Lowenstein Sandler

January 16, 2019

Johnson & Johnson
One Johnson & Johnson Plaza
New Brunswick, New Jersey 08933

Re: Johnson & Johnson 2019 Annual Meeting of Shareholders;
Shareholder Proposal of The Doris Behr 2012 Irrevocable Trust

Ladies and Gentlemen:

You requested our opinion as to certain matters of New Jersey law in connection with a shareholder proposal (the "Proposal") submitted by The Doris Behr 2012 Irrevocable Trust (the "Shareholder") to Johnson & Johnson, a New Jersey corporation (the "Company"), for inclusion in the Company's proxy statement for its 2019 annual meeting of shareholders.

In rendering our opinions set forth herein, we have examined and relied on originals or copies, certified or otherwise identified to our satisfaction, of the following:

(a) the Restated Certificate of Incorporation of the Company, as filed with the Department of the Treasury of the State of New Jersey on February 19, 2016, and as currently in effect;

(b) the By-Laws of the Company, as currently in effect (the "By-Laws"); and

(c) the Proposal and the supporting statement thereto, attached to a letter dated November 9, 2018, submitted by the Shareholder to the Company.

In rendering our opinions contained herein, we have, with your approval, also relied without investigation or independent verification on information obtained from public officials and officers of the Company. We have assumed without investigation that the information upon which we have relied is accurate and does not omit disclosures necessary to prevent such information from being misleading. For purposes of our opinions contained herein, we have further relied, without investigation, upon the authenticity of all documents submitted to us as originals, the conformity to original documents of documents submitted to us as certified, conformed, photostatic, electronic or facsimile copies, and the completeness of all documents reviewed by us.

Members of our firm are admitted to the bar of the State of New Jersey. The opinions expressed herein are based on the New Jersey Business Corporation Act, N.J.S. 14A:1-1 et seq. (the "BCA"), and New Jersey law, each as in effect on the date hereof, which law is subject to change with possible retroactive effect. We do not express herein any opinion as to the laws of any other jurisdiction.

Factual Background

We understand, and for purposes of our opinions we have assumed, the relevant facts to be as follows:

On November 9, 2018, the Shareholder submitted the Proposal to the Company for inclusion in the Company's proxy materials in connection with its 2019 annual meeting of shareholders. The Proposal reads as follows:

> **Resolved**: The shareholders of Johnson & Johnson request the Board of Directors take all practicable steps to adopt a mandatory arbitration bylaw that provides:
>
> - for disputes between a stockholder and the Corporation and/or its directors, officers or controlling persons relating to claims under federal securities laws in connection with the purchase or sale of any securities issued by the Corporation to be exclusively and finally settled by arbitration under the Commercial Rules of the American Arbitration Association (AAA), as supplemented by the Securities Arbitration Supplementary Procedures;
>
> - that any disputes subject to arbitration may not be brought as a class and may not be consolidated or joined;
>
> - an express submission to arbitration (which shall be treated as a written arbitration agreement) by each stockholder, the Corporation and its directors, officers, controlling persons and third parties consenting to be bound;
>
> - unless the claim is determined by the arbitrator(s) to be frivolous, the Corporation shall pay the fees of the AAA and the arbitrator(s), and if the stockholder party is successful, the fees of its counsel;
>
> - a waiver of any right under the laws of any jurisdiction to apply to any court of law or other judicial authority to determine any matter or to appeal or otherwise challenge the award, ruling or decision of the arbitrator(s);
>
> - that governing law is federal law; and

- for a five-year sunset provision, unless holders of a majority of Corporation shares vote for an extension and the duration of any extension.

The Proposal includes a supporting statement that reads as follows:

Supporting Statement

The United States is the only developed country in which stockholders of public companies can form a class and sue their own company for violations of securities laws. As a result, U.S. public companies are exposed to litigation risk that, in aggregate, can cost billions of dollars annually. The costs (in dollars and management time) of defending and settling these lawsuits are borne by stockholders. Across the corporate landscape, this effectively recirculates money within the same investor base, minus substantial attorneys' fees. Lawsuits are commonly filed soon after merger or acquisition announcements, or stock price changes, based on little more than their happening.

We believe arbitration is an effective alternative to class actions. It can balance the interests and rights of plaintiffs to bring federal securities law claims, with cost-effective protections for the corporation and its stockholders.

