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4 Lessons Del. Corporate Litigators Should Have Learned in 2023

By Ellen Bardash
Of the DLW

While another year in the Delaware courts has gotten sporadic attention from one-off appearances of household names and national political controversies, the litigation events of 2023 that will likely have the most impact moving forward are, as usual, the ones that garner attention from the small bar that litigates the world's biggest business deals.

The Court of Chancery and Delaware Supreme Court hammered home these points multiple times throughout 2023, signaling to litigators that they may want to keep them in mind as they head into the new year.

Officers May Face Oversight Liability

One of the first 2023 Chancery decisions that sparked a conversation among corporate attorneys was released at the end of January in the case in which McDonald's shareholders brought Caremark claims related to the company's handling of sexual harassment.

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Vice Chancellor J. Travis Laster's opinion concluded that corporate officers, like directors, can face oversight liability, officially putting on paper a concept that many said had been implicit for years under Delaware law.

"Procedurally, it was interesting to see the first opinion come out with the reminder that officers also have fiduciary duties, including the duty of oversight. That's not carved out," said Skadden, Arps, Slate, Meagher & Flom partner Jenness

Corporate *continues on page 5*

IN THIS ISSUE

Out-of-State Case Isn't Enough to Dismiss Derivative Litigation: Court

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It's the first time the state's high court has officially addressed whether or not a Delaware judge can take adjudicative notice of factual findings from another court, and the opinion written by Justice Gary Traynor stated Delaware's rules of evidence are similar enough to the federal rules that the federal precedent not to adopt those findings when underlying facts are disputed should apply.

The decision, an appellate win for shareholders' attorneys with Prickett, Jones & Elliott and Bernstein Litowitz Berger & Grossmann, reverses and remands a Chancery decision sandwiched between the West Virginia weighing in the AmerisourceBergen defendants' favor and the Department of Justice filing another lawsuit that weighed in the plaintiffs'.

Vice Chancellor J. Travis Laster found that under the court's Rule 23.1, the complaint met the requirements to get past a motion to dismiss, a stage at which Delaware law requires judges to draw reasonable inferences in the plaintiffs' favor. But he decided the West Virginia case was enough to dismiss the case anyway, as AmerisourceBergen and its directors and officers, represented by Potter Anderson & Corroon, Dechert and Morgan, Lewis & Bockius, had argued.

"We agree with the plaintiffs," Traynor wrote. "The Court of Chancery's use of D.R.E. 202, which provides for judicial notice of law, to effectively adopt the factual findings of another court in another case reflects a category error and a departure from the principles that animate the concept of judicial notice."

The Supreme Court, all five justices of which heard argument in September, held that the West Virginia decision's findings of historical fact didn't count as findings of law.

"In the face of well-pleaded facts in the plaintiffs' complaint, which under our rules of procedure are presumed to be true, the court accepted a contradictory version of those facts and, consequently, dismissed the plaintiffs' claims. This unfairly deprived the plaintiffs of the opportunity to prove the truth of their well-pleaded allegations," the opinion stated.

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Derivative *continues on page 4*

NEWS IN BRIEF

12 Morris Nichols Associates Admitted to Practice in Del.

Morris, Nichols, Arsht & Tunnell congratulated 12 lawyers associated with the firm who were admitted to practice in Delaware in December 2023.

Ryan Myers is a member of the firm's alternative entity counseling/commercial transactions practice group.

Avery J. Meng, Austin Park, Casey Sawyer and Erin L. Williamson are members of the Morris James bankruptcy and restructuring group.

Kirk Andersen, Sara Carnahan, Louis F. Masi, Jacob M. Perrone and Phillip Reytan are a part of the firm's corporate and commercial litigation practice group.

Apoorva R. Gokare and Staats C. Smith are both members of the firm's corporate counseling practice group.

Lewis Brisbois Partner to Speak at Bankruptcy Webinar

Lewis Brisbois Bisgaard & Smith Wilmington partner Rafael X. Zahralddin is scheduled to speak on "death trap" provisions in Chapter 11 of the U.S. Bankruptcy Code at an upcoming Strafford webinar at 1 p.m. Jan. 18.

The CLE session, titled "Death Trap Provisions in Chapter 11 Plans: Minimizing the Likelihood of a Cramdown; Incentivizing Consensus," is designed to highlight how restructuring counsel use these provisions and related tools to create an accepting impaired class of creditors.

Zahralddin is a member of the firm's corporate, bankruptcy, complex business and commercial litigation, digital asset and Ukraine conflict response practices.

Editor's Note

Embracing Change: Delaware Law Weekly Moves Into the Digital Frontier

When you started as a lawyer, chances are you weren't filing court papers online, conducting depositions remotely, or working for months at a time from the comfort of your home. No. Most likely printers, or couriers, or even typewriters were involved with your first filings, depositions likely required grueling travel, and home and the office were practically oil and water.

The same is true in the media business. When I started as a journalist, news publications were all about paper. But for a long time now publications have become all about digital—how can we break the news faster, how can we best tailor our emailed newsletters, how can we deliver content that goes beyond words on a page?

The change has been the same across both our industries. It's been slow and deliberate, and each advancement was done as a step forward to better serve our clients and customers.

And that's why you're hearing from me today. As a company, ALM has decided to move away from the print production of nearly all of our news publications, including Delaware Law Weekly. We're making the move to help us produce even more relevant and insightful information in a way that highlights where the industry is headed and what it means for our readers.

