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TRENDS IN M&A AND FIDUCIARY DUTY LITIGATION

The authors discuss two evolving areas of Delaware law for which they review recent significant decisions, offer predictions for future litigation, and summarize suggested best practices. They first address Caremark oversight claims, which, despite their proliferation following the Delaware Supreme Court's 2019 decision in Marchand v. Barnhill, remain one of the most difficult claims to plead and prove given the requirement that plaintiffs demonstrate bad faith. Second, they address the recent jurisprudence surrounding controlling stockholders, including entire fairness review and conflict transactions, duties of controlling stockholders, controller status, and reincorporation with a controller. Oversight and controlling stockholder risks are at the forefront of Delaware M&A and fiduciary duty litigation and should be key areas of focus for directors, officers, and stockholders alike.

By Meredith Kotler and Nicholas A. Caselli *

This article reviews two areas of Delaware law receiving continued scrutiny. It first discusses *Caremark* oversight risks, including recent motion to dismiss decisions emphasizing the demanding pleading requirements for such claims, as well as other noteworthy decisions addressing statute of limitations, oversight liability for officers, and inactionable business risks. The article then turns to recent controlling stockholder developments, including several post-trial decisions that found conflict transactions entirely fair, as well as decisions concerning duties of controlling stockholders, controller status, and reincorporation with a controller.

CAREMARK OVERSIGHT CLAIMS

In 2019, after three consumers died following a listeria outbreak at Blue Bell Creameries, the Delaware

Supreme Court held that the complaint in *Marchand v. Barnhill* adequately pleaded a *Caremark* oversight claim based on the board's "utter failure to attempt to assure a reasonable information and reporting system" existed for food safety risks.¹ Since then, *Caremark* claims have, as one court put it, "bloomed like dandelions after a warm spring rain."² Despite this recent proliferation and the apparent bounty of fact patterns that invite such claims ("find a corporate trauma; allege the truism that the board of directors failed to avert that trauma; and hey, presto! an oversight liability claim is born"), *Caremark* claims still remain "one of the most difficult claims to

¹ 212 A.3d 805 (Del. 2019).

² *Constr. Indus. Laborers Pension Fund v. Bingle*, No. 2021-0940-SG, 2022 WL 4102492, at *1 (Del. Ch. Sept. 6, 2022), *aff'd*, 297 A.3d 1083 (Del. 2023).

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FORTHCOMING

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