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DELAWARE LAW**Despite Amorphous, Somewhat Minimal Benefit,
Delaware Chancery Court Awards Fees for Multiple Suits Over Many Years**

BY FRANCIS G.X. PILEGGI

Introduction

The American Rule refers to the general principle that each party in a lawsuit in the U.S. pays their own way. There are a few exceptions such as those based on statute, contractual provisions or bad faith. Another exception is known as the corporate benefit doctrine, which allows an award of reasonable attorneys' fees and expenses based upon, for example, a stockholder lawsuit against a corporation that resulted in a benefit to all stockholders or the corporation generally.

For a stockholder plaintiff to be entitled to attorneys' fees and expenses under the corporate benefit doctrine, the following factors must be present: (1) meritorious litigation is filed; (2) an action producing a benefit to the corporation or its stockholders is taken by the de-

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fendants before a judicial resolution is achieved; and (3) the resulting benefit is causally related to the litigation.

To determine the amount of fees to award, Delaware courts apply the *Sugarland* factors: (1) the amount of time and effort applied to the case by plaintiffs' counsel; (2) the relative complexities of the litigation; (3) the standing and ability of petitioning counsel; (4) the contingent nature of the litigation; (5) the stage at which the litigation ended; (6) whether the plaintiff can rightly receive all the credit for the benefit conferred or only a portion thereof; and (7) the size of the benefit conferred.¹

In a recent decision by the Delaware Court of Chancery, *Sutherland v. Sutherland*,² the corporate benefit doctrine was applied to a multitude of lawsuits spanning nearly a decade among relatives fighting about the management of a family-owned enterprise. The dispute was not about whether the corporate benefit doctrine applied, but rather the amount of fees that should be awarded based on that doctrine. The plaintiff sought \$1.4 million in fees, which was only a portion of the total amount of fees they incurred. The defendant argued that the benefit obtained was merely therapeutic and did not merit an award exceeding five figures.

This decision is noteworthy primarily because it awards fees, at least in part, for a § 220 action even when the court determined that the vigorous defense of the company was not in bad faith. Also notable about this ruling is that the court awarded fees for a multitude of litigation spanning many years, even though the benefit was amorphous and in some manner even minimal.

Factual Background

The stockholder who initiated the litigation was Martha Sutherland. Martha was a stockholder of Darda-

¹ *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149–50 (Del. 1980).

² C.A. No. 2399-VCN, 2004 BL 225613 (Del. Ch. July 31, 2014).

nelle Timber Co., Inc. and a director of a related entity called Sutherland Lumber-Southwest, Inc. She served on that board along with her brothers Perry and Todd, as well as their father and others until their father's death at the end of 2003. Martha was removed from the board of Southwest in February 2004. That same day, Southwest and Dardanelle executed employment agreements with Perry and Todd. Martha sought books and records for the companies in March 2004 and filed a formal action under § 220 of the Delaware General Corporation Law in August 2004. The § 220 action resulted in an order requiring the production of certain books and records. Martha's attorneys asserted that a partial total of the fees Martha incurred in that case exceeded \$500,000 and the company's attorneys allegedly spent over \$750,000 to defend the § 220 action.

Thereafter, in September 2006, Martha filed a complaint alleging derivative and double-derivative claims against Perry, Todd and a cousin named Mark on a variety of grounds, including self-dealing.

In response, the board added an additional director who became the sole member of a special litigation committee (the "SLC") tasked with investigating Martha's claims. After a hearing in December 2006, the defendant companies received a stay of the litigation while the SLC completed an investigation. The SLC completed a report by March 2007. The defendants moved to dismiss the complaint based on the SLC's recommendation. The court in July 2007 permitted discovery regarding the SLC's report and its conclusions, and in February 2008 the Court of Chancery issued an opinion finding fault with the SLC's report. For example, the court faulted the SLC for not providing any citation to documentary evidence or witness summaries. The court also questioned the wisdom of a single-person SLC. After the opinion authorizing discovery, the company amended the employment agreements of the directors, providing limits on certain benefits the directors could receive at the expense of the company, reducing the compensation under the termination provisions and restricting competition with affiliated companies.