For our readers, that will mean a few things. You will continue to get online everything you are accustomed to getting in print. In fact, you will get more online. It was always the case that we could only fit so much content into our print editions, so each issue would be accompanied by additional related pieces online. And now that we are freed up from the time constraints of producing print, we will be able to produce more and faster, and experiment with innovative ways of storytelling.

Everything you've come to expect in print, from the detailed features on current trends, in-depth data analysis, insights from contributed authors and so much more will continue to be produced online.

Our focus has always been on great content and being connected with our audience. Whether the content was for print or online was always secondary. The most important thing we need to do as a newsroom is provide the

Editor's Note *continues on page 4*

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ALM The Legal Intelligencer

Mass Tort Bankruptcies Stumbled in 2023. Could Some Fall Apart in 2024?

By Amanda Bronstad
Law.com

Mass tort bankruptcies took some big hits in 2023, with two of them dismissed outright, and two more potentially hanging in the balance.

The U.S. Supreme Court heard oral arguments on Dec. 4 in a closely watched case involving the release of liability granted to the Sacklers, founders of Purdue Pharma, as part of the opioid manufacturer's $6 billion bankruptcy plan.

The Supreme Court's ruling could dismantle the Purdue deal, as well as the Boy Scouts of America's Chapter 11 plan, which also involves third-party releases.

Two other mass tort bankruptcies died in 2023.

U.S. Bankruptcy Chief Judge Michael Kaplan, in New Jersey, dismissed Johnson & Johnson's second talcum powder bankruptcy after the U.S. Court of Appeals for the Third Circuit tossed the first one. Both were filed by LTL Management, a Johnson & Johnson subsidiary created through a controversial "Texas two-step" merger.

And U.S. Bankruptcy Chief Judge Jeffrey Graham of the Southern District of Indiana tossed the Chapter 11 case involving 3M's combat earplugs. On Aug. 29, 3M announced a $6 billion settlement.

In both Chapter 11 cases, the judges found the subsidiaries didn't have the "financial distress" required under U.S. Bankruptcy Code. Both decisions, plus the third-party releases before the Supreme Court, show that judges in 2023 were skeptical about some of the most creative tactics in Chapter 11 cases involving mass torts.

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"The theme I'm seeing is the juxtaposition of being overly creative with the code without a really hard statutory basis," said Brown Rudnick partner David Molton, in New York, who represented claimants in all four mass tort bankruptcies. "The appellate courts, and possibly the Supreme Court, and in Two-step circuit courts, are pushing back against very aggressive uses of the bankruptcy code that impact individual rights."

Here's what to watch in 2024:

Purdue

The Purdue case ended up before the Supreme Court after the U.S. Court of Appeals for the Second Circuit, on May 30, approved the releases granted to the Sacklers.

Purdue's plan has significant support from opioid victims and their families, but the U.S. Justice Department, for the U.S. Trustee, challenged such waivers for nondebtors.

In this month's oral arguments, justices appeared split.

Debtors and plaintiffs are concerned about a Supreme Court reversal, Molton said.

"This isn't a red state/blue state issue, it's not a Republican/Democrat issue, it's really a textualist issue, and we have a textualist Supreme Court sitting there,"

Bankruptcies *continues on page 4*

Derivative

Continued from page 1

In the bellwether decision in an opioid-related MDL in the Southern District of West Virginia, a city and co unty claimed AmerisourceBergen and other distributors, by failing to meet their obligations under the Controlled Substances Act, had escalated the opioid epidemic.

After a two-month trial, the West Virginia court determined in July 2022—while briefing on the motion to dismiss the Delaware case was already underway—that AmerisourceBergen's compliance measures hadn't violated the CSA. Laster decided the Chancery pleadings supported an inference in each side's favor but went on to write that with the West Virginia finding issued, it's not possible for the Delaware court to draw inferences in the shareholder plaintiffs' favor at the motion to dismiss stage.

A week after Laster's decision was released, the Department of Justice filed a civil suit against AmerisourceBergen and some of its subsidiaries in the Eastern District of Pennsylvania, bringing more allegations that the corporation's systems led to CSA violations en masse.

The shareholders' attorneys appealed the Delaware dismissal, saying if the West Virginia case could have an impact on whether the Chancery case should be dismissed, the DOJ case also needed to be factored in. The Chancery court rejected that argument, finding the evidence from the new case wouldn't have a significant effect on the outcome, and the shareholders then appealed to the Supreme Court. ■

Ellen Bardash can be contacted at ebardash@alm.com.

Bankruptcies

Continued from page 3

Molton said. "That may not survive Supreme Court review, and a lot of people are thinking about that, and what it means in terms of this tool."

For those in the Purdue case, a potential reversal, from a practical standpoint, raises the question: what happens next?

"If they're kicking third-party releases off the table, does that mean this deal is dead for now, and we have to restart the process?" said Samir Parikh, of Lewis & Clark Law School, who wrote an amicus brief in the Supreme Court supporting the Purdue plan. "We should be cognizant of the fact that, if this is off the table, these non-consensual third-party releases, there might not be a deal here. That's something the court is going to think about."

Boy Scouts

The Supreme Court's decision could impact more than Purdue.

