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RECENT DEVELOPMENTS IN DELAWARE CORPORATE GOVERNANCE

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I. CHANCERY COURTS ADHERE TO BEDROCK PRINCIPLES DESPITE ECONOMIC CLIMATE AND HIGH-PROFILE CASES

Two-high profile cases decided earlier this year – *American International Group, Inc. v. Greenberg*[1] ("AIG I") and *In re Citigroup Inc. Shareholder Derivative Litigation*[2] (*"Citigroup"*) have drawn significant media attention and commentary. That attention, however, has more to do with *schadenfreude* than any change in Delaware law. Both decisions are consistent with well-established Delaware law and perhaps add to existing bedrock principles rather than blaze new trails.

Shareholders of both *AIG I* and *Citigroup* filed derivative suits alleging *Caremark* claims and that the director defendants were guilty of bad faith breaches of their duty of care. Both also challenged compensation packages. However, the shareholders of neither AIG nor Citigroup filed a pre-suit demand, alleging demand was futile. And, this is where the similarities between these cases end.

A. AMERICAN INTERNATIONAL GROUP V. GREENBERG (ACT I – DIRECTORS AND OFFICERS)

1. DEMAND FUTILITY

The principle legal distinction between *AIG I* and *Citigroup* is the demand requirement. In *AIG I,* demand was futile.[3] Accordingly, the complaint's allegations were evaluated under the "plaintiff-friendly Rule 12(b)(6) standard."[4] Under this standard of review, the outcome was preordained.

AIG's board of directors empanelled a Special Litigation Committee in response to the filing of the first complaint filed in *AIG I*. The board empowered that SLC with "complete authority" to decide the company's position with respect to the lawsuit.[5] The Chancellor stayed the litigation for eighteen months while the SLC conducted its investigation and determined what action to take with respect to the lawsuit.[6] The SLC ultimately decided that: (i) AIG itself would sue Greenberg and Smith, (ii) AIG would move to dismiss certain defendants, and that (iii) AIG would otherwise take no position on the shareholders' claims, *i.e.,* the claims at issue in this case.[7]

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Because the SLC remained empowered to address the lawsuit, it had reiterated its decision to "take no position" with respect to the claims asserted, Vice Chancellor Strine correctly held that the shareholders were not required to make a demand because doing so would have been futile.[8] While the Special Litigation Committees typically take a position (and almost always to dismiss),[9] the "no position" taken by AIG's SLC was not unprecedented. More than twenty years ago, the Delaware Supreme Court held:

> When a corporation takes a position regarding a derivative action asserted on its behalf, it cannot effectively stand neutral. Because of the inherent nature of the derivative action, a corporation's failure to object to a suit brought on its behalf must be viewed as an approval for the shareholders' capacity to sue derivatively.[10]

The Vice Chancellor did not merely reject defendants' Greenberg, Tizzio, Matthews and PwC pre-suit demand arguments.[11] He openly castigated them for presenting the argument, characterizing it as one in which defendants claimed the demand requirement is "an immunity shield."[12] He emphasized that the demand requirement does "not exist for the benefit of defendants in suits," but rather, it is "for the benefit of the corporation itself."[13] While Vice Chancellor Strine's indignation may have been sparked by a challenge to well-established precedent, it seems more likely that he was not immune to the multiple fraudulent schemes alleged. Indeed, the Vice Chancellor's rejoinder to Tizzio's argument that the complaint failed to plead a *Caremark* claim against him was telling:

> But here? Really? The Complaint fairly supports the assertion that *AIG's* Inner Circle led ã and I use this term with knowledge of its strength – criminal organization. The diversity, pervasiveness, and materiality of the alleged financial wrongdoing at *AIG* is extraordinary.[14]

Although the court was not required to decide if the shareholders pleaded facts with the particularity required by Delaware Chancery Rule 23.1, the schemes alleged, collectively, apparently convinced the court that the defendants faced a substantial likelihood of liability for breaching their fiduciary duties of loyalty.

