Client Update
Delaware Supreme Court Holds Directors Entitled to Dismissal in Entire Fairness Case Unless Plaintiffs Allege Non-Exculpated Breach

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The Supreme Court of Delaware has held that directors subject to exculpatory charter provisions are entitled to be dismissed from lawsuits seeking only monetary damages unless the plaintiff has alleged a non-exculpated claim for breach of fiduciary duty – namely, a breach of the duty of loyalty – irrespective of the standard of review applicable to the directors' actions.[1]

The decision arose from interlocutory appeals of two Court of Chancery decisions declining to dismiss claims against directors in controlling stockholder going private cases, which were subject to entire fairness review. In each of these cases, the Court of Chancery felt constrained by language in the Delaware Supreme Court's opinion in *Emerald Partners*, which stated that in entire fairness cases, "a determination that the director defendants are exculpated from paying monetary damages can be made only after the basis for their liability has been decided…."[2]

The Delaware Supreme Court rejected the plaintiffs' contention that they should be entitled to "an automatic inference" that a director considering a controlling stockholder transaction is disloyal based on the heightened possibility of conflicts in those transactions, as well as the possibility that facts giving rise to a duty of loyalty breach "may be unknowable at the pleading stage." Chief Justice Strine found such an inference to be inconsistent with "basic tenets of Delaware law" which presume that directors act with fidelity. He was also concerned that

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1 *In re Cornerstone Therapeutics S'holder Litig.*, No. 564, 2014 (Del. May 14, 2015); *Leal v. Meeks*, No. 706, 2014 (Del. May 14, 2015).

2 *Emerald Partners v. Berlin*, 787 A.2d 85 (Del. 2001).

it would create unhelpful disincentives which could discourage directors from serving on special committees. The Court therefore held that "when the plaintiffs have pled no facts to support an inference that any of the independent directors breached their duty of loyalty, fidelity to the purpose of Section 102(b)(7) requires dismissal of the complaint against those directors."

The Delaware Supreme Court's decision is welcome news to any independent director sitting on a special committee. In addition to allowing Delaware courts to dismiss claims for monetary damages against independent directors at an early stage even in transactions subject to entire fairness, the decision provides consistency of treatment of directors regardless of whether their decisions are subject to business judgment review, intermediate scrutiny under *Revlon* or *Unocal*, or entire fairness review.

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Please do not hesitate to contact us with any questions.