On March 28, U.S. District Judge Richard Andrews of the District of Delaware affirmed U.S. Bankruptcy Judge Laurie Selber Silverstein's approval of the Boy Scouts plan, which provides nearly $2.5 billion fund for sexual abuse victims.

Objectors have appealed that decision to the U.S. Court of Appeals for the Third Circuit.

"That plan, even more than Purdue, was built on third-party non-consensual releases under Third Circuit law," Molton said.

Without third-party releases, he said, the Boy Scouts plan "may go upside down."

"And everybody's looking forward to the distribution of the settlement funds for survivors," he said.

Talcum Powder

With Johnson & Johnson's bankruptcies dismissed, a dozen trials are scheduled in 2024.

Last month, Johnson & Johnson settled two talc cases involving mesothelioma victims at the start of trial. That raised hopes among some in the plaintiffs' bar that Johnson & Johnson could settle the talc litigation in 2024.

"After they filed their first bankruptcy, that's the position they were taking: They're not settling any of these cases outside of bankruptcy," said Andy Birchfield, of Beasley Allen in Montgomery, Alabama, who represents talcum powder plaintiffs. "Now we know they are. They can do that, and they are doing that."

Johnson & Johnson has vowed to appeal Kaplan's Aug. 11 dismissal of its second Chapter 11 case to the Third Circuit, and perhaps to the Supreme Court, and continues to maintain that bankruptcy is the appropriate vehicle to resolve the talc cases.

Parikh said Johnson & Johnson would likely run into the same challenges should it file a third bankruptcy in another venue, like the Western District of North Carolina, where it filed its first Chapter 11 before the case was transferred to New Jersey.

"I hope that the Texas two-step is on its last leg," Birchfield said. "Or drawing its last breath."

As for the Supreme Court? Parikh said the Texas two-step doesn't present the same constitutional law issues or circuit splits that are present in the Purdue case.

"It is very much inside baseball," he said. "We have not seen abuse at a level that would draw the Supreme Court's attention. Generally speaking, the Supreme Court does not love taking bankruptcy cases." ■

Amanda Bronstad can be contacted at abronstad@alm.com.

Editor's Note

Continued from page 2

most relevant, insightful information in a way that highlights where the industry is headed and what it means for our readers. And the only way we can do that is by being deeply connected to the communities we cover.

I know that, like me, many of you have stacks of print copies around your office, and you enjoy having the ink rub off on your fingers as you flip through to see who's leading what big case, which associates are making partner, or which partners are lateralling to the competition.

But for so many reasons, ranging from where our readers are actually consuming our content (online) to being more thoughtful of our environment, it was time for ALM to make the proactive decision to step away from that format.

In one of her first columns as editor of The American Lawyer, ALM's now chief content officer Gina Passarella advised to her audience of top legal minds and leaders, "Make the change before the change makes you." ALM is now making good on that philosophy so we can continue serving as the Delaware legal community's most relevant source of information.

Please let me know if you all have any questions!

Thanks,

Max Mitchell

Continued from page 1

Parker. "That's been an interesting discussion as people continue to think about what that means."

But that discussion still involves hypotheticals, because a month later, Laster issued a second opinion in the same case, dismissing oversight claims. Since then, no other shareholder has been able to get a Caremark claim against corporate officers further than the McDonald's case, though Laster's first decision has been cited: Vice Chancellor Lori Will just dismissed claims against Segway's former president in an opinion that reiterated there's still a high bar officer oversight claims need to clear to move forward in the court.

"It's unclear to us whether officer liability for Caremark claims is going to get a lot of traction because it's different than Caremark liability at the director level, given the demand futility standard," Latham & Watkins partner Colleen Smith said. "I don't think we've seen a lot of those cases for that reason. It's getting a lot of attention, but may ultimately not be something we see a lot of going forward."

"That's something that's going to take a while to flush out in practice," Sullivan & Cromwell partner Brian Frawley said.

Not Looking for the Perfect Deal

There's arguably no corporate law topic that's created more of a stir in Delaware this year than entire fairness, with the Court of Chancery and Supreme Court both making decisions that have some practitioners rethinking their trial strategy.

In the past, it was exceedingly rare for the entire fairness standard to be applied and for a defense motion to dismiss not to be granted. It was also rare, if not unprecedented, for shareholders who did make it to trial in those cases not to win.

That's no longer the norm in 2023, which showed three examples of corporate defendants prevailing under the entire fairness standard of review: cases involving Tesla's acquisition of SolarCity, the merger between BGC Partners Inc. and Berkeley Point Financial and Oracle's acquisition of NetSuite.

"It was, in some ways, the year of entire fairness. We had a lot of cases on just entire fairness, and we will continue to: when does it apply and what exactly does it mean?" said Blair Connelly of Latham & Watkins, which represented defendants in both the BGC and Oracle cases.

Last year's Chancery opinion stating the SolarCity acquisition was imperfect but fair was affirmed by the Supreme Court in June, and the case is now frequently cited in Chancery filings.

"Of course, no process is the same, and the Delaware Supreme Court was very clear to say, it doesn't have to be pitch perfect," Parker said. "It's been interesting to see some of these fact patterns unfold in that area."

Defense verdicts in the Oracle and BGC cases were issued post-trial, and the Supreme Court has summarily affirmed the BGC decision.

Some on the plaintiff's side have said the trio of cases has given corporate defendants an edge. Among them is Bernstein Litowitz Berger & Grossmann partner Gregory Varallo, who appeared for the plaintiff in the BGC case.

