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2025 Delaware Year-End Review: M&A and Stockholder Litigation

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In the wake of growing discourse among corporate boards and other market participants about Delaware's continued status as the jurisdiction of choice for incorporation, and the widely reported speculation that many companies were considering reincorporation in other states (which came to be known as "DExit"), 2025 saw the Delaware legislature enact a suite of amendments to the Delaware General Corporation Law ("DGCL") in Delaware Senate Bill 21 ("SB 21") that sought to address some of the concerns raised in the DExit debate. These issues included the availability of safe harbors for conflicted controller transactions and the permissible scope of stockholder books and records demands. The passage of SB 21 was not without controversy, but in the months following its enactment, attention has now focused on how the Delaware courts will interpret and implement the new statutory framework.

At the same time, the Delaware courts continued in 2025 to issue a host of decisions that provided guidance on numerous areas of interest to corporate practitioners, including with respect to merger proxy disclosures, *Revlon* enhanced scrutiny and *Corwin* cleansing. Together, these events reflect that Delaware's legislature and its courts remain responsive and stand ready to take steps to reinforce and maintain Delaware's position as the default state of incorporation for companies in the United States.

SB 21 and Constitutional Considerations

As discussed in our April 3, 2025 client alert, SB 21 amended Sections 144 and 220 of the DGCL to provide corporations with clarity and predictability when structuring certain transactions involving controlling stockholders. Notably, SB 21 adopted a new safe harbor provision that insulates certain transactions from claims for damages or equitable relief. In particular, SB 21 amended DGCL § 144 to introduce a safe harbor for: (i) transactions between a corporation and interested parties other than controlling stockholders; and (ii) controlling stockholder transactions other than "going private transactions." The amendment also introduced a statutory presumption regarding which directors will be deemed "disinterested"; a more rigorous definition of who constitutes a "controlling stockholder" under Delaware law; and stricter limits on the information available to stockholders through statutory demands for corporate books and records under DGCL § 220.

As noted, SB 21's passage generated significant debate in the media among practitioners and market participants, with opponents challenging not only its merits, but also whether the amendments violated the Delaware Constitution. In November 2025, the Delaware Supreme Court heard oral argument in ***Rutledge v. Clearway Energy***,[1] which presented two certified questions regarding the constitutionality of SB 21. That case was a derivative action brought on behalf of Clearway Energy, Inc. ("Clearway"), challenging the fairness of a $117 million asset purchase by Clearway from its majority stockholder, Clearway Energy Group LLC. The transaction had been approved under SB 21's new safe harbor provisions by a committee the board deemed independent under New York Stock Exchange rules and was not put to a stockholder vote. In June 2025, Vice Chancellor Will granted an unopposed motion to certify two questions to the Delaware Supreme Court for immediate guidance concerning SB 21's amendment to DGCL § 144: first, whether the new safe harbor provision, which protects certain transactions from claims for damages or equitable relief, unconstitutionally divests the Court of Chancery of its equitable jurisdiction under the Delaware Constitution; and second, whether the amendment retroactively and unconstitutionally extinguishes accrued or vested causes of action by applying those safe-harbor protections to fiduciary duty claims arising from acts or transactions predating the enactment of SB 21. A decision from the Delaware Supreme Court is expected soon.

Re-Domestication

In the midst of questions surrounding a potential corporate exodus from Delaware, boards of directors and controllers faced additional scrutiny—and potential exposure—following the Court of Chancery decision in ***Palkon v. Maffei***, which subjected TripAdvisor's decision to reincorporate in Nevada to the stringent entire fairness review standard based on allegations that moving to Nevada's more "protective" legal regime for fiduciaries would provide a non-ratable benefit to TripAdvisor's controlling stockholder and directors. As discussed in our February 5, 2025 client alert, the Delaware Supreme Court reversed that decision, holding that, absent concrete non-ratable benefits or the existence of actual pending claims against the board or controller, a "clear-day" move to a new jurisdiction is reviewed under the deferential business judgment rule.[2] In reaching that decision, the Supreme Court reasoned that, similar to a company's decision to obtain D&O insurance or to adopt indemnification and exculpatory provisions

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[1] *Rutledge v. Clearway Energy Grp. LLC*, No. 2025-0499-LWW, 2025 WL 1604186 (Del. Ch. June 6, 2025).

