

CLEARY GOTTlieb

2019 Developments in Securities and M&A Litigation

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3 Overview

4 Securities Litigation

- 4 Supreme Court Rules On “Scheme Liability” Under Rule 10b-5(a) And (c)
- 5 Tenth Circuit Rules On SEC’s Authority To Bring Securities Fraud Claims Over Certain Foreign Transactions
- 5 Second Circuit Rules On Statements Of Regulatory Compliance Forming Basis For Securities Fraud Claim
- 6 Third Circuit Addresses Defendants’ Burden To Rebut Presumption Of Reliance Under *Halliburton II*
- 6 Second Circuit Finds Limits to the Extraterritorial Reach of the CEA
- 7 Third Circuit Holds that SLUSA Preclusion in an Opt-out Action Requires Actual Coordination with the Class Action
- 7 Second Circuit Holds that the Non-disclosure of Illegal Activity in a Securities Fraud Complaint Must Be Pleaded with Particularity
- 7 Jury Returns Mixed Verdict In Rare Securities Class Action Trial
- 8 Noteworthy Dismissal And Denials Of Certiorari From Ninth Circuit Decisions
- 10 Data Privacy Securities Cases

11 M&A Litigation

- 11 Delaware Supreme Court Affirms Finding Of A Breach Of Fiduciary Duty By Activist Investor
- 12 Delaware Supreme Court Clarifies Timing Requirements To Trigger “Dual Protections” Under *MFW*
- 12 Delaware Supreme Court Reaffirms Director Oversight Obligation
- 13 Delaware Court Of Chancery Strictly Enforces “End Date” Of Merger Agreement
- 13 Delaware Court Of Chancery Rules On Privilege Of Pre-Merger Attorney-Client Communications
- 14 Payment of a Contractual Termination Fee Was not the Exclusive Remedy for a Breach of a Non-solicitation Clause
- 14 Northern District of Illinois Rejected “Mootness Fee” as a “Racket”
- 14 Delaware Court Of Chancery Holds that Documents Produced to a Special Litigation Committee are Subject to Discovery

18 Looking Ahead

Overview



In 2019, the Supreme Court issued an important securities law decision in *Lorenzo v. SEC*, which clarified the scope of “scheme liability” under Rule 10b-5(a) and (c). However, the Supreme Court’s year was noteworthy more for the cases the Court declined to decide than for the cases it did decide. The Court declined to rule on several significant issues arising from the Ninth Circuit, including whether plaintiffs must show that the defendant acted with scienter when bringing claims under Section 14(e), whether foreign issuers can face liability with respect to unsponsored American Depositary Receipts under *Morrison*, and the standard for establishing loss causation.

The circuit and district courts also addressed several contested securities laws topics, including a significant ruling from the Tenth Circuit in *SEC v. Scoville*, which held that the Dodd-Frank Act permits the SEC to bring claims based on sales of securities that do not constitute domestic transactions within the meaning of *Morrison*. The Second Circuit also found limits to the extraterritorial reach of the CEA in *Prime International Trading v. BP P.L.C.* when the transactions at issue were “predominantly foreign.”

With respect to M&A litigation, the Delaware Supreme Court continued to clarify its jurisprudence with respect to appraisal methodology as well as the protection *MFW* affords to controlled transactions. The Court also released important opinions pertaining to oversight duties for boards of directors and the fiduciary duties of activist investors. The Delaware Court of Chancery continued to see a rise in litigation pertaining to books and records demands under Section 220. It also issued decisions reflecting its continued strict enforcement of the plain language of provisions in merger agreements.

Securities Litigation



Supreme Court Rules On “Scheme Liability” Under Rule 10b-5(a) And (c)

In March, the Supreme Court held in *Lorenzo v. SEC* that an investment banker could be primarily liable under Rule 10b-5(a) and (c) for circulating misleading emails to investors, even though the investment banker did not personally author the content of the emails.¹

The case arose out of allegations that Francis Lorenzo, the director of investment banking at a broker-dealer, sent investors emails containing false statements that were drafted by his supervisor. The D.C. Circuit concluded that Lorenzo was not a “maker” of a misleading statement for the purposes of 10b-5(b) liability, but held that he could be liable for deceptive practices in violation of Rules 10b-5(a) and (c). The Supreme Court had previously restricted liability under Rule 10b-5(b) to a “maker” of a misleading statement, meaning someone with ultimate authority over the statement.²

In *Lorenzo*, the Supreme Court clarified the relationship between “making” a false statement under Rule 10b-5(b) and engaging in deceptive conduct—so-called “scheme liability”—under Rule 10b-5(a) and (c). The Court explained that the three subsections of Rule 10b-5 overlap rather than apply to mutually exclusive conduct, and that the scheme liability provisions can reach a defendant who disseminates a false statement with intent to defraud, even if the defendant does not qualify as the “maker” of the statement and therefore could not be held liable under Rule 10b-5(b). The Court rejected Lorenzo’s argument that the scheme liability provisions of Rule 10b-5 should apply only to conduct other than misstatements.

The *Lorenzo* decision shows that cases involving misstatements are not exclusively the province of Rule 10b-5(b). But the decision does not precisely define the reach of “scheme liability” with respect to false statements, and it seems likely to lead to questions in SEC enforcement actions and private litigation about when exactly defendants can be held primarily liable for statements that they did not themselves make.

¹ *Lorenzo v. Sec. & Exch. Comm’n*, 139 S. Ct. 1094 (2019).

² *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135 (2011).

Tenth Circuit Rules On SEC's Authority To Bring Securities Fraud Claims Over Certain Foreign Transactions

In January, the Court of Appeals for the Tenth Circuit held in *SEC v. Scoville* that the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") allows the SEC to bring fraud claims and claims under Section 17 of the Securities Act based on sales of securities that do not qualify as domestic transactions, where defendants engage in fraudulent conduct within the United States.³

Scoville arose out of an SEC civil enforcement action against Traffic Monsoon, LLC and its founder, alleging that the defendants operated a Ponzi scheme in violation of various securities laws. Traffic Monsoon sold online advertising packages, many of which were purchased by foreign individuals in transactions that may not have been domestic under the Supreme Court's decision in *Morrison v. National Australia Bank Ltd.* The Tenth Circuit nonetheless held that, in the context of governmental actions, the antifraud provisions of the securities laws reached the sales of advertising packages to those individuals outside the United States.