"This wasn't a close call. I don't think that we should have lost. I think that the case potentially makes it much harder for corporate lawyers in the boardroom to convince controllers to do the right thing," Varallo said.

But defense attorneys say they represent the proper application of a standard that's long been in place.

"The law had always been that you had to prove that the deal was fair. That's still the law. It's just that people did it now," Connelly said. "That's the only thing that's changed. People actually did it."

The Courts' Standard Isn't 'Anything Goes'

The Delaware courts weren't just letting any transactional conduct slide in 2023, with two key decisions showing the Court of Chancery's handling of SolarCity, BGC and Oracle weren't a sign that it's scrutinizing deals—or their potential to be tainted by conflict—in any less detail.

In both the Mindbody and Columbia Pipeline cases, the court found conflict existed on the side of the target companies and that the conflicted directors had acted for personal gain rather than in shareholders' best interests when negotiating. But parties on the buyer's side were also found liable for aiding and abetting in both of those cases.

"In the ordinary capitalist economy, it's OK for buyers to be rough and tumble when buying a company. You try and get the lowest buy price you can. And these were circumstances where the court found that they went beyond ordinary economic competition and actually helped violate fiduciary duties," Varallo said.

The decisions in all five of those cases were all highly fact-specific—they didn't set out a checklist for the perfect deal or say any one part of the deal process should be considered in isolation. But they've gotten attention because they still do offer some guidance on the interplay between certain moving parts in a negotiation involving a controller, giving corporate attorneys more examples for bits and pieces they may want to emphasize or downplay in future deal-related litigation and signaling to M&A attorneys what they may want to steer clients away from.

It's the Board's (Not Shareholders') Thoughts That Count

Sprinkled in among the attention-grabbing, entire fairness-contemplating cases of 2023 was Chancery litigation that didn't get as far for a simple reason: just because a shareholder doesn't like an action made by a corporation's board doesn't mean the board took that action in bad faith.

That idea was given by the Court of Chancery in both the litigation challenging Block's acquisition of Tidal and a Section 220 case claiming Disney was wrong to have taken a stance against Florida's Parental Rights in Education bill, colloquially known as the "Don't Say Gay" bill.

Chancellor Kathaleen St. J. McCormick decided in May that Block was "free to make a terrible business decision" if there's no evidence that its board made the decision in bad faith. After argument in November during which the fine points of where good faith ends were discussed, the Supreme Court quickly affirmed McCormick's decision.

In June, Vice Chancellor Will ruled that the Disney shareholder who sued for books and records hadn't demonstrated a proper purpose.

"At bottom, what the court said was, you can disagree with a board's decision, but that's not a credible basis to suspect wrongdoing, and that's not the keys to the books and records," Parker said.

While the cases, having been dismissed fairly early on in the litigation process, didn't set a legal precedent, they're a reminder to shareholders that there's a certain threshold of showing corporate misconduct that needs to be present if they're going to be able to win in Delaware. ■

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2016 ISSUE

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Delaware Presence of Am Law 100 Firms Stresses First State's Strategic Importance

By Tom McParland
Of the DLW

Of the nation's 100 top-grossing law firms, 21 operate offices in Wilmington, highlighting both the prominence of Delaware's legal market and the influence national firms have been able to exert in the First State.

Ranked in Delaware Law Weekly affiliate The American Lawyer's Am Law 100, the firms boasting a Delaware presence range from top-five earners DLA Piper and Skadden, Arps, Slate, Meagher & Flom to national powerhouse Wilson Sonsini Goodrich & Rosati and the intellectual property-focused Fish & Richardson. Ballard Spahr and Cozen O'Connor, two Philadelphia-based firms back in the top 100 this year, also maintain offices in Wilmington.

All told, the 21 firms combine to employ 284 attorneys in Delaware, an average head count of 14 lawyers per firm.

IN THIS ISSUE

Sen. Coons Set to Speak At 2016 DTLA Convention 2
Chancery Court Blocks Inmate's Bid for Correction Dept. Info 3
Digests 7

Am Law 100 *continues on page 4*

DGCL, Alternative Entity Bills Sailing Toward Final Approval

By Tom McParland
Of the DLW

A suite of amendments to the Delaware General Corporation Law and the statutes governing limited liability companies and partnerships are headed for final legislative approval this month after moving easily through the House and a Senate panel.

The measures, rolled out in March by the corporation law section of the Delaware State Bar Association, are the product of a year-long drafting and approval process and have been described as mostly modest proposals, designed to bring greater "certainty and clarity" to existing law.

The proposals were divided into four separate bills and introduced May 5 by state Rep. Melanie George Smith, a Richards, Layton & Finger attorney who works closely with members of the corporation law section in guiding the measures through the General Assembly.

All four bills sailed through the House Judiciary Committee on May 11 and won the unanimous support of the full House the following day. The Senate Judiciary Committee advanced the legislation to the full chamber on May 18, setting up a vote in the upper chamber this month, when lawmakers return from a round of budget markups.

With only 12 legislative days remaining in the session, Smith expects a "timely" vote before lawmakers are set to take up the budget on June 20.

"I would suspect the Senate is not going to want to sit on the corporate bills for three weeks," she said.

Once passed by the Senate, the bills would require the signature of Gov. Jack Markell.