[2] *Maffei v. Palkon*, 339 A.3d 705 (Del. 2025).

in its charter or bylaws, merely seeking to reincorporate in another state, even if it could be viewed as a prospective reduction in liability exposure, was not, without more, a material non-ratable benefit triggering entire fairness review. This is the case particularly where the redomestication takes place on a "clear day"—i.e., at a time when the redomestication will not materially benefit the fiduciary as a result of pending transactions, claims or litigation. Through *Palkon*, the Court limited potential stockholder challenges to redomestication transactions to those where plaintiffs can plead a concrete, non-ratable benefit or extinguishment of an existing liability.

Claims Against Controlling Stockholders

Issues surrounding a plaintiff's pleading burden when challenging transactions involving controlling stockholders arose in a number of cases in 2025. In ***Roofers Local 149 v. Fidelity & Guaranty Annuities & Life***, stockholders brought fiduciary duty claims challenging a controlling stockholder's investment of $250 million in the company as part of a capital raise.[3] Vice Chancellor Will dismissed the complaint, holding that merely asserting that the challenged controller transaction is subject to entire fairness review was insufficient to survive defendants' motion to dismiss. Rather, because such transactions are not viewed as "inherently wrongful under Delaware law," a plaintiff must plead at least some nonconclusory facts demonstrating unfairness. The Court found the complaint at issue failed to show an unfair process where, in approving the transaction, the company had appointed a special committee and the special committee retained independent advisors, met several times, negotiated with the controller, and considered alternatives. The Court also held that the plaintiff's allegations of unfair price were conclusory.

In contrast, ***Wei v. Levinson*** illustrated how an entire fairness pleading may survive dismissal where plaintiffs alleged that board-level conflicts and non-ratable benefits skewed the fairness of the transaction process.[4] The case concerned Amazon's 2020 acquisition of Zoox for $1.3 billion, with plaintiffs alleging that Zoox's directors and officers were subject to conflicts that resulted in a transaction that harmed the common stockholders. Chancellor McCormick held that plaintiffs adequately pleaded claims for breach of the duty of loyalty against a majority of the board, making it reasonably conceivable that the transaction would be reviewed for entire fairness. As to fairness, the Court highlighted a number of factual allegations, including liquidation preferences in the acquisition that resulted in significantly diverging interests between the preferred and common stockholders based on the deal price, which rendered the directors designated by such preferred holders conflicted. Similarly, the Court found the company's two management directors conflicted based on certain material post-closing bonuses and stock grants they were slated to receive as part of the deal, as well as allegations that they favored Amazon because it would allow Zoox to operate independently and continue pursuing the management directors' "mission."

This past year also saw continued emphasis on disclosures of potential conflicts as a prerequisite to invoking the protections of *Kahn v. M&F Worldwide Corp.* ("*MFW*") and preserving business judgment review of controller transactions. After a remand from the Delaware Supreme Court, the Court of Chancery revisited the issue of conflicts disclosures regarding advisors in ***City of Sarasota Firefighters' Pension Fund v. Inovalon Holdings***

3 *Roofers Local 149 Pension Fund v. Fid. Nat'l Fin.*, No. 2024-0562-LWW, 2025 WL 1354973 (Del. Ch. May 9, 2025).

4 *Wei v. Levinson*, No. 2023-0521-KSJM, 2025 WL 1565356 (Del. Ch. June 3, 2025).

Inc.[5] *Inovalon* concerned a challenge to the take-private transaction of Inovalon Holdings by a private equity consortium that included Inovalon's founder and controller. In remanding the case, the Delaware Supreme Court reasoned that *MFW* did not apply where the stockholder vote was not fully informed because the transaction's proxy statement misstated and omitted material facts about the special committee's advisors. On remand, the Court of Chancery denied a motion to dismiss special committee directors, finding it reasonably conceivable that the directors acted in bad faith with respect to the omitted disclosures given their awareness of the advisor conflicts and the advisor's roles in market outreach. The Court's decision was based, in part, on inconsistencies between the committee minutes and the challenged proxy disclosures. This decision underscores the care and attention that special committees and their advisors should pay to ensuring that conflicts disclosures are comprehensive and well supported by an accurate internal record.

