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Delaware's Noteworthy 2011 Decisions

Posted By [Francis G.X. Pileggi](#) and [Kevin F. Brady](#) On January 5, 2012 @ 5:40 pm In [Articles & Research, Home Center Column Feature, Law and the Courts](#) | [No Comments](#)

This is the seventh year that we are providing an annual review of key Delaware corporate and commercial decisions. During 2011, we reviewed and summarized approximately 200 decisions from Delaware's Supreme Court and Court of Chancery on corporate and commercial issues. Among the decisions with the most far-reaching application and importance during 2011 include those that we are highlighting in this short overview. We are providing links to the more complete blog summaries, and the actual court rulings, for each of the cases that we highlight below.



[1]

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Top Five Cases from 2011

We begin with the top five cases on corporate and commercial law from Delaware for 2011 and we are glad to see that at least four of them have some support from the bench as these were the cases that four Vice Chancellors highlighted as important decisions in a recent panel presentation that they presented in New York City in early November 2011. Those cases were the following: *In Re: OPENLANE Shareholders Litigation*; *In Re: Smurfit Stone Container Corp. Shareholder Litigation*; *In Re: Southern Peru Copper Corp. Shareholder Litigation* and *Air Products and Chemicals, Inc. v. Airgas Inc.*, and *Kahn v. Kolberg Kravis Roberts & Co., L.P.*

This article originally appeared on the [Delaware Corporate & Commercial Litigation Blog](#) [2].

In Re: OPENLANE Shareholders Litigation. In what many commentators referred to as a "sign and consent" transaction, in which the majority shareholders and the board of directors had sufficient control to provide the statutorily required consent, the Court of Chancery determined that the *Revlon* standard was satisfied and fiduciary duties were not breached notwithstanding the *Omnicare* case and even without customary safeguards such as a fairness

opinion. See fuller summary [here](#) [3].

In Re: Smurfit Stone Container Corp. Shareholder Litigation. The Court of Chancery denied a motion for preliminary injunction and determined that the *Revlon* standard applied to a merger for which the consideration was split roughly evenly between cash and stock. See fuller summary [here](#) [5].

In Re: Southern Peru Copper Corp. Shareholder Litigation. In what may be the largest award granted in the Court of Chancery's venerable history, a judgment was entered for \$1.2 billion (later amended to \$1.3 billion) for breach of fiduciary duties in connection with an interested transaction. With interest, the total is expected to be \$2 billion. The Court later awarded attorneys' fees of 15 percent which amounts to \$300 million in this derivative action. See fuller summary [here](#) [6].

Air Products and Chemicals, Inc. v. Airgas Inc. This magnum opus of over 150-pages in length will be the focus of scholarly analysis for many years to come. For purposes of this



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short blurb, it ended a year long takeover battle between two determined companies, with the Court of Chancery ruling, among other things, that the target company was not required to pull its poison pill when the board determined that the offer for the company was too low. See fuller summary [here](#)^[7].

Kahn v. Kolberg Kravis Roberts & Co., L.P. This Delaware Supreme Court decision reversed and remanded an opinion by the Court of Chancery interpreting "a Brophy claim as explained in *Pfeiffer*." The issue before the Court was whether a stockholder had to show that the company had suffered actual harm before bringing a breach of loyalty claim that a fiduciary improperly used the company's material, non-public information (a Brophy claim). The Supreme Court rejected that part of the Chancery's decision in *Pfeiffer v. Toll* which requires a showing of actual harm to the company. See fuller summary [here](#)^[8].

We also selected the following additional noteworthy cases:

Shareholder Litigation

In Re: John Q. Hammons Hotels, Inc. Shareholder Litigation. Despite the application of the entire fairness standard, the Court concluded that the merger price was entirely fair, the process leading to the transaction was fair, that there was no breach of fiduciary duty, and therefore no claims for aiding and abetting fiduciary duty. See fuller summary [here](#)^[9].

Reis v. Hazelett Strip-Casting Corp. The Court applied an entire fairness analysis and held that the attempt to cash out minority shareholders via a reverse split was neither the result of a fair process nor did it involve a fair price. See fuller summary [here](#)^[10].

