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Delaware Supreme Court Reaffirms Core Principles of Exculpation and Director Independence


In 2016, to jumpstart its self-driving car program, Uber purchased Ottomotto LLC and hired employees with relevant technical expertise away from Google. When it later came to light that the new hires had misappropriated proprietary Google information, Uber fired the key new employee and paid $245 million in stock to settle Google’s claims. A stockholder plaintiff then sued Uber’s board, alleging that the directors breached their duties by approving the Ottomotto transaction. In a carefully reasoned opinion upholding the dismissal of the suit, the Supreme Court reaffirmed two important pleading requirements that shield directors from unsubstantiated derivative litigation:

First, the Court refused to credit plaintiff’s assertion that the directors faced a substantial likelihood of personal liability. Because Uber’s certificate of incorporation includes an exculpation provision, the Court held, its directors could face a likelihood of liability only if the pleaded facts showed that they “acted with scienter, meaning they had actual or constructive knowledge that their conduct was legally improper.” Allegations that the board should have done more or acted differently do not suffice. Rather, courts will credit a damages action against an exculpated director only upon pleaded facts showing “an intentional dereliction of duty” or that the director was “motivated by an actual intent to do harm.”

Second, the Court confirmed core principles of director independence. The plaintiff contended that a majority of the directors were beholden to Uber’s ex-CEO. But, the Court held, to rebut a director’s presumed independence, a plaintiff must allege facts showing that the director’s relationship to an allegedly interested party “is of a bias-producing nature”—that is, facts demonstrating that the director “had a personal or financial connection” to the interested party “or that the directorship was of substantial material importance to him.” Added the Court: “Hearsay and hyperbole [] are no substitute for pleading particularized facts to meet the plaintiff’s heightened pleading burden.”

The decision is a welcome reaffirmation that exculpation provisions are a high bar for any plaintiff to clear and that Delaware continues to maintain a forceful presumption of director independence.

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