexpected bankruptcy and the fact that the Florida courts held that O'Brien's claims were meritorious helped persuade the Court that

the unusual circumstances of this case justified the Chancery Court's decision to disregard the statute of limitations, that O'Brien's delay in filing suit against IAC was not unreasonable, and that IAC was not prejudiced by the delay. The Court also affirmed the Chancery Court's award of attorney's fees, including fees that included a 20% success fee and a contingent arrangement. The Court noted that 8 Del. C. §145(a) permitted indemnification for fees "actually and reasonably incurred" and that "the fact that the amount of the fee is not set until the result is obtained does not change the fact that the fee is incurred based on hours or work performed for the client."

Link to Supreme Court Opinion:

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Link to Chancery Court Opinion:

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Delaware Supreme Court Reverses Chancery Court, Cites "Conceivability" Standard for 12(b)

(6) Motions

In *Central Mortgage Company v. Morgan Stanley Mortgage Capital Holdings LLC* (No. 595, 2010, Del. Supr. Aug. 18, 2011), the Delaware Supreme Court, sitting *en banc*, reversed the Chancery Court's dismissal of claims alleging breach of contract and breach of the implied covenant of good faith and fair dealing. The case arose of out plaintiff Central Mortgage Company's (CMC) purchases of servicing rights on mortgage loans sold by Morgan Stanley.

According to Morgan Stanley, these loans were to be sold to Fannie Mae and Freddie Mac, and CMC alleged that Morgan Stanley had made assurances that its due diligence satisfied the agencies' underwriting criteria. The Master Agreement between CMC and Morgan Stanley provided that within 60 days of discovery or notice to Morgan Stanley of a breach of representations or warranties that materially and adversely affected CMC's servicing rights related to any

particular loan, Morgan Stanley was required to cure the breach, or, at CMC's option, repurchase CMC's servicing rights. After Morgan Stanley ceased its repurchases, CMC sued, alleging that Morgan Stanley had breached the Master Agreement and violated the covenant of good faith and fair dealing. The Chancery Court dismissed the breach of contract claim without prejudice, holding that CMC had failed to provide proper

notice pursuant to the Master Agreement. According to the Chancery Court, the exhibits attached to CMC's complaint could not constitute notice, since they gave no chance to cure. In addition, forwarding agency files for non-compliant loans to Morgan Stanley did not constitute notice because CMC did not specify the representations or warranties allegedly breached. The Chancery Court also held that the implied covenant of good faith and fair dealing claim

was duplicative of the contract claims and dismissed the claim with prejudice.

In reversing the Chancery Court, the Delaware Supreme Court noted that the United States Supreme Court, in *Ashcroft v. Iqbal* (2009), had determined that to survive a motion to dismiss in a federal court, the complaint must contain sufficient factual matter that accepted as true

would state a claim to relief that is plausible on its face. The Delaware Supreme Court emphasized that Delaware has not yet adopted the *Iqbal* standard and that to survive a motion to dismiss, the plaintiff must state a claim that is "provable under any reasonably conceivable set of circumstances." Under this standard, CMC's allegations that it provided adequate notice were sufficient to

survive Morgan Stanley's motion to dismiss. The Delaware Supreme Court also held that CMC's allegations that Morgan Stanley had made false representations regarding its due diligence practices did not serve as the basis for the breach of contract claim and could therefore serve as an independent basis for the implied covenant claim. Accordingly, the Chancery Court's dismissal with

prejudice was reversed as well.

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Delaware Supreme Court Confirms That Creditors of Limited Liability Companies Lack Standing for Derivative Suits; Finds Standing Statute Constitutional

In *CML V, LLC v. Bax* (No. 735, 2010, Del. Supr. Sept. 2, 2011, corrected Sept. 6, 2011), the Delaware Supreme Court affirmed the Chancery Court's holding that creditors of an insolvent limited liability company have no standing to sue derivatively on the LLC's behalf. As discussed in [Vol. 10.3](#) the plaintiffs, creditors of JetDirect Aviation Holdings, LLC, had brought suit alleging that the managers breached their duty of care by approving transactions without adequate information, acted in bad faith by failing to implement and monitor an adequate system of internal controls, and violated their duty of loyalty by engaging in self-interested transactions with the company. The Chancery Court dismissed the claims, holding that §18-1002 of the Delaware Limited Liability Company Act requires the derivative plaintiff to be a member or an assignee of the LLC, and that §18-1001 does not provide for any other classes of derivative plaintiff.