In re: Del Monte Foods Co. Shareholders Litigation. This first of three rulings enjoined a shareholder vote on a premium LBO transaction and the buyers' deal protection devices. The Court also held that the advice that the target board received from a financial advisor (who also did work on the deal for the bidder) was so conflicted as to give rise to a likelihood of a breach of fiduciary duty and the Court indicated that the financial advisory firm could face monetary damages due to aiding and abetting the potential breach. See fuller summary [here](#)^[11].

In re: Massey Energy Company Derivative and Class Action Litigation. The Court declined to enjoin a proposed merger. The Court noted that the derivative claims that the plaintiffs argued were not being fairly valued as part of the merger, would become assets of the surviving corporation. The Court reasoned in part that the shareholders should decide for themselves whether to exchange their status as Massey stockholders for a chance to receive value from a third party in an arms-length merger. See fuller summary [here](#)^[12].

Frank v. Elgamal. This decision exemplifies the different approach taken by different members of the Court in connection with an application for interim fees in a class action. (Compare the different approach in the *Del Monte* case.) See fuller summary [here](#)^[13].

Krieger v. Wesco Financial Corp. This decision determined that holders of common stock were not entitled to appraisal rights under Section 262 when they had the option of electing to receive consideration in the form of publicly traded shares of the acquiring company. See fuller summary [here](#)^[14].

In re: The Goldman Sachs Group, Inc. Shareholder Litigation. In this first corporate opinion by Vice Chancellor Glasscock, the Court dismissed a derivative action brought against Goldman's current and former directors based on a failure to make a pre-suit demand. At

issue was Goldman's allegedly excessive compensation structure. See fuller summary [here](#) ^[15].

Contested Director Elections

Genger v. TR Investors, LLC. In this opinion, the Delaware Supreme Court addresses electronic discovery issues and contested elections for directors involving DGCL Section 225. See fuller summary [here](#) ^[16].

Johnston v. Pedersen. This opinion determined that directors breached their fiduciary duties when issuing additional stock and as a result were not entitled to vote in connection with the removal of the incumbent board and the election of the new directors. See fuller summary [here](#) ^[17].

Section 220 Cases

King v. VeriFone Holdings, Inc. This Delaware Supreme Court ruling reversed a Chancery decision that found a lack of proper purpose in a suit by a shareholder seeking books and records pursuant to Section 220. Delaware's High Court explained that it remains preferable to file Section 220 suits for books and records prior to filing a derivative suit, but holding that such a chronology is not, per se, a fatal flaw in a Section 220 action. See fuller summary [here](#) ^[18].

Espinoza v. Hewlett Packard Co. This affirmance of Chancery's denial of a §220 claim was based on the requested report to the board being protected by the attorney/client privilege. (This is one of several decisions in this matter.) See fuller summary [here](#) ^[19].

Graulich v. Dell., Inc. This is a Section 220 case in which Chancery denied a request for books and records due to the underlying claims being barred by a previous release and due to the shareholder not owning the shares during the period of time for which he was requesting documents. See fuller summary [here](#) ^[20].

Alternative Entity Cases

CML V, LLC v. Bax. This Delaware Supreme Court decision determined that creditors of an insolvent LLC are not given standing by the Delaware LLC Act to pursue derivative claims unlike the analogous situation in the corporate context. See fuller summary [here](#) ^[21].

Sanders v. Ohmite Holding, LLC. This decision clarified the rights of a member of an LLC that demanded books and records of an LLC. The Court determined that pursuant to Section 18-305 of the Delaware LLC Act a member may seek records for a period prior to becoming a member of the LLC. See fuller summary [here](#) ^[22].

Achaian, Inc. v. Leemon Family LLC. This opinion addressed the transferability of interests of a member of an LLC and specifically whether one member of a Delaware LLC may assign its entire membership interests, including voting rights, to another existing member, notwithstanding the provision in an agreement that requires the consent of all members upon the admission of a new member. See fuller summary [here](#) ^[23].

Jurisdictional or Procedural Issues

Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC. In this decision, a Delaware Supreme Court determined that Delaware would not follow the standards for a motion to dismiss under Rule 12(b)(6) announced by the U.S. Supreme Court in the *Twombly* or *Iqbal* opinions. See fuller summary [here](#) ^[24].