Sale Processes Under Enhanced Scrutiny and the Limits of *Corwin*

The Delaware courts this past year also continued to scrutinize cases outside of the entire fairness context. Hurried or skewed sales processes may invite heightened scrutiny under *Revlon* and limit the availability of *Corwin* cleansing, which affords business judgment protection where a fully informed, uncoerced majority of disinterested stockholders approves the transaction. In ***Sjunde AP-Fonden v. Activision Blizzard Inc. et al.*** ("Activision II"), the Court of Chancery addressed a stockholder plaintiff's claims against Activision's CEO and board arising from Microsoft's acquisition of Activision.[6] The stockholder-plaintiff alleged that the CEO and board engaged in a hurried, conflicted sale process that favored Microsoft in the immediate aftermath of highly publicized allegations that the CEO was aware of pervasive sexual harassment at Activision. Applying *Revlon* enhanced scrutiny, Chancellor McCormick denied defendants' motion to dismiss, holding that the plaintiff adequately alleged a "paradigmatic" *Revlon* theory where Activision's CEO rushed the transaction in an attempt to keep his job, limited full board oversight, manipulated the process to favor Microsoft, and negotiated a price that fell outside of the range of reasonableness. Nor, the Court held, could defendants invoke *Corwin* cleansing because, among other things, the proxy statement failed to mention the sexual misconduct issues thereby creating the "misleading and incomplete narrative" that the scandal had no role in or relevance to the process and negotiations leading up to the deal.

By contrast, ***Amethyst Arbitrage International Master Fund v. Svane*** ("Zendesk") highlights the limits of disclosure based challenges under *Corwin*.[7] Following Zendesk's late 2021 announcement of its plans to acquire a software company in a stock-for-stock merger that valued Zendesk's common stock at about $124 per share, an activist investor heavily criticized the proposed acquisition as undervaluing Zendesk. A few months later in early 2022, the Zendesk board then rejected a separate proposal to acquire Zendesk for $127 to $132 per share, which the company's then-CEO and Chairman of the Board stated undervalued Zendesk. The rejection of this proposal triggered a proxy contest led by the activist investor that had criticized the $124 per share transaction. By June 2022, the activist investor and Zendesk's board were close to a settlement pursuant to which Zendesk's CEO and several directors would step down and the activist investor would gain board seats. However, the same day as the settlement was being finalized, the board approved a take-private offer for Zendesk at $77.50 per share, which

5 *City of Sarasota Firefighters' Pension Fund v. Inovalon Hldgs. Inc*., No. 2022-0698-KSJM, 2025 WL 1642064 (Del. Ch. June 10, 2025).

6 *Sjunde AP-Fonden v. Activision Blizzard, Inc.*, No. 2022-1001-KSJM, 2025 WL 2803254 (Del. Ch. Oct. 2, 2025).

7 *Amethyst Arbitrage International Master Fund v. Svane*, No. 2023-1139-JTL (Del. Ch. Apr. 23, 2025) (ORDER).

would leave company management and the board unchanged. Stockholder plaintiffs in a class action sued, alleging that the board breached its *Revlon* duties by engineering an underpriced sale to avoid the consequences of the activist settlement. In response to defendants' *Corwin* dismissal motion, plaintiffs argued that the company's proxy statement failed to disclose (1) that the board had authorized the nearly finalized activist settlement that would have terminated the CEO and several directors, (2) an "upside case" financial projection that undermined the value in the take-private offer, and (3) that the company's financial advisor had concurrently advised one of its counterparties in an unrelated deal. In granting dismissal, the Court of Chancery found—in a ruling that was upheld on appeal—no disclosure violations because the activist investor's public campaign had already put stockholders on notice that management and the board could be acting out of self-interest. As to advisor conflicts, the alleged concurrent engagements had ended and therefore the proxy's present tense disclosures were accurate.