2. THE ALLEGED CRIMINAL ORGANIZATION

Greenberg had been AIG's CEO since 1968 and its Chairman since 1969.[15] Greenberg exercised a "dominating and intrusive style of management," a "hands-on role in the company's diverse operations,"[16] and knew everything that went on in the company.[17] Greenberg "did not even answer to AIG's board."[18] Board members were too intimidated to ask Greenberg questions for fear of looking stupid.[19] Greenberg also controlled AIG through two companies he owned, Starr International Company, Inc. ("SICO") and C.V. Starr & Co., Inc. ("Starr"), both of which owned AIG stock worth billions of dollars.[20] Greenberg rewarded those loyal to him with the right to purchase stock in SICO and Starr.[21] Greenberg removed any insider who did not remain in his "good graces" at which time the insider also forfeited his entire earnings in Starr.[22]

Matthews and Tizzio, for example, emerge from the complaint as particularly lucky beneficiaries of *Greenberg's* fealty-generating largesse. Before retiring, Matthews had been on *AIG's* board since 1973 and Tizzio had been an officer since 1982 and a director since 1999. Both held significant ownership interests in Starr and SICO. By 2005, Matthews holdings were worth well over $50 million and Tizzio's over $32 million. Both served on the Board's Executive Committee. Matthews was also a member of the Board's Finance Committee and the Credit Risk Committee (which approved AIG's sale of non-GAAP complaint special purpose vehicles. He was Vice Chairman of Investments and Financial Services. Tizzio was Senior Vice Chairman for General Insurance, was on AIG's internal reinsurance security committee, and was one of the senior managers who oversaw AIG's reinsurance operations. The General Insurance division contained AIG's Domestic Brokerage group, National Union and American Company. In 2003, the division reported over $5 billion in operating income.[23] When Tizzio left *AIG's* board of directors in 2003 he was made an "Honorary Director."

The "inner circle defendants" allegedly directed, participated, or were aware intimately of and failed to report or stop four types of schemes: (i) transactions designed to hide AIG's true financial situation, such as "topside adjustments" to AIG's consolidated financial statements[24] and a fraudulent "round trip" transaction with Gen Re which was designed to overstate AIG's loss reserves;[25] (ii) illegal schemes to avoid taxes, such as a practice, begun in 1989, of mischaracterizing workers' compensation insurance (which was taxed at a higher rate and required greater reserves) as general or auto liability insurance;[26] (iii) selling illegal financial products to other companies, like issuing insurance policies to "insureds" knowing and agreeing to cover losses already sustained (and to conceal the "insured's" loss) as in exchange for the "insured's" after-the-fact payment of premiums over a number of years to reimburse AIG and provide it with a fee for the "service";[27] and (iv) schemes to rig markets, such as an agreement with Marsh & McLennan, the world's largest insurance broker, pursuant to which Marsh led its clients to believe it was conducting a bid process to obtain for them the best insurance offer, which was in fact, pre-determined to be AIG.[28]

Although these schemes were pled in detail, the court acknowledged that the complaint did not "tie all of the defendants directly with specific facts to all of the schemes."[29] While the complaint alleged that Greenberg and the inner circle defendants either hatched or received memoranda regarding certain fraudulent transactions, the misconduct related to other schemes was merely "outlined" and specified only the involvement of other individuals within the "inner circle."[30] Despite these weaknesses, the court held that the complaint's allegations withstood dismissal under the Rule 12(b)(6) standard. Granting the shareholders "the benefit of all reasonable inferences," the court held that even the transactions which could not "be tied to specific defendants support the inference that, given the pervasiveness of the fraud, Greenberg and his Inner Circle knew that AIG was engaging in illegal conduct."[31] Viewing the complaint as a whole, rather than on a scheme-by-scheme basis as argued by the defendants,[32] the facts alleged a claim for breach of loyalty that Greenberg and the inner circle defendants "knowingly fail[ed] to monitor their subordinates' compliance with legal duties" and "knowingly tolerat[ed] inadequate internal controls."[33]

Considering the knowledge and experience of the Inner Circle and the endemic nature of the alleged schemes, the Court facetiously opined:

