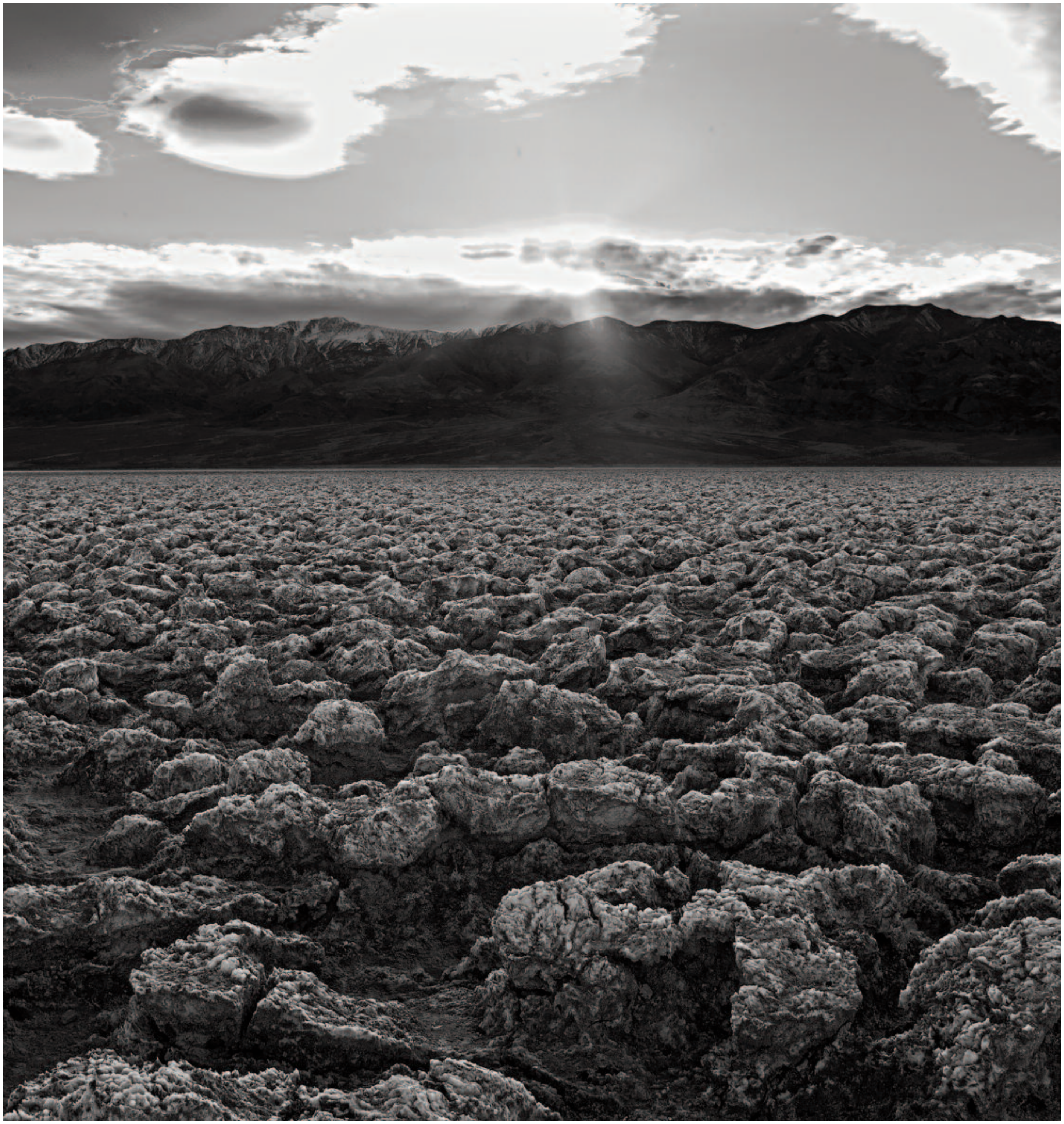
TEXAS BUSINESS LITIGATION JOURNAL



Business Torts and Fiduciary Duty Law

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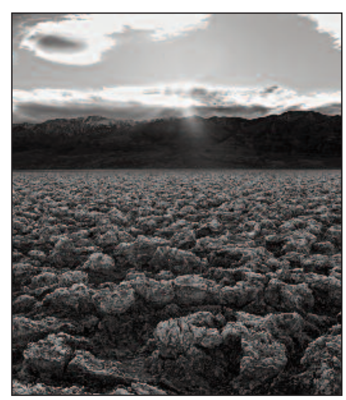

COVER: "Devil's Golf Course, Death Valley California." Photograph by Larry Gustafson, Dallas.

Publication Layout - State Bar of Texas Graphics Department

▪ FROM THE SECTION CHAIR ▪

Dear Section Members:

It is once again my privilege to introduce this latest edition of the *Journal*. Mike Ferrill has put together another edition of the *Journal* that will provide you with valuable news and insight into a number of topics of interest to antitrust and business litigators. Thanks go to Bill Katz and Cleveland Burke for their piece on business torts and Todd Murray for tackling the subject of fiduciary duty under Delaware law. And we are always indebted to Larry Gustafson for yet another amazing cover photograph.

In addition to the *Journal*, the section has a number of ongoing activities. In particular, we will present a timely and interesting program regarding foreign discovery at the State Bar annual meeting. This program will address the challenges U.S. litigants (particularly multinational corporations) face in obtaining foreign discovery for use in U.S. proceedings. Data privacy rules and blocking statutes may prevent the discovery sought, but U.S. courts may nonetheless enforce U.S. discovery obligations. The responding party may find itself in the unenviable position of choosing which set of laws to comply with and which set to possibly violate. The program features views from the bench, counsel experienced in dealing with these issues in transnational matters, and data collection experts who will identify and discuss the issues and provide practical advice on how to minimize the risks involved. Panellists include U.S. District Judge Lee Yeakel of the Western District of Texas, Juan M. Alcala and Danielle S. Fitzpatrick from King & Spalding, and Tom Matzen and Jim Vaughn from Intelligent Discovery Solutions.

In addition, we will present this year's Distinguished Counselor award at the annual meeting. The recipient will be J. Burleson Smith. Burley is past chair of the section (1978-79) and a name partner of the Cox Smith law firm. He will rightfully join an august body of past recipients of this award.

As my term as chair of the Section of Antitrust and Business Litigation is nearly at an end, this will be my last opportunity to write in this space and I need to thank a few folks whose assistance allowed me to survive this year without falling flat on my face. Wallis Hampton, my successor, and James Berglund, our secretary-treasurer, both made my job much easier. Leslie Hyman, my immediate predecessor, was also tremendous in her support. As past chair, she could easily have faded into the woodwork, but she has remained an active member of the Council and always been available to help me. Finally, to the folks at the State Bar, thank you for all that you do. Every member of the Bar staff has been tremendously supportive. In particular, I want to thank Tracy Nuckols, Lily Hewgley, and Michelle Schweitzer for all that they do for the Section.

It has been a privilege. Best regards,

Michael D. Rubenstein
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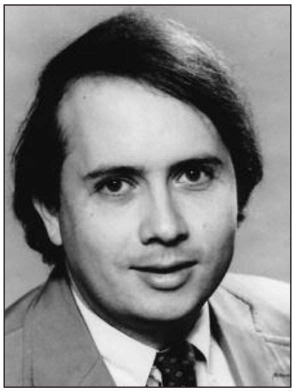

This issue of the Journal features the annual survey articles on business torts and Delaware fiduciary duty law.

As always, we solicit written contributions to the Journal. We currently have commitments for annual survey articles on antitrust, securities, RICO, business torts, arbitration, class actions, D&O and expert witness developments. If you have an idea for a survey article in another area of business litigation, or an article focusing on a particular aspect of or development in the law (even if it falls within one of the broad survey categories), contact me at 112 E. Pecan, Suite 1800, San Antonio, Texas 78205 (210) 554-5282; (210) 226-8395 (fax), amferril@coxsmith.com.

A. Michael Ferrill
Editor

Business Torts Update – Spring 2011

By William M. Katz, Jr. and Cleveland R. Burke[1]

William M. Katz, Jr.

Cleveland R. Burke

This survey examines significant business torts decisions by the Texas courts for the period from March 2010 through April 2011. "Business torts" obviously covers a broad spectrum, and in narrowing the survey, we included cases that either decided new issues or examined issues of particular interest to business litigators. During the survey period, Texas courts addressed: (1) contractual language as a bar to claims for fraudulent inducement; (2) attorneys as limited-purpose public figures in defamation suits; (3) legal sufficiency of evidence supporting lost-profit damages; (4) tortious interference with terminable-at-will contracts; and (5) investors' "holder claims" against auditors.

Merger Clause Language in a Lease Contract as a Bar to Fraudulent Inducement Claims

In *Italian Cowboy Partners, Ltd. v. Prudential Insurance Company of America*,[2] the Texas Supreme Court held that generic merger clause language in a commercial lease did not prohibit the lessee from claiming fraudulent inducement based on the lessor's representations regarding the condition of the property.

Jane and Francesco Secchi leased a commercial space owned by Prudential Insurance Company to operate their restaurant, Italian Cowboy. During lease negotiations, the property manager overseeing the premises represented that the building was practically new and had no problems. The Secchis signed the lease, which contained: (1) a provision in which the Secchis acknowledged that neither Prudential nor its agents "have made any representations or promises with respect to the [leased premises] except as expressly set forth herein"; and (2) a clause providing that the lease constituted the "entire agreement" of the parties.

Upon moving in, the Secchis discovered a foul odor emanating from the sewer lines. They informed the property manager, who disclaimed any prior knowledge of the problem but authorized the Secchis' remediation efforts. Unable to eradicate the smell, the Secchis later learned that the previous tenant had been plagued with the same issue. The previous tenant told the Secchis that the property manager knew of the odor and had visited the building on several occasions to investigate.

The Secchis closed the restaurant, stopped paying rent, and sued Prudential and the property management company for fraudulent inducement, fraudulent misrepresentation, negligent misrepresentation, breach of the implied warranty of suitability, and constructive eviction. Prudential counterclaimed for breach of contract. The trial court found for the Secchis on all counts, awarding damages and rescission of the lease. The court of appeals reversed and rendered a take-nothing judgment on the Secchis' claims, and it rendered judgment for Prudential on its counterclaim.

