

DELAWARE CORPORATE LAW UPDATE — August 2024

YOUNG
CONAWAY

FEATURED:

InterMune, Inc. v. Harkonen
Erste Asset Mgmt. GmbH v. Hees
In re Dell Techs. Inc. Class V S'holders Litig.
Paul Rivera v. Angkor Cap. Ltd.

***InterMune, Inc. v. Harkonen*, 2024 WL 3619692 (Del. Ch. Aug. 1, 2024) (holding company entitled to repayment of legal expenses advanced to former CEO who was ultimately convicted of wire fraud).**

In this post-trial opinion, the Court ordered the defendant, the former CEO of the plaintiff company, to repay plaintiff for legal expenses that plaintiff had advanced to defendant. In the underlying action, defendant requested and received advancement from plaintiff, which was in turn funded by D&O insurance. Defendant ultimately was criminally convicted of wire fraud. After defendant was convicted, plaintiff's insurers demanded that plaintiff seek repayment from defendant of the amounts advanced. DGCL Section 145(a) empowers companies to indemnify its directors and officers as long as the indemnitee acted in good faith, and Section 145(e) permits companies to advance expenses, including legal fees, to that indemnitee, but requires the repayment of those funds if the court determines the person is not ultimately entitled to indemnification. The Court had already ruled in a prior opinion that defendant's conviction for wire fraud was conclusive evidence of bad faith, and so held that defendant was not entitled to indemnification and must reimburse plaintiff for all sums advanced.

***Erste Asset Mgmt. GmbH v. Hees*, 2024 WL 3722620 (Del. Ch. Aug. 8, 2024) (declining to reopen previous dismissal of derivative claims relating to Kraft Heinz's announcement of a \$15.4 billion impairment charge, holding that alleged new evidence could have been uncovered during the prior lawsuit with reasonable diligence).**

In this decision, the Court declined to grant relief under Court of Chancery Rule 60(b) from a prior dismissal of derivative claims. A significant stockholder sold its ownership interest in The Kraft Heinz Company just before the company announced a \$15.4 billion impairment charge. Plaintiff initiated a derivative suit, alleging that the other significant stockholder sold its stock based on material non-public information that Kraft Heinz officers and directors concealed from the market. The suit was dismissed for failure to plead demand futility and the Delaware Supreme Court affirmed the dismissal. Plaintiff then made a litigation demand on the board. The Company rejected that demand. While other plaintiffs

who made litigation demands tried to sue for wrongful refusal of demand, this plaintiff asked the Court to reopen its dismissed demand futility suit based on alleged newly discovered evidence. Among other things, plaintiff argued that one of the independent directors had received stock options for undisclosed consulting services. The Court rejected that argument, holding that reasonable diligence on plaintiff's part—whether through a books and records demand or a review of public filings—would have uncovered this information during the prior lawsuit. In fact, the Court pointed out that plaintiff had previously pointed out the director's options in its unsuccessful appeal.

***In re Dell Techs. Inc. Class V S'holders Litig.*, 2024 WL 3811075 (Del. Aug. 14, 2024) (affirming Court of Chancery award of \$266.7 million in fees—26.67% of a \$1 billion settlement—but noting that “it is not inconsistent” with Delaware law to decrease the percentage of fees in a megafund case and that it is “entirely appropriate, and indeed essential,” to consider the size of the award when deciding the fee percentage so to prevent “windfalls to counsel”).**

Plaintiff sued the board of Dell Technologies, Inc. and Dell's alleged controlling stockholders in connection with Dell's redemption of Dell Class V stock. The suit survived dismissal and was hotly litigated for the next two-and-a-half years. The parties filed pre-trial briefs before settling for \$1 billion. No stockholder objected to the settlement, but investment funds holding 24% of the class objected to the fee, arguing that awarding a percentage of the settlement without considering the size of the settlement was unfair. The objectors asked the Court of Chancery to adopt a declining percentage method applied in large federal securities law settlements whereby the percentage of the fee awarded declines as the size of the recovery increases. The Court held that such an approach is inconsistent with Delaware law and criticized the objectors for advocating a reduced fee percentage when, as fund managers, they agreed that they do not use similar arrangements in their risk-based business. On appeal, the Delaware Supreme Court held that the Court of Chancery acted within its discretion by awarding 26.67% of the common fund, but “note[d] that it is not inconsistent” with Delaware law “for the court to decrease the percentage of fees in a megafund case.” Given “this Court's concern for excessive compensation or windfalls, it is entirely appropriate, and indeed essential, for the court to consider the size of the award in a megafund case when deciding the fee percentage.” The Court also “question[ed] the utility of singling out objectors for their business practices” because “lawyers are not in the same position as investment bankers and fund managers when it comes to class action settlements—they are fiduciaries for the class.”

***Paul Rivera v. Angkor Cap. Ltd.*, 2024 WL 3873050 (Del. Ch. Aug. 20, 2024) (concluding corporations voided under Section 510 for failure to pay franchise taxes have no powers and cannot sue or be sued).**

In this letter opinion, issued at the request of the Delaware Supreme Court, the Court of Chancery held that a corporation voided for failure to pay franchise taxes cannot sue or be sued. In an earlier opinion, the Court of Chancery issued a final judgment awarding plaintiffs damages but finding in favor of defendant with respect to the composition of plaintiff entity Kalibrr, Inc.'s board. Plaintiffs appealed. During the appeal, defendants discovered that Kalibrr had not paid franchise taxes since

2020, and shortly thereafter Kalibrr was declared void under DGCL Section 510. The Supreme Court then issued an order asking the Court of Chancery to decide whether Kalibrr’s void status affected the final judgement. The Court of Chancery conducted an analysis of both statutory and common law and concluded that all powers of a corporation that is void under Section 510, “including the powers to sue, be sued, dissolve, or wind up,” are inoperative. The Court acknowledged that this is a “harsh consequence” that would deprive void corporations and their creditors of the benefits of a windup period afforded to dissolved corporations. In the instant case, however, though the Court of Chancery noted that the final judgment was “likely void[,]” the Court declined to set aside the final judgment because, in the absence of a motion, the Court was “unaware of any rule, procedure, or equitable power that allows [the Court], *sua sponte*, to set it aside.”