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BUSINESS LAW TODAY

Delaware Insider: Top Five Delaware Corporate and Commercial Decisions of 2012

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During 2012, Delaware's Supreme Court and Court of Chancery issued a number of important decisions with far reaching implications. This is a short overview, in no particular order, of five key decisions during 2012 from those courts.

In *Americas Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012), Grupo Mexico sought to sell its interest in Minera Mexico to Southern Peru Copper for approximately \$3 billion of Southern Peru Copper shares. The shareholders of Southern Peru Copper filed a derivative action on behalf of the company asserting that Southern Peru Copper had overpaid for Minera Mexico and that the deal was done for the benefit of Grupo Mexico only, Southern Peru Copper's largest shareholder.

The Delaware Supreme Court upheld a decision of the Court of Chancery awarding over \$2 billion in damages based on a breach of fiduciary duty claim in connection with the sale of the company. Delaware's high court also upheld an award of attorneys' fees in the amount of \$300 million which equated to approximately \$35,000 per hour, and declined the opportunity to set a cap or formula for the calculation of attorneys' fees in such large cases.

The case of *Gatz Properties LLC v. Auriga Capital Corp.*, 2012 Del. LEXIS 577 (Del. Nov. 7, 2012) (per curiam), addressed the issue of whether Gatz, the manager of a limited liability company (LLC), owed fiduciary duties to the LLC's minority investors based upon the

provisions of the LLC agreement. The Delaware Supreme Court and Court of Chancery agreed that the LLC agreement imposed fiduciary duties on the manager even though the agreement did not use the words "fiduciary duty." Specifically, the Delaware Supreme Court explained that the language of the LLC agreement was the "contractual equivalent of the entire fairness standard of conduct and judicial review," and that the manager failed to carry his burden. The Chancery Court decision was affirmed on this ground.

However, this case will most likely be remembered for the instructions given to the Court of Chancery by the Delaware Supreme Court as a result of what Delaware's high court called the lower court's excursus on the issue of whether default fiduciary duties apply to Delaware LLCs when the LLC agreement is silent on the issue. The Delaware Supreme Court declared the portion of the lower court's opinion discussing this issue as dicta, because that issue was not a necessary part of the trial court's decision. As a result, this remains an unresolved issue in Delaware.

South v. Baker, 2012 Del. Ch. LEXIS 229 (Del. Ch. Sept. 25, 2012), is a candidate for inclusion in the pantheon of iconic Court of Chancery opinions based on its treatment of the following issues: (1) when derivative plaintiffs and their counsel will be presumptively found to provide inadequate representation resulting in the complaint's dismissal with

prejudice, (2) when dismissal of one derivative suit will not bar another derivative suit involving the same corporation, (3) when a *Caremark* claim will be dismissed with prejudice if Section 220 is not used beforehand; and (4) how to successfully allege pre-suit demand futility in connection with making a *Caremark* claim.

This derivative case involved a company that was engaged in the mining of silver in Idaho and Alaska. Shortly after several unfortunate mining incidents within one year, and after several federal securities suits were filed, this lawsuit and other derivative suits were filed invoking the legal theory first recognized in the Delaware case styled as *In Re Caremark International Inc. Derivative Litigation*, 690 A.2d 959 (Del. Ch. 1996). A *Caremark* claim refers to directors being held liable for knowingly causing or consciously permitting a corporation to violate positive law, or for failing utterly to attempt to establish a reporting system or other oversight mechanism to monitor the corporation's legal compliance.

In connection with explaining its disapproval of the hastily filed complaint, the Court of Chancery cited a plethora of Delaware cases admonishing shareholders to avail themselves of Delaware General Corporation Law Section 220 in order to obtain books and records to investigate their claims before filing a suit based on *Caremark*. The decision clearly enunciated that there is a presumption of inad-

equate representation by the derivative plaintiff and its counsel when a *Caremark* claim is filed with haste. As the plaintiffs had failed to satisfy the pre-suit demand futility requirements of Court of Chancery Rule 23.1, the Court of Chancery dismissed the complaint with prejudice and without leave to amend as to the named plaintiff. However, the Court clarified that the dismissal did not have any preclusive effect on the efforts of other shareholders to investigate claims.

This case also clarified that there is an evidentiary presumption that a derivative plaintiff who fails to conduct a meaningful investigation has acted disloyally to the company.

In re: Encore Energy Partners LP Unitholder Litigation, Cons., 2012 Del. Ch. LEXIS 214 (Del. Ch. Aug. 31, 2012), addressed whether the terms of a limited partnership agreement protected the general partner from claims regarding what would otherwise be a self-interested transaction. The short answer was “yes.”

The general partner sought and received “Special Approval” from a conflicts committee before approving a merger that involved an affiliated entity and submitting it for unitholder approval. If the “Special Approval” was valid, the LP agreement immunized the merger from judicial challenge and protected the general partner from claims that would otherwise subject it to liability if the economic terms of the merger were shown to be unfair.

The Court of Chancery began with the notion that the Delaware Revised Uniform Limited Partnership Act allows a LP agreement to eliminate all duties other than the implied contractual covenant of good faith and fair dealing. In this case, the LP agreement provided that all duties would be waived except as set forth in the agreement, and provided the “Special Approval” procedure which required the approval of a majority of the members of the conflicts committee acting in good faith. The court then noted the importance of the uniform interpretation and application of identical contract language, and considered the interpretation of identical

language in another case. After considering these points, the court evaluated whether the conflicts committee had a subjective belief that their approval was in the partnership’s best interest. The court concluded that the plaintiffs failed to allege sufficient facts from which one could reasonably infer that the conflicts committee believed that it was acting contrary to the best interests of the partnership or in bad faith.

Finally, *Soterion Corp. v. Soteria Mezzanine Corp.*, 2012 Del. Ch. LEXIS 257 (Del. Ch. Oct. 31, 2012), addressed for the first time in Delaware the applicable standard to determine when the threat of a lawsuit will constitute tortious interference with a prospective business relationship. The Court of Chancery determined that the applicable test would be based on Comment “c” to Section 767 of the Restatement (Second) of Torts. This test requires proof that either the interferer had no belief in the merit of the suit, or while having some belief in its merit, the interferer institutes or threatens to institute the litigation in bad faith, intending only to harass the third parties and not to bring the claim to definitive adjudication.

The core background facts of this case involved the sale of two imaging centers which, it was argued, were not consummated because of the threat of litigation that was included in a letter to the prospective buyers with a copy of a draft complaint. That draft complaint was not filed until three months later. Moreover, several days prior to the eventual trial on that complaint, the plaintiffs stipulated to a judgment dismissing the claims. The defendants counterclaimed and argued that the threat of litigation constituted a tortious interference with a prospective business relationship and was the cause of the two deals not closing.

The court found, despite contrary testimony by the plaintiffs, that the plaintiffs never intended to bring their claims to definitive adjudication and they knew that their claims were false when they made them. However, as with other torts, in order to prevail on a tortious interference

claim, the claimant must establish proximate cause and the Court of Chancery found that the threatened litigation was not the proximate cause of the two deals not closing. Therefore, the prerequisites to tort liability were not satisfied. This opinion also features the rare instance when attorneys’ fees are assessed based on an exception to the American Rule.

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