The Supreme Court has held that mandatory individual arbitration provisions are not in conflict with any provision of the federal securities laws, and the SEC has no basis to prohibit mandatory arbitration provisions that apply to federal securities law claims. Furthermore, New Jersey law establishes that the bylaws of a corporation are to be interpreted as a contract between the corporation and its stockholders.

A bylaw providing for mandatory individual arbitration of federal securities law claims would permit stockholders and corporations to opt-out of a flawed system that often seems more about the lawyers than the claimants and invariably wastes stockholder funds on expensive litigation costs.

Analysis

If the Proposal is adopted by the Company's shareholders, the Company's board of directors would be asked to amend the By-Laws to require disputes between a shareholder of the Company and the Company and/or its directors, officers or controlling persons relating to claims under federal securities laws in connection with the purchase or sale of any securities issued by the Company, to be exclusively and finally settled by arbitration under the Commercial Rules of the American Arbitration Association.

The Proposal presents two issues under New Jersey law: (i) whether a New Jersey corporation may lawfully mandate arbitration in its constitutive documents as the forum to resolve claims of shareholders for alleged violations of the federal securities laws, irrespective of whether all current and future shareholders have approved an arbitration provision; and (ii) whether current and future shareholders who did not approve an arbitration provision would be bound to arbitrate claims under federal securities laws.

A. New Jersey Business Corporation Act.

No New Jersey court has considered the issue of whether a New Jersey corporation may lawfully mandate arbitration in its constitutive documents as the forum to resolve claims of shareholders for alleged violations of the federal securities laws, irrespective of whether all current and future shareholders have approved the arbitration provision. However, the issue of modifying the concurrent jurisdiction of the federal and state courts respecting federal securities law claims by private plaintiffs through a constitutive document provision was very recently considered by the Court of Chancery of the State of Delaware in Sciabacucchi v. Salzberg, 2018 Del. Ch. LEXIS 578 (Dec. 19, 2018).

In Sciabacucchi, the defendant corporations adopted provisions in their respective certificates of incorporation that required any claims under the Securities Act of 1933, as amended (the "1933 Act"), to be filed in federal court, notwithstanding the state and federal courts' concurrent jurisdiction over claims by private plaintiffs under the 1933 Act. The Delaware Court of Chancery held that "[t]he constitutive documents of a Delaware corporation cannot bind a plaintiff to a particular forum when the claim does not involve rights or relationships that were established by or under Delaware's corporate law." Sciabacucchi, at *8. The Court of Chancery concluded that Delaware law only permitted forum selection provisions in constitutive documents to regulate the internal affairs of a Delaware corporation and that federal securities law claims do not fall within that category.

In so ruling, the Court of Chancery considered and relied on §§ 102(b)(1) and 109(b) of the Delaware General Corporation Law (the "DGCL"). Section 102(b)(1) of the DGCL provides that:

> (b) [i]n addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section, the certificate of incorporation may also contain any or all of the following matters: (1) [a]ny provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders, or the governing body, members, or any class or group of members of a nonstock corporation; if such provisions are not contrary to the laws of this State. Any

> provision which is required or permitted by any section of this chapter to be stated in the bylaws may instead be stated in the certificate of incorporation.

Section 109(b) of the DGCL provides that:

> [t]he bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.

The Court of Chancery concluded that the authority granted to Delaware corporations under §§ 102(b)(1) and 109(b) of the DGCL is limited to the internal affairs of those corporations. The Court of Chancery recognized that "[t]he Boilermakers[1] distinction between internal and external claims answers whether a forum-selection provision can govern claims under the 1933 Act. It cannot, because a 1933 Act claim is external to the corporation. Federal law creates the claim, defines the elements of the claim, and specifies who can be a plaintiff or defendant. The 1933 Act establishes a statutory regime that applies when a particular type of property – securities – is offered for sale in particular scenarios that the federal government has chosen to regulate." Sciabacucchi, at *3-4. The Court of Chancery further found that "[a] claim under the 1933 Act does not turn on the rights, powers, or preferences of the shares, language in a corporation's charter or bylaws, a provision in the DGCL, or the equitable relationships that flow from the internal structure of the corporation." Sciabacucchi, at *4. Finally, the Court of Chancery held that "[w]hether a purchaser of securities may have bought shares in a Delaware corporation is incidental to a claim under the 1933 Act. That happenstance does not provide a sufficient legal connection to enable the constitutive documents of a Delaware corporation to regulate the resulting lawsuit. The claim does not arise out of the corporate contract and does not implicate the internal affairs of the corporation." Sciabacucchi, at *7.

