

# Delaware Supreme Court Allows Dismissal of Claims Against Independent Directors

By Francis G.X. Pileggi

A recent Delaware Supreme Court decision clarified those situations in which independent directors may seek dismissal of claims against them. The case, which involved Cornerstone Therapeutics, specifically addressed whether a motion to dismiss could be filed by independent directors in situations where the plaintiff challenged a transaction that was presumptively subject to the entire fairness standard of review, and the plaintiff pled an exculpated claim against independent directors who had no financial stake in the transaction. (Exculpation provisions protect directors from liability for certain claims.)

The court ruled that in order to avoid a motion to dismiss, a plaintiff seeking monetary damages must plead non-exculpated claims, such as breach of the duty of loyalty, against the director who is protected by an exculpatory charter provision, regardless of the underlying standard of review for the board's conduct.

## Factual Background

This decision involved two appeals arising from mergers. The controlling stockholder, which had representatives on the board, acquired the remainder of the shares that it did not own in a Delaware public corporation. Both mergers were at substantial premiums compared to the pre-announcement market price. Nonetheless, the plaintiffs contended that the directors breached their fiduciary duty by approving transactions that were unfair to minority stockholders.

The facts of this matter supported the presumptive application of the entire fairness standard. In both cases, an exculpatory charter provision insulated the defen-

dant directors from liability for monetary damages for breaches of the fiduciary duty of care. Nonetheless, the plaintiffs sued the independent directors who had negotiated and approved the mergers.



## Legal Principles Applied

This Delaware Supreme Court decision provided the following guidance: when a director is protected by an exculpatory charter provision, a plaintiff can survive that director's motion to dismiss by pleading facts that support that the director harbored self-interest adverse to the stockholders' interests; acted to advance the self-interest of an interested party for whom they could not be presumed to act independently; or acted in bad faith. If such a claim cannot be made, the case against those directors must be dismissed.

Under Delaware corporate law, independent directors are presumed to do their duty with fidelity. Delaware law has long inquired into the practical negotiating power

given to independent directors in conflicted transactions when analyzing the independence of a special committee. Nonetheless, it is not prudent to create an invariable rule that an independent director who says "yes" to an interested transaction subject to entire fairness review must remain as a defendant until the end of the litigation regardless of the absence of any evidence suggesting that the director acted for an improper motive.

The Delaware Supreme Court in this opinion declined to adopt an approach that would create incentives for independent directors to avoid serving on special committees. Directors who face personal liability might be dissuaded from making decisions and the benefits of the exculpatory charter provision would be reduced if directors were always required to remain as parties in litigation involving a transaction with a controlling stockholder.

## Remanded to Chancery

This opinion reversed the judgments of the Court of Chancery that denied the independent directors' motions to dismiss, and remanded to the Court of Chancery to determine if the plaintiffs sufficiently pled facts suggesting that the independent directors committed a non-exculpated breach of their fiduciary duty. **D**

Francis G.X. Pileggi is the member-in-charge of the Wilmington, Del., office of Eckert Seamans Cherin & Mellott. His e-mail address is [fpileggi@eckertseamans.com](mailto:fpileggi@eckertseamans.com). He summarizes key corporate and commercial decisions of Delaware's Supreme Court and Court of Chancery at [www.delawarelitigation.com](http://www.delawarelitigation.com).