Chief among the DGCL amendments in HB 371 are long-discussed changes to appraisal proceedings that would limit the right to bring appraisal actions against publicly traded companies if the claim is de minimis, or too insignificant to warrant judicial scrutiny.

Bills *continues on page 5*

LAST ISSUE

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IN THIS ISSUE

12 Morris Nichols Associates Admitted to Practice in Del. 2
Mass Tort Bankruptcies Stumbled in 2023. Could Some Fall Apart in 2024? 3
Digests 7

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Derivative *continues on page 4*

BACKGROUND IMAGE: OLGA/ADOBE STOCK

THIRD CIRCUIT

CRIMINAL LAW

Aggravated Assault • Serious Bodily Injury • Sentencing Guidelines

United States v. Caraballo, DEFAX Case No. D70492 (3Cir. Dec. 8, 2023), Montgomery-Reeves, J. (20 pages).

Counsel: Gino A. Bartolai, Jr., Pittston, PA for appellant. Gerard M. Karama, Robert J. O'Hara, Office of the United States Attorney, Scranton, PA for appellee.

Multiple stab wounds, including one to the chest, plus a broken jaw constituted injuries severe enough to meet the definition of "serious bodily injury" as defined by the Commentary to the Sentencing Guidelines.

Michael Caraballo appealed the sentence imposed following his conviction for aggravated assault. Caraballo and his co-defendant, both inmates at the United States Penitentiary at Canaan, assaulted a third inmate, P.R. Caraballo struck P.R. with a five-inch metal shank. P.R. was transferred to the emergency room of a local hospital where he remained overnight before being released the next day. P.R. suffered multiple puncture wounds to his chest, forearm, and triceps, a broken jaw, and abrasions to his forehead, upper jaw, and left knee.

Caraballo pled guilty to assault with a dangerous weapon and related offenses. His presentence investigation report calculated a total offense level of 20, applying a five-level sentencing enhancement on the grounds that P.R. suffered severe bodily injury. Caraballo objected to the enhancement. The district court overruled the objection, noting that prior cases had found broken jaws constituted severe bodily injury, on top of stab wounds to P.R.'s chest.

On appeal, the court affirmed Caraballo's sentence. The court acknowledged that there was ambiguity concerning what constituted a "serious bodily injury." The court noted that Black's Law Dictionary defined "serious bodily injury" as a "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any" body part. However, the court also noted that the Guidelines also imposed a larger enhancement for cases involving "permanent or life-threatening bodily injury," which meant that including permanent disfigurement in the definition of "serious bodily injury" would render the larger enhancement superfluous.

Although the term serious bodily injury was ambiguous, the court held that the Commentary's interpretation of the term was reasonable as it fell between a bodily injury resulting in "anxiety" and an injury with "dangerous possible consequences" not rising to the level of permanent or life-threatening. The court further ruled that P.R.'s injuries fell within the scope of a serious bodily injury as interpreted by the Guidelines Commentary, as he suffered three stab wounds, including one to his chest, and a broken jaw.

Armed Bank Robbery • Crime of Violence • Divisible Statute • Motion to Correct Sentence

United States v. Jordan, DEFAX Case No. D70493 (3Cir. Dec. 12, 2023), Bibas, J. (16 pages).

Counsel: Stacie M. Fahsel, Renee Pietropaolo, Federal Public Defender's Office, Pittsburgh, PA for appellant. Robert A. Zauzmer, U.S. Attorney's Office, Philadelphia, PA for appellee.

Defendant was correctly charged with committing a crime of violence where the armed bank robbery statute was divisible as it could be committed either intentionally/knowingly or recklessly and defendant was charged with "knowingly" taking money through force and jeopardizing others' lives through the use of a deadly weapon.

Defendant Mark Jordan appealed the district court's denial of his motion to correct sentence. Jordan robbed three banks. During two robberies, Jordan fired a gun to intimidate the tellers into handing over the money. Jordan was charged with three armed bank robberies under 18 U.S.C. §2113(d), which prohibited use of a dangerous weapon or device while committing or attempting to commit bank robbery or larceny. Jordan was also charged with two gun crimes under the statute punishing "any person who, during and in relation to any crime of violence...uses or carries a firearm." 18 U.S.C. §924(c). The government contended that Jordan's armed bank robberies constituted the predicate crimes of violence.

Jordan pled guilty to all five counts but filed a §2255 motion to challenge his sentence, arguing that his armed bank robbery offenses were not crimes of violence. The district court denied the motion.

On appeal, the court affirmed. Although the court had previously ruled that armed bank robbery constituted a crime of violence under the elements clause, Jordan contended that the Supreme Court had abrogated that ruling in Borden v. U.S., 141 S.Ct. 1817, by holding that crimes are not violent felonies if they can be committed recklessly. Jordan contended that armed bank robbery could be committed recklessly.

However, the court ruled that the armed bank robbery statute was divisible into separate criminal offenses. The court found that the plain text of the statute contemplated different crimes with different required elements and mens rea. Although the statute used the word "and," the court found that the full text of the statute clearly indicated that "and" was being used disjunctively. Moreover, the court noted that Jordan was specifically charged with "knowingly" taking money by force and violence and putting other people's lives in jeopardy through the use of a dangerous weapon.