Judicial Deference: The Good Faith Safe Harbor

The Court of Chancery also had occasion this past year to weigh in on an ongoing bidding war in ***Pfizer v. Metsera***. *Pfizer* arose from a bidding war between Pfizer and Novo Nordisk to acquire Metsera Inc., a pharmaceutical company focused on developing anti-obesity drugs.[8] After multiple bidding rounds, Metsera and Pfizer executed a merger agreement that allowed Metsera to terminate the deal if, after consulting with its advisors, it determined a subsequent offer was superior. Novo Nordisk then made a new offer that included an upfront cash payment to stockholders, which Metsera determined to be a superior proposal, reasoning that the payment was a significant premium over Metsera's share price and the price in the Pfizer merger agreement. Pfizer filed suit, seeking declarations that Novo Nordisk's proposal was not superior and that Metsera could not terminate the merger because, according to Pfizer, Novo Nordisk's proposal would be blocked by federal antitrust authorities.

In a November 5, 2025 bench ruling, Vice Chancellor Zurn denied Pfizer's motion for a temporary restraining order. The Court held that Pfizer had not shown that the Metsera board reached its decision to terminate in bad faith. The Court declined to address Pfizer's arguments around the likelihood of regulatory approval, reasoning that, as long as a board acts in good faith, Delaware law allows a board to "get it wrong." Notably, the Court found that the equities weighed against Pfizer because an injunction would jeopardize the premium Metsera stockholders would receive from Novo Nordisk and would "excuse[]" Pfizer from offering a more competitive bid. Following the Court's ruling, Pfizer ultimately prevailed in acquiring Metsera for up to $86.25 per share. This decision reinforces the Court of Chancery's long-standing deference to the good faith decisions of corporate boards (even if ultimately those decision could turn out to be "wrong") and its reluctance to intervene and be seen as putting a thumb on the scales during an ongoing bidding war.

Aiding-and-Abetting Liability for Acquirors

Delaware continues to cabin aiding-and-abetting exposure for arm's-length buyers, demanding allegations showing clear, direct knowledge and substantial assistance by the buyer beyond merely having negotiated contractual rights and engaging in hard bargaining. In ***In re Columbia Pipeline Group, Inc.***, the Delaware Supreme Court reversed the Court of Chancery's post-trial aiding-and-abetting judgment arising from TransCanada's acquisition of Columbia

[8] *Pfizer v. Metsera, et. al*, No. 2025-1259-MTZ (Del. Ch. Nov. 5, 2025) (TRANSCRIPT).

Pipeline, holding that an arm's-length acquiror's liability requires "clear and direct" actual knowledge of both a sell-side fiduciary breach and the wrongfulness of the acquiror's own conduct.[9] Rejecting constructive-knowledge theories and building on its recent tightening of the "culpable participation" standard, the Court explained that hard bargaining and TransCanada's contractual rights to review Columbia Pipeline's proxy disclosures do not, without more, constitute knowing participation. The Delaware Supreme Court found that the record did not show that the parties had colluded, that TransCanada provided substantial assistance to a fiduciary breach, or that there was a deal commitment that had not been disclosed. TransCanada's alleged failure to correct seller-authored omissions from the proxy statement was not actionable absent an independent duty and actual knowledge that inaction furthered a breach. The decision vacated a substantial damages award and, on the heels of the Delaware Supreme Court's similar holding in 2024's *Mindbody* ruling, reinforces the high bar for aiding-and-abetting exposure for arm's-length buyers. For practitioners, *Columbia* counsels clear separation between buyer conduct and sell-side process, disciplined use of standstills and information rights, and robust record-building to avoid any inference of collusion.