In reaching this holding, the Tenth Circuit concluded that the Dodd Frank Act abrogated in part the Supreme Court's rule in *Morrison* that fraud claims under the federal securities laws can only be brought with respect to transactions in securities listed on a U.S. exchange or transactions in other securities in the United States. The Tenth Circuit found that the Dodd-Frank Act's jurisdictional amendments with respect to enforcement actions brought by the SEC were intended to codify the conduct-and-effects test for evaluating the extraterritorial application of the securities laws, which was the test universally applied prior to *Morrison*. Under the conduct-and-effects test, courts apply the securities laws to foreign transactions if the wrongful conduct occurred in the United States or had a substantial effect in the United States.

Scoville provides a strong precedent for the SEC and DOJ to continue to bring securities fraud actions or for the SEC to bring an action under Section 17 of the Securities Act concerning certain foreign transactions. This decision also portends a potential increase in the risk of liability for companies with significant U.S. operations or companies that engage in investor relations related activities in the United States, but that have no securities listed or sold here, or for companies located abroad but whose activities result in injury to investors in the U.S. market. A petition for *certiorari* was denied in November.

Second Circuit Rules On Statements Of Regulatory Compliance Forming Basis For Securities Fraud Claim

In March, in *Singh v. Cigna Corp.*, the Second Circuit held that plaintiffs failed to identify a materially false statement as a matter of law when they alleged that Cigna's statements about its commitment to regulatory compliance procedures were materially misleading in light of an undisclosed history of non-compliance with Medicare regulations.⁴ The Second Circuit affirmed the district court's decision dismissing the plaintiffs' case, finding that Cigna's statements with respect to its policies and procedures in its Code of Ethics were plainly an example of "puffery." The Second Circuit's decision provides a strong defense for companies accused of securities fraud following the revelation of corporate mismanagement or regulatory violations. The decision also gives comfort that a company's disclosure of its Code of Ethics and description of its compliance efforts cannot alone provide the basis for an investor suit in the event that the company or its employees violate ethical policies.

³ *Sec. & Exch. Comm'n v. Scoville*, 913 F.3d 1204 (10th Cir. 2019).

⁴ *Singh v. Cigna Corp.*, 918 F.3d 57 (2d Cir. 2019).

Third Circuit Addresses Defendants' Burden To Rebut Presumption Of Reliance Under *Halliburton II*

In May, in *Vizirgianakis v. Aeterna Zentaris, Inc.*, the Third Circuit affirmed a district court order granting class certification to a group of shareholders who alleged that Aeterna Zentaris, Inc., a biopharmaceutical company, violated Section 10(b) of the Exchange Act and Rule 10b-5 by misrepresenting the efficacy of a particular drug.⁵ The district court found that the plaintiffs properly invoked the “fraud-on-the-market” theory of reliance, which provides plaintiffs a rebuttable presumption of class-wide reliance when plaintiffs traded securities in an efficient market. On appeal, Aeterna did not contest that plaintiffs raised the presumption of an efficient market, and instead argued that the district court erred in finding that it had not rebutted the presumption of reliance by proving that the alleged misstatements did not have a price impact under *Halliburton Co. v. Erica P. John Fund, Inc.* (“*Halliburton II*”).⁶ In particular, Aeterna argued that it had rebutted the presumption by presenting an expert declaration “pointing out that [plaintiffs’ expert] had not proven—to a 95% confidence level—that the alleged misrepresentations ... impacted the price of Aeterna’s common stock.”⁷ But the Third Circuit held that the plaintiffs’ “failure to do so is not necessarily proof of the opposite,”⁸ namely a lack of price impact, and otherwise deferred to the district court’s competency in weighing conflicting testimony and making factual findings with respect to market efficiency.

This decision is another example of the difficulties that defendants have faced rebutting the presumption of reliance under *Halliburton II*.

Second Circuit Finds Limits to the Extraterritorial Reach of the CEA

In August, in *Prime International Trading v. BP P.L.C.*, the Second Circuit held that Sections 6(c)(1) and 9(a)(2) of the Commodities Exchange Act (CEA) do not apply extraterritorially and concluded that the transactions at issue, although domestic, were outside the scope of the CEA because they were “predominantly foreign.”⁹ Therefore, the Second Circuit affirmed the District Court’s dismissal.

The case arose out of allegations of benchmark rigging for the price of Brent crude oil. Plaintiffs had brought action against BP and other entities involved in the production of Brent Crude oil, alleging that the defendants manipulated the trading of Brent-related futures and derivatives contracts by executing fraudulent transactions.

In considering whether the CEA had extraterritorial scope, the Second Circuit used the two-step framework set out in *RJR Nabisco*¹⁰ and *Morrison*.¹¹ First, courts examine the text of the statute to see whether there is a “clear indication of extraterritoriality,” and then if there is no such indication, whether the domestic activity that took place was the “focus of congressional concern.” Under the second factor, the Second Circuit found the allegations to be “predominately foreign” under the rule established in *Parkcentral*. In *Parkcentral*, swap investors in the U.S. sued over trades that referenced Volkswagen stock, which are traded on European stock exchanges. Though some of the equity swaps could potentially be classified as domestic transactions, the Court held that domestic transactions are a necessary, but not sufficient factor when examining wholly extraterritorial conduct. Similarly, in *Prime International*, plaintiffs failed to plead any domestic conduct by defendants. This case shows the continuing vitality of the *Parkcentral* holding

⁵ *Vizirgianakis v. Aeterna Zentaris, Inc.*, 2019 WL 2305491 (3d Cir. May 30, 2019).

⁶ *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014).

⁷ *Vizirgianakis*, 2019 WL 2305491, at *2.

⁸ *Id.*

⁹ *Prime International Trading v. BP P.L.C.*, 937 F.3d 94, (2d Cir. Aug. 29, 2019).

¹⁰ *RJR Nabisco, Inc. v. European Cmty*, 136 S. Ct. 2090 (2016).

¹¹ *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247 (2010).

in the Second Circuit, notwithstanding the Ninth Circuit's rejection of that holding in *Stoyas*.¹²

Third Circuit Holds that SLUSA Preclusion in an Opt-out Action Requires Actual Coordination with the Class Action

In September, the Third Circuit held that preclusion of state claims under the Securities Litigation Uniform Standards Act (SLUSA) in an opt-out action requires actual coordination with the class action.¹³ The Third Circuit reversed the dismissal of several state law securities actions against Merck and Schering-Plough, holding that SLUSA did not prohibit their individual action because they were filed after the settlement of the class action and had not "proceed[ed] as a single action for any purpose" with the class action.