Hamilton Partners, LP v. Engard. This decision addressed the issue of personal jurisdiction over directors and interlocking entities, as well as demand futility in the context of a double derivative shareholders suit. (Although this was decided at the end of 2010, it was important enough to include in this list as it was issued after our deadline for our compilation last year). See fuller summary [here](#) ^[25].

Encite LLC v. Soni. This decision rejected a request for an extension of a deadline for submitting expert reports because the Court did not approve an amendment to the Scheduling Order. See fuller summary [here](#) ^[26].

Whittington v. Dragon Group. In this latest iteration of multiple decisions in this long-running saga, the Court examines the doctrine of claim preclusion, issue preclusion and judicial estoppel. See fuller summary [here](#) ^[27].

In re: K-Sea Transportation Partners, L.P. Unitholders Litigation. This decision provides a useful recitation of the standard used in Chancery for deciding whether to grant a motion to expedite proceedings, and it also reviews language in a limited partnership agreement which arguably was an effective waiver of traditional fiduciary duties as allowed by the LP statute. See fuller summary [here](#) ^[28].

Sagarra Inversiones, S.L. v. Cemento Portland Valderrivas, S.A. This ruling determined that the standard of "irreparable harm" granting injunctive relief was not satisfied based on the financial condition of the defendant which was "not poor enough" to convince the Court that a money judgment would not make the plaintiff whole. (This is one of several decisions in this matter.) See fuller summary [here](#) ^[29].

ASDC Holdings LLC v. The Richard J. Malauf 2008 All Smiles Grantor Retained Annuity Trust. This decision discussed the enforceability of forum selection clauses and in particular when those clauses will be enforced despite a related case being filed first in another forum. See fuller summary [here](#) ^[30].

Gerber v. ECE Holdings LLC. This decision discusses the difference between a motion to supplement and a motion to amend a complaint. See fuller summary [here](#) ^[31].

Advancement

Fuhlendorf v. Isilon Systems, Inc. This decision addresses the advancement of fees incurred by officers and directors sued in connection with their corporate roles. The specific issue in this case was whether the corporation should pay for all of the costs of a Special Master appointed to review the interim application for fees. The case also discusses the common procedure employed to review disputed monthly legal bills in advancement cases. See fuller summary [here](#) ^[32].

Receiver or Dissolution

Pope Investments LLC v. Benda Pharmaceutical Inc. This decision rejected the application for the appointment of a receiver on the grounds that while the plaintiff demonstrated that the defendant was insolvent, the plaintiff failed to show that "special circumstances existed which would warrant the appointment of a receiver." See fuller summary [here](#) ^[33].

Stephen Mizel Roth IRA v. Laurus U.S. Fund, L.P. This decision rejected a request to dissolve a limited partnership and refused to appoint a receiver in the context of an investment fund that was in liquidation mode but was not dissolved, nor was it winding-up as that term is used in the statute. See fuller summary [here](#) ^[34].

Legal Ethics

BAE Systems Information and Electronics Systems Integration, Inc. v. Lockheed Martin Corp. This opinion addresses Delaware Lawyers' Rule of Professional Conduct 3.4(b) and discusses those situations in which a fact witness may be compensated for the "lost time" away from his "day job" suffered while testifying. See fuller summary [here](#) ^[35].

Judy v. Preferred Communications Systems, Inc. This decision addresses the issue of legal ethics involved in determining whether an attorney may assert a retaining lien over the documents of a former or delinquent client. See fuller summary [here](#) ^[36].

Common Law v. Statutory Claims

Overdrive, Inc. v. Baker & Taylor, Inc. In this last formal decision by Chancellor Chandler, the Court discussed how the Delaware Uniform Trade Secrets Act displaces conflicting tort and other common law claims that are grounded in the same facts which would support the statutory misappropriation of trade secret claims. See fuller summary [here](#) ^[37].

Damages for Breach of Agreement to Negotiate in Good Faith

PharmAthene, Inc. v. SIGA Technologies, Inc. This Court of Chancery decision awarded damages for breach of a contractual obligation to negotiate in good faith and fashioned an

equitable remedy that required the sharing of profits from the production of a product that the defendant failed to negotiate the license of in good faith. There are several decisions involving contract law by the Court of Chancery in this matter, the most recent ruling denying a motion for reargument. See fuller summary of the most recent decision [here](#) ^[38].