On appeal, the Supreme Court considered whether the lease disclaimed reliance on the representations made by Prudential or its agents. At the outset, the court cited the longstanding rule in Texas that a party may not circumvent the public policy against enforcing promises obtained by deceit "by means of contractual devices." The court acknowledged an exception to this rule, which applies when sophisticated parties represented by counsel disclaim reliance as to a specific matter in dispute. If the disclaimer is clear and unequivocal, it may be enforced, thereby negating the element of reliance in a suit for fraudulent inducement.

Turning to the language of the lease, the court held that the provisions at issue amounted to a standard merger clause, which did not have the effect of disclaiming reliance on the property manager's representations. The court distinguished the lease, which disclaimed the *fact* that other representations were made, with contracts explicitly disclaiming *reliance* on outside representations. Thus, the court concluded that the lease's "generic merger clause language" was insufficiently clear and unequivocal in disclaiming reliance to preclude the Secchis' claim for fraudulent inducement.

After determining that the property manager's representations were actionable as a matter of law, the court remanded the Secchis' fraud claims to the court of appeals for consideration of Prudential's arguments regarding factual sufficiency of the evidence. The court also reversed and rendered in favor of the Secchis their claim for breach of the implied warranty of suitability, because Prudential did not challenge the factual sufficiency of the evidence on this issue in the court of appeals. Additionally, the court held that the Secchis did not ratify the lease by staying on for a short time after discovering the odor, and it affirmed rescission of the contract as a proper remedy for breach of the implied warranty of suitability. Finally, the court upheld the trial court's damages award, which included compensation for the interest that Italian Cowboy's investors would have earned had they invested elsewhere.

Attorneys as Limited-Purpose Public Figures in Defamation Suits

In *ZYZY Corporation v. Hernandez*,[3] the San Antonio Court of Appeals held that an attorney is not a limited-purpose public figure simply because he or she represents a client in a high-profile case.

ZYZY Corporation published several newspapers in the same county where Gloria Hernandez served as an attorney. Hernandez, who represented a faction of the Kickapoo Traditional Tribe of Texas, was called to testify before the Kickapoo's Tribal District Court in a dispute over the tribe's leadership. When asked how much of her practice was devoted to work for the Kickapoo, she responded that she made "about ten percent of my income from the tribe."

The next day, one of ZYZY's newspapers published a front-page story with the following sub-headline: "Gloria Hernandez admits she's skimming 10% of casino profits off the top." The article reported Hernandez as testifying that she took ten percent of the profits from the Kickapoo's casino in exchange for her legal services. The newspaper went on to accuse Hernandez of violating National Indian Gaming Commission rules and regulations and of defrauding the federal government.

Hernandez filed a libel suit against ZYZY. In turn, ZYZY moved for summary judgment, arguing in part that the evidence negated actual malice as a matter of law. The trial court denied the motion, and ZYZY filed an interlocutory appeal under TEX. CIV. PRAC. & REM. CODE § 51.014(a)(6), which allows a media defendant to immediately appeal the denial of a motion for summary judgment.

To recover actual damages from a media defendant for defamation, a private figure need only show that the defendant negligently published the defamatory statement. In contrast, a general or limited-purpose public figure must establish by clear and convincing evidence that the defendant published the statement with actual malice. General-purpose public figures are celebrities or otherwise famous individuals; limited-purpose public figures do not enjoy general notoriety, but rather thrust themselves into the spotlight surrounding a particular public controversy.

The appellate court first considered whether a lawyer representing a client in a highly publicized controversy might, simply by virtue of his or her legal representation, become a limited-purpose public figure. Citing decisions from the United States Supreme Court and the Wyoming Supreme Court, the court concluded that, so long as an attorney does not seek out media attention to influence the outcome of the case, his or her representation alone does not make him or her a limited-purpose public figure. Thus, Hernandez was not a limited-purpose public figure simply because of ZYZY's own extensive reporting of the case.

The court then rejected ZYZY's claim that Hernandez had thrust herself into the public controversy over the Kickapoo's leadership. Although Hernandez appeared frequently in ZYZY's newspaper articles, she did so in response to press inquiries regarding tribal legal matters, and the court found no evidence that she sought out media attention to influence public opinion in favor of her client. And although the tribe reached out to numerous government officials in pursuing their cause, the court found no evidence that Hernandez herself initiated these contacts.

Accordingly, the San Antonio Court of Appeals concluded that ZYZY failed to prove as a matter of law that Hernandez was a limited-purpose public figure, and it affirmed the trial court's denial of ZYZY's motion for summary judgment seeking to negate actual malice as a matter of law.

Legal Sufficiency of Evidence Supporting Lost Profit Damages

In two recent decisions, the Texas Supreme Court and the First Court of Appeals explored the legal sufficiency of evidence in support of claims for lost profit damages. In *ERI Consulting Engineers, Inc. v. Swinnea*,[4] the Supreme Court determined that the plaintiff had shown some lost profits, but not in the amount awarded by the trial court. Relying on *ERI Consulting*, the First Court of Appeals in *Glattly v. Air Starter Components, Inc*.[5] found no reliable evidence in support of lost profits and therefore reversed and rendered the award entirely.

In *ERI Consulting*, two partners named Swinnea and Snodgrass owned ERI Consulting Engineers, Inc., a company that managed asbestos abatement projects, which they performed through independent contractors. Snodgrass and ERI agreed to purchase Swinnea's interest in ERI and to keep him on as an employee. Unbeknownst to Snodgrass and ERI, Swinnea and a coworker, acting through their wives, had created an asbestos abatement company called Air Quality Associates (AQA).[6] AQA bid on and won numerous ERI projects.

When one of AQA's competitors, Merico, learned of AQA's "insider" connection to ERI employees, Merico refused to work for ERI so long as it continued to accept bids from AQA.

Swinnea and his wife eventually sold their interest in AQA and formed yet another asbestos abatement company named Brady Environmental. Unlike AQA, Brady used a method of abatement that did not require consultants such as ERI. Thus, while still employed by ERI, Swinnea began encouraging ERI's clients to use Brady's method, effectively eliminating the need for ERI's services.

Eventually, Snodgrass and ERI fired Swinnea and sued him and his companies for fraud, breach of contract, breach of fiduciary duty, and conspiracy. Following a bench trial, the trial court rendered judgment for ERI and Snodgrass. Among other damages, the court awarded Snodgrass the money that Swinnea earned from the sale of his interest in ERI plus $300,000 in lost profits resulting from the termination of ERI's business relationship with Merico. The court of appeals reversed and rendered judgment in favor of Swinnea, finding the evidence legally insufficient to support the damage awards.

As a matter of first impression, the Supreme Court first considered whether the money Snodgrass and ERI paid Swinnea for his interest in ERI was subject to equitable forfeiture due to Swinnea's breach of fiduciary duty. The court concluded that where the actions constituting a breach of fiduciary duty also amount to fraudulent inducement, the consideration received by the fiduciary is recoverable in equity, regardless of whether actual damages are proven. The court then listed several factors for courts to consider in determining whether forfeiture is appropriate, and it directed the court of appeals to remand that portion of the case to the trial court for further proceedings.

Next, the court addressed whether Snodgrass presented legally sufficient evidence in support of the trial court's award of lost profit damages. Citing the standard it set forth in *Holt Atherton Industries, Inc. v. Heine*,[7] the court declared that the amount of lost profits must be shown "by competent evidence with reasonable certainty," which requires the presentation of "objective facts, figures, or data." In support of its claim, ERI presented evidence of the profit margin it earned from Merico's work and invoices contrasting ERI's revenues from before and after the demise of ERI's relationship with Merico. The court approved of ERI's method but, when applying it to the figures provided, found that the resulting amount of lost profits was far below the $300,000 awarded by the trial court. Therefore, reversing the court of appeals, the court affirmed the trial court's decision to award some lost profits, but it remanded the case for possible remittitur.

In *Glattly*, the First Court of Appeals considered whether the evidence was legally sufficient to support an award of lost profits resulting from the defendants' tortious interference and misappropriation of trade secrets. The dispute in *Glattly* arose when two employees left Air Starter Components, Inc., which manufactured and repaired air starters, to work for a competitor named Specialized Components, Inc. One employee, a machinist, brought with him schematics used to manufacture and repair air starters. Another, a salesman, took a list of Air Starter's customers.

When Air Starter began losing business, it sued Specialized and its two former employees for misappropriation of trade secrets, statutory theft, conversion, tortious interference with contract, and breach of the employees' non-compete agreements. A jury found the defendants liable for misappropriation of trade secrets and tortious interference with contract, and awarded lost profit damages for both.

Specialized and its employees argued on appeal that there was legally insufficient evidence to support the jury's award of lost profit damages. At trial, Air Starter presented the testimony of a certified public accountant to establish its lost profits. The court attacked several unproven assumptions underlying the CPA's calculations: that Air Starter's schematics and customer list afforded Specialized an unfair advantage; that every sale made by Specialized would have been made by Air Starter; and that the average profit margin for Air Starter's entire operation, rather than for a particular product, customer, or contract, would have been realized on the business allegedly lost to Specialized.

The court noted that some of the purported lost profits stemmed from products that Air Starter did not even manufacture, and some of the customers alleged to have been lured away by Specialized had left on their own accord due Air Starter's poor performance. Further, the CPA had never examined the stolen schematics and could not testify which, if any, of Specialized's products were based on those drawings. Finally, the CPA was unable to distinguish between damages attributable to the stolen schematics and those arising from the tortious interference.

The court compared the record before it to the evidence found to be legally sufficient by the Supreme Court in *ERI Consulting*. Unlike ERI, Air Starter presented no invoices and no evidence of specific lost contracts, customers, or the profit margins associated with those particular contracts or customers. Instead, Air Starter relied on calculations and figures that the court found to be speculative and without evidentiary support. Therefore, the *Glattly* court reversed and rendered the award of lost profits in its entirety.

Tortious Interference with Terminable-at-Will Contracts

In *Faucette v. Chantos*,[8] the Fourteenth Court of Appeals held that the alleged interference with a terminable-at-will contract presents a claim for tortious interference with prospective business relations, not tortious interference with an existing contract.

