

CLIENT ALERT

# Delaware Supreme Court Adopts Entire Fairness Standard in Reviewing Challenges to Discretion-Based Director Compensation

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## AUTHORS

Tariq Mundiya | Mary Eaton | Martin L. Seidel

On December 13, 2017, the Delaware Supreme Court issued an important opinion, *In re Investors Bancorp, Inc. Stockholder Litigation*, No. 169 (Del. Sup. Ct. Dec. 13, 2017), holding that stockholder challenges to certain types of director compensation awards will be governed by the fact-intensive “entire fairness” standard, rather than the more deferential “business judgment” rule. Specifically, *Investors Bancorp* holds that even where stockholders have ratified director compensation awards, boards of directors will not be able to get the benefit of business judgment rule protection to a subsequent stockholder challenge unless (1) the stockholders approve the *specific director awards* or (2) the plan is self-executing (meaning the directors had no discretion in making the awards such as when the award is set pursuant to a predetermined formula).

Under *Investors Bancorp*, where directors exercise any discretion in granting themselves compensation, they must demonstrate that the compensation award was entirely fair to the Company. This is so even if the stockholders approved the compensation plan in advance. The Delaware Supreme Court expressly rejected the prior Delaware cases holding that directorial compensation plans that impose meaningful, director-specific limits on compensation should nevertheless be subject to business judgment review as long as informed stockholders had approved the plan. After *Investors Bancorp*, for business judgment review to attach, the board must be divested of all discretion in awarding itself compensation.

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The decision is important because it increases the risks of derivative litigation challenging director compensation. Although the precise ramifications of the Delaware Supreme Court's decision remain to be seen, *In re Investors Bancorp* will likely require Delaware corporations to conduct prompt, wholesale reviews of their director compensation plans to guard against stockholder litigation challenging directorial compensation as unfair and excessive.

If you have any questions about the *Investors Bancorp* ruling, please contact the following attorneys or the attorney with whom you regularly work.

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**Tariq Mundiya**

212 728 8565

tmundiya@willkie.com

**Mary Eaton**

212 728 8626

meaton@willkie.com

**Martin L. Seidel**

212 728 8385

mseidel@willkie.com

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