However, the decision leaves unanswered the precise degree of coordination required to trigger SLUSA preclusion, as well as whether state law claims should be dismissed where an opt-out action is consolidated with a class action "over an opt-out plaintiff's objection." Defendants facing securities class actions with significant numbers of opt outs should consider these issues in deciding whether to stay any opt-out actions during the pendency of the class action, the degree to which to coordinate discovery across the actions, and in considering the timing and scope of any class action settlement.

Second Circuit Holds that the Non-disclosure of Illegal Activity in a Securities Fraud Complaint Must Be Pleaded with Particularity

In December, the Second Circuit, in *Gamm v. Sanderson Farms*, held that when a securities fraud complaint alleges that statements were rendered false or misleading through the non-disclosure of illegal activity, the facts of the underlying wrongdoing must be pleaded with particularity in accordance with Federal Rule of Civil

Procedure 9(b) and the Private Securities Litigation Reform Act, raising the bar for securities claims based on undisclosed wrongdoing.¹⁴

The case arose out of an alleged conspiracy among poultry producers to manipulate the prices of chicken in violation of the Sherman Act, an underlying claim that need not satisfy heightened pleading standards.

However, the Second Circuit affirmed the dismissal of the lawsuit, holding that "when a complaint claims that statements were rendered false or misleading through the non-disclosure of illegal activity, the facts of the underlying illegal acts must also be pleaded with particularity."¹⁵ The decision places a high bar on Section 10(b) claims based on undisclosed wrongdoing, requiring that the details not only of the misstatement or omission be pleaded with particularity, but also those of the underlying misconduct. It thus will make it far more difficult for plaintiffs to plead similar claims in the future.

Jury Returns Mixed Verdict In Rare Securities Class Action Trial

In February 2019, in the Central District of California, a rare jury trial in a securities class action resulted in a mixed verdict in *Hsingching Hsu v. Puma Biotechnology, Inc.*¹⁶ Plaintiffs alleged that the pharmaceutical company and certain of its directors made misrepresentations about the results of a clinical trial. The jury rendered a verdict in favor of the defendants with respect to three of four allegedly misleading statements, but the jury found in favor of the plaintiff class with respect to a fourth misleading statement about a drug's efficacy, which led to a decline in the stock price following disclosure. As a result, shareholders who purchased stock between 2014 and 2015 may recover up to \$4.50 per share in damages, an amount that the company has claimed represented 5% or less of the claimed damages. This case is

¹² *Stoyas v. Toshiba Corp.*, 896 F.3d 933 (9th Cir. July 17, 2018).

¹³ *North Sound Capital LLC v. Merck & Co.*, 938 F.3d 482 (3d Cir. Sep. 12, 2019).

¹⁴ *Gamm v. Sanderson Farms, Inc.*, No. 18-0284-cv, 2019 WL 6704666 (2d Cir. Dec. 10, 2019).

¹⁵ *Id.* at *8.

¹⁶ Verdict Form, *Hsingching Hsu v. Puma Biotechnology, Inc.*, 8:15-cv-00865-AG (C.D. Cal. Feb. 4, 2019), ECF No. 718.

noteworthy because of the infrequency of jury trials in securities class actions. Commentators have noted that since Congress enacted the Private Securities Litigation Reform Act (PSLRA) in December 2005, only 25 securities class action suits have resulted in a verdict, with 12 of these 25 in favor of defendants.

Noteworthy Dismissal And Denials Of Certiorari From Ninth Circuit Decisions

The Supreme Court denied certiorari petitions from three Ninth Circuit decisions this year. In another case, where the Court had previously granted certiorari of a decision from the Ninth Circuit, the Court dismissed the writ as improvidently granted following oral argument. The Court thereby let stand four Ninth Circuit rulings that serve to expand the scope of liability under the securities laws.

The Supreme Court Dismissed Writ Of Certiorari From Decision Holding That Plaintiffs Need Only Show That Defendants Acted Negligently To Bring Claims Under Section 14(e)

In January 2019, the Supreme Court granted certiorari to review a Ninth Circuit decision in *Varjabedian v. Emulex Corp.*, which held that plaintiffs bringing claims under Section 14(e) of the Exchange Act need only show that defendants acted negligently, rather than with scienter.¹⁷ Section 14(e) prohibits misstatements, omissions or fraudulent conduct in connection with a tender offer. The Ninth Circuit's holding split with decisions from the Second, Third, Fifth, Sixth and Eleventh Circuits, which all held that Section 14(e) claims require a plaintiff to demonstrate that defendants acted knowingly or with a reckless disregard of the truth—a significantly higher burden than negligence.¹⁸

In its merits brief before the Supreme Court, Emulex argued that the Ninth Circuit erred in using negligence as the standard, and that, more fundamentally, Section

14(e) does not provide a private right of action.¹⁹ At the Court's invitation, the Solicitor General filed an amicus brief arguing that, although the Ninth Circuit correctly held that Section 14(e) does not require a showing of scienter, the provision does not contain an implied private right of action.²⁰ The question whether Section 14(e) contains a private right of action was a primary focus during oral argument, with certain justices expressing the view that it was beyond the authority of the Court to permit a private suit under this provision when the right is absent from the text,²¹ and others indicating that they preferred not to consider this issue because it had not been preserved below.²²

On April 23, the Supreme Court dismissed the grant of certiorari without explanation. Thus, a private right of action under Section 14(e) may remain available for now. However, going forward, we expect to see defendants challenge the existence of a private right of action under Section 14(e) in hopes that the Court will take the next case in which this issue is properly preserved.

The Supreme Court Declined To Address Application Of *Morrison* To Un-sponsored ADRs

In June, the Supreme Court denied a petition for certiorari from the Ninth Circuit's decision in *Stoyas v. Toshiba Corp.*, which held that plaintiffs were not precluded from asserting claims under the Exchange Act against foreign issuers with respect to domestic transactions in unsponsored American Depositary Receipts ("ADRs"), in which the foreign issuer may not have played any role.²³ The Ninth Circuit held that if "irrevocable liability" for the purchase and sale of ADRs is incurred in the United States, the transaction qualifies as domestic under *Morrison* and the Exchange Act applies. The Ninth Circuit explicitly declined to follow

¹⁷ *Varjabedian v. Emulex Corp.*, 888 F.3d 399 (9th Cir. 2018). In the Supreme Court, the case was captioned *Emulex Corp. v. Varjabedian*, No. 18-459.