Like *Glattly, Faucette* involved an employer's tortuous interference claims against its former employees. Sarco of Texas sold plumbing, heating, and AC supplies under representative contracts with several manufacturers. Two of its employees purchased stock in the company with an option to buy out the founders if certain conditions were met. The dispute arose when the employees, after electing to exercise that option, instead chose to resign and start their own company called

Tri-Rep Sales, Inc. Before leaving, the employees approached several manufacturers under contract with Sarco and signaled their intent to start a competing business. Within days of their departure, two of those manufacturers, Elkay and Vanguard, gave notice that they were terminating their contracts with Sarco. Soon thereafter, Elkay and Vanguard signed representation agreements with TriRep.

Sarco and its principal shareholder sued for breach of contract and tortious interference with existing customer contracts. The jury found for Sarco on both causes of action, but the trial court entered judgment notwithstanding the verdict on the tortious interference claim.

After affirming the breach of contract award, the Fourteenth Court of Appeals considered whether the trial court erred in rendering JNOV on Sarco's tortious interference claim. The parties disputed whether Sarco's claim was for interference with existing or prospective contracts. The two causes of action have one major difference: unlike a plaintiff asserting interference with an existing contract, a plaintiff claiming interference with a prospective contract must show that the defendant's acts of interference are actionable as an independent tort.

Elkay's and Vanguard's agreements with Sarco were terminable at will, allowing termination after 30 days' notice. The Texas Supreme Court has advised that although a third party is prohibited from tortiously interfering with a terminable at will contract, inducing a contracting party to exercise its right to terminate does not necessarily constitute tortious interference. It was undisputed that both Elkay and Vanguard provided the required 30 days' notice, and Sarco did not allege or prove that either breached its contract.

Citing the Restatement (Second) of Torts and precedent from its own court and the Fort Worth Court of Appeals, the court concluded that tortious interference with prospective business relations includes tortious interference with continuing business relationships. As such, Sarco's claim was properly construed as one for tortious interference with prospective business relations. And because Sarco failed to show that its former employees engaged in independently tortious or unlawful acts, the court affirmed the trial court's rendition of JNOV.

Investors' "Holder Claims" against Auditors

In *Grant Thornton LLP v. Prospect High Income Fund, ML CBO IV*,[9] the Texas Supreme Court held that: (1) a company's outside auditors are not liable for failing to provide accurate financial reports to unknown persons that may read and rely on those reports; and (2) to the extent that "holder claims" are even viable in Texas, they require the investor to show direct communication with the auditor. A holder claim is based on an investor's assertion that it refrained from taking action with respect to an investment—and thereby incurred greater losses than necessary—due to the defendant's wrongful acts or misrepresentations.

The investors in *Grant* were several bond and hedge funds (the Funds) that purchased high-risk, high-yield "junk bonds" in a company named Epic Resorts, LLC. Before putting the bonds on the open market, Epic registered the bonds with the Securities and Exchange Commission and entered into an escrow and disbursement agreement (the "Agreement") with a trust company responsible for disbursing interest payments to the bondholders. The Agreement required Epic to maintain a minimum amount of funds in an escrow account with the trust company and to file regular audited financial statements with the SEC. Finally, Epic had to obtain a "negative assurance" statement from an auditor stating that it was in compliance with the Agreement.

After the bond issuance, Epic hired Grant Thornton, LLP to audit its financial statements. Grant soon discovered that Epic had opened a cash management account instead of an escrow account, and in any case, the funds in the account did not meet the minimum amount required under the Agreement. Grant also later learned that Epic had lost an essential source of funding for the bonds. Nevertheless, Grant continued to issue reports showing that there were sufficient funds in the trust account and certifying that Epic was in compliance with the Agreement. Meanwhile, the Funds purchased more Epic bonds.

Eventually, Epic proved unable to make interest payments to the bondholders. The Funds forced Epic into bankruptcy and sued Grant for fraud, negligent misrepresentation, negligence, third-party beneficiary breach of contract, conspiracy to commit fraud, and aiding and abetting fraud. The trial court granted summary judgment for Grant on all claims. The court of appeals affirmed in part but reversed on the negligent misrepresentation, fraud, conspiracy, and aiding and abetting claims.

On appeal, Grant asserted that there was no evidence of causation or justifiable reliance and that, as a matter of law, an auditor's liability for misrepresentations does not run to entities that the auditor does not know or intend to influence when it issues a financial report. The Funds maintained that Grant's actions led them to buy more bonds, to forgo investigating the balance in the escrow account, and to refrain from selling their bonds or forcing Epic into bankruptcy sooner.

The court began by surveying the standards employed by various state courts and the Restatement (Second) of Torts when holding an auditor liable to third parties for negligent misrepresentation. The court reaffirmed Texas' commitment to the Restatement approach, which requires that the auditor's misrepresentation be made to a known party for a known purpose. Applying this standard, the court rejected the assertion by one of the Funds that, because it was part of a small group of investors willing to purchase junk bonds like Epic's, it fell within the limited class of persons protected under the Restatement. For similar reasons, the court refused to find the prospective investor within Grant's scope of liability for fraud. The court also determined that none of the Funds had shown justifiable reliance in support of their claims for fraud and negligent misrepresentation.

Finally, the court turned to the Funds' "holder claims," which presented a matter of first impression. The court began by observing that the United States Supreme Court has refused to recognize holder claims under federal securities law, and the states are divided on the issue with respect to state law. In those states that do recognize holder claims, however, courts generally impose heightened pleading standards. In some states, this includes requiring the plaintiff to prove direct communication with the auditor. The court then reviewed the only two reported Texas decisions to address this issue, one by an intermediate appellate court and the other by a federal district court, both of which stressed the requirement of direct communication between the investor and the auditor.[10]

Assuming without deciding that holder claims are cognizable in Texas, the court concluded that, even if such claims do exist, the plaintiff must show some direct communication with the auditor. Finding none in the case at bar, the court declined to pass judgment on the viability of holder claims in Texas. Instead, the court held that Grant was entitled to judgment on the Funds' holder claims as a matter of law.

ENDNOTES

1 Mr. Katz is a partner in the Dallas office and Mr. Burke is an associate in the Austin office of Thompson & Knight LLP.

2 --- S.W.3d ----, No. 08-0989, 2011 WL 1445950 (Tex. Apr. 15, 2011).

3 --- S.W.3d ----, No. 04-10-00311-CV, 2011 WL 228101 (Tex. App.—San Antonio, Jan. 26, 2011, no pet. h.).

4 318 S.W.3d 867 (Tex. May 7, 2010).

5 --- S.W.3d ----, No. 01-09-00098-CV, 2010 WL 3928480 (Tex. App.—Houston [1st Dist.] Oct. 7, 2010, no pet. h.).

6 The trial court later found that the ERI employees' placement of their wives as principals of AQA was a sham constituting fraud.

7 835 S.W.2d 80 (Tex. 1992).

8 322 S.W.3d 901 (Tex. App.—Houston [14th Dist.] Sept. 23, 2010, no pet.).

9 314 S.W.3d 913 (Tex. July 2, 2010).

10 *See Shirvanian v. DeFrates*, No. 14-02-00447-CV, 2004 WL 35987 (Tex. App.—Houston [14th Dist.] Jan. 8, 2004), *opinion withdrawn and substituted by Shirvanian v. DeFrates*, 161 S.W.3d 102 (Tex. App.—Houston [14th Dist.] 2004, pet. denied); *Newby v. Enron Corp. (In re Enron Corp. Sec., Derivative & "ERISA" Litig.)*, No. MDL-1446, 2007 WL 789141 (S.D. Tex. Mar. 12, 2007).

2010 Update of Delaware Fiduciary Duty Law

By Todd A. Murray[1]

Among the most interesting decisions issued last year were two involving limited liability companies, *CML V, LLC v. Bax* and *In re Atlas Energy Resources, LLC*, both summarized below. Both litigation and transactional counsel would be well-advised to review these decisions and keep their holdings in mind.

CML V, LLC v. Bax[2]

This was a derivative action by a creditor against members of the board of managers of insolvent limited liability company JetDirect Aviation Holdings, LLC. The defendants filed motion to dismiss, asserting that the creditor lacked standing. Vice Chancellor Laster granted the motion.

JetDirect's aggressive expansion had left it with a highly-leveraged balance sheet and volatile cash flows. In 2006, JetDirect's board of managers became aware of serious deficiencies in its accounting system. A year later, JetDirect's auditor, Ernst & Young LLP ("E&Y") declined to complete its audit because E&Y concluded that it could not rely on JetDirect's internal controls. The court noted that JetDirect's internal control deficiencies had been exacerbated when senior management attempted to consolidate the Company's billing operations. The project was "botched."

In April 2007, CML V, LLC ("CML") loaned JetDirect $25,743,912, an amount later increased to $34,243,912. Despite lacking current information about JetDirect's financial condition, the Company's board in late 2007 approved four major acquisitions. In June 2007, JetDirect defaulted on its loan obligations to CML. By January 2008, JetDirect was insolvent. In late 2008, JetDirect's managers began liquidating some of JetDirect's holdings. According to CML, certain managers negotiated sales of JetDirect assets to entities they personally controlled, and the JetDirect board approved the interested sales without adequately reviewing their fairness. This lawsuit followed, and the managers moved to dismiss, asserting that the language of the Delaware LLC Act did not give creditors standing to bring derivative claims.[3]

CML argued that the same equitable considerations that entitle creditors of a corporation to sue derivatively also allow creditors to sue derivatively on behalf of an insolvent LLC. "[T]he creditors of an insolvent corporation have standing to maintain derivative claims against directors on behalf of the corporation for breaches of fiduciary duties."[4] When a corporation is insolvent, the creditors become "the principal constituency injured by any fiduciary breaches that diminish the firm's value."[5] Under these circumstances, "equitable considerations give creditors standing to pursue derivative claims against the directors of an insolvent corporation."[6]

The Chancery Court first looked to the plain language of the Delaware LLC Act.[7] That Act creates a statutory right to bring a derivative action. Section 18-1001, entitled "Right to Bring Action," states: "A member or an assignee of a limited liability company interest may bring an action in the Court of Chancery in the right of a limited liability company to recover a judgment in its favor if managers or members with authority to do so have refused to bring the action or if an effort to cause those managers or members to bring the action is not likely to succeed."[8] The following section, entitled "Proper Plaintiff," provides:

