PROGRAM MATERIALS
Program #3034
January 8, 2020

Newest Developments in Delaware M&A Litigation

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NEWEST DEVELOPMENTS IN M&A LITIGATION

January 8, 2020

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AGENDA

- Recent M&A Litigation Statistics
- Shift from Delaware Chancery Court to Federal Court
- Growth in Delaware Section 220 Demands
- Growth in Post Closing Claims
- Voluntary Dismissal & Payment of Mootness Fees
- Oracle Opinion (Special Litigation Committees)

RECENT M&A LITIGATION STATISTICS

RECENT M&A LITIGATION STATISTICS*

- 2018: M&A litigation filed in 82% of public company deals valued at more than $100 million (142 total deals announced)

Year	% Deals	Year	% M&A Deals
2018	82%	2013	94%
2017	82%	2012	93%
2016	71%	2011	93%
2015	82%	2010	90%
2014	92%	2009	86%

* Figures from Sept. 2019 Cornerstone Report

RECENT M&A LITIGATION STATISTICS*

- 2018: On average, 3.1 lawsuits filed in each litigated deal

Year	Ave. # Lawsuits	Year	Ave. # Lawsuits
2018	3.1	2013	5.1
2017	2.9	2012	4.8
2016	2.9	2011	5.3
2015	3.9	2010	4.8
2014	4.5	2009	4.4

* Figures from Sept. 2019 Cornerstone Report

RECENT M&A LITIGATION STATISTICS*

- 2018:
  - Only 13 cases filed in Delaware Chancery Court (37 in 2016)
  - Multiple Jurisdictions
    - 45% of deals challenged in 1 jurisdiction (5 year low)
    - 43% of deals challenged in 2 jurisdictions (26% in 2017)
    - 12% of deals challenged in 3 or more jurisdictions (4% in 2017)

* Figures from Sept. 2019 Cornerstone Report

SHIFT FROM CHANCERY COURT TO FEDERAL COURT

SHIFT FROM CHANCERY COURT TO FEDERAL COURT

- Shareholders now more likely to file cases in federal court
  - Federal securities law claims
    - 1934 Act: Section 14(a) & Rule 14a-9, Section 20(a);
    - 1933 Act: Section 11, Section 12, Section 15(a)
      - Concurrent jurisdiction of 1933 Act claims (state or federal court)
      - Dec. 2018: Chancery Court holds that federal forum selection clause in bylaws is invalid and unenforceable (*i.e.*, companies cannot force shareholders to file 1933 Act claims in federal court)
- Shareholders in Federal Court face procedural obstacles:
  - heightened pleading standard
  - automatic stay of discovery

SHIFT FROM CHANCERY COURT TO FEDERAL COURT*

- 2018: 91% of cases filed in federal court (vs. 26% in 2015)

Circuit	# Cases 2018	# Case 2017	Circuit	# Cases 2018	# Case 2017
1st	10	8	7th	5	5
2nd	24	7	8th	2	12
3rd	79	34	9th	25	20
4th	15	19	10th	7	6
5th	14	8	11th	6	3
6th	7	9	D.C.	0	2

* Figures from Sept. 2019 Cornerstone Report

SHIFT FROM CHANCERY COURT TO FEDERAL COURT

- The Private Securities Litigation Reform Act of 1995 ("PSLRA")
  - Heightened pleading standard
    - Misleading statements: Must plead with particularity "each statement alleged to have been misleading" and the "reason or reasons why statement is misleading"
    - Omissions: Must identify the affirmative statements that were rendered materially misleading by the omission and explain why they are misleading
    - Scienter (Intent): Must "state with particularity facts giving rise to a strong inference that defendant acted with the required state of mind"

SHIFT FROM CHANCERY COURT TO FEDERAL COURT

- The Private Securities Litigation Reform Act of 1995 ("PSLRA")
  - Automatic Stay
    - Applies to "[a]ll discovery and other proceedings … during the pendency of any motion to dismiss" unless court finds that particularized discovery is necessary to preserve evidence or prevent undue prejudice

  - Practical Result: Limited opportunities for discovery in federal court have caused many shareholders to use Delaware Section 220 demands to obtain discovery