While Sciabacucchi is a Delaware decision, the New Jersey courts have long looked to Delaware precedent when considering New Jersey corporate law matters. See, e.g., Seidman v. Clifton Savings Bank, S.L.A., 205 N.J. 150 (2011); Casey v. Brennan, 344 N.J. Super. 83 (App. Div.); certif. denied, 170 N.J. 389 (2001); Balsamides v. Protameen Chemicals, Inc., 160 N.J. 352, 372 (1999) ("In analyzing corporate law issues, we find Delaware law to be helpful."); Lawson Mardon Wheaton v. Smith, 160 N.J. 383 (1999); In re Prudential Ins. Co. Derivative Litigation, 282 N.J. Super. 256 (Ch.Div.1995); and Pogostin v. Leighton, 216 N.J. Super. 363 (App. Div. 1987), certif. denied, 108 N.J. 583 (1987), cert. denied, 484 U.S. 964 (1987).

Under the BCA, a corporation's certificate of incorporation may include provisions that are required or permitted to be set forth in the bylaws. N.J.S. § 14A:2-7(1)(f). In addition, the

[1] Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934 (Del. Ch. 2013).

BCA provides that a corporation's bylaws may not contain a provision inconsistent with law. N.J.S. § 14A:2-9(4).

Section 2-7(1)(f) of the BCA is comparable to § 102(b)(1) of the DGCL. Section 2-7(1)(f) provides that "(1) the certificate of incorporation shall set forth … (f) [a]ny provision not inconsistent with this act or any other statute of this State, which the incorporators elect to set forth for the management of the business and the conduct of the affairs of the corporation, or creating, defining, limiting or regulating the powers of the corporation, its directors and shareholders or any class of shareholders, including any provision which under this act is required or permitted to be set forth in the bylaws."

While § 2-7(1)(f) of the BCA is organized slightly differently than § 102(b)(1) of the DGCL, the import of both provisions is that corporations may include provisions in their certificates of incorporation that are not inconsistent with law for the management of the conduct or affairs of the corporation.

Section 2-9(4) of the BCA is identical to § 109(b) of the DGCL. Section 2-9(4) provides that "[t]he by-laws may contain any provision, not inconsistent with law or the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or power or the rights or power of its shareholders, directors, officers or employees."

The similarities between the applicable provisions of the BCA and of the DGCL are striking. We believe that given those similarities and the value placed by New Jersey courts on Delaware decisions, that a New Jersey court, if presented with the question, would likely find persuasive the conclusion in Sciabacucchi that a claim under the 1933 Act does not arise out of the corporate contract and thus does not implicate the internal affairs of the corporation. Thus, we believe that a New Jersey court would likely reach the same conclusion as the Sciabacucchi court did in interpreting parallel statutory provisions that New Jersey corporations may not lawfully mandate arbitration in their constitutive documents as the forum to resolve claims of shareholders for alleged violations of the federal securities laws, irrespective of whether all current and future shareholders have approved the arbitration provision.

B. Agreement to Arbitrate.

Under New Jersey law, "state contract-law principles generally govern a determination whether a valid agreement to arbitrate exists." Hojnowski v. Vans Skate Park, 187 N.J. 323, 342 (2006); see also Kernahan v. Home Warranty Adm'r of Fla., Inc., 2019 N.J. LEXIS 3 (2019). In New Jersey, "[a] contract arises from offer and acceptance, and must be sufficiently definite 'that the performance to be rendered by each party can be ascertained with reasonable certainty.'" Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992), quoting West Caldwell v. Caldwell, 26 N.J. 9, 24-25 (1958). The New Jersey Supreme Court has also held that "[i]t is requisite that

there be an unqualified acceptance to conclude the manifestation of assent." Weichert, 128 N.J. at 435, quoting Johnson & Johnson v. Charmley Drug Co., 11 N.J. 526, 539 (1953).

In the arbitration context, the New Jersey Supreme Court has held that as with other contracts, "[a]n agreement to arbitrate … must be the product of mutual assent, as determined under customary principles of contract law." Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430, 442 (2014). Put differently, as stated by the New Jersey Supreme Court, "[a]s a general principle of contract law, there must be a meeting of the minds for an agreement to exist before enforcement is considered." Kernahan v. Home Warranty Adm'r of Fla., Inc., 2019 N.J. LEXIS 3, *27 (2019). The New Jersey Supreme Court has also held "[t]hat recognition [of a right to a jury trial] informs our analysis given the importance of ensuring that a party has actually waived its right to initiate a claim in court in favor of submitting to binding arbitration." Hirsch v. Amper Financial Services, LLC, 215 N.J. 174, 194 (2013).