> In a derivative action, the plaintiff must be a member or an assignee of a limited liability company interest at the time of bringing the action and: (1) At the time of the transaction of which the plaintiff complains; or (2) The plaintiff's status as a member or an assignee of a limited liability company interest had devolved upon the plaintiff by operation of law or pursuant to the terms of a limited liability company agreement from a person who was a member or an assignee of a limited liability company interest at the time of the transaction.[9]

The only Delaware treatise to comment directly on how these provisions impacts the rights of creditors states: "Under Sections 18-1001 and 18-1002, [an LLC] creditor is not a proper plaintiff in a derivative suit." The court also noted that the United States District Court for the District of Delaware reached this conclusion when applying the Montana LLC Act, which has a provision comparable to Section 18-1002.[10]

The court next found that the exclusive language of Section 18-1002 contrasted with the "non-exclusive" language of Section 327 of the Delaware General Corporation Law (the "DGCL").[11] Section 327 is the only provision in the DGCL that addresses derivative actions. It provides: "In any derivative suit instituted by a stockholder of a corporation, it shall be averred in the complaint that the plaintiff was a stockholder of the corporation at the time of the transaction of which such stockholder complains or that such stockholder's stock thereafter devolved upon such stockholder by operation of law."[12] The court noted that the Delaware Supreme Court and this Chancery Court have recognized that Section 327 does not create the right to sue derivatively, and it does not say that only stockholders can sue derivatively.

The court noted that, read literally, Section 18-1002 denies derivative standing to creditors. However, it also noted that the universe of authorities favoring the no-standing position consists of (i) a sentence at the end of a footnote in one Delaware treatise,[13] and (ii) an unreported district court decision.[14]

In contrast, the court noted, many commentators have debated vigorously whether an LLC agreement can limit the fiduciary duties that the creditors would invoke. It also noted that two Chancery Court decisions have assumed, implicitly, that a creditor of an insolvent alternative entity could sue derivatively for breach of fiduciary duty.[15]

The court then looked to comparable provisions of the LP Act,[16] noting that the Chancery Court had interpreted the LP Act's derivative standing provisions as exclusive.[17] Then, in 1998, Sections 17-1001 and 17-1002 of the LP Act and Sections 18-1001 and 18-1002 of the LLC Act were amended to authorize assignees of LP or LLC interests to sue derivatively. But those amendments did not mention creditors.

CML argued that a plain reading of Section 18-1002 generated an "absurd" distinction between insolvent corporations, on behalf of which creditors can sue derivatively, and insolvent LLCs, on behalf of which they could not. The court disagreed, holding that CML lacked standing.

In reaching its conclusion, the court noted that creditors generally are presumed to be "capable of protecting themselves through the contractual agreements that govern their relationships with firms," and that "creditors are often protected by strong covenants, liens on assets, and other negotiated contractual protections." To limit creditors to their bargained-for rights and deny them the additional right to sue derivatively on behalf of an insolvent entity comported with the "contractarian environment" created by the LLC Act.[18]

The court also noted that the LLC Act included specific statutory features designed in part with creditors in mind. First, Section 18-101(7) of the Act authorizes an LLC agreement to "provide rights to any person, including a person who is not a party to the [LLC] agreement, to the extent set forth therein." Second, Section 18-1101 enables creditors to expand their available remedies. Third, other provisions of the Act offer creditors the opportunity to secure protection. For example, Section 18-303(b) provides that a member or manager may agree in the LLC agreement "or under another agreement" to be "obligated personally for any or all of the debts, obligations and liability of the limited liability company." Fourth, a creditor of an LLC can protect itself by seeking the appointment of a receiver pursuant to Section 18-805. Fifth, a creditor can enforce a member's obligation to make a contribution to the LLC pursuant to Section 18-502(b). Thus, the court reasoned, if a creditor extends credit to an LLC in reliance on a member's obligation to make a contribution to the LLC or to return a distribution in violation of the LLC Act, then the creditor may enforce the obligation to the extent of the creditor's reasonable reliance.

In re Atlas Energy Resources, LLC, Unitholder Litigation[19]

A publicly-traded Delaware limited liability company, Atlas Energy Resources, LLC ("Atlas Energy"), negotiated a merger with its controlling unitholder, Atlas America, Inc. ("Atlas America"), a widely-held Delaware corporation. The unitholders of Atlas Energy sued Atlas America and the board of managers of Atlas Energy. The defendants moved to dismiss. Vice Chancellor Noble allowed the claim to proceed but denied the plaintiffs' request to enjoin the merger.

Atlas America created Atlas Energy in 2006 to own and operate the natural gas and oil assets and the investment partnership assets management business of Atlas America, including natural gas production in the Marcellus Shale, a gas-rich formation in parts of the Appalachian Mountains. Atlas America has been in the oil and gas industry since 1968. Atlas Energy, which owns over 7,600 oil and gas wells in Pennsylvania, Ohio and Tennessee, and operates drilling properties in northern Michigan, went public at a price of $21 per unit.

In February 2009, Atlas America, without input from Atlas Energy's Board, developed five strategic alternatives for Atlas Energy. Notes taken around this time indicated:

> So we've just begun an internal investigation appointing a committee that will investigate whether we should stay an LLC (no) where our job is to hand out money, become a C-corp where we don't hand out money, or merge the company with Atlass [sic] America (yes)....

Soon thereafter, the Atlas Energy board formed a special committee, comprised of three directors, to consider formally Atlas Energy's options. Among the candidates for financial advisor was KeyBanc Capital Markets, which had previously stated that it believed Energy was "unique among Production MLPs in that its asset base should warrant a premium valuation ... due to the emergence of the Marcellus Shale." The special committee engaged counsel, and UBS as its financial advisor. Atlas America made it known that it was not interested in either selling its assets or converting Atlas Energy into a publicly traded corporation. Counsel and UBS informed the special committee of Atlas America's position. The special committee then concluded that a merger with Atlas America was the proper alternative.[20]

On April 19, Atlas America's counsel presented the special committee with an outline of possible terms for a taxable merger transaction, in which Atlas Energy's public unitholders would receive shares of Atlas America in exchange for their units. Atlas America's financial advisors proposed an exchange ratio of 0.96 shares of Atlas America for each outstanding unit, representing more than a 13% discount. The special committee eventually agreed to an exchange ratio of 1.16 shares of Atlas America per share of Atlas Energy, a modest 0.3% premium. The merger agreement also provided that Atlas Energy's cash distributions would cease during the pendency of the merger, beginning with the distribution that was to have been announced on April 27. The merger required approval by a majority of all Atlas Energy common unitholders, a majority of Atlas America's shareholders, and 51% of Atlas Energy's creditors. This was achieved, and the merger was consummated on September 29, 2009.

The plaintiffs argued that the merger undervalued Atlas Energy's units because it failed to either include a premium for the elimination of Atlas Energy's cash distributions or account fully for the value of the company's Marcellus Shale assets. And with regard to process, the plaintiffs accused Atlas America and certain individual defendants of dictating the terms of the merger. The plaintiffs contended that the special committee violated its duties to Atlas Energy's minority unitholders and otherwise failed to negotiate in good faith. Finally, they argued that the defendants breached their fiduciary duties by approving the merger based on a less than complete investigation of its terms.[21]

The court cited *Kelly v. Blum*[22] for its holding that, "in the absence of provisions in the LLC agreement explicitly disclaiming the applicability of default principles of fiduciary duty, controlling members in a manager-managed LLC owe minority members the traditional fiduciary duties that controlling shareholders owe minority shareholders." Thus, the court reasoned, absent any provision of the LLC Agreement explicitly disclaiming its fiduciary duties, Atlas America owed the Atlas Energy's minority unitholders traditional fiduciary duties of care and loyalty with regard to the merger.

The court found the defendants' reliance on *Brickell Partners v. Wise*[23] misplaced. Specifically, the limited partnership agreement in *Brickell* explicitly addressed contacts between the general partner and other partners. Atlas Energy's LLC Agreement, in contrast, did not mention Energy's unitholders, controlling or otherwise, at all.

The court also cited *Kahn v. Lynch*[24] in which the Delaware Supreme Court held that a negotiated merger between a corporation and its controlling shareholder must be evaluated under entire fairness, regardless of any safeguards the deal included to protect the minority's interest. Following *Kahn* and its more recent progeny, the court held that it must "review the transaction under entire fairness to assure that the parties are assiduous in fulfilling their fiduciary duties."[25]

At the outset of its entire fairness review, the court observed that a transaction that must be reviewed under entire fairness "normally will preclude dismissal of a complaint on a Rule 12(b)(6) motion to dismiss." Predictably, this statement did not bode well for Atlas America.

The plaintiffs had alleged that UBS, which was ultimately selected as the committee's financial advisor, had charted "the then current exchange ratio of Energy units versus America stock with a 15% and 30% premium at 1.27x and 1.44x, respectively." Thus, the court concluded that, taken together, the plaintiffs' allegations as to price and process, which the court must take as true for purposes of the defendants' motion, adequately suggested that the merger was not entirely fair to Atlas Energy's public unitholders. Thus, it denied the defendants' motion to dismiss as to claims for breach of fiduciary duty by Atlas America.

The court next addressed claims against the individual defendants. Its analysis began by noting that the LLC Agreement "unambiguously eliminates the traditional fiduciary duties of Energy's directors and officers. Thus, the only duties owed by the Individual Defendants are those set forth elsewhere in the LLC Agreement or imposed by the implied covenant of good faith and fair dealing."[26]

The court then noted that Section 7.9(b) of the LLC Agreement contractually imposed on Atlas Energy's officers and directors "a fiduciary duty to act in good faith in all cases unless a different provision of the LLC Agreement specifically imposes a different duty." For the purposes of the LLC Agreement, however, good faith meant a "subjective belief" by the actor that an action was in the best interests of Atlas Energy. The plaintiffs had argued that this limited and subjective definition of good faith was unenforceable. The court disagreed, finding that, when the parties have agreed to eliminate fiduciary duties, they may not invoke an implied covenant as a "back door through which such duties may be reimposed."