¹⁸ See *Connecticut Nat'l Bank v. Fluor Corp.*, 808 F.2d 957 (2d Cir. 1987); *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579 (5th Cir. 1974); *Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422 (6th Cir. 1980); *In re Digital Island Sec. Litig.*, 357 F.3d 322 (3d Cir. 2004); *U.S. Sec. & Exch. Comm'n v. Ginsburg*, 362 F.3d 1292 (11th Cir. 2004).

¹⁹ Brief for Petitioners, *Emulex Corp. v. Varjabedian*, No. 18-459 (Feb. 19, 2019).

²⁰ Brief for the United States as Amicus Curiae in Support of Neither Party, *Emulex Corp. v. Varjabedian*, No. 18-459 (Feb. 26, 2019).

²¹ See Tr. of Oral Arg., *Emulex Corp. v. Varjabedian*, 2019 WL 1598075, at *43-44, (Apr. 15, 2019) (No. 18-459).

²² *Id.* at *3-4, 7-8.

²³ *Stoyas v. Toshiba Corp.*, 896 F.3d 933 (9th Cir. 2018). In the Supreme Court, the case was captioned *Toshiba Corp. v. Auto. Industries Pension Trust Fund*, No. 18-486.

the Second Circuit's decision in *Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings SE*, which held that a domestic transaction is necessary, but not sufficient, to satisfy *Morrison*.²⁴ The Ninth Circuit further held that the issue of whether the Exchange Act applies under *Morrison* is distinct from the issue of whether Toshiba could be held liable. Even if the Exchange Act applies, Toshiba could be liable only if the plaintiffs show a connection between Toshiba's fraud and the domestic purchase or sale of an ADR.

In January, the Supreme Court invited the Solicitor General to file an amicus brief. The Solicitor General's brief argued that certiorari should be denied and that the Ninth Circuit correctly held that the plaintiffs' claims could involve a permissible domestic application of the Exchange Act.²⁵

The Supreme Court's denial of certiorari leaves intact a potential split between the Ninth Circuit's holding that a domestic transaction is sufficient for the Exchange Act to apply, and the Second Circuit's holding that a domestic transaction is necessary but not sufficient if the transaction and alleged fraud at issue are "predominantly foreign."

The Supreme Court Declined To Address The Standard For Establishing Loss Causation

Also in June, the Supreme Court denied a petition for certiorari from the Ninth Circuit's decision in *Mineworkers' Pension Scheme v. First Solar Inc.*, which held the element of loss causation can be based on an event or disclosure that causes a decline in stock price, even when the event or disclosure does not reveal the underlying fraud.²⁶ The Ninth Circuit permitted plaintiffs to recover based on the drop in the stock's value before the fraud was revealed to the market because "the underlying facts concealed by fraud... affect[ed] the stock price."²⁷ The

Ninth Circuit held that the revelation of fraud to the market is just one of many theories on which a plaintiff may establish proximate cause in a securities fraud claim. At the Court's invitation, the Solicitor General filed an amicus brief and argued that the Ninth Circuit's decision was correct.²⁸

The Court's denial of *certiorari* leaves intact a decision that could be highly consequential for securities fraud defendants, because it may enable plaintiffs to establish loss causation based on facts that were not disclosed to the market.

The Supreme Court Declined To Address An Issuer's Duty To Update A Statement Of Historical Fact Under Rule 10b-5(b)

In May, the Supreme Court denied a petition for certiorari from the Ninth Circuit's decision in *Khoja v. Orexigen Therapeutics, Inc.*, which held that a company had a duty to disclose information making clear that a historical statement of fact was no longer accurate.²⁹ In 2015, Orexigen published results of an "interim analysis" reporting that its new obesity drug reduced the risk of cardiovascular events by 41%. A few weeks later, results from a new study showed the drug did not offer such benefits, but the company failed to disclose these results in its subsequent SEC filings. The Ninth Circuit held that although the statements about the results of the interim analysis were technically still accurate, "having learned new information that diminished the weight of those results, [the company] was obligated to share that information."³⁰ The company's petition for certiorari argued that the Ninth Circuit had created a new standard of a "duty to update" when the "weight" of an historical fact has been "diminished" by subsequent events.³¹ The company claimed this standard articulated by the Ninth Circuit was at odds with other Circuits, which may recognize a duty to update in narrow

²⁴ *Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings SE*, 763 F.3d 198 (2d Cir. 2014).

²⁵ Brief for the United States as Amicus Curiae, *Toshiba Corp. v. Auto. Industries Pension Trust Fund*, No. 18-486 (May 20, 2019).

²⁶ *Mineworkers' Pension Scheme v. First Solar Inc.*, 881 F.3d 750 (9th Cir. 2018). In the Supreme Court, the case was captioned *First Solar Inc. v. Mineworkers' Pension Scheme*, No. 18-164.

²⁷ *Id.* at 754.

²⁸ Brief for the United States as Amicus Curiae, *First Solar Inc. v. Mineworkers' Pension Scheme*, No. 18-164 (May, 15, 2019).

²⁹ *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988 (9th Cir. 2018). In the Supreme Court, the case was captioned *Hagan v. Khoja*, No. 18-1010.

³⁰ *Id.* at 1015.

³¹ Petition for Writ of Certiorari, *Hagan v. Khoja*, No. 18-1010 (Jan. 31, 2019).

circumstances, but do not require an issuer to update a statement of historical fact that was accurate when made. The Supreme Court's denial of certiorari leaves this potential circuit split in place. It also fails to offer guidance on other ambiguities in the Ninth Circuit's decision, including what it means for an historical fact to be "diminished."

Data Privacy Securities Cases

The year 2019 saw several important securities lawsuits in response to data breaches, as data privacy issues continue to be of increasing concern to companies and investors.

In January, a District Court Judge in Georgia denied in part a motion to dismiss a securities fraud class action against Equifax following a massive 2017 data breach.³² The Court found that plaintiffs had sufficiently pleaded that Equifax's disclosures were false or misleading given that its cybersecurity systems were "grossly deficient and outdated." This case is ongoing and a motion for class certification is pending.

In September, however, the Northern District of California dismissed a privacy-related securities class action suit arising out of the Cambridge Analytica leak of private Facebook data.³³ The court held that defendants failed to meet the heightened pleading standard for falsity and scienter under the Private Securities Litigation Reform Act ("PSLRA"). Plaintiffs alleged that statements made by the company about Facebook's readiness to comply with the GDPR were forward-looking statements protected by the PSLRA's Safe Harbor. Other comments about the reaction to the Cambridge Analytica leak were general statements of corporate puffery, and therefore were also not actionable.