GROWTH IN DELAWARE SECTION 220 DEMANDS

GROWTH IN DELAWARE SECTION 220 DEMANDS

- Stockholders of record and beneficial owners may make demand
- Demand has technical requirements that must be met
- Require “credible basis” to establish right to make demand
  - Investigation of possible wrongdoing is a “proper purpose” for making a demand
- Corporation must respond within 5 business days
  - If corporation refuses demand (or fails to respond), stockholder can file suit in Chancery Courts

GROWTH IN DELAWARE SECTION 220 DEMANDS

- DGCL § 220(b): "Any stockholder, in person or by attorney or other agent, shall, upon written demand under oath stating the purpose thereof, have the right during the usual hours for business to inspect for any proper purpose, and to make copies and extracts from:
  - (1) The corporation's stock ledger, a list of its stockholders, and its other books and records; and
  - (2) A subsidiary's books and records…"

- DGCL § 220(a)(1): "Stockholder" means record holders and beneficial owners
  - Beneficial owners must provide documentary evidence of beneficial ownership of stock

GROWTH IN DELAWARE SECTION 220 DEMANDS

- Corporation's Response
  - DGCL § 220(c): "If the corporation, or an officer or agent thereof, refuses to permit an inspection sought by a stockholder or attorney or other agent acting for the stockholder … or does not reply to the demand within 5 business days after the demand has been made, the stockholder may apply to the Court of Chancery for an order to compel such production."
    - Chancery Court is vested with exclusive jurisdiction to determine whether stockholder is entitled to inspection
    - Proceeding in Chancery Court is a "summary proceeding"

GROWTH IN DELAWARE SECTION 220 DEMANDS

- Stockholder must have a “proper purpose” for the demand
  - A proper purpose “shall mean a purpose reasonably related to such person’s interest as a stockholder” (DGCL § 220(b))
  - Examples:
    - Investigating potential mismanagement, breaches of fiduciary duty, self-dealing, corporate waste or other wrongdoing
    - Investigating director independence and disinterestedness, demand excusal
    - Valuing shares
    - Communicating with other stockholders

GROWTH IN DELAWARE SECTION 220 DEMANDS

- Improper purposes include:
  - Investigating corporate wrongdoing for which there is no remedy
  - Stockholder lacks standing to assert any subsequent claim
  - Underlying claim is not justiciable, barred by limitations, or released by settlement
  - Lending name to opportunistic demand
  - Sheer curiosity
  - Investigate pending claims (“sue first, ask questions later”)

GROWTH IN DELAWARE SECTION 220 DEMANDS

- Credible basis from which wrongdoing may be inferred
  - Low burden of proof under Delaware law but “more than a mere speedbump”
    - Speculation, curiosity, suspicions not enough
    - Documents, logic, testimony may suffice

GROWTH IN DELAWARE SECTION 220 DEMANDS

- What qualifies as books and records?
  - Stockholders may inspect "the documents [that] are necessary and essential to satisfy the stockholder's proper purpose"
    - Source of document(s) is irrelevant
  - Starting point: Board level documents evidencing the directors' decisions and deliberations, as well as the materials that the directors received and considered" (*KT4 Partners LLC* (Del. 2018))

GROWTH IN DELAWARE SECTION 220 DEMANDS

- BUT … If stockholder can show that additional documents are "necessary and essential," Delaware courts are willing to provide more:
  - Officer- and employee-level documents and electronic data from back-up tapes. [*Wal-Mart Stores, Inc.,* Del. 2014]
  - Emails from directors and one officer [*Yahoo!*, Del. Ch. 2016]
  - Directors' personal emails [*Palantir Techs. Inc.*, Del. 2019]
  - Directors' personal text messages [*Papa John's*, Del. Ch. 2019]

GROWTH IN DELAWARE SECTION 220 DEMANDS

- "If a company observes traditional formalities such as documenting actions through board minutes, resolutions, and official letters, it will likely be able to satisfy a Section 220 petitioner's needs solely by producing those books and records." (*KT4 Partners*)

BUT

- "[I]f a company instead decides to conduct formal corporate business largely through informal electronic communications, it cannot use its own choice of medium to keep shareholders in the dark about the substantive information to which Section 220 entitles them." (*Papa John's*)

