

2012 Key Delaware Decisions

Dear Friends and Colleagues,

As 2013 starts, we thought it would be helpful to recall key 2012 decisions involving corporate and alternative entity law. Below are headlines and links to noteworthy decisions from the Delaware Supreme Court and Court of Chancery in 2012.

For more detailed summaries on these and other cases, please look out for our Delaware Corporate, Commercial and Alternative Entity Law: Key Decisions 2012 (forthcoming, February 2013).

Corporate Cases

Delaware Supreme Court reverses Court of Chancery decision and orders that a significant shareholder may opt-out of a class action settlement to pursue a claim for monetary damages challenging a merger transaction. *BVF P's v. New Orleans Emps. Ret. Sys.*, 2012 Del. LEXIS 658 (Del. Dec. 27, 2012); *rev'g In re Celera Corp. S'holder Litig.*, 2012 Del. Ch. LEXIS 66 (Del. Ch. Mar. 23, 2012)

Court of Chancery questions enforceability of "Don't Ask, Don't Tell" standstill agreements in light of competing fiduciary obligations. *In re Complete Genomics, Inc. S'holder Litig.*, C.A. No. 7888-VCL, at 13-18 (Del. Ch. Nov. 27, 2012) (TRANSCRIPT); *see also In re Ancestry.com Inc. S'holder Litig.*, C.A. No. 7988-CS, at 23-34 (Del. Ch. Dec. 17, 2012) (TRANSCRIPT); *In re Celera Corp. S'holder Litig.*, 2012 Del. Ch. LEXIS 66, at *81-82 (Del. Ch. Mar. 23, 2012).

Delaware Supreme Court affirms \$1.3 billion judgment against controlling shareholder and \$300 million attorneys' fees award. *Am. Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012), *aff'g In re So. Peru Copper Corp. S'holder Deriv. Litig.*, 30 A.3d 60 (Del. Ch. 2011).

Court of Chancery dismisses class action, applying the business judgment rule where controlling shareholder received pro rata share of merger consideration. *In re Synthes Inc. S'holder Litig.*, 50 A.3d 1022 (Del. Ch. 2012).

Supreme Court affirms Court of Chancery decision enjoining hostile takeover bid that violates a confidentiality agreement executed during friendly merger negotiations. *Martin Marietta Mat'ls, Inc. v. Vulcan Mat'ls Co.*, 45 A.3d 148 (Del. 2012) (summary affirmance), 2012 Del. LEXIS 342 (Del. July 10, 2012) (formal opinion explaining affirmance), *aff'g* 2012 Del. Ch. LEXIS 93 (Del. Ch. May 4, 2012).

Court of Chancery holds that decision by a California Federal Court to dismiss Caremark claims under Rule 23.1 did not preclude litigation of the same claims in the Court of Chancery. *La. Mun. Pol. Emps. Ret. Sys. v. Pyott*, 46 A.3d 313 (Del. Ch. 2012).

Court of Chancery refuses to enjoin merger despite issues with sales process. *In re*

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El Paso Corp. S'holder Litig., 41 A.3d 432 (Del. Ch. 2012).

Supreme Court holds that Court of Chancery applied incorrect “plausibility” standard in deciding motion to dismiss and upholds “reasonable conceivability” standard applied in *Central Mortgage. Cambium Ltd. v. Trilantic Capital P'rs III L.P.*, 36 A.3d 348 (Del. 2012).

Appraisal Cases

Court of Chancery rejects management projections made outside of the ordinary course when “the possibility of litigation, such as an appraisal proceeding, was likely” and holds that where a liquidity effect relates to the a firm’s “ability to obtain capital at a certain cost” it is properly included in a cost of capital determination in an appraisal proceeding. *Gearreald v. Just Care, Inc.*, 2012 Del. Ch. LEXIS 91 (Del. Ch. Apr. 30, 2012).

Court of Chancery rejects the build-up method in favor of the CAPM model in determining cost of capital in an appraisal proceeding. *In re Appraisal of The Orchard Enters.*, 2012 Del. Ch. LEXIS 165 (Del. Ch. July 18, 2012).

Alternative Entity Cases

Delaware Supreme Court holds that “[t]he question remains open” as to whether the LLC Act imposes default fiduciary duties on managers and controllers of LLCs. *Gatz Props., LLC v. Auriga Capital Corp.*, 2012 Del. LEXIS 577 (Del. Nov. 7, 2012).

Court of Chancery dismisses claims against a general partner and its affiliates where the transaction at issue was approved under a Special Approval provision of a limited partnership agreement. *Gerber v. Enter. Prods. Hldg., LLC*, 2012 Del. Ch. LEXIS 5 (Del. Ch. Jan. 6, 2012); *In re K-Sea Transp. P'rs L.P. Unitholders Litig.*, 2012 Del. Ch. LEXIS 67 (Del. Ch. Apr. 4, 2012); *In re Encore Energy P'rs LP Unitholder Litig.*, 2012 Del. Ch. LEXIS 214 (Del. Ch. Aug. 31, 2012).

Court of Chancery explains the difference between an implied covenant of good faith and fair dealing and a fiduciary duty analysis in context of claims involving parties to an LLC agreement. *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434 (Del. Ch. 2012).

Court of Chancery interprets an undefined term “good faith” in a limited partnership agreement as primarily a subjective standard with a “gloss” added for “conduct that is utterly unreasonable.” *Policeman’s Annuity & Benefit Fund of Chicago v. DV Realty Advisors LLC*, 2012 Del. Ch. LEXIS 188 (Del. Ch. Aug. 16, 2012).

Court of Chancery holds that no statutory basis exists for asserting jurisdiction over a manager of a limited partnership for breach of fiduciary duty “absent acts taken in Delaware.” *New Media Hldg. Co., L.L.C. v. Brown*, 2012 Del. Ch. LEXIS 263 (Del. Ch. Nov. 12, 2012).

If you have any questions or would like to discuss the decision further, please contact any of the Corporate partners at Young Conaway. The Firm is also available for complimentary Delaware Update CLE programs to address any aspects of Delaware law that are of interest to our friends and colleagues around the country.

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