> It may be that billions and billions of dollars in financial shenanigans involving diverse schemes that crossed business units at AIG occurred without the knowledge, approval, or support of Greenberg and his Inner Circle. A cosmic wrong may have been done to the Inner Circle Defendants, whose members were victimized by a large number of lower level employees who, despite good faith efforts at over-sight and the use of internal controls by the Inner Circle Defendants, were able to avoid detection and engage in widespread financial fraud.[34]

B. IN RE CITIGROUP SHAREHOLDER DERIVATIVE LITIGATION

While the defense in *AIG I* appeared to exceed the Delaware Chancery Court's tolerance for meritless arguments, the shareholders in *Citigroup* appeared to exceed the Court's tolerance for claims based on nothing more than public outcry.

Citigroup's shareholders filed suit derivatively seeking to hold current and former directors liable under *Caremark* because Citigroup entered the subprime mortgage market and did not exit that market before it collapsed, spectacularly. The shareholders' complaint suffered from two fatal defects. The shareholders had not made a pre-suit demand on Citigroup's board and the oversight duties recognized in *Caremark* do not apply to the management of business risks.

Citigroup's shareholder sought to hold current and former directors liable for the losses the bank incurred in the subprime lending market.[35] They claimed that "defendants breached their fiduciary duties by failing to properly monitor and manage the risks the Company faces from problems in the subprime lending market and for failing to properly disclose Citigroup's exposure to subprime assets."[36] The shareholders claimed demand was futile under *Rales.*[37] Unlike the board in *AIG I,* Citigroup had no reason to empanel an SLC in response to the allegations set forth in the complaint. The heightened pleading standards of Chancery Rule 23.1 applied and, to survive dismissal, the complaint was required to plead "particularized facts" which "create a reasonable doubt that, as of the time the complaint [was] filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand."[38]

Housing prices began to decline in late 2005 and at about the same time, the teaser rates on many subprime mortgages began to reset.[39] Citigroup entered the subprime mortgage business in 2006.[40] Subprime mortgage lenders began filing for bankruptcy by February 2007. and securities based on subprime mortgages began suffering increasing levels of delinquency. By mid-2007, rating agencies had downgraded bonds backed by subprime mortgages.[41] Notwithstanding these signs of collapse, in March and September 2007, Citigroup purchased $2.7 billion in subprime loans.[42] In November 2007, Citigroup approved a multi-million dollar payment and benefit package for its retiring CEO.[43]

The shareholders' complaint purported to cite numerous "red flags" that they claimed should have alerted the directors that "problems [] were brewing in the real estate and credit markets." According to the shareholders, the defendants ignored these red flags causing Citigroup to suffer substantial losses as the subprime market collapsed.[44] But the red flags plaintiffs identified were simply media reports˜ an economist predicting a bubble in the housing market in the New York Times, a subprime mortgage company announcing the closing of retail offices, the bankruptcy filing of a subprime lender and the like.[45]

According to the shareholders, the defendants should have been particularly sensitive to these "red flags" because the majority of them served on the board during the Enron scandal and were financial experts.[46] The shareholders further alleged that the defendants failed "to properly monitor Citigroup's *business risk,* specifically its exposure to the subprime mortgage market."[47] Invoking *Caremark* buzzwords, the shareholders characterized defendants' liability as a failure to "make a good faith attempt to follow the procedures put in place or failing to assure that adequate and proper corporate information and reporting systems existed that would enable them to be fully informed regarding Citigroup's risk to the subprime mortgage market."[48] Buzzwords were not enough.

Chancellor Chandler rejected this attempt to expand *Caremark*. Liability under *Caremark* arises from a board's "failure to properly monitor or oversee employee *misconduct or violations of law."* [49] In this action, however, the shareholders' Caremark claim was premised on the "defendants' alleged failure to properly monitor Citigroup's *business risk,* specifically its exposure to the subprime mortgage market."[50] Chancellor Chandler refused the invitation to expand *Caremark* liability, correctly recognizing that the shareholders' Caremark claim was nothing more than a trumped-up challenge to the Citigroup board's decision to enter into the subprime mortgage market.[51] In other words, the shareholders were challenging the board's business judgment but they failed to "rebut the presumption that the directors acted on an informed basis, in good faith and in the honest belief that the action was taken in the best interest of the company."[52] As Chancellor Chandler ruled:

> It is almost impossible for a court, in hindsight, to determine whether the directors of a company properly evaluated risk and thus made the 'right' business decision. In any investment there is a chance that returns will turn out lower than expected, and generally a smaller chance that they will be far lower than expected. When investments turn out poorly, it is possible that the decision-maker evaluated the deal correctly but got

> 'unlucky' in that a huge loss-the probability of which was very small-actually happened.[53]

The court explained that to hold otherwise would "cripple" directors from making investments and would "abandon [] bedrock principles of Delaware fiduciary duty law."[54] This is particularly true for Citigroup which is "in the business of taking on and managing investment and other business risks."[55] Chancellor Chandler sympathized with the shareholders, but correctly held and explained that the desire to blame someone is not enough to state a claim:

> It is understandable that investors, and others, want to find *someone* to hold responsible for these losses [suffered as a result of recent problems in the United States economy], and it is often difficult to distinguish between a desire to blame *someone* and a desire to force those responsible to account for their wrongdoing. Our law, fortunately, provides guidance for precisely these situations in the form of doctrines governing the duties owed by officers and directors of Delaware corporations. This law has been refined over hundreds of years, which no doubt included many crises, and we must not let our desire to blame someone for our losses make us lose sight of the purpose of our law.[56]

II. DELAWARE SUPREME COURT CLARIFIES REVLON DUTIES.

In Lyondell Chemical Company v. Ryan,[57] the Delaware Supreme Court reversed and remanded a decision by the Delaware Chancery Court which -- if allowed to stand -- would have represented a significant expansion of Delaware directors' Revlon duties that could have significantly undermined the efficacy of corporate exculpatory provisions under §102(b)(7) of the Delaware General Corporation Law.

Plaintiff Walter Ryan was a Lyondell shareholder who filed a derivative claim challenging the decision by the Lyondell board of directors to accept a $13 billion cash-for-shares merger proposal.[58] Ryan claimed that deal, which featured a "substantial" premium over market price and which was approved by an "overwhelming" majority of Lyondell shareholders, was the product of a flawed review process undertaken by a board impermissibly motivated by self interest. Ryan claimed the board had breached its duty of loyalty and its *Revlon* duties by employing a process to consider and approve the merger that was too short, that failed to ensure that the price was the highest reasonably attainable and that involved deal protection provisions that effectively made it impossible for other bidders to make an offer for the company.

The director defendants moved for summary judgment, arguing that there was no evidence that the board was conflicted or had acted with improper purpose and, as such, Ryan's claim was nothing more than a claim for breach of the duty of care, from which the board was protected by the §102(b)(7) exculpatory provision in the Lyondell corporate charter.[59] The Chancery Court agreed that on the record before it the board was independent and not impermissibly motivated by self-interest and granted defendants' motion for summary judgment on Ryan's breach of loyalty claim. However the Chancery Court denied the motion on the *Revlon* claim, finding that fact issues regarding whether the directors had acted with "bad faith" or "in conscious disregard" of their duties precluded giving effect to the exculpatory provision at that stage of the litigation.[60]

The Chancery Court began its analysis with the observation that overcoming the exculpatory provision would require Ryan to "demonstrate that the [b]oard either failed to act in good faith in approving the [m]erger or otherwise acted disloyally."[61] The Chancery Court quoted the seminal case of *Stone v. Ritter:*

> Where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith. One consequence if directors act

> disloyally or not in good faith is that the protections of an exculpatory provision do not attach.[62]

The Court concluded that the record before it supported a reasonable inference that the board had "failed to act" because it had not "engaged in a more proactive sale process" with regard to the merger.[63] In a subsequent opinion denying defendants' motion for an interlocutory appeal the Court rejected the directors' claim that the Court had "improperly conflated possible violations only of the Board's duty of care (i.e. gross negligence) with a violation of the good faith component of the duty of loyalty as defined in Stone v. Ritter and In re Walt Disney Company Derivative Litigation."[64] Instead the Court insisted repeatedly that its denial of the motion for summary judgment was based primarily on the paucity of the factual record before it, not on any misreading of the applicable law. More specifically, the Court pointed to several facts from which it said it was possible to draw the reasonable inference that the directors "*may have* consciously disregarded their known fiduciary obligations in a sale scenario"[65] :