One case to watch in 2020 is *Wicks v. Alphabet*, a securities class action about Google's failure to disclose a data breach.³⁴ Plaintiffs brought suit arguing that Google artificially inflated its stock price by failing to disclose a significant 2018 data leak in at least two federal securities filings. Google argued in its defense that the necessary breach reporting triggers hadn't been met. A motion to dismiss is currently pending in *Alphabet*.

³² *In re: Equifax Inc. Securities Litigation*, No. 1:17-cv-03463, (N.D. Ga. Jan. 28, 2019).

³³ *In re Facebook, Inc. Securities Litigation*, No. 5:18-cv-01725-EJD, 2019 WL 4674347 (N.D. Ca. Sep. 25, 2019).

³⁴ *Wicks v. Alphabet Inc. et al.*, No. 4:18-cv-06245 (N.D. Ca.).

M&A Litigation



Delaware Supreme Court Affirms Finding Of A Breach Of Fiduciary Duty By Activist Investor

In May 2019, the Delaware Supreme Court in *In re PLX Technology Inc. Stockholders Litigation* affirmed a decision concerning both (i) an activist stockholder's aiding and abetting a board's breaches of fiduciary duty and (ii) damages.³⁵

The case arose after activist investor Potomac Capital Partners II, L.P. ("Potomac") acquired a stake in PLX Technology Inc. ("PLX") for the purpose of inducing (ultimately successfully) PLX to sell itself to a company called Avago. A co-managing member of Potomac, Eric Singer, attained a position on the PLX board of directors. Singer received a tip that disclosed significant information about Avago's interest in acquiring PLX. Singer failed to disclose this tip to the rest of the PLX board, and the tip was also not disclosed to PLX stockholders. The Court of Chancery found after a trial that failing to disclose the tip to stockholders was a material omission that amounted to a breach of Singer's duty of disclosure as a director, and that Potomac had aided and abetted the

breach through Singer's actions as an agent of Potomac.³⁶

However, the Court of Chancery also found that the plaintiffs had failed to prove any damages. The plaintiffs argued that the company should not have been sold at all and that they had suffered damages in the amount of the difference between the merger consideration and the company's "fair" or "intrinsic" value as a going concern. The Court of Chancery disagreed. Relying on recent decisions from the Delaware Supreme Court in the context of appraisal actions, it found that the deal price was sufficiently reliable evidence of the company's fair value notwithstanding the flaws in the sale process. On appeal, the Delaware Supreme Court affirmed the finding on damages, and therefore declined to reach the issue of breach of fiduciary duties.

This decision underscores the importance of full disclosure of material facts in cases involving potential conflicts at the board level and at the stockholder level. And it demonstrates the Delaware Supreme Court's comfort with expanding its recent appraisal jurisprudence, which gives substantial deference to deal price in arm's length transactions, into other contexts.

³⁵ *In re PLX Tech. Inc. Stockholders Litig.*, 2019 WL 2144476 (Del. May 16, 2019).

³⁶ *In re PLX Tech. Inc. Stockholders Litig.*, 2018 WL 5018535 (Del. Ch. Oct. 16, 2018).

Delaware Supreme Court Clarifies Timing Requirements To Trigger “Dual Protections” Under *MFW*

In April, in *Olenik v. Lodzinski*,³⁷ the Delaware Supreme Court further clarified when the “dual protections” outlined in *Kahn v. M&F Worldwide Corp.* (“*MFW*”)³⁸ must be put in place in order to qualify a take-private transaction for deferential business judgment review.

Under *MFW*, business judgment review applies to a take-private transaction proposed by a controlling stockholder when the transaction is conditioned “*ab initio*” on two procedural protections: (1) the approval of an independent, adequately-empowered special committee that fulfills its duty of care; and (2) the uncoerced, informed vote of a majority of the minority stockholders. If the controlling stockholder does not commit to these dual protections from the beginning of negotiations, then the traditional entire fairness standard applies instead. Recently, the Delaware Supreme Court explained in *Flood v. Synutra International, Inc.*, a case won by Cleary Gottlieb, that the dual protections must be put in place “early in the process and before there has been any economic horse trading.”³⁹ *Synutra* clarified that the controlling stockholder is not required to include the dual protections in its initial written offer to receive protection under *MFW*.

The *Olenik* decision provides further guidance about the application of *MFW*. The transaction at issue was a stock-for-stock merger between two companies both controlled by the same stockholder, which was alleged to have actively participated in the conception and negotiation of the transaction. Minority stockholders of one of the companies challenged the transaction post-closing seeking damages. Although the Court of Chancery dismissed the claims, the Delaware Supreme Court reversed, holding that the complaint pled facts “support[ing] a reasonable inference” that the controlled companies and the controlling stockholder had effectively

engaged in “substantive economic negotiations” before the dual protections were in place, and thus the complaint “should not have been dismissed on *MFW* grounds.”⁴⁰

The implication of the Court’s holding in *Olenik*, along with its recent holding in *Synutra* on the “*ab initio*” requirement, clarifies the line between “preliminary discussions” (which are permissible before *MFW*’s dual protections are put in place) and “substantive economic discussions” (which are not). For example, exploratory meetings and initial exchanges of information may be sufficiently “preliminary” such that they can be done before the dual protections are put in place without triggering entire fairness review, but a discussion of valuation or significant deal terms is likely to preclude business judgment review.

Delaware Supreme Court Reaffirms Director Oversight Obligation

In *Marchand v. Barnhill*, the Delaware Supreme Court reversed the Court of Chancery’s dismissal of a *Caremark*⁴¹ claim, providing guidance on the role of the board of directors in overseeing risk management.⁴² The case arose out of a listeria outbreak at Blue Bell Creameries USA in 2015, which resulted in the death of three customers, a complete product recall, a liquidity crisis, and a temporary closure of manufacturing facilities. The plaintiffs brought claims against key executives, alleging that they breached their duties of care and loyalty—specifically that deficiencies in food safety controls were uncovered, yet the board failed to discuss any problems. The Court of Chancery dismissed the claims, but in June 2019, the Delaware Supreme Court reversed, holding that the plaintiffs had sufficiently alleged that the board breached its duty of oversight by failing to make a good-faith effort to establish a board-level system to monitor food safety and compliance—a key risk facing the company. The alleged “utter failure” to attempt to develop such a reporting system constituted an unexculpated act of bad faith and a breach of the

³⁷ *Olenik v. Lodzinski*, 208 A.3d 704 (Del. 2019).