The plaintiffs also argued for application of Section 12 of the LLC Agreement, which had imposed the implied covenant of good faith and fair dealing when directors acted to decline a merger. The court rejected this view, holding that the plaintiffs must present allegations that the individual defendants subjectively believed that the merger with Atlas America was not in the best interests of Atlas Energy and its unitholders. The court then held that the complaint had not done so, and granted the motion to dismiss the claims against the individual defendants.

In re CNX Gas Corporation Shareholders Litigation[27]

In this lawsuit, representatives of a putative class of minority stockholders challenged a controlling stockholder freeze-out structured as a first-step tender offer to be followed by second-step short-form merger. The plaintiffs moved to enjoin the merger. The court found that the tender offer failed under the entire fairness standard, but did not enjoin the merger.

In this opinion, Vice Chancellor Laster applied the unified standard for reviewing controlling stockholder freeze-outs described in *In re Cox Communications, Inc. Shareholders Litigation*.[28] Under that standard, the business judgment rule applies when a freeze-out is conditioned on both the affirmative recommendation of a special committee and the approval of a majority of the unaffiliated stockholders. However, in this instance, the special committee had not recommended in favor of the tender offer. Thus, the court reviewed the transaction at issue under the entire fairness standard.

Defendant CONSOL Energy, Inc., a Delaware corporation, is the largest producer of high-Btu bituminous coal in the United States. The court noted that CONSOL also is a leader in the production of coalbed methane gas.

In June 2005, CONSOL formed defendant CNX Gas Corporation, also a Delaware corporation, to conduct CONSOL's natural gas operations. As of April 26, 2010, CONSOL, its officers and directors, and the officers and directors of CNX Gas owned an aggregate ownership stake of approximately 83.5%. The remaining shares of CNX Gas were held principally by institutional investors, with the top twenty-five institutions holding over 87% of the public float. The largest minority stockholder of CNX Gas was T. Rowe Price Associates, Inc.

In January 2008, CONSOL proposed to acquire the public shares of CNX Gas through an exchange offer. On January 29, 2008, CONSOL publicly announced that it would exchange 0.4425 shares of CONSOL common stock for each share of CNX Gas. Based on the pre-announcement price of CONSOL common stock, the value of the consideration was $33.70. Various institutional investors, including T. Rowe Price, reacted negatively. Although the board of CNX Gas formed a special committee to evaluate the exchange offer, CONSOL withdrew its proposal without commencing an exchange offer.

In January 2009, CONSOL decided to revamp the corporate governance structure of CNX Gas, eliminating all board committees other than the audit committee. The size of the board was then decreased from eight to five, and one of the five then resigned.[29]

In September 2009, CONSOL approached T. Rowe Price about acquiring its CNX Gas shares. On March 15, 2010, CONSOL announced that it had agreed to acquire the gas assets of Dominion Resources, Inc., a CNX Gas competitor, for approximately $3.475 billion (the "Dominion Transaction"). Many of Dominion's assets were located near CNX Gas properties. Under a Master Separation Agreement, CNX Gas had a right of first refusal. But, the CONSOL board determined not to offer the Dominion Transaction to CNX Gas pursuant to the right of first refusal because CNX Gas lacked the financial resources to consummate any such transaction.

The CONSOL board signed off on the transaction with T. Rowe Price on March 20, 2010, CONSOL and T. Rowe Price executed a tender agreement the following day, and CONSOL then issued a press release announcing the tender agreement and the contemplated tender offer. The tender agreement provided that, subject to certain conditions, CONSOL would commence a tender offer no later than May 5 at a price of no less than $38.25 per share in cash. The tender agreement obligated T. Rowe Price to tender its shares no later than 10 business days after the commencement of the tender offer, and to not withdraw its shares.

On April 28, 2010, CONSOL commenced a tender offer to acquire the outstanding public shares of CNX Gas at a price of $38.25 per share in cash. The price represented a premium of 45.83% and a 24.19% premium over the closing price of CNX Gas's common stock on the day before CONSOL announced the T. Rowe Price agreement.

CONSOL committed to effect a short-form merger after the successful consummation of the tender offer. In the merger, remaining stockholders were to receive the same consideration of $38.25 per share in cash. Consummation of the tender offer was subject to a non-waivable condition that a majority of the outstanding minority shares be tendered, excluding shares owned by directors or officers of CONSOL or CNX Gas. The T. Rowe Price shares were to be included in the majority-of-the-minority calculation.

On April 9, 2010, the lone independent director of CNX Gas delivered a letter asking that CNX Gas (a) form a special committee to evaluate the proposed Tender Offer and (b) elect an additional director to join the special committee. At a special meeting held on April 15, the CNX Gas board unanimously approved the formation of a special committee, but formed it with one member – the single independent director.

The special committee was authorized only to review and evaluate the tender offer, to prepare a Schedule 14D-9, and to engage legal and financial advisors. The resolution did not authorize the special committee to negotiate the terms of the tender offer or to consider alternatives.[30]

Notwithstanding its limited powers, the special committee decided to ask CONSOL for a price increase. On May 5, 2010, the special committee's counsel advised CONSOL's counsel that the special committee could not recommend the tender offer at a price of $38.25, but likely could do so at $41.20. On May 10, the CNX Gas board retroactively granted the special committee authority to negotiate. CONSOL, however, declined to increase the price.

Later on May 11, the special committee issued a Schedule 14D-9 stating that it had "determined not to express an opinion on the offer and to remain neutral with respect to the offer." The special committee cited its "concerns about the process by which CONSOL determined the offer price" and its "view that CONSOL was unwilling to negotiate the offer price." The Schedule 14D-9 noted that a member of CONSOL management had previously suggested that CNX Gas stock was worth more than $38.25. The Schedule 14D-9 also reported that the CNX Gas board had refused to expand the size of the special committee or grant it the full power of the board in connection with the offer. The Schedule 14D-9 cited the tender agreement with T. Rowe Price as a "potentially negative factor[ ]."

The court began its analysis by stating the different standards of review depending on how a controlling stockholder agreement had been structured. Under *Kahn v. Lynch Communication Systems, Inc.*[31] a negotiated merger between a controlling stockholder and its subsidiary is reviewed for entire fairness. But under *In re Siliconix Inc. Shareholders Litigation*[32] a controller's unilateral tender offer followed by a short-form merger was reviewed under a standard far less onerous than *Lynch*.

The court then discussed the twin cornerstones on which *Siliconix* rested. The first was the statutory distinction between mergers and tender offers and the lack of any explicit role in the General Corporation Law for a target board of directors regarding a tender offer. The second was *Solomon v. Pathe Communic. Corp.*[33] often cited for the rule that a tender offeror has no duty to offer a fair price. In the instant opinion, however, the court noted a flaw in the normal articulation of *Solomon* – it did not speak to controlling stockholder squeeze-outs because, in *Solomon*, the controlling stockholder was not standing on both sides of the transaction. Thus, *Solomon* did not eliminate the possibility of an entire fairness review for a two-step freeze out transaction. The court noted that *Cox Communications* added coherence by explaining that the business judgment rule should apply to any freeze-out transaction that has the elements of an arm's-length transaction – approval by both disinterested directors and disinterested stockholders. When both elements are not present, the court found, the merger should be reviewed under entire fairness.[34]

Under the entire fairness standard, the court held, the tender offer failed. The special committee's decision not to recommend in favor of the transaction alone, the court noted, was lethal. In addition, however, the court faulted the GNX Gas board for not providing the special committee with authority necessary to approximate a third-party transaction. The court also found sufficient facts had been pleaded about the role of T. Rowe Price to undercut the effectiveness of its decision to tender its shares.

Nevertheless, the court denied the plaintiffs' motion for a preliminary injunction, finding that an award of money damages could be fashioned if the defendants could not show that the tender price was fair.

Yucaipa American Alliance Fund II v. Riggio[35]

This lawsuit involved a shareholder action brought by Yucaipa American Alliance Fund II, a fund connected to billionaire investor Ronald Burkle, against the board of directors of Barnes & Noble, Inc., alleging that adoption of a poison pill by the board had breached their fiduciary duties. Vice Chancellor Strine's post-trial opinion dismissed the lawsuit.

In 2009, Burkle called Barnes & Noble founder Leonard Riggo to tell him that Yucaipa was going to invest in Barnes & Noble. Riggio tried to persuade Burkle to take his money elsewhere. After Yucaipa had acquired a stake, Burkle began to give Riggio input concerning Barnes & Noble. In August 2009, Burkle became upset when he learned that Barnes & Noble was to acquire a college bookstore chain that had been wholly-owned by Riggio. Burkle could not understand why Barnes & Noble had chosen to acquire this chain, owned by Riggio and his wife, for $596 million in cash in an interested transaction, and he filed suit to challenge the fairness of this transaction. Burkle and his fund, Yucaipa, then began to increase its stake in the company.

In response to Yucaipa's rapid accumulation of Barnes & Noble shares, the Barnes & Noble directors adopted a poison pill. The pill was to be triggered when a shareholder acquired over 20% of Barnes & Noble's outstanding stock, or when two or more shareholders, who combined own over 20%, entered into an "agreement, arrangement or understanding ... for the purpose of acquiring, holding, voting ... or disposing of any voting securities of the Company." The court noted that this 20% was at the high end of the typical range. But, if that were to occur, each share of common stock could exercise an option to purchase 1/1000th of a share of new series of preferred (the "Rights Plan"). The 20% threshold did not apply to Riggio or his family, whose approximately 30% stake was grandfathered. The Rights Plan, however, also limited Riggio from further increasing his stake. Also notable was the fact that, under the Rights Plan, Burkle would have to win two successive proxy contests to gain control of the board, because board members had staggered terms.[36]

Exchanges among Barnes & Noble and its advisors presumed that Yucaipa would likely initiate a proxy contest, accepted the possibility that Yucaipa might win that contest, and demonstrated a recognition that the board could not adopt a Rights Plan that would foreclose an effective proxy challenge from Yucaipa because to do so would be preclusive. The directors who faced the electorate in less than a year included Leonard Riggio himself, along with a close affiliate and non-independent director, as well as the lead independent director.