Availability of Common Law Fiduciary Duty Claims In the LLC Context

Many of the foregoing doctrines apply solely to the corporate context, rather than alternative entities such as limited liability companies and limited partnerships, and the Delaware courts have been careful to respect the distinction between breach of fiduciary duty claims in the corporate context and claims for breach of the implied covenant of good faith and fair dealing in the alternative entity context. In ***Khan v. Warburg Pincus***, minority investors in an LLC that owned and operated urgent care clinics alleged that Warburg Pincus and six Warburg affiliated investment funds, who were the LLC's majority members, improperly structured a sale to Walgreens.[10] As a condition of the merger, the minority investors approved an amendment to the LLC agreement that waived certain rights in order to allow Warburg Pincus to receive a greater proportion of its merger consideration in cash. More than a year after the transaction closed, Walgreens announced that it took an impairment charge on its acquisition of CityMD, negatively impacting the value of the equity that the minority investors received in the deal. The minority investors alleged that Warburg "coerced" the LLC agreement amendment and violated, among other things, the implied covenant of good faith and fair dealing. Vice Chancellor Will granted defendants' motion to dismiss (which the Delaware Supreme Court affirmed) holding that the LLC agreement's broad fiduciary waivers and provisions expressly permitting the LLC agreement to be amended precluded plaintiffs' use of the implied covenant as an indirect means of reintroducing fiduciary concepts to govern the parties' commercial relationship.

Demand Futility, Independence, and Zuckerberg's Structured Inquiry

Derivative plaintiffs continued to face the rigor of *Zuckerberg's* three-prong framework and director-by-director pleading burdens to establish demand futility. To satisfy *Zuckerberg*, plaintiffs must plead particularized allegations that at least half of the board of directors (1) faced a substantial likelihood of liability from the alleged misconduct,

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9 *In re Columbia Pipeline Grp., Inc. Merger Litig.*, 342 A.3d 324 (Del. 2025).

10 *Khan et al. v. Warburg Pincus LLC et al.*, No. 2024-0523-LWW, 2025 WL 1251237 (Del. Ch. Apr. 30, 2025), *aff'd* 2025 WL 3525599 (Del. 2025). Willkie represented Warburg Pincus and its affiliated entities in this litigation.

(2) would have received a material personal benefit as a result of misconduct, or (3) lacked independence from an individual who is conflicted under one of the first two prongs.

The Trade Desk Inc. Derivative Litigation demonstrates that even where challenges to a controller's compensation may be reviewed on the merits under the entire fairness standard, Rule 23.1 still requires particularized pleading showing that a majority of the demand board is compromised. In *The Trade Desk*, the Delaware Supreme Court affirmed the Court of Chancery's dismissal of a stockholder derivative action for failure to adequately plead demand futility. [11] The suit challenged a performance-based "mega grant" to The Trade Desk's CEO (and controlling stockholder), which was a ten-year equity award that could reach roughly 4% of the company's outstanding stock if fully earned. The transaction was approved by the company's board, but was not submitted to a stockholder vote. Notwithstanding that the merits of the plaintiff's claims challenging the grant would be subject to entire fairness review, the Court first evaluated the threshold issue of whether the complaint sufficiently alleged demand futility under *Zuckerberg*. Given the Court's finding that the allegations only raised a reasonable doubt as to two of the company's eight directors—the controller/CEO who received the award and the chief technology officer who had long professional ties to the CEO—the claims were dismissed.

Similarly, in ***Central Laborers' Pension Fund v. Karp***, the Court of Chancery applied *Zuckerberg* to dismiss claims of insider trading alleged under *Brophy v. Cities Service Co.* for failure to plead demand futility. In that case, plaintiffs alleged certain officers and directors of Palantir, Inc. engaged in insider trading by selling shares into the public market in connection with the company's September 2020 direct listing. Vice Chancellor Will held that the plaintiffs did not plead particularized facts showing that a majority of directors faced a substantial likelihood of liability, would receive a material personal benefit, or lacked independence. In reaching that conclusion, the Court emphasized that *Brophy* requires trading on material nonpublic information ("MNPI") with intent or knowledge of wrongdoing and rejected the notion that large trading profits alone render a director interested for demand-futility purposes. The Court reasoned that focusing its demand futility analysis myopically on profits, without particularized circumstances indicating actual possession of MNPI and intent, would distort the incentives of director stock ownership.