³⁸ *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014).

³⁹ *Flood v. Synutra International, Inc.*, 195 A.3d 754, 756 (Del. 2018).

⁴⁰ *Olenik*, 208 A.3d at 718.

⁴¹ *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959 (Del. Ch. 1996).

⁴² *Marchand v. Barnhill*, 2019 WL 2509617 (Del. June 18, 2019).

duty of loyalty. The case is a reminder that *Caremark* claims still have teeth, especially on facts as striking and consequential as those in this case. By the same token, boards can protect themselves from such claims by taking steps to design a functional risk management and oversight system.

Boards should ensure that protocols for regular reporting on key risks are in place and that these procedures are properly documented. The Court offered concrete suggestions, advising that boards should consider risk management efforts on quarterly or biannual bases.

In October, in *In re Clovis Oncology, Inc. Derivative Litigation*,⁴³ the Delaware Court of Chancery denied a motion to dismiss a shareholder derivative suit, applying the “duty to monitor” doctrine expanded in *Marchand v. Barnhill*. Shareholders of Clovis Oncology Inc. brought a *Caremark* claim alleging that the board ignored red flags in the testing of a lung cancer treatment called Rocilentinib. The clinical trials for Rocilentinib failed to follow standard protocol, which would prevent the drug from gaining FDA approval. The Company allegedly made public statements about the success of trials that were inconsistent with the information the board received. When Clovis withdrew the drug from FDA consideration in 2016, the stock price plummeted.

The Delaware Court of Chancery interpreted *Marchand* as requiring a higher level of board oversight in industries where “externally imposed regulations govern its ‘mission critical operations.’” This decision may invite a higher volume of *Caremark* claims against boards of companies operating in such industries.

⁴³ *In re Clovis Oncology, Inc. Derivative Litigation*, No. 2017-0222-JRS, 2019 WL 4850188 (Del. Ch. Oct. 1, 2019).

Delaware Court Of Chancery Strictly Enforces “End Date” Of Merger Agreement

In *Vintage Rodeo Parent, LLC v. Rent-a-Center, Inc.*, the Delaware Court of Chancery found that a target company properly terminated a merger agreement following the passage of the specified “end date” where the buyer—apparently due to a mistake—failed to exercise its right under the agreement to give notice that it wished to extend the end date.⁴⁴ The Court further determined that there was no implied duty to warn a counterparty of such a mistake, and that an obligation to use commercially reasonable efforts to consummate a merger does not preclude exercise of an express right to terminate the merger agreement. The court, however, requested additional briefing regarding the enforceability in this context of the \$126.5 million reverse termination fee to which the target claimed to be entitled, which constituted 15.75% of the equity value of the transaction. The case settled before that issue was decided, but the decision is a stark reminder that courts will strictly enforce the terms of a merger agreement as written, and that the failure to comply with seemingly ministerial formalities can have potentially severe consequences.

Delaware Court Of Chancery Rules On Privilege Of Pre-Merger Attorney-Client Communications

In *Shareholder Representative Services LLC v. RSI Holdco, LLC*, the Court of Chancery upheld a provision in a merger agreement that precluded the buyer from using the seller’s pre-merger attorney-client privileged communications in a post-closing dispute.⁴⁵ The Court had previously addressed the issue in *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, which held that privileges over attorney-client communications transfer to the surviving company unless the seller takes affirmative action to prevent it.⁴⁶ In *RSI Holdco*, the seller negotiated for a provision in the merger agreement

⁴⁴ *Vintage Rodeo Parent, LLC v. Rent-a-Center, Inc.*, 2019 WL 1223026 (Del. Ch. Mar. 14, 2019).

⁴⁵ *Shareholder Representative Servs. LLC v. RSI Holdco, LLC*, 2019 WL 2290916 (Del. Ch. May 29, 2019).

⁴⁶ *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 80 A.3d 155 (Del. Ch. 2013).

that allowed the seller to continue asserting privilege over pre-merger attorney-client communications and prohibited the buyer from using these communications in post-closing litigation. The Court held that the plain language of the contractual provision prevented the buyer from using or relying on the seller's pre-merger privileged communications in the post-closing litigation. The Court disagreed with the buyer's contention that the seller's failure to excise or segregate the privileged communications from the computers that were transferred as part of the deal constituted a waiver of the privilege, reasoning that such an argument would undermine the policy behind *Great Hill*, which encourages "parties to negotiate for contractual protections."

Payment of a Contractual Termination Fee Was not the Exclusive Remedy for a Breach of a Non-solicitation Clause

In *Genuine Parts Co. v. Essendant, Inc.*, the Delaware Chancery Court denied Essendant Inc.'s motion to dismiss an action for wrongful termination of a merger agreement even though the defendant had already paid the contractually required fee.⁴⁷ Essendant and Genuine Parts had entered into a merger agreement, which Essendant backed out of in favor of an acquisition by Staples for a higher price. The merger agreement specified a \$12 million termination fee, which Essendant paid, but Genuine Parts alleged that Essendant had materially breached the contract's non-solicitation clause, and therefore the termination fee was not the "exclusive remedy" for terminating the transaction. The court held that the contract did not clearly and unambiguously limit recovery to the termination fee in the face of a claim that the defendant had breached the contract's non-solicitation clause.

⁴⁷ *Genuine Parts Co. v. Essendant, Inc.*, C.A. No. 2018-0730-JRS (Del. Ch. Sept. 9, 2019).

Northern District of Illinois Rejected "Mootness Fee" as a "Racket"

Northern District of Illinois Judge Thomas Durkin abrogated a settlement agreement in the securities litigation concerning the acquisition of Akorn, Inc. by Frensenius Kabi AG, calling the lawsuit and quick settlement for attorneys' fees a "racket."⁴⁸

As has become increasingly common, once the company filed its proxy describing the proposed transaction, shareholders brought a putative class action seeking disclosure of additional information that could purportedly affect shareholder approval of the merger, and the parties settled for additional disclosures of dubious materiality and attorneys' fees.

Although such "mootness fee" settlements do not involve any class-wide release and thus do not require court approval, Judge Durkin used *Akorn* as an opportunity to scrutinize this practice. The court ordered plaintiffs' lawyers to return to Akorn a \$322,000 "mootness fee." The Court invoked its equitable power to abrogate the fees because the information sought by the lawsuit "worthless to shareholders." An appeal is currently pending.

