

The ‘State’ of Delaware

November 8, 2023

During a panel at the October 2023 [Berkeley Fall Forum on Corporate Governance](#), Delaware Court of Chancery Chancellor Kathaleen St. J. McCormick and Vice Chancellor Paul Fioravanti, along with lawyers Shannon Eagan (Cooley), Elena Norman (Young Conaway) and Randall Baron (Robbins Geller Rudman & Dowd), shared their views on recent developments in Delaware corporate governance law. Catch up on the “state” of Delaware – and what’s been happening at the Court of Chancery – below.

Court of Chancery’s ‘ever-increasing’ caseload

Chancellor McCormick reported that the Court of Chancery has been busy, to say the least: The court has seen record numbers of cases in 2023, with 1,000+ filings as of early October, compared to just over 900 at the same time in 2022. Some of this increase can be attributed to the “SPAC ratification attack,” with the court hearing 63 SPAC (special purpose acquisition company) ratification cases so far in 2023—but even setting that aside, the court is on track to break all previous case records.

Given this volume, in an effort to increase efficiency the court is now assigning almost all Section 220 matters to magistrate judges (who also handle all guardianship cases in Delaware). Two magistrates were added to the court in 2023 (bringing the total to three), and the court has requested funding for even more magistrates to streamline cases beyond Section 220. Since March 2023, pursuant to a [standing order](#) issued by the Delaware Supreme Court, the Chancery Court also has referred about 30 [Section 111](#) cases to Superior Court judges serving on that court’s Complex Commercial Litigation Division (CCLD).

Chancellor McCormick also described increases in select case types up through 2022 – namely, breach of fiduciary duty cases (including *Caremark* claims), attendant Section 220 actions, and corresponding claims for advancement of fees filed by directors and officers of corporations. Additionally, she highlighted several trends as of 2022, including that 37% of new cases involved motions to expedite, while 12% involved a breach of contract claim.

Delaware General Corporation Law (DGCL) amendments

Norman shared [an overview of the DGCL amendments made in summer 2023](#), which included changes related to forward stock splits and stock buybacks without a stockholder vote, the expansion of transactions for which statutory appraisal rights are available, and the circumstances under which stockholder approval is not required for mortgages or pledges of assets.

Earnout agreement disputes: Fact-intensive and heavily litigated

Earnout agreement disputes also have taken up a considerable amount of the court’s time. An amendment to Section 111 in 2016 allowed these disputes – typically money damages cases that would have been brought in the Superior Court – to be brought in the Court of Chancery if they involve a merger agreement with a Delaware corporation. Some of these cases are being assigned to CCLD judges, as described above, but the Court of Chancery is still handling a large volume. The panel emphasized that earnout disputes tend to be more heavily litigated than other cases and tend not to settle – meaning that the court ends up hearing fact-intensive cases that often require multiple-day trials focused both on the construction of the contract and whether the buyer used best efforts to reach milestones. Furthermore, because many earnout agreements have an alternative dispute resolution provision (e.g., referral of disputes to an arbitrator), the enforceability of such provisions often becomes an issue in litigation.

Valuing disclosure claims

The panel discussed several recent cases (including [In re Mindbody, Inc. Stockholder Litigation](#) and [In re Columbia Pipeline Group Merger Litigation](#)) that involved the court having to value disclosure liability – a difficult task, particularly when even experts disagree on approach. Their conversation also reflected that the court continues to care about the **process** – not only the **price** – of a transaction in awarding damages. Read more about these and other cases in [Cooley’s round-up of recent M&A decisions](#).

Cases involving attorneys' fees: The court giveth and the court taketh

The panel also discussed several noteworthy cases from this year involving the award of attorneys' fees. First up was [Anderson v. Magellan Health, Inc.](#) In that case, in determining whether to grant a mootness fee award in the context of supplemental disclosures, Chancellor McCormick explained that going forward, she would only award mootness fees where supplemental disclosures are "plainly material," not merely "helpful." Her decision was motivated in part by a concern about a flood of mootness actions that would continue to tax the court, and the sense that plaintiffs should only be rewarded in the mootness context for claims that are legally viable. However, she acknowledged that this was an open issue in the law – and that her Chancery Court colleagues may disagree.

The panel then discussed a decision from earlier in 2023 where Vice Chancellor Laster awarded plaintiffs \$266 million in attorneys' fees. Although this figure is higher than what is typically awarded, Vice Chancellor Fioravanti did not consider the decision startling, noting that it reinforced that the Court of Chancery would carefully apply the [Sugarland factors](#) when assessing attorneys' fees.

An Uptick in Caremark cases

In reflecting on *Caremark* claims – those alleging that a director's lack of oversight constituted a breach of the fiduciary duty of loyalty – Chancellor McCormick observed that the test remains the same as ever and that it is a slow-developing area of the law. However, she opined that after *Marchand v. Barnhill* (where the Delaware Supreme Court allowed a lack of oversight claim to survive a dismissal motion), plaintiffs' firms have initiated more *Caremark* suits – and that this volume has both hastened the development of the law and meant that some such cases have succeeded in surviving dismissal. While this has not created a "seismic shift" in the doctrine, it has reflected a change in practice.

Given all this activity, 2023 is expected to continue to be quite active in the Delaware Court of Chancery.

Under the *Caremark* test, a director's lack of oversight may breach their fiduciary duty of loyalty under two factual theories, which the Delaware Supreme Court adopted in *Stone v. Ritter*: "(a) directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention." 911 A.2d 362, 370 (Del. 2006).

Contributors



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