

Del. M&A Law Changes Leave GCs, Officers 'Holding The Bag'

By **Dorothy Atkins**

Law360, San Francisco (February 6, 2020, 10:15 PM EST) -- Delaware Vice Chancellor Kathaleen McCormick told mergers and acquisitions attorneys at a San Francisco conference Thursday that the state's law is shifting toward presuming boards operate independently of their corporations. It's a trend that, in the words of one attendee, has left corporate general counsel and officers "holding the bag."

Vice Chancellor McCormick says there has been a "slight shift" in the Delaware law toward assuming board members are independent and that "mere friendship" between board members isn't enough to indicate foul play.

"Independence is effectively presumed, and it's very hard to show that even at a pleading stage, that [a board] lacks independence," she said.

She added that it's difficult to grapple with what "mere friendship" means, and the fact that two board members have a friendship is not necessarily a cause for concern, but the rest of the board should be aware of the friendship.

However, Rolin Bissell of Young Conaway Stargatt & Taylor LLP, who represents corporate defendants and boards, told the vice chancellor that in litigation it seems to be getting "tougher" for corporate officers like general counsel and CEOs who are "left holding the bag." Vice Chancellor McCormick appeared to agree.

"Well said, defense bar, well said," she replied.

The vice chancellor blamed the trend in part on Section 102(b)(7) of the Delaware Code, which permits corporations to include provisions eliminating monetary damages for board directors for any breach of fiduciary duty.

"It's a board-centric model," she said.

The exchange came during the 2020 Forum on M&A and Governance hosted by the Berkeley Center for Law and Business. The half-day event drew hundreds of M&A legal professionals and featured panels on legal trends in M&A, initial public offerings and government oversight.

During the event, Vice Chancellor McCormick answered questions about recent trends in Delaware corporate securities law from M&A litigator Meredith Kotler of Freshfields Bruckhaus Deringer LLP and University of Pennsylvania law professor Jill Fisch.

Kotler asked the vice chancellor if three recent Delaware decisions denying motions to toss Caremark claims — a notoriously difficult-to-prove type of claim rooted in a 1996 derivative case that alleges a company's directors allowed it to break the law — means that board directors should "run for the hills."

Vice Chancellor McCormick replied that those decisions were unusual, but she doesn't think they signal a "seismic shift" in the law. In at least one of those cases, she said, the board ignored warning

signs, and in another the board admitted it had no systems in place to identify regulatory issues.

"Stating 'We had no reporting system' is very unusual," she said.

The response prompted Fisch to ask Vice Chancellor McCormick if she thinks board members need any specific skill sets to ensure that their companies are following federal reporting rules. The vice chancellor declined to offer tips.

"I don't know what a good board does, I just know what a bad board does," she replied. "That's my job."

The conversation also turned to board member compensation and how much is fair pay for a board member. The vice chancellor said she lets attorneys argue over compensation, but she noted that large board member pay packages could result in litigation.

Fisch added that the courts are also seeing more litigation over board member compensation as the plaintiffs' bar **shifts away** from suing companies over inadequate corporate disclosures in the wake of the state high court's 2015 ruling in [Robert A. Corwin v. KKR Financial Holdings](#) .

When asked her advice for young litigators, the vice chancellor said the lawyers that impress her the most deal "head on" with difficult issues in a meaningful way, and the lawyers who tend to annoy her "cast aside" and dismiss those difficult issues.

--Editing by Haylee Pearl.