No-Contact Order • Violation of Terms of Non-Posted Bail • Habeas Petition

Rowan v. Warden James T. Vaughn Corr. Ctr., DEFAX Case No. D70490 (3Cir. Dec. 11, 2023), Shwartz, J. (8 pages).

Counsel: David R. Fine, K&L Gates, Harrisburg, PA for appellant. Andrew J. Vella, Delaware Department of Justice, Wilmington, DE for appellees.

Failure to be expressly advised of continued no-contact order at second arraignment did not violate due

process where the terms of the order explicitly stated that it remained in effect until changed/withdrawn or until the case ended.

Bruce Rowan appealed the dismissal of his habeas petition. Rowan was arraigned on state charges of rape and child sexual abuse. Rowan signed a bond document that included a no-contact order prohibiting Rowan from having any contact with the victim. However, Rowan did not make bail and was detained pending trial. Rowan was mistakenly released several weeks later. At a second arraignment, the court increased bond but did not expressly reference the no-contact order. Rowan failed to post bail again and was detained.

While detained, Rowan called his victim over 50 times using other inmates' personal identification numbers to make phone calls. During one of the calls, Rowan admitted that he was not permitted to contact her and could be charged with a felony for doing so. Rowan was subsequently charged with 56 counts of violating the no-contact order. Rowan moved to dismiss those counts, arguing that he believed the no-contact order no longer applied following his second arraignment. The trial court denied the motion, finding that Rowan was aware of the continued applicability of the no-contact order.

Rowan filed a direct appeal from his conviction, again contending that the trial court implicitly discharged the no-contact order at the second arraignment because there was nothing in the record indicating that the order was included in the reinstated bond. The Delaware Supreme Court held that a no-contact order in a case involving child sexual abuse remained in effect until a nolle prosequi is filed, the case is dismissed, or the defendant was found not guilty.

Rowan ultimately filed the present habeas petition, arguing that the state trial court violated his due process rights when it failed to inform him at his second arraignment that the no-contact order remained in effect. The district court denied the petition, ruling that the order remained in effect despite the trial court's failure to explicitly advise Rowan of such.

On appeal, the court affirmed. The court noted that the no-contact order, which Rowan signed, expressly advised him that the order remained in effect until "changed or withdrawn" or until the case ended. Although Rowan was erroneously released from pretrial detention, there was nothing that should have indicated to Rowan that the order had been changed or withdrawn, and the case clearly had not ended. The court held that due process did not require the trial court to repeat to Rowan what he had already been told by the terms of the no-contact order.

U.S. DISTRICT COURT OF DELAWARE

BANKRUPTCY

Adversary Proceeding • Inverse Condemnation Claim • Decommissioning

In Re Venoco, LLC, DEFAX Case No. D70488 (D.Del. Dec. 12, 2023), Connolly, U.S.D.J. (24 pages).

Counsel: Robert J. Dehney, Andrew R. Remming, Matthew O. Talmo, Morris, Nichols, Arsht & Tunnell LLP, Wilmington, DE; Warren W. Harris, Nancy McEvily Davis, Stephani A. Michel, Bracewell LLP, Houston, TX for appellant. Rob Bonta, Christina Bull Arndt, Office of the California Attorney General, Los Angeles, CA; Edward K. Black, Delaware Department of Justice, Wilmington, DE; David M. Fournier, Kenneth A. Listwak, Troutman Pepper Hamilton Sanders LLP, Wilmington, DE; Steven S. Rosenthal, Marc S. Cohen, J.D. Taliaferro, Alicia M. Clough, Loeb & Loeb LLP, Los Angeles, CA for appellee.

Adversary proceeding asserting inverse condemnation claim failed where state government seized possession of facility necessary to prevent dangerous environmental contamination when owner ran out of funds to operate the facility.

The liquidating trustee of the Venoco Liquidating Trust appealed the final judgment of the bankruptcy court in the adversary proceeding brought by the trustee against the state of California and the California State Lands Commission. Venoco was an oil and gas company that operated the Platform Holly drilling rig. Venoco held leasehold interests to 32 offshore wells in the South Ellwood Field. The SEF leases were issued by the California state government through the State Lands Commission. The gas produced by the South Ellwood Field contained toxic hydrogen sulfide. Platform Holly lacked the equipment to treat the hydrogen sulfide and thus had to transfer the gas by pipeline to the Ellwood Onshore Facility, where it was passed through an iron sponge and burned off safely.

Venoco ran into financial difficulties and ultimately began considering quitclaiming its leases and filed for bankruptcy. Venoco asserted that it intended to work with the SLC to transfer the leases, including continuing operational support for the EOF. The SLC agreed to pay Venoco $1.1 million per month to operate Platform Holly and the EOF until a new contractor assumed operational control. After a contractor began decommissioning and plugging operations, Venoco and the SLC entered a new agreement for the commission to pay Venoco $10,000 per month for nonexclusive access and use of the EOF.

The SLC later filed a proof of claim against Venoco for approximately $130 million to recover the amounts incurred by the commission in plugging the wells, decommissioning Platform Holly, and operating and maintaining the EOF. The bankruptcy court approved Venoco's plan of liquidation and created a liquidating trust, which included the EOF and any claims Venoco might have against California. When Venoco could not negotiate a transfer of the EOF, it notified the SLC that it intended to terminate the parties' gap agreement. However, the state informed the liquidating trustee that it intended to remain at the EOF without further compensation pursuant to the state's police powers until the plugging and decommissioning process was completed, at which point the SLC would return the EOF to the liquidating trust.