Yucaipa was not the only one buying large blocks of stock. Aletheia Research and Management, Inc., a California-based investment advisor, increased its stake in Barnes & Noble from 6.37% to 17.44%. Aletheia filed a Schedule 13D after acquiring its 17% stake. That Schedule 13D stated that Aletheia had "no plans or proposals" that would result in an "extraordinary corporate transaction" involving Barnes & Noble, but also expressly noted that "Aletheia however reserves the right, at a later date, to affect one or more of such changes or transactions." However, the court noted that Aletheia's founder, Peter Eichler, had followed Burkle's lead in at least three other investments.

On February 16, 2010, the board considered a request by Burkle to amend the Rights Plan to allow him to acquire a 37% stake. During the process, the court noted, a "weird" discussion occurred. The issue tabled by Yucaipa required some consideration of the dangers posed by Riggio himself. This was an "awkward" discussion because the board was already facing litigation brought by Burkle over the college bookstore transaction, and wanted to contend that although Riggio was Barnes & Noble's largest stockholder and it's Chairman, and his brother was then still CEO, he was not a controlling stockholder. But, the court noted, instead of holding an executive session of the independent directors to ponder these issues, the board discussed whether Riggio was a threat in his presence, determining that he was not. Ultimately, the board then adopted an amendment clarifying that Riggio was not permitted to acquire any more Barnes & Noble shares, but denied Yucaipa's request to buy a 37% stake. Further correspondence occurred over the next few months. On May 5, 2010, Yucaipa filed this lawsuit. The court held an expedited four day trial and heard post-trial argument.

Yucaipa argued to the court that the standard of review to evaluate whether the board's adoption and amendment of the Rights Plan complied with its fiduciary duties was subject, not to the *Unocal* standard used in *Moran* and its progeny, but to either: (1) entire fairness review or (2) *Blasius*'s "compelling justification" standard. The court rejected these arguments.[37]

The court found that, other than grandfathering Riggio, the Rights Plan did not confer any special benefit on Riggio, or allow Riggio to obtain a majority stake in Barnes & Noble. Furthermore, the Rights Plan was approved by an independent board majority, thus invoking the business judgment rule standard.

Under very unusual facts, the court noted, *Blasius* had held that the board of directors must provide a "compelling justification" for its actions where the board acted "for the primary purpose of interfering with the effectiveness of a stockholder vote." By *Blasius's* own terms, however, it applies only when directors "act [ ] for the primary purpose of thwarting the exercise of a shareholder vote." Thus, the court concurred with Barnes & Noble's argument that the Delaware Supreme Court's decision in *Moran* and this Chancery Court's decision in *Stahl* held that a rights plan such as the Plan under consideration here was to be addressed under Unocal's intermediate review standard.

Ultimately, the Chancery Court's opinion applied *Unocal* and sided with Barnes & Noble, holding (1) the board made a good faith, reasonable judgment that the corporation faced a legitimate threat and (2) the defense was reasonable and proportional.

Nemec v. Shrader[38]

This lawsuit was brought by retired corporate officers of Booz Allen against the corporation and its board members, claiming that the board had (1) breached the corporation's stock plan's implied covenant of good faith and fair dealing and its fiduciary duty and (2) unjustly enriched itself when the board redeemed retired officers' stock after their post-retirement put rights had expired, but before selling the corporation's government business division. The Court of Chancery dismissed the claims. An appeal was filed, and the Delaware Supreme Court affirmed.

Booz Allen was founded as a partnership in 1914, but later changed its legal structure and became a Delaware corporation. Nemec retired from Booz Allen on March 31, 2006, after nearly 36 years of service. Nemec was elected three times to the company's board of directors. Wittkemper also retired from Booz Allen on March 31, 2006, after nearly 20 years of service. Wittkemper built the foundation for Booz Allen's German business and helped expand Booz Allen throughout Europe. Throughout their tenure, Nemec and Wittkemper were partly compensated with annual grants of stock rights, which could be converted into stock.

Under Booz Allen's Stock Rights Plan, each retired officer had a "put" right, exercisable for a period of two years from the date of his or her retirement, to sell his or her shares back to the company at book value. After that two-year period expired, the company then had the right to redeem, at any time, part or all of the retired officer's stock at book value. When they retired in March 2006, Nemec owned 76,000 shares of Booz Allen stock (representing about 2.6% of the company's issued and outstanding common shares), and Wittkemper owned 28,000 shares (representing almost 1% of outstanding shares).

During the summer of 2007, Booz Allen's leadership discussed internally a possible transaction in which Booz Allen would sell its government business to the Carlyle Group. In March 2008, Booz Allen's board extended their terms 90 days until June 2008, and declined to issue new stock rights, preserving the then-current ownership structure. By this time, the purchase price of the Carlyle transaction had been agreed upon, and the Booz Allen board and stockholders knew that the transaction would generate over $700 per share to Booz Allen's stockholders. That transaction closed on July 31, 2008, four months after the plaintiffs' put rights had expired. If allowed to participate in the Carlyle transaction, the plaintiffs would have received materially more than the March 2008 (pre-transaction) book value of their Booz Allen shares. In April 2008, however, the Company redeemed the plaintiffs' shares at their pre-transaction book value (approximately $162.46 per share).

The Delaware Supreme Court first held that the Court of Chancery had properly dismissed Count I. The implied covenant of good faith and fair dealing involves a "cautious enterprise," inferring contractual terms to handle developments or contractual gaps that the asserting party pleads that neither party anticipated. The court noted that "one generally cannot base a claim for breach of the implied covenant on conduct authorized by the agreement." The court then held that the plaintiffs had lacked "a reasonable expectation of participating in the benefits" of the Carlyle transaction. The implied covenant only applies to developments that could not be anticipated, not developments that the parties simply failed to consider.[39]

The court also noted that company's directors, at the time of the decision to redeem, owed fiduciary duties to the corporation and its existing working stockholders. The redemption would not affect the company directly. However, a failure to redeem the now retired stockholders' shares consistent with the company's right under the stock plan would directly reduce the working stockholders' distribution by $60 million. If the company's directors had not exercised the company's absolute contractual right to redeem the retired stockholders' shares, the working stockholders had a potential claim against the directors for favoring the retired stockholders to the detriment of the working stockholders. The court, in affirming the dismissal of Count I, found that the "policy underpinning the implied duty of good faith and fair dealing does not extend to post contractual rebalancing of the economic benefits flowing to the contracting parties."

The court then turned to Count II of the complaint, which had alleged that, by causing the company to redeem the plaintiffs' shares before the Carlyle transaction closed, the directors acted to further their own economic self-interest, at the expense and to the detriment of the plaintiffs, thereby breaching their fiduciary duty of loyalty.

The court recited that the Chancery Court had dismissed Count II for two reasons. First, the claim had sought to enforce obligations that were expressly addressed by contract (the Stock Plan), which, therefore, must be adjudicated within the analytical framework of a breach of contract claim. Second, the Chancellor had held that the complaint had not adequately pleaded facts sufficient to establish that the timing of the directors' redemption decision was contrary to the exercise of the directors' sound and good faith business judgment.

The court noted the well-settled principle that, when a dispute arises from obligations that are expressly addressed by contract, that dispute will be treated as a breach of contract claim. Although the plaintiffs had conceded that both their contract and fiduciary duty claims had a "common nucleus of operative facts," the fiduciary duty claim, they contended, was grounded on an additional and distinct fact – that the directors were responsible for the company's decision to redeem the plaintiffs' shares before the Carlyle transaction closed, and stood to gain personally from that decision. However, the court noted that the fiduciary duty claim still arose from a dispute relating to the exercise of a contractual right – the company's right to redeem the shares of retired nonworking stockholders. Any separate fiduciary duty claims that might have arisen were, therefore, foreclosed.[40]

The Delaware Supreme Court then turned to Count III and affirmed dismissal. Count III had claimed that the directors had been unjustly enriched by the pre-transaction redemption of the plaintiffs' Booz Allen shares. The Chancellor had dismissed this Count on two alternative grounds. The first was that "the alleged wrong [which made the Directors' enrichment unjust] arises from a relationship governed by contract" (i.e., the Stock Plan) and "Delaware courts ... have consistently refused to permit a claim for unjust enrichment when the alleged wrong arises from a relationship governed by contract." The second was that Booz Allen had properly exercised its redemption right. The Delaware Supreme Court affirmed on the first ground, not reaching the second. The court noted that the elements of unjust enrichment are: (1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law. It then found that, although the complaint pleaded the first four elements, it had failed to establish the fifth requirement, that absent an unjust enrichment claim the plaintiffs would have no remedy to recover the benefit of which they were wrongfully deprived.

Beard Research, Inc. v. Kates[41]

This lawsuit concerned an action brought by former employers against former employees, including the former executive vice president (EVP), the employees' new employer, the new employer's parent company, and the person at new employer who recruited the EVP, for misappropriation of trade secrets, breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, tortious interference with contractual relations, and tortious interference with prospective business relations. Vice Chancellor Parsons issued an opinion containing his post-trial findings of fact and conclusions of law.

Charles Beard Research & Development, Inc. ("CB") hired Michael Kates in 1998. He became a 33% owner, an officer, and a director of Beard Research, Inc. ("BR") when that company was founded in 2003 (collectively BR and CB are "plaintiffs"). He later became CB's executive vice president and director of marketing. Kates was an at-will employee of BR and CB and had not signed a non-compete agreement. By 2003, Kates was ready to move on and began talking frequently with Alan Blize, whose employer, ASDI, Inc., was looking to set up a company that would compete with the plaintiffs. Blize knew Kates from his previous job at Pfizer, Inc., the plaintiffs' biggest customer. In early 2004, Kates left the plaintiffs to take a job with Advanced Synthesis Group, Inc. ("ASG"), a company funded by ASDI. Within a couple of months of Kates's departure, Pfizer signed a contract with ASG and terminated a $22 million contract it had with the plaintiffs.

The defendants argued that Kates owed no fiduciary duties to either CB or BR. The defendants asserted that, to the extent the plaintiffs' breach of fiduciary duty claim was based on misappropriation of trade secrets, it was preempted by the Delaware Uniform Trade Secrets Act ("DUTSA"). DUTSA's preemption provision has been interpreted to mean that DUTSA preempts claims that are "grounded in the same facts which purportedly support the misappropriation of trade secrets claims."