GROWTH IN DELAWARE SECTION 220 DEMANDS

- "Although some methods of communication (*e.g.*, text messages) present greater challenges for collection and review than others, and thus may impose more expense on the company to produce, the utility of Section 220 as a means of investigating mismanagement would be undermined if the court categorically were to rule out the need to produce communications in these formats. Accordingly, I decline to adopt that approach." (*Papa John's*)
- If directors and officers "used personal accounts and devices to communicate about [topics related to a proper purpose], they should expect to provide that information to the Company. That would apply not only to emails, but also to text messages, which in the court's experience often provide probative information." (*Id.*)
- "In so holding, I do not mean to suggest any form of a bright-line rule. To the contrary, when considering requests for information from personal accounts and devices in Section 220 proceedings, the court should apply its discretion on a case-by-case basis to balance the need for the information sought against the burdens of production and the availability of the information from other sources, as the statute contemplates." (*Id.*)

GROWTH IN DELAWARE SECTION 220 DEMANDS

- Other Recent Section 220 Opinions
  - *Facebook* (Oct. 2019): Shareholders did not state "proper purpose" for inspection where (i) board was exculpated from liability for any breaches of duty of care, (ii) no evidence of duty of loyalty claim, and (iii) Facebook already had produced all "necessary and essential" books & records to fulfill the shareholders' stated purpose
  - *Keryx Biopharmaceuticals* (Oct. 2019): Chancery court grants shareholders' request for books / records concerning merger where shareholder demonstrated possible breaches of duty of loyalty based on merger price, influence by majority shareholder, bonuses paid in connection with merger, independence of D&Os, and certain disclosure issues
  - *Occidental Petroleum Corp.* (Nov. 2019): Stockholder's desire to communicate with other stockholders as part of proxy contest was not a "proper purpose" for Section 220 demand

GROWTH IN POST-CLOSING DAMAGES CLAIMS

GROWTH IN POST-CLOSING DAMAGES CLAIMS

- Cases seeking pre-closing injunctions are not dead BUT shareholders increasingly file claims after the vote or closing
- Claims often seek damages for alleged breach of fiduciary duty
- If stockholder asserts Delaware law breach of fiduciary duty claim, defendants typically move to dismiss based on *Corwin*:
  - Business judgment rule applies to post-closing claims if merger is approved by fully informed, uncoerced vote of disinterested stockholders
  - Focus of motion likely on whether vote was "fully informed"

IN RE PLX TECH. INC. STOCKHOLDERS LITIGATION

- Board breached fiduciary duty by bowing to activist pressure and engaging in sale rather than continuing business as a going concern
  - "best transaction reasonably available is not always a sale; it may mean remaining independent and not engaging in a transaction at all"
  - No damages (no proof that company's standalone value > merger price)
- Corwin did not apply to post-closing claims (board failed to disclose material information)
- Acquiescing to directors nominated by activists is not consistent with fiduciary duties if director believes that a different course of action is preferable

VOLUNTARY DISMISSAL & PAYMENT OF "MOOTNESS FEES"

VOLUNTARY DISMISSAL & PAYMENT OF "MOOTNESS FEES"

- In pre-vote case, plaintiffs often demand supplemental disclosures to correct alleged deficiencies
- If "mooting" disclosures are issued, defendants will ask plaintiff to dismiss case
  - Plaintiffs' counsel may agree to voluntarily dismiss in exchange for payment of "mootness fee" (and supplemental disclosures)
  - No class-wide release of claims by shareholders
  - So other shareholders can assert similar claims (including class claims)

VOLUNTARY DISMISSAL & PAYMENT OF "MOOTNESS FEES"

- *Scott v. DST Systems, Inc.* (D. Del., Aug. 2019)
  - Federal court rejects plaintiffs' mootness fee request
  - Shareholders filed Section 14(a) claims in connection with $5.4B merger of DST Systems, Inc. and SS&C Technologies
  - Defendants issued supplemental disclosures and Plaintiffs' sought $215,000 in "mootness fee"
    - Defendants objected to fee request
  - Court found that lawsuits had not provided "substantial benefit" merely because they resulted in additional disclosures.
    - 3 categories of disclosures concerning financial advisor's analyses, all of which were immaterial.