The trustee filed the present adversary proceeding, arguing that the state's continued use of the EOF constituted a taking under the federal and California Constitutions, entitling the trust to just compensation, including the fair rental value for the facility. The state moved to dismiss, arguing that the trustee's claims were barred by sovereign immunity. The bankruptcy court denied the motion, concluding that its in rem jurisdiction defeated sovereign immunity. However, the bankruptcy court

ultimately granted summary judgment for the state on the trustee's inverse condemnation claim, finding that Venoco created a public emergency when it threatened to leave the EOF unmanned and thus the state averted harm to the environment and the public by assuming control of the EOF.

On appeal, the court affirmed the bankruptcy court. The court noted that the government's seizure of property for protection of the public did not constitute a compensable taking. The court ruled that there was sufficient evidence to support the bankruptcy court's determination that Venoco created an emergency that necessitated the state's occupation and operation of the EOF.

BUSINESS TORTS

Defamation • Unjust Enrichment • Counterclaims • Motion for Leave to Amend

Ryanair DAC v. Booking Holdings Inc., DEFAX Case No. D70491 (D.Del. Dec. 8, 2023), Bryson, J. (9 pages).

Court denied motion for leave to amend counterclaims due to defendant's lack of diligence in seeking leave upon immediately learning of the facts supporting the amendment, which occurred before the close of discovery.

Defendant Booking.com, B.V., moved for leave to amend its counterclaims against plaintiff Ryanair DAC. Booking's motion came after the close of discovery and the initial deadline for dispositive motions. Booking sought to amend its counterclaims to add two new causes of action: a defamation claim based on statements made by Ryanair's CEO Michael O'Leary, and a claim of unjust enrichment based on emails Ryanair allegedly sent to Booking's customers to discourage them from using online travel portals such as Booking.

The statements underlying Booking's proposed defamation counterclaim were reported prior to the close of discovery. However, the statements included some that were part of Booking's initial defamation counterclaim that was dismissed as insufficiently pled. In its unjust enrichment claim, Booking alleged that Ryanair sent Booking customers emails advising them that their validly purchased flight reservations were blocked until they completed an arduous, unnecessary verification process or paid a large fee and stated that they could avoid these hassles by booking directly on the Ryanair website.

Ryanair apposed the motion as untimely and contended that Booking was required to seek modification of the scheduling order. The court agreed and denied Booking's motion.

The court found that Booking failed to act with requisite diligence in seeking to amend its counterclaims given the advanced stage of the litigation. Specifically, the court noted that Booking waited more than two months after learning of O'Leary's statements and Ryanair's customer emails before filing the present motion. Given the procedural posture of the case, the court held that Ryanair would be prejudiced by allowing Booking to amend its counterclaims when it could have sought to do so earlier prior to the close of discovery. The court further held that the proposed defamation claim failed because O'Leary's statements either constituted a summarization of Ryanair's litigation position or were non-actionable hyperbolic statements of opinion.

CORPORATE ENTITIES

Fraudulent Inducement • Breach of Contracts/Fiduciary Duties • Appointment of Receiver • Internal Affairs Doctrine

FTE Networks, Inc. v. Szkaradek, DEFAX Case No. D70487 (D.Del. Dec. 14, 2023), Bryson, J. (14 pages).

Internal affairs doctrine did not prohibit federal court from exercising inherent powers to appoint receiver for foreign corporation under that corporation's home state's laws.

Defendants Alexander and Antoni Szkaradek moved for appointment of a receiver for plaintiff FTE Networks, Inc. Prior to 2019, the Szkaradeks were the owners of Vision Portfolio, a company that owned a portfolio of lease-to-own homes. Vision Portfolio was managed by Vision Property Management, LLC, a company owned by the Szkaradeks. Between 2016 and 2019, Vision Portfolio was engaged in litigation in multiple states.

In 2019, the Szkaradeks entered a purchase agreement to sell Vision Portfolio properties to FTE in exchange for cash and FTE stock. FTE later filed the present lawsuit, alleging that the Szkaradeks fraudulently induced FTE into entering the 2019 purchase agreement by misrepresenting the value of the Vision Portfolio companies and concealing or misrepresenting the litigation involving Vision Portfolio. FTE further alleged that the Szkaradeks conspired with others to seize control after the purchase agreement. The Szkaradeks disputed these allegations and filed counterclaims asserting that FTE fraudulently induced them into selling the Vision Portfolio properties, failed to make required payments, mismanaged the properties, and interfered with their voting rights as FTE stockholders.

The Szkaradeks filed the present motion for appointment of a receiver for FTE, arguing that FTE was insolvent and had abandoned its business, making a receivership necessary to avoid further loss/waste of corporate assets. FTE opposed the motion on various procedural and jurisdictional grounds.

The court granted the Szkaradeks' request for an evidentiary hearing on their receivership motion, rejecting FTE's argument that the motion was barred on procedural and jurisdictional grounds. The court first noted that it had discretion whether to dismiss the motion for the Szkaradeks' failure to confer with FTE's counsel. But the court found that the oversight was not prejudicial given FTE's opposition to a receivership in another action, which indicated that a meet and confer would likely have been futile.