The court disagreed, finding that the same facts were not required to establish all the elements of both the misappropriation and breach of fiduciary duty claims. To prove misappropriation of trade secrets, a plaintiff must show that the information in question qualifies as a trade secret under 6 Del. C. § 2001(4). No such showing is required to prove a breach of fiduciary duty, which can be premised on the misuse of confidential information, even if that information does not rise to the level of a trade secret.[42]

Ultimately, the court held that: (1) ASDI, ASG, Kates, and Smith were liable for misappropriation of trade secrets; (2) Kates was liable for breach of fiduciary duty; (3) ASDI and Blize were liable for aiding and abetting Kates's breach of fiduciary duty; (4) none of the defendants were liable for tortious interference with contractual relations; and (5) ASDI, ASG, Blize, and Kates were liable for tortious interference with prospective business relations.

Kates v. Beard Research, Inc.[43]

This case, a companion case to the one above, involving two of the same parties, deals with the propriety of a $100,000 per month management fee a company charged its affiliate. Dr. Charles D. Beard and his wife owned 100 percent of CB Research & Development, Inc. ("CB") and controlled Beard Research, Inc. Dr. Beard hired Michael J. Kates and gave Kates 33 percent of BR's stock. Dr. Beard and Kates agreed that, because CB covered the majority of BR's overhead expenses, BR would pay CB a management fee of $50,000 per month. Two years later, the fee increased to $100,000 per month. Kates filed this suit, alleging that the increase in the fee constituted corporate waste and a breach of Dr. Beard's fiduciary duties. Kates's suit asserted, among other things, derivative claims for waste, misuse and misappropriation of corporate assets, usurping corporate opportunities, and for breach of fiduciary duty based on those allegations. Vice Chancellor Parsons held that Kates failed to prove that the increase in the management fee amounted to waste or a breach of fiduciary duty.

While the complaint described his claim as one for waste, Kates argued that the fee increase should be assessed under the entire fairness standard because, as the controlling shareholder of both CB and BR, Dr. Beard stood on both sides of the transaction. The defendants asserted that the traditional waste standard should apply. The court decided it did not need to resolve the parties' dispute as to whether the standard for waste or entire fairness applied because Kates failed to prove his case under either standard. The court noted:

> A claim of waste will be sustained only in the rare, unconscionable case where directors irrationally squander or give away corporate assets. This standard is a corollary of the proposition that where the presumption of the business judgment rule applies, the decision of a corporate board of directors will be upheld unless it cannot be attributed to any rational business purpose.[44]

The court held that, under this rule, a business person of ordinary, sound judgment could have concluded that CB's carrying of the overhead associated with a large increase in BR's staff over the years represented adequate consideration for BR's payment of twice the management fee it paid at the beginning of the arrangement when BR had a smaller staff.

The court also held that, even assuming the entire fairness standard applied to the increase in the management fee for purposes of the breach of fiduciary duty claim, Kates still would not have prevailed. The court found there was no dispute that $50,000 per month was a fair fee when BR employed only four employees, and it also found that Kates had approved the increase in the fee. "The fact that Kates had the ability to investigate further the basis for the increase for several years, but never did so, buttresses those conclusions and supports a finding that he acquiesced to the increase."

eBay Domestic Holdings, Inc. v. Craig Newmark[45]

eBay Domestic Holdings, Inc., a stockholder of craigslist, filed this lawsuit challenging the implementation by the craigslist board of a stock rights plan, a staggered board, and a right of first refusal sought over shares eBay owned. Chancellor Chandler conducted a nine day trial and issued an opinion containing his findings and conclusions.

In 2007, eBay launched the online classifieds site www.Kijiji.com, which was to compete with craigslist, the most widely used internet classifieds site in the United States. When eBay launched Kijiji, it owned 28.4% of craigslist. The only other stockholders in craigslist were Craig Newmark and James Buckmaster, who together owned a majority of craigslist's shares. Under the craigslist stockholders' agreement, eBay was permitted to compete with craigslist. By doing so, however, and launching Kijiji, eBay lost certain consent rights giving it the right to approve or disapprove of a various corporate actions. Additionally, the craigslist shares eBay owned were freed of the right of first refusal that the two majority stockholders had held, and they became freely transferable.

As the court noted, Newmark and Buckmaster "were not enthusiastic about eBay's foray into online classifieds." They requested that eBay sell its shares either back to craigslist or to a third party who would be compatible, but eBay refused to sell. In January 2008, Newmark and Buckmaster, acting in their capacity as directors, adopted a rights plan that kept eBay from purchasing any additional craigslist shares and made it difficult to freely sell the craigslist shares it already owned. They also implemented a staggered board that prevented eBay from unilaterally electing its own director and tried to regain their right of first refusal over the craigslist shares eBay owned by offering to issue a new share in exchange for every five shares over which any stockholder granted a right of first refusal to craigslist. Newmark and Buckmaster accepted the right of first refusal offer and were issued new shares, but eBay declined it and saw its ownership stake diluted from 28.4% to 24.9%.

eBay filed suit challenging all three measures. eBay asserted that Newmark and Buckmaster, as directors and controlling stockholders, breached the fiduciary duties they owed to eBay as a minority stockholder. Following trial, the court held that the defendants breached their fiduciary duties to eBay by adopting the rights plan and by making the right of first refusal offer.

The court noted that the dispute was driven in large part by the dissimilarities between the companies. craigslist, although a for-profit business, "largely operates its business as a community service." It operates as a small business and is privately held. eBay, on the other hand, was "[i]nitially a venture with humble beginnings," but "has grown to be a global enterprise." It is a for-profit, publicly-traded company with large revenue streams and a hefty acquisition capability.[46]

After eBay invested in craigslist by purchasing the shares of one of the original investors, Newmark owned 42.6% of craigslist, Buckmaster owned 29%, and eBay owned 28.4%. In addition to the stock purchase agreement and shareholders' agreement executed among all three, Newmark and Buckmaster also executed a voting agreement.

In negotiating the agreements, eBay "believed it was critical to preserve the right to compete, so much so that it likely would not have invested in craigslist without this right." Although the shareholders' agreement permitted eBay to compete, it guaranteed certain consequences should eBay do so. The court noted that the shareholders' agreement definition of "competition" was quite narrow. In discussing the voting agreement between Newmark and Buckmaster, the court noted that the agreement "ensured that two out of the three director positions would be filled by Newmark's and Buckmaster's designees, who have always been Newmark and Buckmaster. The third position would be filled by eBay-not by contractual right, but by the laws of mathematics under a cumulative voting system with a non-staggered board."

At the same time eBay was investing in craigslist, it had already begun acquiring international classifieds sites. In March 2005, it launched Kijiji, an international classifieds site with functionality similar to craigslist, in countries throughout Europe and Asia, and even Canada. Evidence at trial suggested that eBay used nonpublic craigslist information in creating Kijiji. It also suggested that eBay employed a third party to remotely "scrape" data from craigslist's website. In June, 2007, eBay launched Kijiji in 220 cities in the U.S. Per the shareholders' agreement, craigslist sent eBay a notice of competitive activity, which gave eBay 90 days to cure. Otherwise, eBay would lose its consent rights, its right to preempt issuance of new shares, and its rights of first refusal over the other shareholders' shares. However, the craigslist shares eBay owned would then become freely transferable.

Shortly after Kijiji's launch, Buckmaster sent an email to eBay informing it that craigslist wished to "gracefully unwind the relationship" between the two companies. eBay responded, saying:

> [W]e are so happy with our relationship with craigslist, that we could [not] imagine ... parting with our shareholding in craigslist, Inc. under any foreseeable circumstances. Quite to the contrary, we would welcome the opportunity to acquire the remainder of craigslist, Inc. we do not already own whenever you and Craig feel it would be appropriate.

After consulting with outside counsel, Newmark and Buckmaster amended the craigslist charter and bylaws to provide for a staggered board; approved a stockholder rights plan; and offered to issue one new share of craigslist stock in return for every five shares on which a craigslist stockholder granted craigslist a right of first refusal.

Because eBay's ability to unilaterally elect a director depended on a cumulative voting regime where all three positions were up for grabs in a given year, the staggered board cut off eBay's unilateral ability to place a director on the craigslist board.

The rights plan implemented on January 2, 2008 contained some standard terms frequently seen in rights plans and some not-so-standard terms. The rights plan payed a dividend to craigslist stockholders of one right per share of craigslist stock. Each right allowed its holder to purchase two shares of craigslist stock at $0.00005 per share if the rights were triggered. Newmark, Buckmaster, and craigslist executed a right of first refusal agreement that provided that Newmark and Buckmaster would receive one newly issued craigslist share for every five shares over which they granted a right of first refusal in craigslist's favor.

eBay's complaint asserted that the 2008 board actions were a breach of the fiduciary duties Newmark and Buckmaster owed to eBay. eBay also argued that by taking those actions, the two other shareholders used their fiduciary positions to secure rights and benefits for themselves. Newmark and Buckmaster responded that those steps were permissible as a response to a takeover plan by eBay.

Analogizing the case to the story of David and Goliath, the court stated that, "the battle in Delaware has not been as one-sided a victory for the smaller contender as was the contest between the fabled Israelite and Philistine: more fortunate than Goliath, eBay leaves this field with only a gash across its forehead; less fortunate than David, craigslist leaves this field with something less than total victory."[47]

The court held that the board actions were not "an inextricably related set of responses to a takeover threat." The amendment for a staggered board, it held, was not a defensive measure at all. The new shareholder rights plan, however, "implicates *Unocal* concerns in my view because rights plans (known as "poison pills" in takeover parlance) fundamentally are defensive devices that, if used correctly, can enhance stockholder value but, if used incorrectly, can entrench management and deter value-maximizing bidders at the stockholders' expense." The court held that the new right of first refusal scheme was subject to entire fairness review, because Newmark and Buckmaster stood on both sides of that decision:

> What remains fairly litigable is the degree to which a board can keep the shield of a rights plan in place under the situationally specific circumstances of a given case. A board similarly can use a rights plan creatively to protect the value of a corporate asset for the benefit of its stockholders or to block a creeping takeover. Using a rights plan to promote stockholder value is a legitimate exercise of board authority that accords with the directors' fiduciary duties.[48]

Under *Unocal*, the court noted, "a rights plan cannot be used preclusively or coercively; nor can its use fall outside the range of reasonableness."