The Court of Chancery also signaled flexibility in case management by entertaining targeted summary judgment on questions of director independence where resolving that issue could be case dispositive. In ***In re Fox Corporation Derivative Litigation***, the Court of Chancery initially denied defendants' motion to dismiss, reasoning that plaintiff's complaint had sufficiently alleged demand futility by raising a reasonable doubt as to the disinterestedness and independence of four of the company's eight directors. Defendants then sought leave to seek summary judgment on the sole issue of whether one of those four directors was disinterested and independent for demand futility purposes under *Zuckerberg*, which, if successful, would end the case. In granting the defendants' request, the Court noted its wide discretion to determine whether to stage discovery and permit briefing on summary judgment.[12] The Court accepted defendants' arguments that allowing discovery and a targeted motion on the issue of the director's independence was the most efficient path forward because resolution of that question in defendants' favor

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[11] *In re The Trade Desk Inc. Deriv. Litig.*, No. 114, 2025, 2025 WL 3113392 (Del. Nov. 6, 2025).

[12] *In re Fox Corp. Deriv. Litig.*, No. 2023-0418-BWD, 2025 WL 1220269 (Del. Ch. Apr. 28, 2025).

would mean that a majority of the board was capable of considering a demand and, as a result, the case would be dismissed.

Finally, the Court held that breach of fiduciary duty claims with respect to interpersonal misconduct may not be viable where the alleged conduct does not involve an exercise of corporate authority and is already addressed by employment law regimes. In ***Brola v. Lundgren***, the Court of Chancery dismissed a derivative claim against a former director and officer of a privately held company for breach of the duty of loyalty premised on sexual harassment allegations against the defendant, which resulted in over $1.8 million in judgments against both the company and the defendant. [13] In assessing whether the defendant faced a substantial likelihood of liability under *Zuckerberg's* second prong, Vice Chancellor Will noted that the underlying misconduct was not an exercise or abuse of fiduciary authority, but rather concerned interpersonal workplace activities. The Court cautioned that Delaware law fiduciary liability "is not a catch-all for every wrong committed in the workplace," but rather "polices the integrity of the corporate decision-making process" and is designed to guard against "self-dealing, conflicted transactions and bad faith conduct," none of which were implicated. The Court further cautioned that regulating workplace misconduct across the nation under a Delaware law fiduciary duty claim would violate principles of comity and impermissibly interfere with the preexisting and comprehensive federal and state employment law frameworks.[14]

Oversight Liability and Red Flags

While the *Caremark* standard for oversight liability remains an exacting burden for plaintiffs to satisfy, the Court of Chancery has excused demand and permitted claims to continue to discovery where the plaintiff sets forth well pleaded allegations regarding "red flags" that are tied to board level notice and inaction. ***Brewer v. Turner***, which involved derivative claims against the board of Regions Financial Corporation arising from overdraft fee practices at Regions Bank, was one such *Caremark* claim that cleared the high bar.[15] Chancellor McCormick held that demand was excused under *Zuckerberg* because at least half the demand board faced a substantial likelihood of liability. Specifically, the pleadings supported a reasonable inference that a majority of the board was alerted to the illegality of the overdraft fee practices as early as November 2019 when it received a draft whistleblower complaint from a former in-house attorney detailing the alleged misconduct. Those practices eventually became the subject of an investigation by the Consumer Financial Protection Bureau (the "CFPB") and led to the company agreeing to a $191 million consent order with the CFPB. Although the board engaged a law firm to investigate the issue, it took no immediate action to halt the practice and that failure, which the Court described as "consciously delaying" actions to end a practice that the board knew to be illegal, supported an inference of bad faith sufficient to excuse demand.

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13 *Brola on behalf of Credit Glory Inc. v. Lundgren*, No. 2024-1108-LWW, 2025 WL 3439671 (Del. Ch. Dec. 1, 2025).

14 Notably, however, in early 2026, Chancellor McCormick issued a ruling in *Los Angeles City Employees' Retirement System v. Sanford* ("*eXp*") distinguishing *Brola*. The rulings in *Brola* and *eXp* suggest that this remains an unsettled area of law. *See Los Angeles City Empls. Ret. Sys., on behalf of eXp World Hldgs., Inc. v. Sanford, et al.,* No. 2024-0998-KSJM, 2026 WL 125986 (Del. Ch. Jan. 16, 2026).