On appeal, the plaintiffs argued that §18-1001 only guarantees derivative standing for members and assignees, but does not limit standing to

those two groups, and that read in conjunction with §18-1002, the legislative intent was to mimic the analogous section of the Delaware General Corporation Law, which has been held not to bar derivative standing for creditors. The Supreme Court, sitting *en banc*, disagreed. It found the language of §18-1002 to be unambiguous and declined to engage in "any extraneous contemplation of, or intellectually stimulating musings about, the General Assembly's intent." It also rejected the argument that a plain reading of §18-1002 yields an absurd result (by creating standing for corporate creditors but not for LLC creditors), pointing out that the General Assembly is free to promote "maximum business entity diversity" by giving investors the option to invest in corporate forms offering different "bundle[s] of rights."

The plaintiffs also contended that by limiting derivative standing in this way, the General Assembly had curtailed the Court of Chancery's jurisdiction in violation of the Delaware Constitution. They argued

that the Delaware Constitution guarantees the Chancery Court the same or greater equity jurisdiction enjoyed by the High Court of Chancery of Great Britain at the time of separation from Britain, and since courts of equity at that time had the power to grant derivative standing to corporate stockholders "to prevent failures of justice," the Delaware Constitution requires that the Chancery Court have jurisdiction to extend derivative standing where it is necessary to prevent complete failures of justice. The Court explained that derivative standing is a "judicially-created ... creature of equity," and for that reason the Delaware General Corporation Law does not create derivative standing. Rather, section §327 (the only section of the DGCL addressing derivative standing) assumes the right of stockholders to sue derivatively but restricts the stockholders who can sue derivatively to those who owned their stock at the time of the alleged wrongful act or whose stock devolved upon them by operation of law from a stockholder who owned stock at that time. Therefore,

the judicial extension of derivative standing to creditors in the corporate context was not an issue of statutory construction but rather an extension of a judicially-created equitable doctrine, consistent with the principles of equity, to address new circumstances. However, the statutes at issue in this case deal not with the corporate context but rather with limited liability companies, a form unknown at the time of separation. Therefore, the Court held that the Delaware Constitution did not preclude limitations on the scope of LLC derivative standing. Rather, courts adjudicating the rights, remedies and obligations associated with LLCs must look to the LLC Act, which alone creates those rights, remedies and obligations. In the face of unambiguous statutory language expressly limiting derivative standing to members or assignees, the Chancery Court has no equitable power to override such limitations. The Court also noted that even if the Chancery Court had the jurisdiction to extend derivative standing to the plaintiffs, such jurisdiction

should only be exercised absent an adequate remedy at law and where there is a threat of failure of justice. According to the Court, such remedy at law did exist. The paucity of remedies practically available to the plaintiffs was a

function of their own contractual choices and did not carry a threat of failure of justice. The Court suggested potential terms that the plaintiffs might have bargained for, including a provision converting the creditors' rights

to that of an "assignee" in the event of insolvency, or a term that would have given the plaintiff management control of the LLC.

Link to Supreme Court Opinion:

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Link to Chancery Court Opinion:

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Changes to the Delaware General Corporation Law

On July 7, 2011, Governor Markell signed into law [S.B. 74](#) (amending the Delaware Revised Uniform Partnership Act), [S.B. 76](#) (amending the Delaware Limited Liability

Company Act), [S.B. 77](#) (amending the Delaware General Corporation Law), and [S.B. 95](#) (revising the Delaware Revised Uniform Limited Partnership Act).

Highlights of S.B. 74, S.B. 76 and S.B. 77 were discussed in [Vol. 11.1](#), as were the highlights of S.B. 75, the predecessor bill to S.B. 95. Although S.B. 75 was stricken

on June 1, 2011, the provisions of S.B. 95 are identical.

Delaware Corporate and Alternative Entity Law Update

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