The court believed that this was a unique situation presented in the context of a challenge to a rights plan, and that was the first time a Delaware court had addressed a challenge to such a plan adopted by a privately held company with so few stockholders. The court identified the two main issues as: (1) whether Newmark and Buckmaster properly and reasonably perceived a threat to craigslist's corporate policy and effectiveness, and (2) if so, whether the new rights plan was a proportional response to that threat.

The court held that, despite its small size, craigslist had chosen to be a for-profit company and so its directors were "bound by the fiduciary duties and standards that accompany that form," including "acting to promote the value of the corporation for the benefit of its stockholders. The 'Inc.' after the company name has to mean at least that." The court refused to accept the validity of a rights plan that, in its words, "specifically, clearly, and admittedly seeks not to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders-no matter whether those stockholders are individuals of modest means or a corporate titan of online commerce."[49]

The court held that the rights plan was unreasonable under *Unocal* because the defendants failed to prove the existence of "a distinctly protectable craigslist culture" and that they executed the rights plan to protect that culture. Rather, the court found, they had decided to punish eBay for competing with craigslist. "Directors of a for-profit Delaware corporation cannot deploy a rights plan to defend a business strategy that openly eschews stockholder wealth maximization-at least not consistently with the directors' fiduciary duties under Delaware law." Therefore, the court rescinded the Rights Plan in its entirety.

The court held that entire fairness review did not apply to the staggered board amendments simply because eBay was affected differently than the defendants by the implementation of a staggered board.

Finally, the court held the right of first refusal changes were subject to entire fairness review because the defendants stood on both sides of that action. The court first analyzed whether the board's action was effectuated at a fair price. The "price" of receiving an additional share, as the court saw it, "was the granting of a right of first refusal over five shares." The defendants argued that the right of first refusal change was fair because all stockholders were offered the same deal. However, the court found that it actually would cost eBay more to grant a right of first refusal over five of its shares than it would cost the defendants. While the defendants would merely have to grant a right of refusal on five already-encumbered shares, eBay would have to grant a right of refusal on five freely transferable shares. "This disproportionate price is sufficient, standing alone, to render the ROFR/Dilutive Issuance void." Therefore, the court found the defendants breached their fiduciary duty of loyalty, and it rescinded the board's action.

Pfeiffer v. Toll[50]

The plaintiff, a stockholder of the nominal defendant, Toll Brothers, Inc., brought this action to recover damages suffered by the company due to alleged insider trading by the defendant directors. The defendants were eight of the eleven members of Toll Brothers' board of directors, all of whom sold significant amounts of stock between December 2004 and September 2005. The complaint alleged that they traded while in possession of material, non-public information regarding the company's prospects. Vice Chancellor Laster denied the defendants' motion to dismiss, holding that the complaint credibly alleged that the directors sold stock while knowing that the company's prospects were not as optimistic as public statements painted them to be.

Toll Brothers was a Delaware corporation, headquartered in Pennsylvania, that designed, built, marketed, and arranged financing for homes in luxury residential communities throughout the country. Its business model relied on developing residential communities. In 2003 and 2004, when the luxury residential market was booming, Toll Brothers experienced record financial performance and projected a bright future. The company's 2004 letter to stockholders predicted "at least 20%" growth in net income for 2006, based on an increase of 20 new residential communities, and it denied that there was a housing bubble that would soon pop.

The court noted the complaint's detailed description of the defendants' attempts to combat market worry with positive projections. "They asserted that they did not perceive any downturn in the housing market, and they represented that the company was uniquely positioned to weather any problems that might occur." Because of the "niche market of luxury home buyers" that Toll targeted, rising interest rates were not a concern, the defendants also asserted. Indications of slowing growth and regulatory delays in development were discounted.

On November 8, 2005, Toll Brothers announced its preliminary fourth quarter results for 2005. Although the company again reported record net income, management's tone was tempered. When Toll Brothers reported its 2005 results, annual growth projections for 2006 were only 0.5%. The company also projected a static number of residential selling communities through the first quarter of 2006. This was the first change from the company's previous prediction of 20% net income growth, "and the number fell off a cliff to 0.5%."

The complaint alleged that after December 2004, the defendants knew they had no reasonable basis for their 2006-2007 projections. The defendants had known for some time about downward trends, including decreased foot traffic, fewer visits by prospective customers, a decreased rate of signing new contracts, and an increasingly complex regulatory approval process. While the trends were beginning to manifest and the company was still projecting 20% growth in net income, the company's stock value rose from $28.50 in December 2004 to over $58.00 in July 2005. During this period, and particularly during the summer and fall of 2005, the defendants collectively sold 14 million shares totaling $615 million. Several directors sold more than 80% of their shares and, as the court noted, all of their trades "were inconsistent with the past trading patterns and are suspicious in timing and amount." [51]

The plaintiffs alleged breach of fiduciary duty under *Brophy v. Cities Service Co.*[52] which allows Delaware corporations to recover for insider trading violations by its fiduciaries.

Before analyzing the insider trading claim, the court first overruled the defendants' objections that no demand had been made on the board. The court held that demand was futile, as all of the individual defendants, even the outside directors, were named in a parallel federal securities action, which had survived a motion to dismiss. Because of the federal securities fraud suit, the court reasoned, it would not be possible for the defendants to consider a demand impartially. "If the company pressed forward with its rights of action against the defendants in this case, then the company's efforts would undercut or even compromise the defense of the federal securities action."

The court then turned to the breach of fiduciary duty/insider trading claim, citing the requirement that the plaintiff must show:

> (1) the corporate fiduciary possessed material, nonpublic company information; and (2) the corporate fiduciary used that information improperly by making trades because she was motivated, in whole or in part, by the substance of that information.[53]

The court rejected the defendants' assertions that the heightened pleading requirements of Chancery Court Rule 9(b) should apply because, as they claimed, an insider trading claim is essentially a claim for fraud – attempting to analogize to insider trading claims in federal court. In Delaware, though, "The insider trading claim is not a fraud claim, but rather a breach of fiduciary duty claim. Rule 9(b) does not apply."

Once past these hurdles, the court held that the complaint adequately alleged that the directors knew the company could not meet the projections set out in its statements. As the court noted, as worries about the housing market mounted, the defendants "engag[ed] in behavior that more closely resembled unabashed and unrestrained cheerleading." "A senior executive can be bullish about his company without sounding like he is auditioning to replace Jim Cramer on Mad Money. Juxtaposed against the allegations about the underlying trends in Toll Brothers' business, these statements are striking. Coupled with massive sales of securities, they amount to a red flag." [54]

Finally, the court held that the complaint adequately pleaded an insider trading claim even against the outside director defendants. The court noted that all directors have both the power and responsibility to direct and oversee the corporation's affairs. "It would afford an ostrich-like immunity to directors not to grant the plaintiff a Rule 12(b)(6) inference that the Outside Director Defendants knew about core information of this type." Furthermore, the timing and size of the outside directors' trades were enough to at least raise an inference that they had traded on material non-public information.

ENDNOTES

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2 6 A.3d 238 (Del. Ch. 2010).

3 *Id.* at 240.

4 *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 101 (Del. 2007); *accord Prod. Res. Gp., L.L.C. v. NCT Gp., Inc.*, 863 A.2d 772, 776 (Del. Ch. 2004).

5 *Gheewalla*, 930 A.2d at 102 (quoting *Prod. Res.*, 863 A.2d at 792).

6 *Id.*

7 *Id.* at 241.

8 6 Del. C. § 18-1001.

9 6 Del. C. § 18-1002.

10 *See Magten Asset Mgmt. Corp. v. Paul Hastings Janofsky & Walker LLP,* 2007 WL 129003, at *3 (D. Del. Jan. 12, 2007).

11 8 Del. C. § 327

12 8 Del. C. § 327.

13 *Symonds & O'Toole*, Delaware Limited Liability Companies § 9.09, at 9-61 n.270 (2007).

14 *Magten*, 2007 WL 129003.

15 S*ee Vichi v. Koninklijke Philips Electronics N.V.*, 2009 WL 4345724 (Del. Ch. Dec. 1, 2009); *Bren v. Capital Realty Gp. Senior Housing, Inc.*, 2004 WL 370214 (Del. Ch. Feb. 27, 2004).

16 *Id.* at 245-46.

17 *See Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 1996 WL 652773, at *1 (Del. Ch. Nov. 4, 1996) ("Since the plaintiffs are not limited partners, they may not bring a derivative action. 6 Del. Ch.§ 17-1001.")."

18 *Id.* at 250.

19 2010 WL 4273112 (Del. Ch. Oct. 28, 2010).

20 *Id*. at *3-4.

21 *Id*. at *5.

22 2010 WL 629850 (Del. Ch. Feb. 24, 2010).

23 794 A.2d 1 (Del. Ch. 2001).

24 638 A.2d 1110 (Del. 1994).

25 *Id*. at *10.

26 *Id*. at *12.

27 4 A.3d 397 (Del. Ch. 2010).

28 879 A.2d 604 (Del. Ch. 2005).

29 *Id*. at 401-02.

30 *Id*. at 404.

31 638 A.2d 1110 (Del. 1994).

32 2001 WL 716787 (Del. Ch. June 19, 2001).

33 672 A.2d 34 (Del 1996).

34 *Id*. at 408-13.

35 1 A.3d 310 (Del. Ch. 2010).

36 *Id*. at 312-13.

37 *Id*. at 329.

38 991 A.2d 1120 (Del.Ch. 2010).

39 *Id*. at 1125-26.

40 *Id*. at 1129.

41 8 A.3d 573 (Del. Ch. 2010).

42 *Id*. at 601-03.

43 2010 WL 1644176 (Del. Ch. April 23, 2010).

44 *Id*. at *5.

45 2010 WL 3516473 (Del. Ch. Sept. 9, 2010).

46 *Id*. at *2-3.

47 *Id*. at *17.

48 *Id*. at *19.

49 *Id*. at *23.

50 989 A.2d 683 (Del. Ch. 2010).

51 *Id*. at 688-89.

52 70 A.2d 5 (Del. Ch.1949).

53 *Id*. at 691.

54 *Id*. at 693-94.

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