Postscript

On a final note, the last week of 2011 saw the sudden and sad passing of one of the nation's foremost experts on alternative entities, Professor Larry Ribstein, who was often cited in opinions of the Delaware Courts. He coined the word "uncorporations" to refer to alternative entities and was the author of many treatises, law review articles and other publications on unincorporations, jurisdictional competition, the business of law firms and related topics involving the intersections of law and business. He was an iconic figure in the law, and the legal profession is better because of his many contributions.

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[1] Image: http://www.directorship.com/media/2012/01/FrancisPileggi_AUTHOR.jpg

[2] Delaware Corporate & Commercial Litigation Blog:

<http://delawarelitigation.com/2012/01/articles/annual-review-of-cases/noteworthy-2011-corporate-and-commercial-decisions-from-delaware%E2%80%99s-supreme-court-and-court-of-chancery/>

[3] here: <http://www.delawarelitigation.com/2011/10/articles/chancery-court-updates/court-rejects-challenge-to-sign-and-consent-merger-with-majority-shareholder-despite-omnicare/>

[4] Image: http://www.directorship.com/media/2012/01/KevinBrady_AUTHOR.jpg

[5] here: <http://www.delawarelitigation.com/2011/07/articles/chancery-court-updates/court-of-chancery-denies-motion-for-preliminary-injunction-finds-revlon-applies-when-merger-consideration-is-evenly-split-between-cash-and-stock/>

[6] here: <http://www.delawarelitigation.com/2011/10/articles/chancery-court-updates/chancery-grants-1-2-billion-judgment-for-breach-of-fiduciary-duties/>

[7] here: <http://www.delawarelitigation.com/2011/02/articles/chancery-court-updates/constrained-by-delaware-supreme-court-precedent-chancellor-chandler-upholds-airgass-use-of-poison-pill/>

[8] here: <http://www.delawarelitigation.com/2011/07/articles/delaware-supreme-court-updates/supreme-court-rejects-the-requirement-of-actual-harm-in-brophy-claim/>

[9] here: <http://www.delawarelitigation.com/2011/01/articles/chancery-court-updates/in-post-trial-decision-in-john-q-hammons-hotels-case-court-finds-no-breach-of-fiduciary-duty-and-fair-merger-price/>

[10] here: <http://www.delawarelitigation.com/2011/02/articles/chancery-court-updates/court-applies-entire-fairness-test-to-reverse-stock-split/>

[11] here: <http://www.delawarelitigation.com/2011/03/articles/chancery-court-updates/court-of-chancery-enjoins-shareholder-vote-and-enforcement-of-deal-protection-provisions-on-del-monte-merger/>

[12] here: <http://www.delawarelitigation.com/2011/06/articles/chancery-court-updates/court-denies-shareholders-request-to-preliminarily-enjoin-massey-energy-company-merger/>

[13] here: <http://www.delawarelitigation.com/2011/07/articles/chancery-court-updates/chancery-defers-request-for-interim-fees-in-class-action/>

[14] here: <http://www.delawarelitigation.com/2011/10/articles/chancery-court-updates/chancery-confirms-that-appraisal-rights-not-available-for-shareholders-who-could-receive-publicly-traded-shares-of-acquirer/>

[15] here: <http://www.delawarelitigation.com/2011/10/articles/chancery-court-updates/court-of-chancery-dismisses-breach-of-fiduciary-duty-waste-and-caremark-claims-challenging-goldman-sach%E2%80%99s-compensation-structure/>

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- [19] here: <http://www.delawarelitigation.com/2011/11/articles/delaware-supreme-court-updates/supreme-court-affirms-chancerys-denial-of-request-for-hewlett-packard-report/>
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- [25] here: <http://www.delawarelitigation.com/2011/01/articles/chancery-court-updates/chancery-addresses-issues-in-double-derivative-suit/>
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- [38] here: <http://www.delawarelitigation.com/2011/12/articles/chancery-court-updates/chancery-denies-motion-for-reargument-and-affirms-decision-to-provide->

equitable-and-monetary-remedies-for-breach-of-an-agreement-to-negotiate-in-good-faith/

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