> (1) the directors knew, based on the filing of a Schedule 13D with the Securities and Exchange Commission in May 2007, that the Company was "in play"; (2) despite having that knowledge, the directors did nothing (or virtually nothing) to prepare or to develop a strategy--consistent with the principles of Revlon and its progeny--for maximizing shareholder value in connection with a possible sale of the Company; (3) the directors did nothing (or virtually nothing) pre-signing to confirm that a better deal could not be obtained; (4) the directors did nothing (or virtually nothing) to negotiate on . . . [the] offer; and (5) the directors did nothing (or virtually nothing) post-signing to verify that a better deal could not have been obtained.

Based on these facts, then, the Chancery Court deemed it appropriate to allow the case to proceed to determine whether, "on a more fully developed record, that failure to act might rise to the level of 'something more' than a mere violation of the board's fiduciary duty of care."[66]

Accepting the directors' application for certification of an interlocutory appeal, the Delaware Supreme Court reversed the Chancery Court's decision and remanded the matter for entry of judgment in favor of the directors.[67] The Supreme Court acknowledged the propriety of deferring a decision to expand the factual record in some cases but concluded that doing so here was inappropriate because the Chancery Court had reviewed the factual record under a mistaken view of the applicable law.[68]

The Supreme Court found three flaws in the Court's analysis. First, it found that the Court had "imposed *Revlon* duties on the directors before they either had decided to sell, or before the sale had become inevitable."[69] Central to the Chancery Court's denial of the summary judgment motion had been the two-month delay between the 13D filing by Lyondell's suitor and the suitor's first offer, which the Chancery Court characterized as "two months of slothful indifference despite knowing that the Company was in play"[70] during which the directors "languidly awaited overtures from potential suitors...."[71] The Supreme Court found that dwelling on this delay was error, though, because Revlon duties "do not arise simply because a company is 'in play'."[72] Instead, the Lyondell board's obligation to take action under Revlon did not begin until the directors actually began negotiating the sale of the company.

Second, the Supreme Court criticized the Chancery Court's characterization of the *Revlon* line of cases as creating a set of requirements that must be satisfied during the sale process for the board to satisfy its *Revlon* duties.[73] The Chancery Court had indicated that directors were required to "engage actively in the sales process," and "confirm that they have obtained the best available price either by conducting an auction, by conducting a market check, or by demonstrating 'an impeccable knowledge of the market.'"[74] The Supreme Court eschewed such a one-size-fits-all analysis:

> There is only one Revlon duty -- to "[get] the best price for the stockholders at a sale of

> the company." No court can tell directors exactly how to accomplish that goal, because they will be facing a unique combination of circumstances, many of which will be outside their control. . . "there is no single blueprint that a board must follow to fulfill its duties."[75]

Thus, because there is no "single blueprint" for satisfying *Revlon* duties, the failure by the Lyondell directors to take the specific steps delineated by the Chancery Court could not have demonstrated a "conscious disregard of their duties."

Third, the Supreme Court determined that the Chancery court erred in "equating an arguably imperfect attempt to carry out *Revlon* duties with a knowing disregard of one's duties that constitutes bad faith."[76] Noting that there is a "vast difference between an inadequate or *flawed* effort to carry out fiduciary duties and a conscious disregard for those duties", the Supreme Court chided the Chancery Court for coming at the analysis from the "wrong perspective":

> Instead of questioning whether disinterested, independent directors did everything that they (arguably) should have done to obtain the best sale price, the inquiry should have been whether those directors utterly failed to attempt to obtain the best sale price.[77]

Looking at the matter from this perspective and giving Ryan the benefit of every reasonable inference, the Supreme Court concluded that the factual record clearly established that the *Lyondell* directors did not breach their duty of loyalty by failing to act in good faith and that the Chancery Court had erred in concluding otherwise.