Delaware Court Of Chancery Holds that Documents Produced to a Special Litigation Committee are Subject to Discovery

In December, the Delaware Chancery Court issued a memorandum opinion in *In re Oracle Corporation Derivative Litigation* finding that the lead plaintiff in a shareholder derivative suit against Oracle's board of directors had the right to subpoena documents relied upon by the corporation's Special Litigation Committee (SLC) in making its determination as to whether litigation against Oracle should be allowed to proceed, including privileged documents Oracle had produced to the SLC.⁴⁹

⁴⁸ *House v. Akorn, Inc.*, 385 F. Supp. 3d (N.D. Ill. Jun 24, 2019).

⁴⁹ *In re Oracle Corporation Derivative Litigation*, C.A. No. 2017-0337-SG (Del. Ch. Dec. 4, 2019).

The case arose from Oracle's acquisition of Netsuite in November of 2016. Oracle's co-founder, chairman, 35% shareholder, Lawrence J. Ellison, was also the co-founder and a 39% shareholder of Netsuite. Plaintiffs brought a shareholder derivative suit for breach of fiduciary duty against Ellison and others. The company formed the SLC to investigate the claims and represent the corporation's interests, and in the course of its investigation the SLC accumulated a large volume of documents and communications. The SLC then decided, in an unusual move, 1) that claims against its founder and chairman should proceed, and 2) that the Lead Plaintiff should be the one to prosecute those claims. The Lead Plaintiff then subpoenaed the SLC's documents, and the Court held that the SLC was entitled to the documents.

The Court's decision has potential ramifications for SLCs in the future, despite the unusual posture of the decision including concerning the scope of the documents it requests, whether it seeks privileged documents, and the degree to which individuals agree to produce privileged documents. SLCs should, therefore, be cognizant of these potential ramifications when they collect and prepare documents in connection with an investigation.

Section 220 Books and Records Requests

In 2019, the Delaware Court of Chancery continued to see a rise in litigation pertaining to books and records demands under Section 220 of the Delaware General Corporation Law. Delaware courts have encouraged stockholders to seek books and records under Section 220 before filing stockholder derivative or post-merger damages suits. These decisions show that Delaware courts are increasingly willing to permit stockholders to gain access to electronic records (even, in some cases, personal emails and text messages) where there are gaps in the board's minutes and other formal materials, although such stockholders must continue to make a threshold showing that they have a proper purpose and legitimate need before the court will order such records turned over.

In *KT4 Partners LLC v. Palantir Technologies Inc.*, the Delaware Supreme Court clarified when emails may be available as part of a Section 220 demand.⁵⁰ The stockholder in the case had demonstrated that the company corresponded via email in relation to the potential wrongdoing the stockholder was investigating, and the company conceded that it did not maintain traditional records related to the issue, such as board resolutions or minutes. The Court explained that "if a company ... decides to conduct formal corporate business largely through informal electronic communications [rather than through formal minutes and resolutions], it cannot use its own choice of medium to keep shareholders in the dark about the substantive information to which § 220 entitles them."⁵¹ But the Court emphasized that this "does not leave a respondent corporation ... defenseless and presumptively required to produce e-mails and other electronic communications. If a corporation has traditional, non-electronic documents sufficient to satisfy the petitioner's needs, the corporation should not have to produce electronic documents."

In *Tiger v. Boast Apparel*, the Delaware Supreme Court held that books and records produced under Section 220 are not subject to a presumption of confidentiality, though the Chancery Court typically imposes a reasonable confidentiality order.⁵² The primary dispute was the scope of confidentiality if the documents in question were produced, and the Chancery Court eventually recommended an indefinite confidentiality period lasting until Tiger filed suit. The Delaware Chancery Court had relied on a presumption of confidentiality for Section 220 production, which the Delaware Supreme Court rejected. However, the Delaware Supreme Court found that the confidentiality agreement was reasonable in the circumstances, and thus upheld it on different grounds.

Two Court of Chancery decisions, both by Vice Chancellor Slight, illustrate what a stockholder must show to present a "credible basis" from which to infer

⁵⁰ *KT4 Partners LLC v. Palantir Tech. Inc.*, 203 A.3d 738 (Del. 2019).

⁵¹ *Id.* at 742.

⁵² *Tiger v. Boast Apparel, Inc.*, C.A. No. 23, 2019 (Del. Aug. 7, 2019).

corporate wrongdoing, as required to demonstrate a proper purpose for a Section 220 request. In *Hoeller v. Tempur Sealy International, Inc.*, the Court found that termination of a supply contract by the company's largest customer was not, by itself, a "credible basis" from which to infer wrongdoing.⁵³ The Court emphasized that "the stockholder's burden [is not] a mere speed bump."⁵⁴ By contrast, in *In re Facebook, Inc. Section 220 Litigation*, the Court found that a Facebook stockholder had succeeded in showing a credible basis for wrongdoing in connection with Facebook's data privacy breaches.⁵⁵ The Court emphasized that it was not appropriate to assess the merits of the stockholder's *Caremark* claim when adjudicating the Section 220 demand.

In November in *High River Ltd. P'ship v. Occidental Petroleum Corp.*, the Delaware Chancery Court denied a Section 220 books and records request to support a proxy contest.⁵⁶ Plaintiffs tried to argue for expanded Section 220 access to documents for the purpose of communicating with other shareholders in a proxy contest. However, the Court declined to recognize such a categorically expanded rule, noting that there was no precedent for "compell[ing] a company to allow inspection of books and records when the stockholder's only stated purpose for inspection is a desire to communicate with other stockholders in furtherance of a potential proxy contest."⁵⁷

In *Inter-Local Pension Fund GCC/IBT v. Calgon Carbon Corp.*, Vice Chancellor Zurn ruled that a company was not entitled to reject a Section 220 demand on the basis that it was an impermissibly lawyer-driven effort.⁵⁸ The investment fund had certain agreements (to monitor the fund's investments, identify potential mismanagement or wrongdoing, and pursue appropriate legal action) with the outside law firm that drafted and sent the Section 220 demand. Vice Chancellor Zurn found as a

factual matter that the fund's purpose was not different from its counsel's purpose, and thus permitted a limited inspection to go forward. But the case is a helpful reminder that books and records actions may be dismissed if discovery shows that there are differences between the aims of the stockholder and its counsel in issuing the demand.