15 *Brewer v. Turner*, No. 2023-1284-KSJM, 2025 WL 2769895 (Del. Ch. Sept. 29, 2025), *cert. denied*, 2025 WL 3048942 (Del. Ch. Oct. 30, 2025), and *appeal refused sub nom. Turner v. Brewer on behalf of Regions Fin. Corp. & Regions Bank*, 2025 WL 3625701 (Del. Dec. 15, 2025).

Remedies and Damages

Recent decisions out of the Delaware courts have also carefully defined the availability and scope of certain remedies that are commonly sought in transaction litigation, including rescission, nominal damages, and expectation and multiple-based damages.

In December, as discussed in our recent client alert, the Delaware Supreme Court reversed the Court of Chancery's rescission of Tesla's 2018 performance-based grant to Elon Musk in ***In re Tesla, Inc.***, holding that equitable rescission was inappropriate because Musk's six years of performance under the performance package could not be "unscrambled" to restore the *status quo ante*. The Court awarded $1 in nominal damages and reduced counsel's fee to approximately $54.5 million on a *quantum meruit* basis. Given its reversal of the judgment, the Delaware Supreme Court did not address a number of other issues in the Court of Chancery's opinion below that had attracted attention of practitioners, including Musk's status as a controller, the application of entire fairness review, and the defendants' ratification defense based on Tesla stockholder approval of the package. Although based on a unique set of facts, the *Tesla* decision arguably narrows the availability of equitable rescission as a remedy and suggests that performance-based equity awards may be more difficult to unwind under Delaware law.

The possibility that a court may award only nominal damages also arises in entire fairness cases where a plaintiff has sufficiently alleged an unfair process, but is unable to show economic injury. ***In re Straight Path Communications Inc. Consolidated Stockholder Litigation*** involved a post-closing challenge to the controlling stockholder's role in allegedly forcing Straight Path's special committee to settle a potentially valuable indemnification claim against his company during a bidding war that culminated in the $3.1 billion sale to Verizon.[16] The Delaware Supreme Court affirmed then-Vice Chancellor Glasscock's decision which held that the transaction was not entirely fair and that the controller breached the duty of loyalty through his overt coercion. However, the plaintiffs were awarded only nominal damages because the indemnification claim at issue lacked material economic value as Straight Path failed to comply with the notice and consent requirements of the governing agreement, and, therefore, the claim was not viable.

In ***In re Dura Medic***, the Court of Chancery clarified the availability of "multiple-based" damages for breach of a merger agreement.[17] At issue in *Dura Medic* was whether a private equity sponsor that had acquired medical equipment supplier Dura Medic could recover damages for breach of a seller's representations based on an EBITDA multiple. The sponsor had acquired Dura Medic with knowledge that the company was under regulatory scrutiny for its billing and claims practices, but sued the selling stockholders for contractual indemnification alleging that it suffered losses post-closing due to the seller's misrepresentation of the extent of the misconduct. The Court allowed the sponsor's indemnification claims to proceed notwithstanding that the sponsor may have been aware of the defendants' misrepresentations as of closing. *Dura Medic* thus reinforced that Delaware is a "pro-sandbagging" jurisdiction; that is, Delaware courts do not require buyers to demonstrate that they did not have knowledge of a breached representation or warranty prior to bringing their breach of contract claims. Following trial, the Court found

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16 *In re Straight Path Commc'ns Inc. Consol. S'holder Litig.*, No. 2017-0486-SG, 2023 WL 6399095 (Del. Ch. Oct. 3, 2023) *aff'd* 2025 WL 3467090 (Del. Dec. 3, 2025).

17 *In re Dura Medic Hldgs., Inc. Consol. Litig.*, 333 A.3d 227 (Del. Ch. 2025).

the sellers liable for failure to disclose the loss of two significant customers as well as the full extent of the regulatory reviews. On the issue of damages, Vice Chancellor Laster rejected defendants' assertions that damages based on an EBITDA multiple were only available in cases of "permanent diminution in the value of the business." Rather, the Court held a multiple-based remedy is available when contemplated in the parties' contract, as was the case here, and also where the price was established with a market approach using a multiple, as the plaintiff had proven with evidence at trial.

Earnout Disputes

Disputes concerning post-closing earnouts have continued to come before the Delaware courts and a number of decisions from 2025 provided useful guidance to practitioners on the how the Court will interpret the specific language of these provisions.

