



Delaware Supreme Court Affirms Protections of Exculpatory Provisions

Posted by Theodore N. Mirvis, Wachtell, Lipton, Rosen and Katz, on Monday, May 18, 2015

Editor's Note: [Theodore N. Mirvis](#) is a partner in the Litigation Department at Wachtell, Lipton, Rosen & Katz. The following post is based on a Wachtell Lipton memorandum by Mr. Mirvis, [Paul K. Rowe](#), [William Savitt](#), and [Ryan A. McLeod](#). This post is part of the [Delaware law series](#), which is cosponsored by the Forum and Corporation Service Company; links to other posts in the series are available [here](#).

The Delaware Supreme Court yesterday [May 14, 2015] unanimously held that a claim for damages against independent, disinterested directors of corporations with exculpatory charter provisions must be dismissed absent allegations of disloyalty or bad faith—even in controlling stockholder cases and no matter what standard of review governs the challenged transaction. [In re Cornerstone Therapeutics Inc. Stockholder Litig., No. 564, 2014 \(Del. May 14, 2015\)](#).

Clarifying a [long-uncertain area](#) of Delaware law, yesterday's opinion establishes that a plaintiff "must plead non-exculpated claims against a director who is protected by an exculpatory charter provision to survive a motion to dismiss, regardless of the underlying standard of review for the board's conduct—be it *Revlon*, *Unocal*, the entire fairness standard, or the business judgment rule." Specifically, to survive dismissal, a plaintiff must plead "facts supporting a rational inference that the director harbored self-interest adverse to the stockholders' interests, acted to advance the self-interest of an interested party from whom they could not be presumed to act independently, or acted in bad faith." Chief Justice Strine's opinion for the Court highlighted that "each director has a right to be considered individually when the directors face claims for damages in a suit challenging board action" and that "the mere fact that a director serves on the board of a corporation with a controlling stockholder does not automatically make that director not independent."

While Delaware law rewards deal structures that empower independent directors to say no to a controller transaction, the Court noted, "it does not follow that it is prudent to create an invariable rule that any independent director who says yes to an interested transaction subject to entire fairness review must remain as a defendant" in the "absence of any evidence suggesting that the director acted for an improper motive." Emphasizing that controlling stockholder mergers can be and often are beneficial to minority stockholders, the Court "decline[d] to adopt an approach that would create incentives for independent directors to avoid serving as special committee members, or to reject transactions solely because their role in negotiating on behalf of the stockholders would cause them to remain as defendants until the end of any litigation challenging the transaction."

Cornerstone signals a significant change of approach in controlling stockholder cases that should generally permit independent directors to avoid the burdens of protracted litigation. The decision is also further confirmation that merger cases under Delaware law are often properly subject to dismissal on early pleadings motions.