No New Jersey court has considered the issue of whether current and future shareholders who did not approve an arbitration provision contained in a corporation's bylaws would be bound to arbitrate claims under federal securities laws. However, the United States Court of Appeals for the Third Circuit held under contract principles similar to New Jersey's, that under Pennsylvania law a shareholder's constructive notice of an arbitration provision in the corporation's bylaws did not constitute the "explicit agreement" required to form an arbitration contract. See Kirleis v. Dickie, McCamey & Chilcote, P.C., 560 F.3d 156, 163 (3d Cir. 2009).[2]

Under Pennsylvania law, "mutual manifestation of an intention to be bound" is a requirement to form a contract. Kirleis, 560 F.3d at 160. "The Pennsylvania Supreme Court has held that an agreement to arbitrate must [also] be 'clear and unmistakable' and cannot arise 'by implication.'" Kirleis, 560 F.3d at 161, quoting Emmaus Mun. Auth. v. Eltz., 416 Pa. 123 (1964). The Kirleis court recognized that "the material issue here is whether Kirleis agreed to be bound by the Firm's arbitration provision, not whether a document containing that provision was ever distributed to her. Even had she received such a document – which the uncontroverted evidence indicates she did not – a mere offer is insufficient to create a triable issue as to the existence of a contract to arbitrate." Kirleis, 560 F.3d at 162. Moreover, the Kirleis court recognized that "[h]ere … there was no explicit agreement; rather, the Firm seeks to derive one from corporate law principles, making its implied acceptance argument even more tenuous than

[2] In Century Indem. Co. v. Certain Underwriters at Lloyd's, 584 F.3d 513 (3rd 2009), the Third Circuit, rejected prior Third Circuit precedent in Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., 636 F.2d 51 (3d Cir. 1980), aff'd on other grounds, 514 U.S. 938 (1995) that required that agreements to arbitrate be "express" and "unequivocal". The Kirleis court cited to Par-Knit and the "express" and "unequivocal" requirement that it had adopted. However, the Kirleis court relied on Pennsylvania contract law and not Third Circuit precedent in reaching its decision so that Century Indem. does not affect the continued applicability of the Kirleis decision.

the one rejected in Quiles[3]." Kirleis, 560 F.3d at 165. The Kirleis court, thus held that notwithstanding the accepted principle that shareholders are generally subject to the terms of a corporation's constitutive documents, an agreement to arbitrate cannot arise by implication and requires explicit agreement.

The similarities between New Jersey law regarding contract formation and agreements to arbitrate, as summarized above, and the principles of Pennsylvania law that form the lynchpin of the Kirleis decision are clear. We believe that given those similarities, if a New Jersey court were presented with the question, it would likely conclude that a shareholder of a New Jersey corporation whose bylaws provide for mandatory arbitration had not "waived its right to initiate a claim in court in favor of submitting to binding arbitration" for any claims under federal securities laws in connection with the purchase or sale of any securities issued by the corporation unless such shareholder "actually waived" its right to proceed in court or, put differently, that such a provision would not constitute "the product of mutual assent" to arbitrate. See Hirsch, 215 N.J. at 194 and Atalese, 219 N.J. at 442. Such a bylaw would likely be held to be inconsistent with New Jersey law and, therefore, invalid.

* * *

Based upon and subject to the foregoing analysis, it is our opinion that implementation of the Proposal would violate New Jersey law, and that a New Jersey court, if presented with the question, would likely so conclude. This letter and the opinions contained in it are furnished to you solely for your benefit in connection with the Proposal, and except as set forth in the next sentence, is not to be used, circulated, quoted or otherwise referred to for any other purpose or relied upon by any other person without our express written permission. We hereby consent to your furnishing a copy of this letter to the Staff of the Securities and Exchange Commission in connection with a no-action request with respect to the Proposal.

Very truly yours,

Lowenstein Sandler LLP

LOWENSTEIN SANDLER LLP

[3] See Quiles v. Fin. Exch. Co., 2005 PA Super 250 (Pa. Super. Ct. 2005).