III. CHANCERY COURT CONFIRMS DEFINITION OF 'PROPER PURPOSE' IN SECTION 220 INSPECTION CASES.

In *Beiser v. PMC-Sierra, Inc.,* the Delaware Chancery Court made clear that it will not find a proper purpose for demanding documents pursuant to 8 Del. C. § 220 when the only perceivable purpose is to circumvent a stay of discovery under the PSLRA.

In *Beiser,* a long-time shareholder of the defendant corporation brought a derivative action in the United States District Court for the Northern District of California against PMC-Sierra, Inc. ("PMC") based on allegations of improper stock option backdating.[79] After the District Court granted defendants' motion to dismiss for failure to adequately allege demand futility, Beiser filed an amended complaint and defendants again moved to dismiss on demand futility grounds, Beiser sent a letter to PMC's counsel asking to inspect the company's books and records pursuant to §220. PMC rejected Beiser's demand.

The District Court again granted PMC's motion to dismiss for failure to adequately allege demand futility but allowed Beiser "one final time" to amend. In the same order, the District Court found that the discovery stay imposed by the Private Securities Litigation Reform Act ("PSLRA") applied, staying discovery until an adequately plead complaint was filed.[80] Beiser filed his second amended complaint and PMC moved to dismiss but before the District Court could rule, the Chancery Court stayed the derivative action to allow Beiser to pursue his 220 action in Delaware. Soon thereafter, Beiser filed his § 220 action in Delaware, seeking inspection of certain PMC books and records . PMC moved to dismiss Beiser's § 220 action, too, arguing that Beiser's demand was not supported by a proper purpose.

According to the Chancery court, "Section 220 requires that the plaintiff have a proper purpose for his books and records request. According to the statute, a 'proper purpose' is 'a purpose reasonably related to [the plaintiff's] interest as a stockholder.'"[81] The Chancery Court noted that a purpose often deemed proper, and even encouraged, is the desire to evaluate whether there is sufficient basis to support the filing of a derivative action.[82] In response to PMC's motion to dismiss, Beiser claimed that he was seeking an inspection for three reasons: to "investigat[e] possible mismanagement and breaches of fiduciary duties; (ii) investigat[e] violations of law by the officers and directors of [PMC] in connection with [PMC's] stock option granting practices and procedures and internal controls; and (iii) determin[e] whether [PMC's] officers and directors are independent and/or disinterested and whether they have acted in good faith."[83]

The Chancery Court explained that in addition to alleging what he might be looking for during an inspection, Bieser was also required to explain what he planned to do with the information if he found it. After all, the Chancery Court reasoned, Beiser could not point to a desire to obtain evidence to support the filing of a derivative action because he had already filed such an action.[84] Thus, the Chancery Court ultimately found that "the only reasonable use for the evidence is to aid Beiser in the Federal Action through discovery that has been foreclosed by the PSLRA."[85] The Chancery Court went on to explain the rationale behind the PSLRA and the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") and stated:

> Both federal and Delaware courts have held that Congress did not intend to preempt Section 220 actions through the enactment of the PSLRA and the SLUSA. Delaware courts have, however, anticipated that Section 220 actions might be used to circumvent the PSLRA and allowed the Section 220 action to proceed, in the face of a PSLRA mandated stay of discovery, only where (1) the plaintiff was not currently involved in the federal action, (2) the plaintiff's counsel was not currently involved in the federal action, and (3) the plaintiff agreed to enter a confidentiality agreement preventing him from sharing the information obtained with the plaintiff or counsel in the federal action.

Since none of the acknowledged safeguards was present, the Chancery Court dismissed Beiser's complaint with prejudice, noting that while a shareholder's rights under Section 220 are independent of his other rights, they do not relieve him of having to demonstrate a proper purpose to obtain inspection.