Director Access to Privileged Information Decisions

In *Gilmore v. Turvo*, the Delaware Court of Chancery explained that the general rule that a director is entitled to communications with counsel for the board has exceptions, but the threshold issue is whether the attorney involved represents the whole board, or just selected board members.⁵⁹ The court restated the general rule that a Delaware corporation "cannot assert the privilege to deny a director access to legal advice furnished to the board during the director's tenure." However, an important condition to the general rule is that the legal advice be furnished to the whole board. In this case, a law firm was hired to conduct an internal investigation only by certain stockholders, and the court determined that the firm conducting that internal investigation did not represent the board as a whole. Therefore, the board member who filed a motion to compel in this case was not entitled to attorney/client communications with that firm.

In contrast, a director was entitled to access corporate records in *Schnatter v. Papa John's*.⁶⁰ The Court considered a claim under Section 220(d) of the Delaware General Corporation Law (DGCL) by the founder and largest stockholder of the Papa John's pizza chain who was forced out as the CEO but retained his position as a director. He sought to obtain books and records in his capacity as a director to support an investigation that the other directors breached their fiduciary duties by improperly ousting him for unjustified reasons. The court emphasized the rule that directors generally have near unfettered access to the corporation's books and records.

⁵³ *Hoeller v. Tempur Sealy Int'l, Inc.*, 2019 WL 551318 (Del. Ch. Feb. 12, 2019).

⁵⁴ *Id.* at *1.

⁵⁵ *In re Facebook, Inc. Section 220 Litig.*, 2019 WL 2320842 (Del. Ch. May 31, 2019).

⁵⁶ *High River Ltd. P'ship v. Occidental Petroleum Corp.*, C.A. No. 2019-0403-JRS, 2019 WL 6040285, (Del. Ch. Nov. 14, 2019).

⁵⁷ *Id.* at 12.

⁵⁸ *Inter-Local Pension Fund GCC/IBT v. Calgon Carbon Corp.*, 2019 WL 479082 (Del. Ch. Jan. 25, 2019).

⁵⁹ *Gilmore v. Turvo, Inc.*, C.A. No. 2019-0472-JRS (Del. Ch. Aug. 19, 2019).

⁶⁰ *Schnatter v. Papa John's International, Inc.*, C.A. No. 2018-0542-AGB (Del. Ch. Jan. 15, 2019).

Appraisal Decisions

In 2019, Delaware courts issued several important decisions in statutory appraisal cases. Statutory appraisal litigation, which often follows major mergers, involves assessing the fair value of a target company's shares, excluding any merger-created value. In accordance with the statute, the Delaware Chancery Court may consider all relevant factors, but case law has developed to put particular emphasis on two market-based valuations of share value: unaffected market price and deal price.

In April 2019, the Delaware Supreme Court in *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.* clarified the extent to which the Court of Chancery may rely on stock trading prices when determining fair value in an appraisal action.⁶¹ In two previous opinions, the Delaware Supreme Court had emphasized that the deal price will often be the best evidence of fair value in appraisal actions involving open, competitive, and arm's-length mergers of publicly-traded targets.⁶² However, neither prior case involved a merger where the transaction resulted in significant synergies, which are excluded statutorily from the determination of fair value. The Chancery Court sidestepped the need to precisely calculate deal synergies by finding that the fair value was the unaffected market price, calculated as the thirty day average market price at which the shares traded before the transaction was publicly reported.⁶³ In a strongly-worded per curiam opinion, the Delaware Supreme Court reversed. The Delaware Supreme Court criticized the selection of the average market price prior to public announcement, and held that the proper approach was to start with the deal price and then subtract the synergies resulting from the deal. The Delaware Supreme Court selected the company's calculation of deal synergies to arrive at the fair value calculation.

Nevertheless, in *In re Appraisal of Jarden Corporation*, the Court of Chancery held that unaffected market price was the best indicator of Jarden's fair value following its acquisition by Newell Rubbermaid, Inc., even though this resulted in a substantial 18.4% discount to the merger consideration.⁶⁴ The court distinguished *Aruba* and found that the unaffected market price was a better measure because of procedural defects in the sale which affected the deal price. Jarden's CEO had met and negotiated with Newell's CEO on certain deal terms, including sales price, without proper Board authorization. These procedural issues were found to have affected the final merger consideration. The unaffected market price was a better indicator of Jarden's fair value because the stock traded in a highly efficient market, never closed above the merger price, had a low bid-ask spread and a high public float, and was frequently assessed by professional analysts. There was also no controlling stockholder. A partial reargument was granted on September 16, which adjusted the final calculation of share value due to mathematical errors, but did not disturb the Court's reasoning.⁶⁵

The Chancery Court reached the opposite conclusion in assessing the acquisition of Columbia Pipeline Group, Inc., by TransCanada Corporation.⁶⁶ In that case, deal price was a reliable indicator of fair value, because the sale had objective indicia of fairness. The transaction was a the result of an arms-length negotiation with an outsider third party, the target successfully negotiated for price increases, the purchaser conducted thorough due diligence, and there were no board conflicts. The Court considered whether management's desire to retire immediately created a personal conflict, but concluded that this objective was not a material conflict.

While these decisions reached somewhat different results, they all found fair value to be at or below the deal price, and thus may continue to discourage the filing of appraisal arbitration actions in Delaware.

⁶¹ *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, 2019 WL 1614026 (Del. Apr. 16, 2019) (Per Curiam).

⁶² *DFC Global Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346 (Del. 2017); *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd.*, 177 A.3d 1 (Del. 2017).

⁶³ *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, 2018 WL 922139 (Del. Ch. Feb. 15, 2018).

⁶⁴ *In re Appraisal of Jarden Corporation*, C.A. No. 12456-VCS (Del. Ch. Jul. 19, 2019).

⁶⁵ *In re Appraisal of Jarden Corporation*, C.A. No. 12456-VCS, 2019 WL 44636 (De. Ch. Sep. 16, 2019).

⁶⁶ *In re Appraisal of Columbia Pipeline Group, Inc.*, Cons. C.A. No. 12746-VCL (Del. Ch. Aug. 12, 2019).



Looking Ahead

In the coming months, we will be watching for:

- a decision by the Supreme Court in *Liu v. SEC* on the scope of the SEC's disgorgement powers in enforcement proceedings;
- if another case challenges whether Section 14 (e) contains a private right of action after the dismissal of *Emulex Corp. v. Varjabedian*; and
- a decision by the Delaware Supreme Court in *Sciabacucchi v. Salzberg* regarding whether Delaware law permits corporations to use charter provisions to require stockholders file Securities Act claims only in federal court.

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