The Court of Chancery denied the SLC's motion to dismiss in May 2008. Martha's attorneys incurred fees and expenses of approximately \$870,000 in successfully defending the motion and a motion for rehearing. Martha estimated that the SLC's counsel incurred a similar amount of fees in connection with the SLC's motion to dismiss.

Fees Requested

Martha sought attorneys' fees for her attorneys' efforts in connection with the § 220 action, and for overcoming the SLC's investigation and motion to dismiss.

The defending companies argued that Martha should only be entitled to \$25,000 for her litigation efforts as opposed to the \$1.4 million she sought. The defendants argued that most of the litigation did not contribute any benefit and that the benefit achieved was akin to a therapeutic disclosure. Martha argued that she did obtain valuable benefits for the companies; and that she prevailed in complicated, risky litigation, was represented by experienced counsel and in part faced such high legal fees because of the scorched-earth strategy employed by the companies.

The court viewed the benefits achieved by Martha as minimal. According to the court, the cultural and corpo-

rate governance benefits that Martha claimed were amorphous and difficult to quantify. They involved a greater awareness of fiduciary responsibilities and the consequences that might flow from their failure to meet those responsibilities. Martha countered that the process by which she vindicated her rights and obtained benefits was unnecessarily prolonged by the conduct of the defendant companies and their attorneys.

In a prior ruling the court had already determined that the company did not act in bad faith in defending the § 220 action, and it was difficult for Martha to identify specific documents she obtained from the action, although the court observed that the effort in seeking documents under § 220 was "a necessary part of the process." The court did not allocate a specific amount of the fees awarded to the § 220 action, but noted that the fees allowed were "otherwise incorporated into the recovery authorized."

Among the factors that the court stated to be uncontested were that Martha was assisted by experienced counsel, who faced challenging legal questions that were skillfully navigated. The court also found that the vigor with which the defendant companies mounted their defense created litigation risks and increased the complexities of issues Martha confronted, and certainly raised the costs for all parties involved.

In sum, in a 14-page decision, which is very short compared to the average Court of Chancery opinion, the court found that Martha's litigation efforts did bring about positive benefits for the companies involved, even if those benefits were not as valuable as Martha argued. The court described the potential harms that Martha allegedly corrected as being speculative and the restrictions to the employment agreements of her brothers as being of negligible savings. Nonetheless, the court found that her efforts did impose enforceable restraints on the activities of her brothers as directors and officers of the companies, and that despite the efforts of the companies to minimize their impact, the court considered them more concrete and substantial than merely therapeutic disclosures. As a result, the court awarded \$275,000.

Public Policy Aspects of This Ruling

From a conceptual point of view, the court's application of the corporate benefit doctrine is consistent with the public policy basis for the doctrine. For example, other cases have described the justification for the doctrine as providing an incentive for one or more members of a class to enforce the rights of the class under circumstances in which filing suit to enforce their individual rights would be prohibitively costly or otherwise impracticable, thereby leaving unchallenged actionable wrongs against the class or the corporation.³ Other Delaware cases have described the doctrine as supporting the award of reasonable attorneys' fees and expenses based upon individual efforts that achieve a benefit conferred on a group of persons.⁴

³ See *In re Fuqua Indus.*, 752 A.2d 126, 133 (Del. Ch. 1999).

⁴ See *Allied Artists Pictures Corp. v. Barron*, 413 A.2d 876, 878 (Del. 1980); see generally *EMAK Worldwide, Inc. v. Kurz*, 50 A.3d 429 (Del. 2012) (recognizing the award of fees to be appropriate based on the corporate benefit doctrine for the preservation of stockholder voting rights even where no monetary award was granted).

In sum, the *Sutherland* ruling is consistent with the evolution of the doctrine that allows for the award of fees for a benefit that is conferred even when no monetary sum is attributable to the litigation.