IV. CHANCERY COURT ENFORCES CLEAR LANGUAGE OF MANDATORY ADVANCEMENT PROVISION.

In *Sun Times Media Group v. Black,* the Chancery Court rejected an attempt by the Sun Times Media Group ("Sun Times") to stop paying defense costs on behalf of its former officers before they had exhausted appeals of their criminal convictions, illustrating the risk of broad, mandatory advancement language in corporate bylaws.[88]

Sun Times is the offshoot of the well-publicized criminal convictions of former Sun Times Chairman and CEO Conrad Black and three co-defendants in which the defendants were convicted of mail and wire fraud and obstruction of justice in connection with their duties as officers of the Sun Times.[89] After defendants were convicted and sentenced to penalties ranging from probation for the former general counsel to six-and-one-half years in prison for Black, the Sun Times brought an action in the Delaware Chancery Court seeking (a) a declaration that it was not obligated to pay advance defense costs for any post-sentencing appeals filed by defendants; and (b) and a "claw-back" repayment for some or all of the $60 million it had previously advanced to defendants in connection with the defense of the criminal proceedings.[90]

The *Sun Times* had advanced defense costs under a provision of its Bylaws which provided:

> Expenses (including attorneys' fees) incurred by a director or officer in defending or investigating any threatened or pending civil[,] criminal, administrative or investigative action, suit or proceeding shall be paid by the Corporation in advance of the final disposition of such action, suit or proceeding, upon receipt of an undertaking by or on

> behalf of such director or officer to repay such amount if it shall ultimately be determined that he is not entitled to be indemnified by the Corporation as authorized in this Article IV if such an undertaking is required by the General Corporation Law of the State of Delaware.[91]

In seeking a declaration that it was not required to fund defendants' appeals, Sun Times argued that "final disposition" of a criminal proceeding occurs at sentencing and that an appeal of a criminal conviction is not the defense of the same "proceeding" as the trial court proceeding but, rather, the initiation of a new proceeding by the defendants.[92]

The Chancery Court framed the issue as being whether advancement "turns on every provisional ruling at various stages of the underlying action" or whether it turns on "only the final, non-appealable resolution of the underlying action." After a lengthy analysis of the linguistics of the phrases and practical and policy implications of each interpretation, the Chancery Court concluded that "final disposition" of an "action, suit or proceeding" meant the final, non-appealable conclusion of a proceeding[93], and, thus, that that the most logical reading of the language at issue was that "advancement must continue until the underlying proceeding is finally concluded, in the sense that its outcome is not subject to further disturbance."[94] In light of this determination the Chancery Court rejected Sun Times request for a declaration that it was not obligated to continue paying defendants' defense costs through the completion of the appeals process and its request for a clawback repayment of funds already advanced, since determining the propriety or scope of such a repayment before defendants' appeals were exhausted would be premature.

[1] 965 A.2d 763 (Del Ch. 2009).

[2] 964 A.2d 106 (Del Ch. 2009).

[3] 965 A.2d at 807.

[4] *Id.* at 811. This relaxed standard is the "permissive notice pleading" standard of Delaware Chancery Rule 8(a), which is similar if not identical to the parallel Federal Rule. See Citigroup, 964 A.2d at 120.

[5] *Id.* at 809.

[6] *Id.*

[7] *Id.* The SLC repeated this decision in April 2008 when the complaint was filed with additional counts and again at oral argument on the these dismissal motions. *Id,* n. 165.

[8] *Id.* at 809.

[9] *Id.* at 808 (noting this case was "not the typical situation where a corporation is objecting to the litigation brought in its name").

[10] *Id.* (quoting *Kaplan v. Peat, Marwick, Mitchell & Co.,* 540 A.2d 726, 731 (Del. 1988)).

[11] 965 A.2d at 807.

[12] *Id.* at 810.

[13] *Id.* at 808, and n. 160

[14] 965 A.2d at 799.

[15] *Id.* at 780.

[16] *Id.* at 799, n.128

[17] *Id.* at 780.

[18] *Id.* at 799, n. 128.

[19] *Id.* at 780.

[20] *Id.* at 781.

[21] *Id.* As of January 31, 2004, SICO and Starr held 13.7% of AIG's common stock.

[22] *Id.*

[23] *Id.* at 781-82.