VOLUNTARY DISMISSAL & PAYMENT OF "MOOTNESS FEES"

- *Scott v. DST Systems, Inc.* (D. Del., Aug. 2019)
  - Categories of Supplemental Disclosures:
    - Analysis of unlevered free cash flows by financial advisor
    - Additional information re DCF analysis (e.g., discount rate, terminal values, etc.)
    - Additional information re Selected Comparable Companies & Precedent Transaction Analyses
  - Court: Plaintiffs failed to carry their burden of showing supplemental disclosures were material:
    - Not per se material (as a matter of law)
    - Plaintiffs failed to demonstrate why the additional information was material as it was applied to the facts of this case

IN RE ORACLE CORP. DERIVATIVE LITIGATION

IN RE ORACLE CORP. DERIVATIVE LITIGATION (DEC. 2019)

- Unusual case history
  - July 2016: Oracle announces that it would acquire Netsuite Inc.
    - Larry Ellison is co-founder of and significant shareholder in both companies
    - Derivative case alleges that acquisition unfairly benefitted Ellison and that Oracle directors (and 1 Netsuite co-founder/director) breached their fiduciary duties
  - March 2018: Chancery Court denies motion to dismiss for demand futility
    - Demand excused because a majority of Oracle directors could not impartially consider a demand to sue Ellison; reasonable doubt that they lacked independence from him
    - Also denies motion to dismiss Ellison and Oracle CEO (Catz) for failure to state a viable claim (Rule 12(b)(6))

IN RE ORACLE CORP. DERIVATIVE LITIGATION

- Unusual case history
  - May 2018: Oracle Board forms a Special Litigation Committee (SLC) to evaluate lead plaintiff's claims and take whatever action related to the lawsuit that the SLC deems to be in the best interest of Oracle
  - July 2018: Court stays litigation to give SLC time to conduct investigation (& later, to conduct mediation (unsuccessful))
    - SLC requests documents from 17 witnesses and interviewed 40 witnesses
    - SLC obtained more than 1.4 million documents
      - Reviewed all documents from Ellison and CEO (Catz)

IN RE ORACLE CORP. DERIVATIVE LITIGATION

- Unusual case history
  - August 2019: SLC determines that it would be in Oracle's best interest to have the litigation proceed and that the litigation asset would be best monetized if the lead plaintiff pursued the claims (not the SLC)
  - Lead Plaintiff subpoenas SLC & its counsel seeking –
    - All documents / communications produced to the SLC or that SLC obtained, reviewed, considered, created or prepared during investigation
    - All documents and communications concerning the litigation or the SLC
      - Lead Plaintiff argued that it did not want to have to duplicate the SLC's work
      - Lead Plaintiff also sought SLC work product
  - SLC objects to production

IN RE ORACLE CORP. DERIVATIVE LITIGATION

- To resolve dispute, Chancery Court was presented with 2 questions:
  - When a SLC transfers a litigation asset to a Lead Plaintiff, does it also transfer the right to access documents made available to or relied up by the SLC during the investigation?
  - If the SLC transfers such right, to what extent and subject to which privileges?

IN RE ORACLE CORP. DERIVATIVE LITIGATION

- Question 1: When a SLC transfers a litigation asset to a Lead Plaintiff, does it also transfer the right to access documents made available to or relied up by the SLC during the investigation?
  - Court: Lead Plaintiff is entitled to all documents and communications relied upon by the SLC or its counsel in forming the conclusions that
    - it would not be in Oracle's best interests to seek to dismiss the claims; and
    - it was in Oracle's best interests to permit the Lead Plaintiff to pursue the claims
    - BUT, Lead Plaintiff not entitled to "all" documents collected by the SLC. Rather, SLC entitled to production of "relevant" documents and communications
      - Relevant: documents "actually reviewed and relied upon by the SLC" in making its determination.

IN RE ORACLE CORP. DERIVATIVE LITIGATION

- Question 2: Subject to which privileges?
  - Lead Plaintiff is entitled to privileged documents produced to SLC by Oracle and
    - if SLC relied upon those documents in concluding that pursuing the litigation was in Oracle's interest
  - Lead Plaintiff not entitled to privileged documents from individual defendants
    - Directors had arguably waived privilege claims by producing to the SLC but question of waiver is fact specific and a privilege log is required
  - Lead Plaintiff not entitled to privileged documents from SLC
    - SLC is distinct entity from Oracle
    - Plaintiff could not rely on "common interest" doctrine


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