Arthur J. Gallagher & Co. v. Agiato reinforced that Delaware courts will adhere rigorously to a contract's earnout mechanics and that buyers will not be permitted to retroactively impose additional conditions that do not appear in the parties' contract.[18] *Agiato* involved a post-closing earnout dispute arising from an asset purchase agreement governing Gallagher's 2022 acquisition of two lending-related businesses. The earnout payment at issue was tied to the businesses achieving certain annual revenue thresholds over a four-year period post-closing, the first of which the parties agreed had been met. The buyer nevertheless withheld the first year earnout payment on the grounds that the sellers had breached other obligations on which the earnout was conditioned. The Court of Chancery rejected that reasoning and enforced the plain text of the earnout provision, which it held contained no express conditions precedent beyond achieving the revenue threshold. The Court also rejected the buyer's argument that customary provisions granting the buyer discretion to operate the businesses for its benefit imposed any conditions on the sellers' entitlement to the earnout if the revenue threshold was met. To the extent the buyer had any basis for claims against the sellers for violating any provisions of the agreement, those claims would provide it grounds to seek indemnification, not withhold the earnout.

In our 2024 year-end update, we previously noted the Court of Chancery's ruling in ***Shareholder Representative Services LLC v. Alexion Pharmaceuticals, Inc***., in which the Court held, after a bench trial, that the buyer (Alexion) had breached its obligation to use "commercially reasonable efforts" to achieve certain regulatory milestones when it terminated the target's drug development program. In June 2025, the Court of Chancery rendered its decision on the issue of damages, awarding the sellers approximately $180.9 million.[19] Vice Chancellor Zurn's decision sets forth a detailed mathematical framework for calculating expectation damages in earnout cases, which seeks to compensate the seller for the lost expected value of each milestone. The Court's damages methodology comprised a number of steps, including determining the probability of achieving each milestone, multiplying the full amount of each milestone payment by its corresponding probability, and discounting the resulting amounts to present value at the time of breach. The Court's detailed, methodical damages analysis provides useful

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18 *Arthur J. Gallagher & Co. v. Agiato*, No. 2024-0494-LWW, 2025 WL 2169455 (Del. Ch. July 31, 2025).

19 *S'holder Representative Servs. LLC v. Alexion Pharms. Inc*, 341 A.3d 513 (Del. Ch. 2025).

guidance for both buyers and sellers to consider as they negotiate the structure and milestones of an earnout provision.

Contested Governance: Enhanced Scrutiny and Disclosure-Oriented Bylaws

Vejseli v. Duffy arose from an expedited proxy-contest fight at Ionic Digital, a digital currency mining entity.[20] Stockholder plaintiffs alleged that Ionic Digital's board breached its fiduciary duties by adopting a resolution to reduce the size of the board on the eve of a proxy contest to elect multiple new directors. Plaintiffs also challenged the board's rejection of their director nomination notice under the corporation's advance-notice bylaw. Following a two-day expedited trial, the Court of Chancery applied *Unocal's* enhanced scrutiny test and invalidated the board reduction resolution as an inequitable defensive measure. In reaching that conclusion, the Court detailed the substantial evidence at trial showing that the board's decision to reduce its size was not adopted on a "clear day," but rather "in the face of a mounting proxy contest," and the Court noted the lack of any contemporaneous record supporting the "shifting explanations" offered by defendants in the litigation. As a result, the Court reopened the nomination window and ordered the company and its board to make corrective disclosures given that the timing and effect of the board size reduction suggested entrenchment rather than any valid corporate purpose. However, the Court upheld the board's rejection of plaintiffs' director nomination because it did not comply with the informational requirements of the company's advance-notice bylaw. The decision underscores that structural changes impeding the stockholder franchise will be subject to searching review and potential injunctive relief absent a valid, non-pretextual and documented corporate purpose, while disclosure-oriented advance-notice bylaws remain enforceable so long as they are applied even-handedly.

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[20] *Vejseli v. Duffy*, No. 2025-0232-BWD, 2025 WL 1452842 (Del. Ch. May 21, 2025).

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