[24] *Id.* at 784. The topside adjustments increased the reported value of AIG's loss reserves by $32 million in the fourth quarter of 2000 and $70 million in the first quarter of 2001. Id.

[25] *Id.* at 783.

[26] *Id.* at 788.

[27] *Id.* at 789-90.

[28] *Id.* at 792.

[29] *Id.* at 782.

[30] *Id.*

[31] *Id.* at 782.

[32] *Id.* at 799.

[33] *Id.* at 798-99. In other words, the complaint stated a *Caremark* claim against these defendants.

[34] *Id.* at 777.

[35] 964 A.2d at 111

[36] *Id.* at 111.

[37] *Rales v. Blasband,* 634 A.2d 927, 933-34 (Del.1993).

[38] 964 A.2d at 120 (quoting *Rales*). As the court noted, the "stringent requirements of factual particularity" applied requiring the shareholders to set forth "particularized factual statements that are essential to the claim. A prolix complaint larded with conclusory language ... does not comply with these fundamental pleading mandates." *Id.* at 120-21

[39] *Id.* at 112-13

[40] *Id.* at 112.

[41] *Id.* at 113.

[42] *Id.* at 115. The shareholders alleged that these purchases constituted waste.

[43] *Id.* The shareholders alleged that this constituted waste as this claim survived dismissal. *Id.* at 138 The complaint adequately alleged the board paid the CEO millions upon his retirement despite the fact that he caused, at least in part, billions of dollars of losses. *Id.* Accepting Plaintiffs' allegations as true, the Court found they raised a reasonable doubt as to whether the compensation package constituted waste. *Id.*

[44] *Id.*

[45] *Id.* at 114-15.

[46] *Id.* at 123-24.

[47] *Id.* at 123.

[48] *Id.* at 123-24.

[49] *Id.* at 123 (emphasis added).

[50] *Id.* at 123.

[51] *Id.* at 124.

[52] *Id.* at 124 (quoting *Aronson,* 473 A.2d at 812).

[53] *Id.* at 126.

[54] *Id.*

[55] *Id.* at 131.

[56] *Id.* at 139 (emphasis in original).

[57] *Lyondell Chemical Co. v. Ryan,* 970 A.2d 235 (Del. Supr. Mar. 25, 2009) (Berger, J.) (hereinafter "Lyondell III").

[58] *Ryan v. Lyondell Chemical Co.,* C.A. No. 3176-VCN, 2008 WL 2923427 at *1-*2 (Del. Ch. July 29, 2008), cert. denied 2008 WL 4174038 (Del. Ch. 2008), and appeal granted, stay granted, 2008 WL 4294938 (Del. 2008), and decision rev'd, 970 A.2d 235 (hereinafter "Lyondell I").

[59] *Id.* at *11.

[60] *Id.* at *16.

[61] *Id.* at *11.

62. *Id.* at *19 (quoting Stone ex rel. AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006)).

63. *Id.* at *11.

64. *Ryan v. Lyondell Chemical Company,* C.A. No. 3176-VCN, 2008 WL 4174038, at *1 (Del. Ch. August 29, 2008) ("Lyondell II")

65. *Id.* (emphasis in original).

66. *Id.*

67. *Lyondell III* 970 A.2d at 244.

68. *Id.* at 240-241.

69. *Id.* at 241.

70. 2008 WL 4174038 at *4.

71. 2008 WL 2923427 at *14.

72. *Lyondell III,* 970 A.2d at 242.

73. *Id.* at 241.

74. *Id.* at 242.

75. *Id.* at 243 (quoting *Barkan v. Amsted Industries, Inc.,* 567 A.2d 1279, 1286 (Del. 1989).

76. *Id.* at 241.

77. *Id.* at 244.

78. 2009 WL 483321

79. *Id.* at *1.

80. *Id.*

81. *Id.*

82. *Id.* at *4.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id* at *4.

88. 954 A.2d 380 (Del. Ch. 2008).

89. *Id.* at 384.

90. *Id.* at 384-385.

91. *Id.* at 385.

92. *Id.* at 389.

93. *Id.* at 397.

94. *Id.* at 395.

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