The court also rejected FTE's assertion that the internal affairs doctrine prohibited appointment of a receiver. Although the court agreed that it could not appoint a receiver over a Nevada corporation based on Delaware law, the court held that the internal affairs doctrine was a choice of law rule rather than a jurisdictional principle. The court held that the doctrine permitted courts in other jurisdictions to apply the law of a company's state of incorporation/formation to appoint a receiver. The court further held that federal courts had inherent powers under their equitable jurisdiction to appoint receivers for foreign corporations to prevent waste of assets, even if those assets were located in other jurisdictions.

Finally, the court held that the denial of a receivership over FTE in the

other case did not have preclusive effect because the denial was without prejudice and thus did not constitute a final adjudication on the merits.

PATENT LITIGATION

Infringement • Claim Construction • Claim Limitation

Acadia Pharm. Inc. v. Aurobindo Pharma Ltd., DEFAX Case No. D70486 (D.Del. Dec. 13, 2023), Williams, U.S.D.J. (14 pages).

Predecessor patents' disclaimer of scope did not restrict priority patent, which was broader in scope and whose language expressly contemplated the previously disavowed scope.

The parties requested construction of two claims of plaintiff Acadia Pharmaceutical's '721 parent. The parties disputed whether the claimed "granule" must contain only pimavanserin or whether the granule could contain other chemical compounds in addition to pimavanserin. The parties further disputed whether the claimed "blended pimavanserin compound" could consist only of granules or whether the composition must contain both a granule and extra-granular component.

The court first agreed with plaintiffs that the granules did not have to contain only pimavanserin. Although defendants argued that, in a prior case between the parties, the court had construed the terms of predecessor patents to find that Acadia had made a "clear and unmistakable disclaimer" that precluded them from claiming "pimavanserin tartrate granulated with excipients." Defendants further noted that the '721 patent claimed priority to the predecessor patents. However, Acadia argued that the disclaimed scope in the predecessor patent did not bind the '721 patent because it was greater in scope. The court agreed that the '721 patent had a greater scope and thus Acadia had not clearly disavowed granules containing both pimavanserin and excipients. The court found that one of the two disputed claims expressly contemplated pimavanserin granulated with other ingredients, while a dependent claim in the '721 patent described a pharmaceutically acceptable capsule as containing granules with an excipient acting as a binder.

The court further ruled that the disputed claims did not require an extra-granular component. The court agreed with Acadia that a blended composition could involve a mixture of ingredients, including one or more excipients. The court held that interpreting a "blended composition" to always include an extra-granular component would import a limitation not found in the claim language. Moreover, the court noted that because it had found that the granules could consist of pimavanserin and other ingredients, using an extra-granular component was not necessary to create a blended composition.

Infringement • Indirect and Willful Infringement • Induced or Contributory Infringement • Pre-Suit Knowledge

NEC Corp. v. Peloton Interactive, Inc., DEFAX Case No. D70489 (D.Del. Dec. 8, 2023), Burke, U.S.M.J. (17 pages).

Counsel: Kenneth L. Dorsney, Cortlan S. Hitch, Morris James LLP, Wilmington, DE; Robert L. Maier, Jennifer C. Tempesta, Michael E. Knierim, Nick Palmieri, Baker Botts L.L.P., New York, NY; Sarah J. Guske, Baker Botts L.L.P., San Francisco, CA for plaintiff. Karen Jacobs, Michael J. Flynn, Cameron P. Clark, Morris, Nichols, Arsht & Tunnell LLP, Wilmington, DE; Anupam Sharma, Robert T. Haslam, Covington & Burling LLP, Palo Alto, CA; Richard L. Rainey, Han Park, Covington & Burling LLP, Washington, DC for defendant.

Receipt of notice of infringement only a day prior to the filing of the complaint was insufficient to charge defendant with pre-suit knowledge of the asserted patents.

Defendant Peloton Interactive, Inc. moved to partially dismiss the patent infringement lawsuit filed by plaintiff NEC Corporation. NEC alleged that Peloton infringed upon three of its patents, which related to multimedia content delivery and distribution systems and methods. NEC asserted claims of indirect, induced, contributory, and willful infringement, alleging that Peloton made products that used the claimed content distribution methods and systems and thus caused its customers to also infringe upon NEC's patents.

In support of its partial motion to dismiss, Peloton argued that NEC failed to sufficiently plead pre-suit knowledge of the asserted patents and otherwise failed to adequately plead induced, contributory, or willful infringement. The court granted in part and denied in part Peloton's partial motion to dismiss.

The court agreed that NEC failed to adequately plead Peloton's pre-suit knowledge of the asserted patents, as the only evidence of pre-suit knowledge was a notice that NEC mailed to Peloton only one day before the complaint was filed. The court ruled that the lack of pre-suit notice meant that NEC could not establish intent in its induced infringement claim. However, the court held that NEC could pursue indirect and willful infringement claims with respect to post-suit notice.

The court declined to dismiss the contributory infringement claim, finding that NEC had stated a prima facie case that Peloton's products lacked any substantial non-infringing uses. However, the court noted Peloton's assertion that its products could be used without delivered content. The court also held that NEC had sufficiently pled that the infringing aspects of Peloton's products were material to the product.

Finally, the court rejected Peloton's challenge to the willful infringement claim, finding the basis for the challenge inadequately articulated or insufficiently developed.

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by Brandon Van Dyke, Lou R. Kling, and Eileen T. Nugent

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